No. -

IN THE
Supreme Court of the United States

CLA USA INC. AND CLA ESTATE SERVICES, INC.,
Petitioners,

v.

STATE OF WASHINGTON,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court for the State of Washington

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a company has fair notice under the Due Process Clause that it is barred from engaging in certain speech under a state consumer protection act, when the language of the relevant act is hopelessly vague, and the state attorney general previously indicated that such speech was not barred under the act and did not take any action for a number of years after learning the full scope of the company's business.

2. Whether the First Amendment tolerates a state consumer protection act which bars speech by individuals who are not members of a particular profession on a particular topic without regard to whether the speech is misleading or deceptive.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioners CLA Estate Services, Inc. and CLA USA, Inc. were defendants–appellants below.

Both CLA entities are privately held and incorporated in the state of Texas. Neither company has a parent corporation, and no publicly held company owns 10% or more of the stock of either company.

Respondent the State of Washington was plaintiff–respondent below.

RULE 14.1(B)(III) STATEMENT

There are no proceedings directly related to this case within the meaning of Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

States' broad consumer protection statutes have long raised serious Constitutional concerns by granting state attorneys general virtually unfettered discretion—in expansive and vague language—to penalize speech by business entities. This case presents an extreme example of the ways in which enforcement under such acts can go off the rails.

The State of Washington's attorney general adopted, and persuaded Washington's courts to adopt, a new and sweeping interpretation of Washington's Estate Distribution Documents Act ("EDDA") in this case. Under that view, anyone who gathers—or even *offers* to gather—information in order to allow a licensed attorney to prepare an estate distribution document acts illegally, unless the person is an attorney. This broad construction of the EDDA came as a shock to Petitioners, as the attorney general had previously taken the position that the EDDA did not create any new categories of prohibited conduct, had never enforced the EDDA in this manner, and had previously reviewed Petitioners' business without taking any action. Indeed, without even hinting that Petitioner's business plan that operates successfully in more than 30 States is anything but permissible. As a result of this unprecedented construction, under which thousands of "violations" accrued while the State delayed its enforcement for years, the Washington attorney general obtained the "highest ever trial award in a Washington state consumer protection case." The award not only "disgorged" all of Petitioner's profits, but also clawed back all revenue earned from doing business in Washington.

Neither the Due Process Clause nor the First Amendment tolerates this result and this Court should intervene to correct this profound injustice.

First, Due Process requires that "laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *F.C.C.* v. *Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012). The EDDA is reasonably read to prohibit collection of information by a nonlawyer *if the nonlawyer plans to prepare the legal document*, not to provide the information to a licensed attorney. After all, that is the view the attorney general previously embraced. Petitioners cannot be subject to the "unfair surprise" of an about-face by the attorney general in this enforcement proceeding, particularly where the attorney general had already thoroughly reviewed Petitioner's business model and taken no action. *Christopher* v. *SmithKline Beecham Corp.*, 567 U.S. 142, 158 (2012). The text of the EDDA and the attorney general's radical, new interpretation and enforcement of it left Petitioners without "sufficient notice." *Fox Television Stations, Inc.*, 567 U.S. at 254.

Second, the Court should make clear that the First Amendment does not permit a State to ban truthful, non-deceptive speech. *Peel* v. *Att'y Registration & Disciplinary Comm'n of Ill*, 496 U.S. 91, 110 (1990) (Stevens, J.) (plurality op.) The EDDA enacts content- and speaker-based restrictions on speech and is therefore subject to strict scrutiny. *Sorrell* v. *IMS Health*, 564 U.S. 552, 567–68 (2011). The EDDA fails that scrutiny. It is indisputable that by categorically barring the gathering of information to facilitate preparation of a will or trust the EDDA sweeps in substantial amounts of speech that is not misleading or deceptive. And there are significantly narrower ways for Washington to address any legitimate concerns with speech regarding estate distribution documents.

Even if Petitioner's speech could be considered commercial speech, the EDDA still could not survive the appropriate level of scrutiny, because it imposes excessive restrictions on commercial speech and sweeps in substantial amounts of non-commercial speech in the process. See *United States* v. *Stevens*, 559 U.S. 460, 472 (2010); *Central Hudson Gas Elec. Corp.* v. *Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561–63 (1980).

This case presents an ideal opportunity for the Court to provide needed guidance on the limits on what First Amendment activities state consumer protection statutes can penalize, and how clear states must be in identifying speech that is illegal under those acts before bringing an enforcement action. The Washington attorney general's overreach, while breathtaking in scope and effect, is part of a broader trend of state attorneys general overreaching in similar contexts which requires this Court's correction.

OPINIONS BELOW

The Washington Supreme Court's order denying CLA's petition for review is reproduced in the Petition Appendix (Pet. App.) 29a–30a. The decision of the Washington Court of Appeal is published at 515 P.3d 1012 (Wash. Ct. App. 2022), and reproduced at Pet. App. 1a–28a. The Superior Court's decision finding CLA liable and awarding civil penalties is reproduced at Pet. App. 31a–111a.

JURISDICTION

The Washington Supreme Court denied CLA's petition for review on February 8, 2023. Pet. App. 29a–30a. On March 15, 2023, Justice Kagan granted CLA's application to extend the time to file a petition for a writ of certiorari to and including July 8, 2023. This Court has jurisdiction under 28 U.S.C. § 1257.

STATUTORY PROVISIONS

RCW 19.295.020 provides:

> (1) Except as provided in subsection (2) of this section, it is unlawful for a person to market estate distribution documents, directly or indirectly, in or from this state unless the person is authorized to practice law in this state.
>
> (2) A person employed by someone authorized to practice law in this state may gather information for, or assist in the preparation of, estate distribution documents as long as that person does not provide any legal advice.
>
> (3) This chapter applies to any person who markets estate distribution documents in or from this state. Marketing occurs in this state, whether or not either party is then present in this state, if the offer originates in this state or is directed into this state or is received or accepted in this state.
>
> (4) This chapter does not apply to any financial institution.
>
> (5) This chapter does not apply to a certificate holder or licensee regulated under chapter 18.04 RCW for purposes of gathering information for the preparation of an estate distribution document.
>
> (6) This chapter does not apply to an individual who is an enrolled agent enrolled to practice before the internal revenue service pursuant to Treasury Department Circular No. 230 for purposes of gathering information for the preparation of an estate distribution document. [2009 c 113 § 3; 2007 c 67 § 3.]

RCW 19.295.010 provides:

. . .

(3) "Gathering information for the preparation of an estate distribution document" means collecting data, facts, figures, records, and other particulars about a specific person or persons for the preparation of an estate distribution document, but does not include the collection of such information for clients in the customary and usual course of financial, tax, and associated planning by a certificate holder or licensee regulated under chapter 18.04 RCW.

(4) "Market" or "marketing" includes every offer, contract, or agreement to prepare or gather information for the preparation of, or to provide, individualized advice about an estate distribution document.

STATEMENT OF THE CASE

A. The Estate Distribution Documents Act

In the early 2000s, the State of Washington became concerned with the rise of trust mills: businesses employing nonlawyers who market, prepare, and sell cookie-cutter trusts or other legal documents for a quick profit. Posing as legal specialists, trust mills step into the role of estate attorneys and insulate customers from legitimate legal advice.

The Washington Legislature responded by enacting the EDDA in 2007 to crack down on trust mill schemes that work to "keep people away from attorneys." House Judiciary Tr. at 11 (2008). Washington already had "[v]arious statutes, common law doctrines, and court rules [that] deal[t] with the unlawful, unauthorized, or negligent practice of law." F. B. Rep., Reg. Sess. H.B. 1114 (Wash. 2007). But the EDDA would "make[] clear what a violation of the law is and create[] a per se

violation of the Consumer Protection Act." H.R. B. Rep., Reg. Sess. H.B. 1114 (Wash. 2007). After the EDDA was adopted, not only was it "unlawful for a person to market estate distribution documents . . . unless the person is authorized to practice law," but such conduct also became a *per se* "unfair or deceptive act." RCW 19.295.020(1), 030.

The Attorney General's Office (AG) was the key proponent of the bill that became the EDDA. See House Judiciary Committee Tr. at 9 (Statement of Representative Rodney) (2007). The AG made clear that, in his view, the EDDA did not sweep in any new conduct not already barred by existing law barring the unauthorized practice of law (UPL). The AG's Office told the Washington legislature that "the only thing that [it] would be creating" in enacting the EDDA was "a perse violation of the Consumer Protection Act." *Id.* at 33–34 (Statement of Cheryl Kringle, AG Spokesperson). The EDDA was not a "new cause of action," but a means to "make it easier to stop" "a practice that really under current law shouldn't [have] be[en] occurring anyway." *Id.* at 31. Before the EDDA, proving that such conduct was a "violation of the Consumer Protection Act [was] based on case law" alone. *Id.* at 34; see also House Judiciary Committee Tr. at 11 (Statement of Doug Walsh) (2008) (reiterating that the EDDA simply made it easier to penalize "those who would engage in the unauthorized practice of law").

The "current law" which the AG believed was codified in the EDDA targeted the practice of law by nonlawyers, not the gathering of information by nonlawyers. Nonlawyers could be punished for "either directly or indirectly . . . giving advice," for example, through the "selection of appropriate [estate distribution] documents." *In re Estate of Knowles*, 143 P.3d 864, 871 (Wash. Ct. App. 2006); see also *In re*

Disciplinary Proceeding Against Shepard, 239 P.3d 1066, 1071 (Wash. 2010) (en banc) ("[Nonlawyer] practiced law by *choosing* living trust documents for customers." (emphasis added)). The EDDA's text reflects this distinction, prohibiting gathering information when the (nonlawyer) speaker's aim is to prepare or to give "individualized advice about an estate distribution document." RCW 19.295.010(4). Indeed, the EDDA explicitly is not intended "to limit consumers from obtaining legitimate estate planning documents . . . from those authorized to practice law." RCW 19.295.005.

Washington's longstanding common law UPL-approach to trust mills parallels that of other states, which recognize that, without more, "gathering the necessary information for [a] living trust does not constitute the practice of law, and nonlawyers may properly perform this activity." *Florida Bar re Advisory Op.*, 613 So. 2d 426, 428 (Fla. 1992); see also, *e.g.*, *Comm. on Pro. Ethics Conduct of the Iowa State Bar Ass'n* v. *Baker*, 492 N.W.2d 695, 701–02 (Iowa 1992) (nonlawyer may "simply furnish[] information" where lawyer remains the one "exercising professional judgment on a legal question"); *In re Mid-Am. Living Trust Assocs.*, 927 S.W.2d 855, 865 (Mo. 1996) ("Merely gathering information for use in a legal document does not necessarily constitute the unauthorized practice of law."). And like Washington, other states also recognize that "the unauthorized practice of law can be a deceptive trade practice." *Avila* v. *State*, 252 S.W.3d 632, 644 (Tex. App. 2008); *Bowers* v. *Transam. Title Ins. Co.*, 675 P.2d 193, 201 (Wash. 1983) (en banc) ("[Defendant] violated the Consumer Protection Act by engaging in the unauthorized practice of law.").

Until this case, by all indications, Washington's EDDA simply "clean[ed] up th[e] link" between the

unauthorized practice of law, specifically in the trust mill context, and consumer protection. House Judiciary Tr. at 34 (2007).

B. CLA's Estate and Financial Planning Services

Petitioner CLA consists of two separate entities—CLA Estate Services, Inc. and CLA USA, Inc. (collectively "CLA")—which, since 1998, have provided coordinated estate and financial planning services to customers approaching or in retirement. CLA's main product is its "Service Package," which consists of planning tools and services such as: booklets to allow customers to gather and track relevant personal information; initial and periodic reviews with CLA representatives who help ensure information is up-to-date and may offer financial products such as life insurance or annuities; and coordination of non-legal actions necessary to settle an estate after a customer passes away. CLA has operated this same business model in more than 30 other States.

In 2008, CLA began advertising its services in the State of Washington via seminars at which it offered to collect basic information for those who purchased a Service Package. This information consisted of the customer's name, contact information, and emergency contact(s). Later, representatives would speak with customers, first at an initial meeting, then at periodic meetings, to discuss the customer's assets and goals.

A representative's job was to ask questions about customers' personal information in order to serve them in a non-legal, planning capacity. Depending on the answers provided, CLA would update customers' information as necessary. At no point did CLA provide legal advice to customers, select estate distribution documents for customers, or prevent customers from

obtaining legal advice from attorneys. In fact, CLA emphasized to its customers that CLA representatives "are not attorneys . . . and cannot offer legal advice," that "[a]ll legal services will be provided by [the customer's] attorney," and that the "[customer] and [their] attorney are solely responsible to make the final decisions regarding [their] estate plan." Opening Br. 51 (citing CP 6008). If a customer was poised to make a decision regarding the *choice* or *preparation* of an estate distribution document, they were always referred to an attorney. In that circumstance, customer information collected by CLA was, at times, provided to customers' attorneys. But it is undisputed that CLA itself provided no legal services and did not hold itself out as capable of doing so.

C. The Unprecedented Penalties Imposed on CLA After Years of Delay

In 2013, the AG issued a civil investigative demand to CLA. Petitioner cooperated fully, providing copious information about its business. In August, November, and December of 2013, CLA requested meetings with the AG, seeking to understand the AG's concerns in order to ensure CLA's business operations were beyond reproach. The AG refused to meet or to provide guidance. In 2014, the AG retained a legal expert who identified potential consumer protection concerns (expressing no opinion on the EDDA) regarding CLA's business, but the AG took no action. Petitioner requested a meeting with the AG once again in August of 2014, but once again the AG declined. Consequently, CLA continued operating its business as it had done for years in over 30 states.

After years of silence, the AG investigated CLA once again in 2017. Nothing had changed in the intervening four years; CLA's practices remained the same, the AG consulted the same legal expert, and the expert

provided the same legal opinion. Despite identical circumstances years later, the AG this time chose to bring the current litigation against CLA, alleging, among other things, that its longstanding practices violated the EDDA.

In Superior Court, the AG argued that CLA committed thousands of EDDA violations, including one violation for every client information form on which customers provided contact information and one violation for every check-in conversation between CLA and its customers. In support of this extravagant claim, the AG relied on partial depositions from a grand total of four dissatisfied customers. What is critical is that the AG did not allege or attempt to prove that CLA ever provided legal advice, prepared legal documents, or otherwise engaged in the unauthorized practice of law.

The trial court ruled for the AG, holding that "[b]ecause the EDDA prohibits gathering, or offering to gather, information, it does not matter for purposes of establishing liability whether the information is ultimately used by an attorney in preparing estate documents." Pet. App. 88a. That is, it does not matter whether a speaker facilitates, perpetrates, or even intends to engage in the unauthorized practice of law. The speaker violates the law the moment it gathers or even offers to gather information that might be relevant for an estate distribution document. In short, "the EDDA violations were offering to gather, and gathering, information from specific consumers for the preparation of estate distribution documents." *Id.* at 19a.

Treating each instance of gathering or offering to gather information as "a separate violation of the CPA," the trial court imposed $4,191,490 in civil penalties across 3,453 EDDA violations. *Id.* at 92a, 105a . Adding this figure to $2,354,510 in non-EDDA penalties plus $6,162,913.93 in restitution yielded nearly

$13,000,000 in total damages—the "highest ever trial award in a Washington state consumer protection case."[1] *Id.* at 95a, 105a.

The trial court thus not only "disgorged" all of the profits that CLA earned on its businesses in Washington, but also divested CLA of all of its revenue derived from conduct that has never been questioned in more than 30 other States. What makes the penalty particularly excessive is that the Attorney General after years of investigation identified a total of four customers who were dissatisfied with CLA's services and testified at the trial.

The Court of Appeals affirmed, concluding that "[t]he EDDA makes it unlawful for a non-lawyer to gather information for the preparation of an estate distribution document." Pet. App. 20a. CLA argued that the EDDA did not "provide fair notice as to what conduct is proscribed" as the trial court's rendition of the statute was "so broad that persons of ordinary intelligence would be obliged to guess at what it prohibits." Opening Br. 97. The Court of Appeals disagreed, describing the trial court's ruling as "a narrow and proper interpretation of the EDDA." Pet. App. 22a.

The court "share[d] CLA's concern about the AG's delay in prosecuting the case," finding it "incongruous" with the AG's assertions about CLA's business practices, but it concluded that the AG's "delay in prosecuting this case did not lead to a presumption that CLA's business model was appropriate." *Id.* at 26a.

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[1] Consumer Protection Week, WASH. STATE OFFICE ATT'Y GEN. (Mar. 10, 2022), https://www.atg.wa.gov/news/news releases/consumer-protection-week-attorney-general-ferguson-announces-recoveries.

CLA also argued that the EDDA, untethered from any UPL-related limitation on its scope, violated its First Amendment rights, *id.* at 21a, and created "serious free speech . . . issues" by "inhibit[ing] harmless speech" and "restrain[ing] non-commercial speech," Opening Br. 75–77. The Court of Appeals chose to "not address this issue," finding that CLA had not adequately "analyze[d] the test . . . for whether a commercial speech restriction is permissible." Pet. App. 22a.

The Washington Supreme Court declined review.

REASONS FOR GRANTING THE PETITION

I. THE AG'S NEW, EXPANSIVE READING OF THE EDDA'S VAGUE LANGUAGE RESULTED IN UNFAIR SURPRISE INCONSISTENT WITH DUE PROCESS.

A. The EDDA Does Not Give Fair Notice That It Bars Nonlawyers From Engaging In Speech Related to Estate Planning.

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required."*Fox Television Stations, Inc.*, 567 U.S. at 253. That "demand of fair notice" is "[p]erhaps the most basic of due process's customary protections." *Sessions* v. *Dimaya*, 138 S. Ct. 1204, 1225 (2018) (Gorsuch, J., concurring in part and concurring in the judgment). In all cases, "regulated parties should know what is required of them so they may act accordingly," and "precision and guidance are necessary." *Fox Television Stations, Inc.*, 567 U.S. at 253; see also *Papachristou* v. *Jacksonville,* 405 U.S. 156, 162 (1972) ("Living under a rule of law entails various suppositions, one of which is that '[all persons] are entitled to be informed as to what the State commands or forbids'").

Here, the text of the EDDA and the AG's changing interpretation and enforcement of it left CLA without "sufficient notice of what [wa]s proscribed." *Fox Television Stations, Inc.*, 567 U.S. at 254.

Notice was particularly inadequate because what the AG punished was speech: asking for and receiving information. When, as here, "speech is involved," due process protections are especially important: "rigorous adherence to th[e] requirements is necessary to ensure that ambiguity does not chill protected speech." *Id.* at 253–54; see also *id.* at 254 (noting the importance of clear notice when a law "touch[es] upon 'sensitive areas of basic First Amendment freedoms'"); *Grayned* v. *City of Rockford*, 408 U.S. 104, 109 (1972) (where "a vague statute abut(s) upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of (those) freedoms"). "[V]agueness concerns are more acute when a law implicates First Amendment rights, and, therefore, vagueness scrutiny is more stringent." *Butcher* v. *Knudsen*, 38 F.4th 1163, 1169 (9th Cir. 2022).

The EDDA's text does not give fair notice that it is illegal for a nonlawyer to ask for or receive certain information with no intent to prepare a legal document. The EDDA makes it unlawful "for a person to market estate distribution documents . . . unless the person is authorized to practice law." RCW 19.295.020(1). "Market" includes "every offer, contract, or agreement to prepare or gather information for the preparation of, or to provide, individualized advice about an estate distribution document." RCW 19.295.010(4). And an "[e]state distribution document" is a legal document, such as a will or trust, "prepared, or intended to be prepared, for a specific person or as marketing materials for distribution to any person." RCW 19.295.010(1).

These provisions are reasonably read as barring a nonlawyer from gathering information relevant to a legal document, *which the nonlawyer prepares or intends to prepare*. Indeed, the EDDA explicitly is "not intended to limit consumers from obtaining legitimate estate planning documents . . . from those authorized to practice law." RCW 19.295.005. Yet, as construed in this case, the EDDA bars virtually all nonlawyers from helping a person collect information to provide to an attorney for estate planning services in any circumstance, a construction which plainly limits senior citizens' access to appropriate legal advice.

As construed, the EDDA penalizes "gathering, or offering to gather, information." Pet. App. 88a. It sweeps in a very broad swath of speech, leaving the AG with expansive discretion to bring prosecutions. Due process "does not leave [regulated parties] . . . at the mercy of *noblesse oblige*." *Fox Television Stations, Inc.*, 567 U.S. at 255 (alterations in original) (quoting *United States* v. *Stevens*, 559 U.S. 460, 480 (2010)); *id.* at 253 (a law does not comport with due process if it is "so standardless that it authorizes or encourages seriously discriminatory enforcement" (quoting *United States* v. *Williams*, 553 U.S. 285, 304 (2008)); *Grayned*, 408 U.S. at 108. The AG's assurance that he will not use the EDDA to prosecute family members for gathering, or offering to gather, information to assist family members in obtaining legal advice cannot save the EDDA. *Fox Television Stations, Inc.*, 567 U.S. at 255. But the AG's need to make that statement proves the State's interpretation is limitless and becomes predatory.

B. The AG's Changed Position Created Unfair Surprise.

CLA also received inadequate notice because the AG's prior position indicated that CLA's actions were not prohibited by the EDDA.

CLA's reading of the EDDA was consistent with what the AG had previously said about the EDDA—that it did not create a "new cause of action," but simply made it easier to penalize "the unauthorized practice of law." See *supra* at 6. Moreover, CLA's understanding was consistent with Washington case law regarding the unauthorized practice of law which, according to the AG, the EDDA codified. *Id.* The AG's Office held this position for many years. Until this case, the AG had neither stated that the EDDA prohibits nonlawyers who do not intend to prepare estate documents from offering to gather or gathering information, nor enforced the EDDA against such conduct. This is true despite the fact that the AG was fully aware of CLA's speech for years before bringing an action. See *supra* at 9–10. In fact, the AG chose not to act against CLA, despite a full understanding of its business, for four years, a delay which the Washington appellate court found "concern[ing]" and "incongruous" with the AG's assertions. Pet. App. 25a–26a.

The AG's about-face violated due process. Where the government announces a new view of the law in an enforcement action following "a very lengthy period of conspicuous inaction, the potential for unfair surprise is acute." *SmithKline Beecham Corp.*, 567 U.S. at 158. It is one thing to expect regulated parties to conform their conduct to a clear articulation of the law; but "it is quite another" to hold a company "liable when the [government] announces its interpretations for the first time in an enforcement proceeding." *Id.* at 158–59. A "change this abrupt on any subject" would violate

due process, but certainly a change which "touch[es] upon 'sensitive areas of basic First Amendment freedoms" requires more. *Fox Television Stations, Inc.*, 567 U.S. at 254 (quoting *Williams*, 553 U.S. at 304). Given the magnitude and punitive nature of the award in this case, the need for intervention by this Court is overwhelming.

II. THE EDDA VIOLATES THE FIRST AMENDMENT BY PUNISHING ASKING QUESTIONS AND RECEIVING ANSWERS.

A. The EDDA Does Not Survive Strict Scrutiny

The EDDA's ban on specific speech by specific people imposes an overbroad "restriction on access to information in private hands" that does not comport with the First Amendment. *Sorrell*, 564 U.S. at 567–68.

On its face, the EDDA enacts content- and speaker-based restrictions on speech. "It follows that heightened judicial scrutiny is warranted." *Id.* at 565.

The EDDA singles out a specific type of speech for disfavored treatment: communications about estate planning. The information exchanged between two speakers as relevant to the preparation of an estate distribution document is not unique. The speech for which CLA was punished is a case in point, in that the State found hundreds of EDDA violations in part based on CLA receiving an individual's name, contact information, and other basic information. Pet. App. 17a–18a. This same information is exchanged every day in doctor's offices, schools, online marketplaces, government websites, and more. Under the EDDA, however, speakers may not exchange or even offer to exchange this information in conversations in furtherance of estate planning, *i.e.*, "speech with a particular content." *Sorrell*, 564 U.S. at 564.

The EDDA then identifies a specific class of people who are "barred from using th[is] information . . . even though the information may be used by a wide range of other speakers." *Id.* In addition to Washington-barred lawyers, all accountants and financial institutions are exempted from this law. RCW 19.295.020(4)–(5). But if anyone else offers to collect "data, facts, figures, records, and other particulars about a specific person or persons for the preparation of an estate distribution document" they face a $7,500 penalty for each utterance. RCW 19.295.010(3); 19.86.140.

It is no answer that this law targets only the exchange of "data, facts, figures, records, and other particulars." RCW 19.295.010(3). "[T]he creation and dissemination of information are speech within the meaning of the First Amendment" and therefore entitled to full constitutional protection. *Sorrell*, 564 U.S. at 570. At bottom, the EDDA "on its face burdens disfavored speech by disfavored speakers, *id.* at 564, and obstructs "the free flow of information and ideas." *City of Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 426 n.21 (1993).

Nor is the EDDA tailored to commercial speech alone. Commercial speech is defined as "speech that does no more than propose a commercial transaction." *Harris* v. *Quinn*, 573 U.S. 616, 648 (2014) (quotation omitted). Without a doubt, the EDDA covers communications that may be characterized as "speech for a profit," but that is not "what defines commercial speech." *Bd. of Trs., State Univ. of N.Y.* v. *Fox*, 492 U.S. 469, 482 (1989); *Discovery Network*, 507 U.S. at 423 ("[T]he proposal of a commercial transaction [i]s '*the test* for identifying commercial speech.'" (emphasis in original) (quoting *Fox*, 492 U.S. at 473–74)). Neither gathering information nor offering to do so

categorically constitutes a proposal to engage in a commercial transaction.

Moreover, to the extent the EDDA draws lines between the speech of certain "professionals" and "non-professionals," this Court has yet to find "a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles." *Nat'l Inst. of Fam. & Life Advocs.* v. *Becerra*, 138 S. Ct. 2361, 2375 (2018). Of course, certain regulations of professional *conduct* may be constitutionally permissible despite imposing incidental burdens on speech, but the relevant provisions of the EDDA target speech and speech alone.[2]

Here, the State has abandoned any argument that the EDDA regulates professional conduct. The Washington Court of Appeals below acknowledged CLA's proffer of "legislative history and contemporary case law [that] indicat[ed] that the EDDA was passed with the intent of regulating the unauthorized practice of law," and found it irrelevant. Pet. App. 20a. And as construed by the highest state court to rule on it, "the EDDA, as enacted, does not mention, define, or regulate the unauthorized practice of law." *Id.*

This leaves the EDDA as nothing more than a prohibition on a particular type of speech by a particular type of person, making it presumptively invalid and subject to strict scrutiny. *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991). To survive this "most exacting scrutiny," *Texas* v. *Johnson*, 491 U.S. 397, 412 (1989)

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[2] And in any case, a state cannot invoke a generic "interest in the 'regulation of professional conduct'" as a shield that protects speech-restrictive statutes against First Amendment scrutiny. *Reed* v. *Town of Gilbert, Ariz.*, 576 U.S. 155, 167 (2015) (citation omitted).

(quotation omitted), the State of Washington must demonstrate that its categorical ban on speech of nonlawyers (excluding accountants and financial institutions) is the least restrictive means of directly furthering a compelling government interest. *Sable Commc'ns of Cal., Inc.* v. *F.C.C.*, 492 U.S. 115, 126 (1989).

The EDDA crumbles under proper First Amendment scrutiny. Washington may have a compelling interest in protecting people against misleading sales practices, but its concern over what the AG might characterize as "harassing sales behaviors" generally—so long as these behaviors are not *deceptive*—is unlikely to "sustain a broad content-based rule like" the EDDA. See *Sorrell*, 564 U.S. at 575 ("Many are those who must endure speech they do not like, but that is a necessary cost of freedom."). To be sure, the State may exercise broad authority over "inherently misleading" speech, but it cannot strip speech of its protected status with a statute that slaps on the conclusory label of "deceptive." See *Peel*, 496 U.S. at 100 (Stevens, J.) (plurality op.) ("Whether the inherent character of a statement places it beyond the protection of the First Amendment is a question of law over which Members of this Court should exercise *de novo* review.").

Taking for granted that the State's interest in protecting citizens against *deceptive* sales practices is legitimate and compelling, the EDDA is both underinclusive and overinclusive in furthering that goal. The Act is underinclusive in that it provides exemptions to entities who are no less likely to engage in deceptive sales tactics and, indeed, may inflict even more serious financial harm by leveraging the imprimatur of their industry. See, *e.g.*, *Navajo Nation* v. *Wells Fargo & Co.*, 344 F. Supp. 3d 1292, 1298 (D.N.M. 2018) (mem.) ("Wells Fargo is one of the biggest banks in the United

States. For years, Wells Fargo increased its sales by engaging in illegal banking practices, defrauding customers nationwide for its own financial gain.") The Act is overinclusive because it purports to "not intend[] to limit customers from obtaining legitimate estate planning documents," RCW 19.295.005, yet makes no effort to distinguish between those who work to "keep people away from attorneys," House Judiciary Tr. at 11 (2008), and those who are in fact useful in facilitating access to valuable legal advice.

For example, consider a daughter who offers to help her elderly father update his trust given recent changes to his financial circumstances. She helps catalog his current assets and holdings, and relays this information to the family attorney who moves forward with detailed communications and planning with the father. The daughter has neither deceived nor harmed her father, but she has nonetheless broken the law by "offer[ing] . . . [to] gather information for the preparation of . . . an estate distribution document." RCW 19.295.010(4).

One available less restrictive alternative would be to enact a law which bars gathering information only to facilitate a *nonlawyer's* preparation of estate documents—the construction of the EDDA which Washington courts rejected. Trust mills threaten harm because of a lack of oversight by a licensed attorney on consequential *legal* issues. Individuals face serious risk when nonlawyers provide "legal advice and counsel" or are responsible for "the preparation of legal instruments," *Trumbull Cnty. Bar Ass'n* v. *Hanna*, 684 N.E.2d 329, 331 (Ohio 1997) (quotation omitted), because these people are not qualified to "exercis[e] professional judgment on [] legal question[s]." *Baker*, 492 N.W.2d at 702. There is no need to prohibit "*any* natural person" from gathering or offering to gather

information, RCW 19.295.010(5) (emphasis added), or to require nonlawyers to be formally "*employed* by someone authorized to practice law" in order to do so, RCW 19.295.020(2) (emphasis added). Punishing only the speech that constitutes the unauthorized practice of law sufficiently targets pernicious trust mills without chilling protected speech.

B. The EDDA Does Not Survive Intermediate Scrutiny

Even if the commercial speech doctrine applied, the EDDA still violates the First Amendment.

1. The EDDA is Overbroad

For starters, assuming for the sake of argument that CLA's particular speech for which it was punished did "no more than propose a commercial transaction," *Harris*, 573 U.S. at 648 (quotation omitted), the EDDA remains overbroad and unconstitutional. CLA may show that the EDDA is overbroad where "the alleged overbreadth (if the commercial-speech application is assumed to be valid) consists of its application to noncommercial speech, and that is what counts." *Fox*, 492 U.S. at 481.

Regardless of the protected status of CLA's particular speech, the EDDA on its face applies to more than commercial speech. The Act has no "commercial activity" or "commercial transaction" limitation. Nor does it provide exceptions for family members or charitable services. Rather, the Act prohibits *any* natural person from making *any* offer to gather or gathering *any* information from another person for the preparation of an estate distribution document. See RCW 19.295.010. Large swaths of the speech covered "do[] much more than" merely propose a commercial transaction. *Harris*, 573 U.S. at 648.

Consequently, whatever "legitimate sweep" the EDDA may have, "a substantial number of its applications are unconstitutional." *Stevens*, 559 at 473 (quotation omitted). In addition to those individuals who have no motive other than to assist someone close to them as they plan for their passing, see, *e.g.*, *In re Estate of Knowles*, 143 P.3d at 871 (no unauthorized practice of law where son did not "select[] the will form or advise[] [his father] about his dispositions"), businesses who engage in this same speech as a matter of course do not forfeit their constitutional protection simply because they are profit motivated. See *Fox*, 492 U.S. at 482 ("Some of our most valued forms of fully protected speech are uttered for a profit."). These persons who do not act to deceive others by unlawfully stepping into the shoes of attorneys by *preparing* or *selling* legal documents without authorization are not fungible with the trust mills that do exactly that. Nor should these persons be forced simply to hope that the State will choose not to enforce the law against them. Under the First Amendment, they are fully protected. The Washington Courts' approval of an expansive reading of the EDDA creates the very risk the First Amendment prohibits.

2. The EDDA is not Narrowly Drawn

Taking the commercial speech question to its limit and assuming that the EDDA *exclusively* covers commercial speech, it still runs afoul of the First Amendment. Where the commercial speech restricted by a statute is not inherently misleading, the State bears the burden of proving that it has a substantial interest that is directly advanced by these restrictions and that the restrictions are "in proportion to that interest," *i.e.*, "narrowly drawn." *Central Hudson*, 447 U.S. at 564–65.

The exchange of information relevant to an estate distribution document is not inherently misleading speech and, as such, the State cannot categorically ban it via the EDDA. The EDDA applies to "any person" and "any offer" to gather information. Even assuming making such an offer as a nonlawyer could be "*potentially* misleading," that would be insufficient justification for a ban on the speech here, which "may be presented in a way that is not deceptive." *Peel*, 496 U.S. at 100 (quotation omitted). And, in fact, here, CLA was very clear that it would not provide legal services. Opening Br. 51 (citing CP 6008) (Service Package welcome materials told customers: "The agents representing [CLA] are not attorneys . . . and cannot offer legal advice . . . . All legal services will be provided by your attorney." (alterations in original)). Of course, actual trust mills deceive their customers, but this deception flows from nonlawyers offering—and then actually carrying out—something they are not authorized to do in the first place. *See* House Judiciary Tr. at 11 (2008) ("[C]onsumers . . . can be misled into believing that [they are] associating with an attorney or someone who's authorized to sell those documents and who's under the surveillance of the State Supreme Court.") But this concern of deception evaporates where someone merely offers to collect information without "exercising a lawyer's professional judgment" or holding themselves out as capable of doing so. *Baker*, 492 N.W.2d at 701. Every CLA customer was required to obtain an independent attorney for the preparation of all estate documents.

Even when the EDDA is viewed through the lens of the commercial speech doctrine, the State cannot justify its blanket prohibition "on access to information in private hands" with an appeal to concerns of deceptive sales practices. *Sorrell*, 564 U.S. at 568. Asking for and

gathering customer information facilitates the provision of valuable services. Prohibiting nonlawyers from gathering this information is disproportionate to the State's anti-deception goal and undermines important speech. "Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs." *Id.* at 570.

When speech is not deceptive, government must recognize that "[w]e already have a code of 'fair information practices,' and it is the First Amendment, which generally bars the government from controlling the communication of information." Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 Stan. L. Rev. 1049, 1051 (2000). No other State appears to give such short shrift to this constitutional concept as Washington does here. *Compare* RCW 19.295.010(4) (proscribing "every offer . . . [to] gather information for the preparation of . . . an estate distribution document"), *with* 815 ILCS 505/2BB (proscribing "[t]he *assembly, drafting, execution,* and *funding* of a living trust document . . . by a . . . nonlawyer" (emphasis added)); *see also Florida Bar re Advisory Opinion*, 613 So. 2d at 428 ("[G]athering the necessary information for the living trust does not constitute the practice of law, and nonlawyers may properly perform this activity."); *Mid-Am. Living Trust Assocs.*, 927 S.W.2d at 861 ("Merely gathering information for use in a legal document does not necessarily constitute the unauthorized practice of law."). Indeed, prior to this action, CLA had been serving customers in more than 30 other states without facing pushback.

For the same reasons that the EDDA's categorical ban on protected speech is not the least restrictive

means of furthering the State's interests, "the outcome is the same [even] whe[re] a special commercial speech inquiry . . . is applied." *Sorrell*, 564 U.S. at 571. A narrower law could avoid sweeping in legitimate businesses like CLA's, allow family members to assist in obtaining legal services, and punish bad actors who work to deceive and mislead. The First Amendment does not permit the State of Washington to use a sledgehammer when it could have used a scalpel.

III. THIS CASE IS AN IDEAL VEHICLE FOR THIS COURT TO ADDRESS VAGUE AND OVERBROAD CONSUMER PROTECTION STATUTES WHICH CHILL AND PUNISH SPEECH.

This case allows the Court to address a nationwide problem by setting clear limits on states' use of broad and vague consumer protection statutes and regulations that implicate and often categorically ban speech. See Henry N. Butler & Jason S. Johnston, *Reforming State Consumer Protection Liability: An Economic Approach*, 2010 Colum. Bus. L. Rev. 1, 35 (2010) (describing consumer protection act liability as "so expansive and uncertain that its likely effect is to both chill and tax socially desirable manufacturer/marketer communication to consumers").

Across the country, the vague language of these laws facilitates unjust and unpredictable punishment, creating a serious risk of "chill[ing] protected speech." *Fox*, 567 U.S. at 253–54; see, *e.g.*, *Mass. Ass'n of Priv. Career Schs.* v. *Healey*, 159 F. Supp. 3d 173, 205–08 (D. Mass. 2016) (unconstitutional restriction on advertisements of educational institutions); *State* v. *TVI, Inc.*, 524 P.3d 622, 638 (Wash. 2023) (unconstitutional restriction on charitable solicitations); *Bristol-Myers Squibb Co.* v. *Connors*, 444 F. Supp. 3d 1231, 1234 (D. Haw. 2020) (challenge to restriction on "ability to

engage in scientific debates" regarding medication); *ACA Int'l* v. *Healey*, 457 F. Supp. 3d 17, 27–28 (D. Mass. 2020) (unconstitutional restriction on debt collection communications).

The remarkable scope of these laws is no accident. Indeed, "[b]road, flexible prohibitions of unfair and deceptive practices are the hallmark of UDAP ['Unfair and Deceptive Act or Practice'] laws." Nat'l Consumer Law Ctr., *Consumer Protection in the States: A 50-State Evaluation of Unfair and Deceptive Practices Laws* 1 (Mar. 2018), https://www.nclc.org/wp-content/uploads/2022/09/UDAP_rpt.pdf. This system "provides substantial power to state AGs." U.S. Chamber Inst. for Legal Reform, *Unfair Practices or Unfair Enforcement?: Examining the Use of Unfair and Deceptive Acts and Practices (UDAP) Laws by State Attorneys General* 1 (Oct. 2016), https://instituteforlegalreform.com/wp-content/uploads/2020/10/UnfairPracticesUnfairEnforcement_WebFile.pdf.

Bestowing punitive government officials with unbridled discretion to enforce capacious laws is not consistent with fundamental due process principles. The Constitution requires "[p]recision and guidance" in the law. *Fox*, 567 U.S. at 253–54. What the Court accomplished by applying the vagueness doctrine to federal regulation in the *Fox* case, it should do in this case to protect entities regulated by States. This case provides this Court an important opportunity to reaffirm that fundamental constitutional requirement in the context of a state consumer protection law that has been interpreted to bar crucial speech when engaged in by people who are not members of particular professions. It also provides the Court with the opportunity to articulate the First Amendment protections applicable to corporate entities which engage in speech as a part of their business.

The issues in this case are squarely presented and ripe for review. CLA challenged the vagueness and overbreadth of the EDDA in the proceedings below, raising these constitutional concerns to the highest level in the Washington Courts. Opening Br. 95–98; PFR 23–27. It similarly argued that the EDDA, as it is now construed, violates the First Amendment. Opening Br. 75–77. At every turn, the State of Washington disregarded the constitutional infirmities that infect its expansive construction of the EDDA. This Court's intervention is thus necessary to correct a profound injustice that violates both the First and Fourteenth Amendments.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

TABLE OF APPENDICES

APPENDIX A

IN THE COURT OF APPEALS OF
THE STATE OF WASHINGTON

No. 82529-1-I

STATE OF WASHINGTON,

Respondent,

v.

CLA ESTATE SERVICES, INC., and CLA USA INC.,

Appellants,

MITCHELL REED JOHNSON, individually and in his marital community,

Defendant.

DIVISION ONE

PUBLISHED OPINION

SMITH, A.C.J. — CLA Estate Services, Inc. (CLA ESI) and CLA USA, Inc. (CLA USA) (collectively, CLA) began offering free estate-planning seminars for seniors in Washington in 2008. These seminars stressed to consumers that "Revocable Living Trusts" (RLTs) were a superior means of estate distribution relative to probate, and offered a "Lifetime Estate Plan," wherein nonlawyer CLA agents would come to consumers' houses and gather information about the consumers' assets to assist the consumers' lawyers in preparing their estate distribution documents. The Office of the Attorney General (AGO) sued CLA for violations of the Consumer Protection Act (CPA), ch. 19.86 RCW, and

"Estate Distribution Documents Act" (EDDA), RCW 19.295. After motions for summary judgment and a bench trial, the court concluded that CLA unlawfully misrepresented the benefits of RLTs compared to probate, misrepresented the CLA agents' intentions in coming to consumers houses, and violated the EDDA by gathering information for the preparation of estate distribution documents. The court ordered CLA to pay restitution for all of the commissions it received from the sales of the Lifetime Estate Plan and annuities sold at in-home meetings, and imposed a civil penalty of $2,000 per violation. CLA appeals. Finding no error, we affirm.

FACTS

CLA ESI and CLA USA are Texas corporations that began offering free estate-planning seminars in Washington in 2008, offering a free meal to seniors to encourage attendance. At these seminars, CLA's presenters, who were not lawyers, distributed and taught from a workbook titled "CLA 'Lifetime Estate Plan.'" The presenters followed scripts promoting the Lifetime Estate Plan and "focus[ing] on the supposed dangers associated with probate that could be avoided with a living trust." The plan was "tout[ed] as a full-service estate planning package in which CLA would assist consumers in estate planning to protect their assets and heirs, ensure their estate passes to their heirs, provide access to attorneys to draft estate documents, and support and coordinate the work of the attorneys." As part of the plan, CLA would gather information about the consumers' estates and enter it into its "Road of Retirement" proprietary software, and share this information with the consumers' independent attorneys for the preparation of estate distribution documents. CLA would then send an agent to the

consumers' house in a "delivery meeting" to deliver and notarize the legal documents. Then, three months later and every year thereafter, CLA would send an agent to review the client's information and check if any changes were needed.

Although these agents were presented as being "financial planners" who could offer a wide variety of advice and help, the agents were insurance salespeople whose primary compensation for these visits was commissions from selling annuities. And "[a]lthough CLA agents represented to consumers that the Road of Retirement's purpose was to gather information for estate planning purposes, CLA expected its agents to use the Road [of] Retirement as a sales tool, to gather lists of assets that could be moved into annuity products." The insurance products that CLA sold were "extraordinarily complex" and "opaque," included an "extraordinarily" high commission relative to other insurance products, and were calculated by an expert as having a substantially lower value than the purchase price.

The AGO issued a Civil Investigative Demand (CID) to CLA in 2013, when it began to investigate whether CLA's business model complied with the CPA and EDDA. In October 2017, the AGO provided CLA with notice of its intent to sue for violations of these acts.[1] The court decided several motions for partial summary judgment and ultimately entered findings of facts and conclusions of law following a bench trial. It concluded that CLA violated the CPA by misrepresenting the relative benefits of RLTs and probate in Washington and by being deceitful about the intentions of the CLA

[1] The record does not establish why the AGO's investigation took 4 years.

agents sent to in-home visits. It also concluded that CLA violated the EDDA by offering to gather, and gathering, information from clients for the preparation of estate distribution documents. It ordered CLA to return all revenue from sales of the Lifetime Estate Plan and insurance products to consumers in Washington and imposed civil penalties of $666 to $2,000 for each CPA and EDDA violation. It also entered extensive injunctive restraints against CLA and awarded attorney fees to the AGO.

CLA appealed.

ANALYSIS

Standard of Review

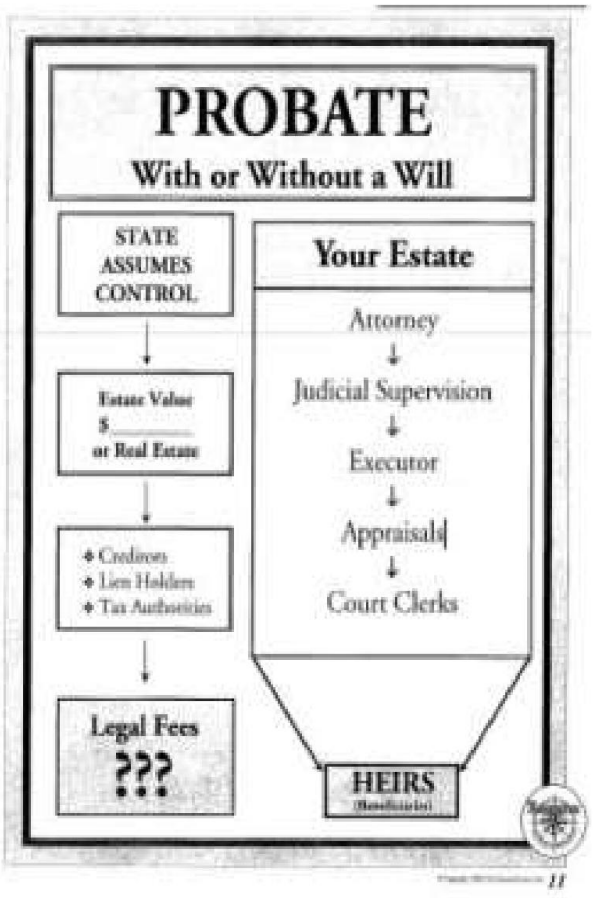
We review the court's findings of fact to determine if they are supported by substantial evidence in the record. *Ledcor Indus. (USA), Inc. v. Mut. of Enumclaw Ins. Co.*, 150 Wn. App. 1, 8 n.5, 206 P.3d 1255 (2009). We then determine whether the findings of fact support the conclusions of law. *Id.* Whether a certain action constitutes a violation of the CPA is a question of law that we review de novo. *Id.* at 12.

"A trier of fact has discretion to award damages which are within the range of relevant evidence." *Mason v. Mortg. Am., Inc.*, 114 Wn.2d 842, 850, 792 P.2d 142 (1990). "An appellate court will not disturb an award of damages made by the fact finder unless it is outside the range of substantial evidence in the record, or shocks the conscience, or appears to have been arrived at as the result of passion or prejudice." *Id.*

Representations about Trusts and Probate

CLA contends that the court erred when it concluded that CLA misrepresented estate law and that these

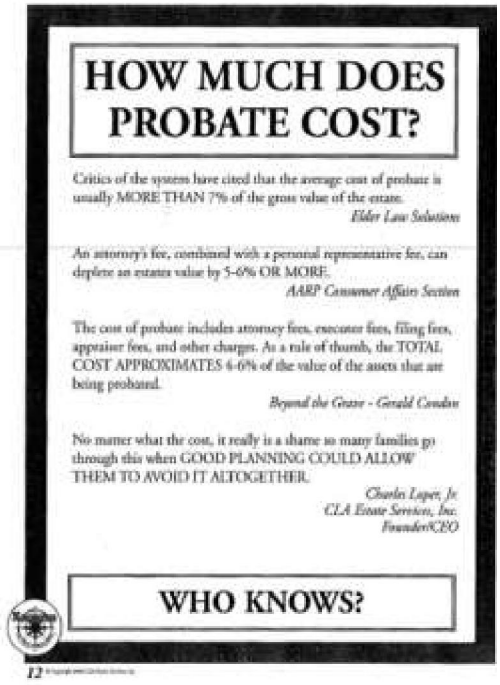
misrepresentations violated the CPA. It challenges several individual findings[2] about the contents of CLA's workbooks and challenges the court's legal conclusions about the net impression made by CLA at the seminar. These issues are discussed in turn.



[2] In its reply brief, CLA also contends for the first time that the court uncritically accepted the State's proposed findings and conclusions and that we should therefore closely scrutinize those findings. But the court did not adopt verbatim the State's proposed findings and its findings stand up to scrutiny.

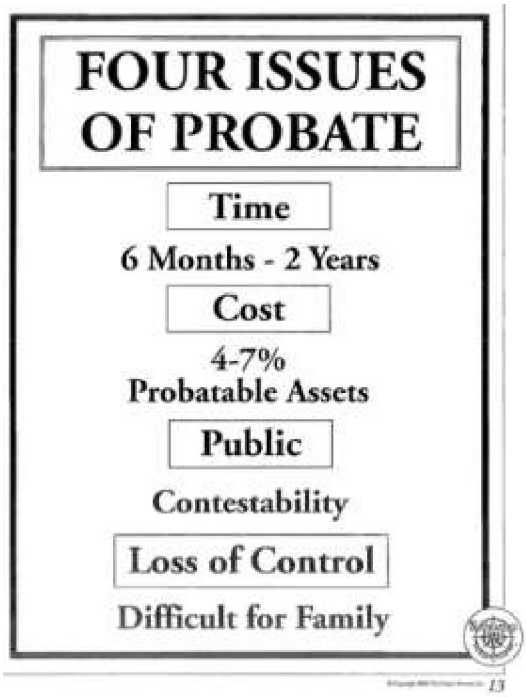
1. Challenged Findings

CLA challenges the portion of the court's Finding of Fact 12(d) that states that page 11 of the CLA workbook "graphically represent[s] that the probate process significantly reduces the estate value available to distribute to heirs." Page 11, which is titled "PROBATE" depicts a large box labeled "Your Estate," with several enumerated costs ("Attorney ➔ Judicial Supervision ➔ Executor ➔ Appraisals ➔ Court Clerks"), and then depicts arrows pointing at a significantly smaller box labeled "HEIRS." This is substantial evidence supporting the court's finding.[3]



[3] CLA challenges this finding rather disingenuously by omitting the word "graphically" from its assignment of error and then protesting that page 11 does not "state or imply a dramatic reduction."

CLA challenges Finding of Fact 12(e)'s characterization of the quotes on page 12 of the workbook as "vastly overstat[ing] the general cost of probate administration in Washington." CLA makes its argument by characterizing the court's finding as referring to CLA's statements, and then contending that CLA's only claim about the cost of probate was "who knows." But the court's finding plainly concerns the "statements" providing specific numbers, ranging from 4 to 6 percent of an estate to "MORE THAN 7%." And the court cites a declaration from the State's expert that the page "both wrongly implies that Washington does have a percentage-based statutory fee schedule and, in my experience, dramatically overstates the cost of probate administration." Additional evidence indicates that the workbook's actual dollar estimate of the cost of probate "is far in excess of the typical cost of probate." Rather than challenging the reliability of this evidence, CLA points to its own expert's declaration highlighting the uncertainties of probate costs, but ultimately presenting evidence that the average probate cost in 100 probate cases in Western Washington was 3.77 percent of the estate value. Given that the page's first estimation of probate costs is "MORE THAN 7%" of the estate value, we conclude that substantial evidence supports the court's finding that this "vastly overstate[s]" the cost of probate.



Page 13 of the workbook characterizes probate cost as being "4- 7%" of probatable assets. We therefore similarly uphold Finding of Fact 12(g), that this characterization "significantly overestimates" the cost of probate in Washington.

CLA challenges Findings 12(f), (h), and (i), which discuss the claims on Page 13 about the time, public nature, and amount of control involved with probate. It claims that, whereas the court's findings indicate that revocable living trusts suffer from the same potential problems as probate, (1) the page "stands on its own," (2) the information on the page is correct, and (3) RLTs are superior to probate in those areas. But the first two points do not contradict anything in the court's findings. And to make the third point, CLA relies only on its own expert's testimony, failing to

engage with the evidence cited by the court or to explain why it is insufficient. CLA therefore necessarily fails to show that the findings are unsupported by substantial evidence.[4]

CLA is correct in its challenge to Finding 12(k), that "CLA's workbook does not mention the use of durable powers of attorney," because the workbook does in fact do so. However, the workbook mentions it only in the context of a list of documents it will prepare and in explaining why it is not as effective as a revocable living trust. Finding 12(k) as a whole challenges the accuracy of CLA's claim that a revocable living trust will avoid guardianship and notes that durable powers of attorney are "the most common means of avoiding guardianship." Although the workbook does in fact mention the use of durable powers of attorney, it still paints revocable living trusts as the only effective way to avoid guardianship. We conclude that the challenged portion of Finding 12(k) is unsupported by substantial evidence but that this does not affect the trial court's conclusions of law. *State v. Coleman*, 6 Wn. App. 2d 507, 516, 431 P.3d 514 (2018) (citing *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 808, 828 P.2d 549 (1992)) ("Even if a trial court relies on erroneous or unsupported findings of fact, immaterial findings that do not affect its conclusions of law are not prejudicial and do not warrant reversal.").

Finally, CLA challenges the court's Finding 13, that the workbook offers to "assist consumers in estate planning to protect their assets and heirs, . . . provide access to attorneys to draft estate documents, and support and coordinate the work of the attorneys."

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[4] CLA's challenge to findings 12(l)-(n) follows the same logic as its challenge to these comparisons, and fails for the same reason.

CLA protests that it did not "coordinate or have any control over the work of attorneys" and "*never* promised to assist in estate planning to protect assets/heirs." But the workbook's explicit claims that CLA "[c]oordinates non-legal services along with legal services provided by independent attorneys into a Lifetime Estate Planning Package," "[c]oordinate[s], through an independent attorney, the implementation of the client's Estate Planning documents," and "[p]rovide[s] legacy planning solutions allowing client to transfer their estate to their heirs at life's end" all provide substantial evidence for this finding.

We hold that the court's finding in Paragraph 12(k), that "CLA's workbook does not mention the use of durable powers of attorney," is unsupported by substantial evidence but that this does not affect the conclusions of law. And we determine that all the other challenged findings are supported by substantial evidence.

2. Net Impression Generated by the Workbook

Next, CLA contends that the court misapplied the "net impression" doctrine and that its estate planning seminars were not deceptive. We disagree.

Under the CPA, "unfair or deceptive acts or practices in the conduct of any trade or commerce" are unlawful. RCW 19.86.020. "By broadly prohibiting 'unfair or deceptive acts or practices in the conduct of any trade or commerce,' the legislature intended to provide sufficient flexibility to reach unfair or deceptive conduct that inventively evades regulation." *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 49, 204 P.3d 885 (2009) (citation omitted) (quoting

RCW 19.86.020). When "the Attorney General brings a CPA enforcement action on behalf of the State, it

must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, and (3) public interest impact." *State v. Kaiser*, 161 Wn. App. 705, 719, 254 P.3d 850 (2011).

"While the CPA does not define the term 'deceptive,' the implicit understanding is that 'the actor misrepresented something of material importance.'" *Id.* (emphasis omitted) (quoting *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 730, 959 P.2d 1158 (1998)). The question is whether "the alleged act had the capacity to deceive a substantial portion of the public." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785, 719 P.2d 531 (1986). "Even accurate information may be deceptive 'if there is a representation, omission or practice that is likely to mislead.'" *Kaiser*, 161 Wn. App. at 719 (quoting *Panag*, 166 Wn.2d at 50).

In *Panag*, insurance companies covered the expenses of their insureds after car accidents and then sought to pursue subrogation claims against the other drivers. 166 Wn.2d at 32-35. Rather than pursue these claims in court, they retained a collection agency that sent the drivers official-looking "collection notices," representing that there was an "AMOUNT DUE," advising the driver to "[a]ct immediately," and taking "increasingly urgent tone[s]" before threatening legal action. *Id.* at 35-36. The court concluded that the notices "were deceptive because they look[ed] like debt collection notices and may [have] induce[d] people to remand payment in the mistaken belief they [had] a legal obligation to do so." *Id.* at 47-48. This was despite the fact that the notices "accurately state[d] the demand was related to a subrogation claim." Id. at 49-50. The court explained that "a communication may be deceptive by virtue of the 'net impression' it conveys,

even though it contains truthful information." *Id.* at 50 (quoting *Fed. Trade. Comm'n v. Cyberspace.Com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006).

Here, the presentations and workbooks at CLA's seminar gave the deceptive net impression "that a revocable trust is preferable regardless of individual circumstances." The court found that the workbook gives the impression that wills lead to "WORRY," while trusts lead to "PEACE OF MIND," based on the workbook's representation that wills are subject to court control, are public, take a long time to resolve, and leave families vulnerable, while trusts avoid all these issues. The court found that this impression was deceptive because it "misrepresents Washington law, the Washington probate process, and the relative benefits of revocable living trusts in Washington." As discussed above, these findings are supported by substantial evidence. We therefore hold that the court correctly concluded that this practice on CLA's part was deceptive.

CLA disagrees and contends that *Panag* is inapposite because that case "dealt with facial falsehoods qualified by an inconspicuous disclaimer." It claims that the trial court here "made no finding that *any* CLA-ESI statement was objectively false" because the findings "concede" that CLA's claims "about RLTs and wills may be true depending on the individual circumstances." But the court did indeed find that CLA's representations were "not accurate" and "materially misleading." This is a clearer case than in *Panag*, where the court reasoned that the notices contained truthful information but that an ordinary consumer would not understand the meaning of the truthful disclaimer.

CLA claims it clearly disclaimed that RLTs "were not for everyone" because of a statement on page 39 of the workbook: "If you own titled assets and want your loved ones (spouse, children or parents) to avoid court interference at your death or incapacity, consider a revocable living trust." Even if this disclaimer actually indicated that RLTs might not be the best choice for everyone in attendance at CLA's seminars, it is one sentence in a series of small questions on page 39. We conclude that this does not affect the net impression given by CLA, and we affirm the trial court's conclusion that CLA's representations were deceptive.

Disclosure about CLA Insurance Salespeople

CLA challenges the court's conclusion that CLA's marketing of its Lifetime Estate Plan created "a deceptive net impression that [consumers] were purchasing robust estate planning services, and not in-home visits from commission-motivated insurance agents." We hold that this conclusion is supported by substantial evidence.

Unchallenged findings establish that CLA told consumers that the Lifetime Estate Plan involved a "CLA financial planner" providing in-home meetings "to ensure [the] plan is kept up to date with tax, financial and family changes" and that the planner could "help you in many ways including financial guidance, tax evaluation, long term health planning, and legacy planning." CLA described in detail how this planner would go over the documents and the client's assets to ensure "everything is going smoothly" and "help you keep your planning on the right track." A CLA seminar presenter "testified that he did not discuss the sale of annuities when he was discussing any of these workbook pages related to CLA's services." Two brief mentions of insurance in the workbook indicated

that CLA offered insurance products but "embed[ded] the mention of insurance in a broad list of estate planning services and present[ed] it only as something that can be offered if needed, not as something that must occur for CLA's agents to make a living." Consumers who attended the seminars testified that insurance and annuities were not referenced at the seminars and that they did not understand that CLA sold insurance or that the in-home review meetings would be conducted by insurance agents. But in fact, the CLA representatives were paid only $25 for delivery meetings and only $10 for review meetings, and only received additional compensation through commissions from annuities sales, indicating that "the sale of annuity products to CLA's clients was CLA's overriding objective." And the fact that CLA agents "assist[ed] with and deliver[ed] consumers' estate documents caused consumers to place their trust in [the agents], which in turn allowed [them] to sell them insurance products."

We conclude that this constitutes a deceptive practice. CLA indicated to consumers that its purpose at the in-home meetings was to assist them with their estate planning process, when in fact its purpose was to "gather lists of assets that could be moved into annuity products" and then to sell them these products. This deception provided CLA with trusting, amenable clients to visit, making these visits particularly desirable from a sales perspective.

CLA disagrees. It points first to the references to insurance in CLA's workbook, and again contends that court erred by relying on *Panag* because *Panag* supposedly "did not address the adequacy of true and correct disclosures." This is inaccurate. *Panag* discussed the adequacy of disclosures that "accurately state[d] the demand was related to a subrogation claim." *Id.* at

49-50. CLA contends that accepting the court's conclusion that the workbooks did not "adequately disclose" that CLA agents would try to sell insurance would have drastic impacts on every salesperson who sells multiple products in conjunction with a sale. But most salespeople do not mislead consumers as to their intentions in order to create a warm and trusting environment for the sale of additional products. We are not persuaded.

CLA next points to disclosures in their consumer information and disclosure agreement and welcome letters, which clients received upon purchasing a service package, indicating that CLA agents might discuss insurance products. The court relied on *Robinson v. Avis Rent A Car Sys., Inc.*, 106 Wn. App. 104, 116, 22 P.3d 818 (2001), for the proposition that "a practice is unfair or deceptive if it induces contact through deception, even if the consumer later becomes fully informed before entering into the contract." The court in *Robinson* concluded that a rental car company engaged in a deceptive practice by "quoting a car rental price that does not include a concession fee that is also charged," even though it disclosed the concession fee "later at the airport car rental counter when customers sign[ed] the car rental agreement." 106 Wn. App. at 115-16. CLA contends that this case is distinguishable from *Robinson* because its clients "were offered annuities they had no obligation to purchase." But the point is that CLA clients purchased the Lifetime Estate Plan under false pretenses, and the nature of the in-home visits they were purchasing was not disclosed until they made the decision to purchase the plan. We are not persuaded.

Lastly, CLA cites to seminar admission tickets, promotional flyers and postcards, and "CLA's Promise

to customers," that all contain mentions of insurance. But there is no evidence about who received these materials, and the latter two items involve no cite to the record whatsoever. Moreover, it is unlikely that any of these disclosures would cure the deceptive net impression, given that they do not explain that CLA agents' goal is to sell insurance and consumers did not understand that CLA sold insurance.[5]

We hold that the court correctly concluded that CLA's marketing of its Lifetime Estate Plan created "a deceptive net impression that [consumers] were purchasing robust estate planning services, and not in-home visits from commission-motivated insurance agents."

EDDA Violations

CLA contends that the court erred by concluding that its business model violated the EDDA. We disagree.

The EDDA declares it "unlawful for a person to market estate distribution documents, directly or indirectly, in or from this state unless the person is authorized to practice law in this state," with certain exceptions for financial institutions, accountants, and tax agents. RCW 19.295.020(1), (4)-(6). "Marketing" is defined as "includ[ing] every offer, contract, or agreement to prepare or gather information for the preparation of, or to provide, individualized advice about an estate

[5] CLA also contends that the court erred in concluding that "CLA created the opportunity for its agents to market insurance products to consumers in their homes . . . [y]et CLA made little effort to provide safeguards to protect its clients from being taken advantage of by overly aggressive or improper sales tactics." CLA contends that "this conduct does not rise to the level of unfair or deceptive." But the court did not conclude that this practice was unfair or deceptive or that it constituted a CPA violation, so we need not address this contention.

distribution document." RCW 19.295.010(4). And " '[g]athering information for the preparation of an estate distribution document' means collecting data, facts, figures, records, and other particulars about a specific person or persons for the preparation of an estate distribution document." RCW 19.295.010(3). A violation of the EDDA is a violation of the CPA. RCW 19.295.030.

The legislature's explicit intention in enacting the EDDA was "to prohibit the marketing of services related to preparation of estate distribution documents by persons who are not authorized to practice law or who are not a financial institution." RCW 19.295.005. This was based on its finding that "the practice of using 'living trusts' as a marketing tool [by unauthorized individuals] for purposes of gathering information for the preparation of an estate distribution document [is] a deceptive means of obtaining personal asset information and of developing and generating leads for sales to senior citizens." RCW 19.295.005.

Here, the plain language of the EDDA supports the court's conclusion that CLA's practices violated the EDDA. CLA routinely offered to gather, and gathered, financial information from its clients, and it represented that it was gathering this information so that the clients' attorneys could prepare estate distribution documents. The trial court's unchallenged findings note that when a consumer purchased CLA's Lifetime Estate Plan, the CLA representative "worked with the client to complete a Client Information Form that identified the client's name, contact information, emergency contacts, reasons for purchasing the Lifetime Estate Plan, value of the estate, and number of real estate holdings." CLA then "continued to gather

information for use in the preparation of a client's estate distribution documents after its agents completed the Client Information forms," such as copies of deeds and information about assets and beneficiaries. CLA continued this conduct throughout its relationship with its clients. Because CLA represented that it was gathering this information to enable the preparation of estate distribution documents, and the CLA agents were not authorized to practice law, this conduct violated the EDDA.

CLA makes several arguments to explain why this outcome is incorrect, disputing factual, statutory, constitutional, and policy issues. We are not persuaded.

1. CLA's Factual Characterizations of its Activities

First, CLA claims that it did not gather information for the preparation of estate distribution documents, but instead gathered the information "for [its] own business and sale purposes." While this may be a more candid statement of CLA's business model than it gave to consumers, unchallenged findings and the record as a whole clearly establish that CLA represented, and its clients understood, that it was gathering information for the preparation of estate distribution documents. CLA also did indeed share the information it gathered with the consumers' attorneys. Because the EDDA is targeted at preventing the "gathering [of] information for the preparation of an estate distribution document [as] *a deceptive means of obtaining personal asset information* and of developing and generating leads for sales to senior citizens," the fact that CLA had hidden motives for gathering information cannot prevent it from being liable under the EDDA. RCW 19.295.005. (Emphasis added.) We hold that under the EDDA, the test of whether information

is gathered for the preparation of estate distribution documents turns on the purpose that is presented to and understood by the consumer.

Next, CLA appears to contend that it used revocable living trusts as a marketing tool but did not market revocable living trusts themselves, and that the court erred by conflating the two. But to make this argument, CLA focuses on its actions in advocating the benefits of revocable living trusts at seminars. This line of reasoning fails because those acts are not what the court concluded violated the EDDA—the EDDA violations were offering to gather, and gathering, information from specific consumers for the preparation of estate distribution documents.

Finally, CLA also contends that because not all the information it gathered was ultimately used by attorneys to prepare estate distribution documents, it did not violate the EDDA. But as discussed above, what matters is the purpose for gathering the information, and here the purpose was unambiguously presented and understood as enabling the preparation of estate distribution documents. We therefore remain unpersuaded.

2. Statutory Construction

CLA next contends that the EDDA should be read as only prohibiting gathering information for the preparation of an estate distribution document where both the information gathering and the actual preparation of the document are done by a non-lawyer. But "a court must not add words where the legislature has chosen not to include them." *Rest. Dev., Inc. v. Cananwill, Inc.*, 150 Wn.2d 674, 682, 80 P.3d 598 (2003). The EDDA makes it unlawful for a non-lawyer

to gather information for the preparation of an estate distribution document.

RCW 19.295.020(1); RCW 19.295.010(4). This simple construction is in line with the legislature's concern about people using estate planning as an excuse to "obtain[ ] personal asset information and . . . develop[ ] and generat[e] leads for sales to senior citizens." RCW 19.295.005. And, indeed, "[a]lthough CLA agents represented to consumers that the Road of Retirement's purpose was to gather information for estate planning purposes, CLA expected its agents to use the Road [of] Retirement as a sales tool." CLA's business model therefore falls squarely within the realm of the EDDA's prohibited conduct, as expressed by the legislature's statement of intent and the plain language of the statute.

3. Unlawful Practice of Law

CLA contends that the trial court's construction of the statute would broaden the definition of the practice of law, thereby violating the court's power to define and regulate the practice. It relies on legislative history and contemporary case law indicating that the EDDA was passed with the intent of regulating the unauthorized practice of law. But we need not evaluate these materials because the EDDA, as enacted, does not mention, define, or regulate the unauthorized practice of law. RCW 19.295.005-030. We need not look beyond the plain meaning of the statute, which by its terms defines a violation of the CPA, not the unauthorized practice of law.

4. Vagueness and Fair Notice

CLA contends that the EDDA is void for vagueness.[6] We disagree.[7]

"Vagueness in a statute raises an issue of procedural due process. The crucial question is whether the statute provides fair notice of the conduct prohibited." *Seven Gables Corp. v. MGM/UA Entm't Co.*, 106 Wn.2d 1, 11, 721 P.2d 1 (1986). "Under the Fourteenth Amendment,[8] a statute may be void for vagueness if it is framed in terms so vague that persons of common intelligence must guess at its meaning and differ as to its application." *Id.* But if it is clear what the statute as a whole prohibits, the statute is not vague. *Id.* And "[a] statute's announced purpose can provide the clarity necessary to establish what a statute prohibits." *Id.*

CLA's only real contention about a possible alternate interpretation of the EDDA is that it "did not understand that filling out a form that *might* later be used by a lawyer to create estate planning documents for his or her own client would violate the statute."

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[6] CLA raises this issue in its challenge to the penalties imposed by the court, but it is discussed here for clarity.

[7] The State contends that the void for vagueness doctrine does not apply to this case because it is primarily a criminal doctrine. But due process considerations apply here because CLA is being deprived of property. *See Yim v. City of Seattle*, 194 Wn.2d 682, 688, 451 P.3d 694 (2019), *as amended* (Jan. 9, 2020) ("The procedural component [of due process] provides that '[w]hen a state seeks to deprive a person of a protected interest,' the person must 'receive notice of the deprivation and an opportunity to be heard to guard against erroneous deprivation.'" (quoting *Amunrud v. Bd. of Appeals*, 158 Wn.2d 208, 216, 143 P.3d 571 (2006))).

[8] U.S. CONST. amend. XIV.

But as discussed above, the EDDA clearly prohibits nonlawyers gathering information *for the purpose of* preparing estate distribution documents. Where CLA told consumers it was gathering the information for that exact purpose, nothing in the language of the EDDA indicates that it would matter whether that purpose was ever effected. Nor is it true that under the trial court's interpretation of the EDDA, "nearly every type of service or paperwork that mentions estate planning documents would come within the purview of the EDDA." The trial court concluded that CLA's offers to gather information for the purpose of preparing estate planning documents were violations of the EDDA; this is a narrow and proper interpretation of the EDDA that does not affect services or paperwork that merely mention estate planning documents.

We conclude that the EDDA is unambiguous and not vague.

5. First Amendment

Finally, CLA makes mention in passing to a violation of its First Amendment[9] rights, citing *Kitsap County v. Mattress Outlet*, 153 Wn.2d 506, 512, 104 P.3d 1280 (2005). However, it makes no attempt to analyze the test articulated in that case for whether a commercial speech restriction is permissible. We therefore need not address this issue. *Health Ins. Pool v. Health Care Auth.*, 129 Wn.2d 504, 511, 919 P.2d 62 (1996) ("'naked castings into the constitutional sea are not sufficient to command judicial consideration and discussion'" (internal quotation marks omitted) (quoting *State v. Johnson*, 119 Wn.2d 167, 171, 829 P.2d 1082 (1992))).

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[9] U.S. CONT. amend. I.

Penalties and Restitution

CLA then challenges the trial court's award of restitution and civil penalties on several bases. We find no error.[10]

1. Proof of Causation and Damages

CLA first contends that the court erred by concluding that the State need not prove causation and damages for restitution. We disagree.

RCW 19.86.080(1) permits the AGO to sue to restrain and prevent CPA violations. RCW 19.86.080(2) provides that the court may also "make such additional orders or judgments as may be necessary to restore to any person in interest any moneys . . . which may have been acquired by means" of a CPA violation. When "the Attorney General brings a CPA enforcement action on behalf of the State, it must prove (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, and (3) public interest impact." *Kaiser*, 161 Wn. App. at 719. "Unlike in a private cause of action under the CPA, the State is not required to prove causation or injury, nor must it prove intent to deceive or actual deception." *Id.*

The private cause of action under the CPA is established in RCW 19.86.090, which permits "[a]ny person who is injured in his or her business or property" by a CPA violation to sue "to recover the actual damages sustained by him or her." Our Supreme Court clarified the elements of a private cause of action under the CPA in *Hangman Ridge*. The Court specified that private plaintiffs must make a "showing of injury . . .

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[10] As discussed above, we reject CLA's contention that the court's award of penalties for EDDA violations violates the principle of fair notice because the statute is not vague.

in [their] business or property" and must establish "a causal link . . . between the unfair or deceptive act complained of and the injury suffered." 105 Wn.2d at 785. The Court relied on the specific language in RCW 19.86.090 as rationale for establishing both of these elements.

Under *Kaiser*, the AGO was not required to prove causation or damages for the restitution awards to private consumers. The statutory requirement for proving causation and damages is located only in the private cause of action section, which is not at issue here. CLA cites *Nuttall v. Dowell*, 31 Wn. App. 98, 110, 639 P.2d 832 (1982), for the proposition that the AGO "must establish some causal link between a defendant's unfair act and a consumer's injury." But *Nuttall* specifically provides that such a causal link is only required in "a private action in which plaintiff seeks recovery of damages," and that in an attorney general action "which seeks to enjoin *or otherwise deter* CPA misconduct," no consumer reliance on the deception must be shown. 31 Wn. App. at 110 (emphasis added). Requiring a company to pay restitution deters CPA misconduct.

CLA does not challenge the court's findings that it received $2,565,626 in revenue from sales of the Lifetime Estate Plan and $3,597,287.93 in commissions from the sale of insurance products. The court did not err by concluding that this money should be restored to CLA's clients, given that it was "acquired by means of any act" prohibited by the CPA. RCW 19.86.080(2).

2. Calculation of Restitution

Relatedly, CLA contends that the court erred by awarding restitution based on disgorgement of illegal

gains, rather than consumer loss. But as noted, RCW 19.86.080(2) permits the court to "restore to any person . . . *any moneys* . . . *which may have been acquired"* by a CPA violation. (Emphasis added). This is in contrast to RCW 19.86.090's provision that a private plaintiff may only seek "the actual damages sustained." CLA cites no law in support of its contention that the court should have awarded restitution based only on net damages to the clients. *DeHeer v. Seattle Post-Intelligencer*, 60 Wn.2d 122, 126, 372 P.2d 193 (1962) ("Where no authorities are cited in support of a proposition, the court is not required to search out authorities, but may assume that counsel, after diligent search, has found none.").

3. Guidance from the Office of the Attorney General

CLA contends that the court erred by finding that CLA did not act in good faith, and awarding significant penalties on that basis, because CLA sought guidance from the AGO and it implicitly approved of CLA's business model. But CLA's characterization of the relevant facts and law is misleading.

The AGO first issued a CID to CLA in 2013. CLA cooperated in the investigation and offered multiple times to meet with the AGO to "help your office understand what exactly CLA ESI and CLA USA do before you speak to consumers." The AGO declined to meet: "for [our] purposes, a meeting to have your client discuss and identify how CLA operates is not necessary." In August 2014, the AGO again declined an offer to meet, saying, "At this time, [we] will decline the opportunity because [our] office is still in an investigative stage in this matter." The AGO did not indicate to CLA that its investigation was over or that it had made any determinations about the legality of CLA's actions. In February 2017, it issued a second CID

against CLA, and in October 2017, it provided CLA with notice of its intent to file the present action.

These facts do not include any explicit or tacit indication from the AGO that it had concluded CLA's business model was lawful. And the case law CLA cites to support its theory refers to a situation in which "the statutory text and relevant court and agency guidance allow for more than one reasonable interpretation." *Safeco Ins. Co. of America v. Burr*, 551 U.S. 47, 70 n.20, 127 S. Ct. 2201, 167 L. Ed. 2d 1045 (2007). This is not such a case: neither statutory text, court guidance, nor agency guidance indicate that CLA's interpretation of the law was reasonable.

We share CLA's concern about the AGO's delay in prosecuting the case, even though we acknowledge the complexity inherent in this type of litigation. The delay is incongruous to the AGO's strong statement that CLA "exploited Washington senior citizens through a deceptive scheme designed to manipulate them into purchasing expensive estate-planning packages and annuities," especially given that such delay allowed for more consumers to be subjected to CLA's practices. However, the AGO's delay in prosecuting this case did not lead to a presumption that CLA's business model was appropriate. And the court entered multiple other findings and conclusions—addressing CLA's use of scare tactics, lack of oversight for agents, admissions that CLA valued sales over standards, CLA's practices of taking advantage of consumers who placed their trust in CLA—supporting its conclusion that CLA did not act in good faith. We conclude that the court did not err by finding that CLA did not act in good faith.

4. Civil Penalties

Finally, CLA broadly contends that the court abused its discretion by imposing excessive civil penalties. CLA examines the penalties imposed in other King County Superior Court trust mill cases and contends that the sum of civil penalties and restitution here is "more than $60,500 per customer—*i.e.*, more than 60 times the next closest sanction" imposed in an estate-related CPA case.[11] CLA gives no justification for its comparison of these values on a "per customer" basis as opposed to a "per violation" basis. *See State v. Ralph Williams' N. W. Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 317, 553 P.2d 423 (1976) ("This statute vests the trial court with the power to assess a penalty for each violation."). CLA does not challenge the court's analysis of the public injury caused by its actions or its ability to pay. Former RCW 19.86.140 (1983) permits the court to award penalties of up to $2,000 for a violation of the CPA.[12] We conclude that the court did not abuse its discretion in imposing the maximum penalty for many of CLA's CPA violations.

Attorney Fees

The State requests attorney fees and costs on appeal under RCW 19.86.080(1), which provides that the prevailing party in a CPA case "may, in the discretion of the court, recover the costs of said action including a reasonable attorney's fee." Because the State prevails on appeal, we award it fees on appeal.

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[11] The State notes in its response that these awards were all settlements or default judgments. Because the parties did not submit any of the relevant orders to us, we cannot confirm the award amounts or how the judgments were obtained.

[12] As of July 2021, the statute permits sanctions of up to $7,500 for the same violations. RCW 19.86.140.

We affirm.

/s/ Smith, A.C.J.

WE CONCUR:

/s/Bowman, J. /s/Dwyer, J.

APPENDIX B

THE SUPREME COURT OF WASHINGTON

No. 101389-2
Court of Appeals
No. 82529-1-I

State of Washington,

Respondent,

v.

CLA Estate Services, et al.,

Petitioners.

ORDER

Department I of the Court, composed of Chief Justice González and Justices Johnson, Owens, Gordon McCloud, and Montoya-Lewis, considered at its February 7, 2023, Motion Calendar whether review should be granted pursuant to RAP 13.4(b) and unanimously agreed that the following order be entered.

IT IS ORDERED:

That the petition for review is denied and the Respondent's request for attorney fees for filing an answer to the petition for review is granted. The Respondent is awarded reasonable attorney fees and expenses pursuant to RAP 18.1(j). The amount of the attorney fees and expenses will be determined by the Supreme Court Clerk pursuant to RAP 18.1. Pursuant to RAP 18.1(d), the Respondent should file an affidavit with the Clerk of the Washington State Supreme Court.

DATED at Olympia, Washington, this 8th day of February, 2023.

For the Court

/s/ González

APPENDIX C

STATE OF WASHINGTON
KING COUNTY SUPERIOR COURT

NO. 18-2-06309-4 SEA

STATE OF WASHINGTON,

Plaintiff,

v.

CLA ESTATE SERVICES, INC.; CLA USA INC.; and MITCHELL REED JOHNSON, individually and in his martial community,

Defendants.

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

THIS MATTER came before the Court for trial on November 16, 2020. The Plaintiff, State of Washington appeared by and through Assistant Attorneys General Cynthia L. Alexander, Audrey L. Udashen, Aaron J. Fickes, and Daniel T. Davies. The Defendants, CLA Estate Services, Inc. and CLA USA Inc. appeared by and through David Elkanich and Calon Russell of Holland & Knight LLP and Robert McKenna of Orrick, Herrington & Sutcliffe LLP.

The Court heard testimony from the following individuals:

1. Nyren Compton
2. Caroline Suissa-Edmiston

3. Alan Gammel
4. Craig J. McCann, Ph.D.
5. Robert Schmidt
6. Christopher A. Benson
7. John L. Olsen

The Court reviewed portions of the deposition testimony of:

1. Susan Atwood
2. James Bradshaw
3. Dorothy Clawson
4. Michael Clawson
5. Chris Conger
6. Edward Corcoran
7. Judy Corcoran
8. Diane Fogelman
9. Chris Garrett
10. Mitchell Johnson
11. Myrna Lindenthal
12. John Long
13. Charles Loper III (in his capacity as a CR 30(b)(6) witness on behalf of CLA USA, Inc.)
14. Chares Loper III (in his capacity as a CR 30(b)(6) witness on behalf of CLA Estate Services, Inc.)
15. Joel Martin
16. David Nelson
17. James Ottosen

18. Robert Schmidt

19. David Van Winkle

20. Janice Ward

The Court admitted approximately 141 exhibits.

Based upon the court file and records and the evidence and testimony presented at trial, the Court makes the following Findings of Fact and Conclusions of Law.

I. FINDINGS OF FACT

1. The Plaintiff State of Washington brought this action against Defendants seeking injunctive and declaratory relief, restitution, civil penalties, and its attorneys' fees and costs under the Consumer Protection Act (CPA), RCW 19.86, pursuant to the enforcement authority of the Attorney General of the State of Washington under RCW 19.86.080 and RCW 19.86.140. Plaintiff also seeks relief under the Estate Distribution Documents Act (EDDA), RCW ch. 19.295.

2. Defendants CLA Estate Services, Inc. (CLA ESI), and CLA USA, Inc. (CLA USA) (collectively, CLA or Defendants) are Texas corporations registered to do business in Washington.

A. Estate Planning Seminars

3. CLA began offering free estate-planning seminars for seniors in Washington in 2008. Answer ¶¶ 5.11-5.13; Ex. 454. CLA promoted its seminars to seniors at or near retirement age or older and included a free meal as an enticement. Answer ¶¶ 5.9-5.13.

4. CLA's estate-planning seminars were led by CLA representatives who were not licensed to practice law. Answer ¶ 5.19; Compton Testimony (Nov. 16, 2020).

5. At its estate-planning seminars, CLA's presenters distributed to attendees and taught from a workbook titled "CLA 'Lifetime Estate Plan.'" Answer ¶ 5.15; Compton Testimony (Nov. 16, 2020); Joel Martin Dep. at 35:25-36:1; see Ex. 421.

6. CLA provided its presenters with a script to follow at CLA's estate-planning seminars. Ex. 483. CLA expected its presenters to follow the script and use the workbook as an outline in making their presentations, and the presenters did so. Compton Testimony (Nov. 16, 2020); Schmidt Testimony (Nov. 24, 2020); Joel Martin Dep. at 35:20-36:11.

7. CLA's workbook and accompanying script promoted CLA's Lifetime Estate Plan and focused on the supposed dangers associated with probate that could be avoided with a living trust. Ex. 421.

8. CLA's seminar presenters received no salary from CLA and relied entirely for compensation on the commissions they received from selling the Plans. Compton Testimony (Nov. 16, 2020).

9. CLA expected its presenters to sell a minimum of three Lifetime Estate Plans per week, and preferred six sales per week. *Id.*; Ex. 417 at CESI 031993. Seminar presenters could lose their positions if they did not meet these sales expectations. Compton Testimony (Nov. 16, 2020). Accordingly, CLA presenters were highly motivated to sell as many Lifetime Estate Plans as possible at each workshop.

10. CLA admits that 1,765 consumers attended CLA's estate-planning seminars in Washington since November 3, 2015. Ex. 454.

1. Deception Regarding Probate and Trust Law

11. The Court previously granted Plaintiff's motion for partial summary judgment, Dkt. No. 135, regarding CLA's representations relating to trusts and probate. The Court ruled that CLA violated the CPA during its estate-planning seminars and one-on-one meetings with consumers by misrepresenting probate law, trust law, federal law, and the relative advantages of estate-planning methods in Washington, and by creating a deceptive net impression that a revocable trust is necessary to protect assets and heirs. Dkt. No. 171 (Order dated July 19, 2019). The Court also determined that "[e]ach deceptive act or practice is a separate violation of the CPA." *Id.*

12. The misrepresentations presented in Plaintiff's motion for partial summary judgment included:[1]

a. CLA does not accurately portray the probate process in Washington at its workshops. Dkt. No. 66 at ¶¶ 15-48; Dkt. No. 56 (Declaration of Jamie Clausen) at ¶¶ 7-22

b. Although probate procedures in some states may be complicated and expensive, Washington has one of the simplest and most efficient probate processes in the country. Dkt. No. 66 (Declaration of Steven Schindler) at ¶ 10. Courts in Washington may appoint an executor and grant letters testamentary with modest fees and no waiting period or hearing, and can grant an executor broad authority to administer

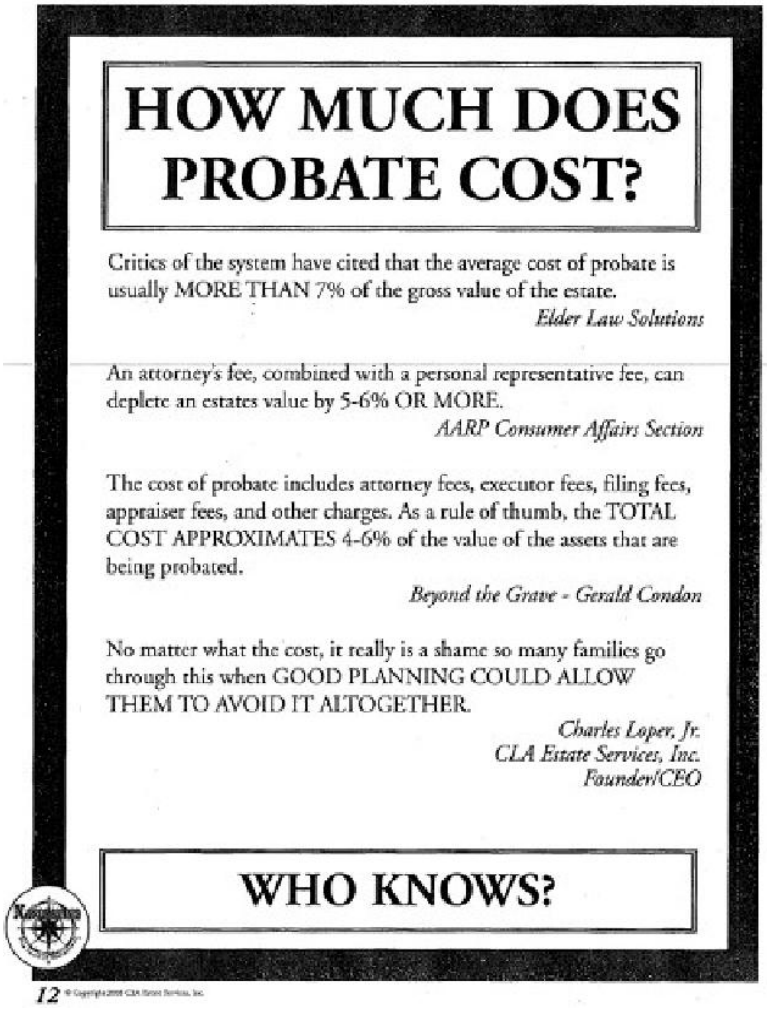
[1] The facts presented in Plaintiff's motion for partial summary judgment are recited in this paragraph and its subparts for their relevance to the Court's remedies determination, as the Court has already made its liability findings regarding these facts.

estates without prior court approval. RCW 11.68.011(1); RCW 11.68.041(1); Dkt. No. 66 at ¶ 11.

c. Unlike some other states, Washington does not impose probate administration fees based on a statutory fee schedule. Dkt. No. 66 at ¶ 13. Instead, it entitles the personal representative to fees approved by the decedent or to reasonable fees. *Id.*; RCW 11.48.210. This is similar to the process that applies to the fiduciary fees for the trustee of a revocable trust, who is entitled either to the fee set in the trust agreement or reasonable fees subject to court approval. Dkt. No. 66 at ¶ 13; RCW 11.98.070(26); RCW 11.97.010.

d. Each CLA workbook contains a page identical or substantially similar to the image below right, graphically representing that the probate process significantly reduces the estate value available to distribute to heirs, and that in probate, the state assumes control; creditors, lien holders, and tax authorities are paid first; the process requires attorneys, judicial supervision, an executor, appraisals, and court clerks; and heirs come last. Ex. 421 at CESI 000031. But this image is misleading with regard to probate in Washington, where most estates have little or no involvement of judges or court clerks. Dkt. No. 66 at ¶¶ 16, 33. Washington probate does not require appraisals, but they may be used to establish a stepped-up basis for assets whether the estate is administered in probate or with a revocable living trust. Dkt. No. 56 at ¶ 12. Whether appraisals are necessary depends on the nature of the assets and beneficial interests, not whether a will or revocable trust is employed. Dkt. No. 66 at ¶¶ 16, 33. Executors in probate serve effectively the same function that trustees of revocable trusts serve, and either may be advised by attorneys whose fees are determined on a

similar basis. *Id.* The statement "STATE ASSUMES CONTROL" in all capital letters on this page is not accurate in Washington, where there is no state intervention or involvement in settling a will in probate. Dkt. No. 56 at ¶ 12.



HOW MUCH DOES PROBATE COST?

Critics of the system have cited that the average cost of probate is usually MORE THAN 7% of the gross value of the estate.

Elder Law Solutions

An attorney's fee, combined with a personal representative fee, can deplete an estates value by 5-6% OR MORE.

AARP Consumer Affairs Section

The cost of probate includes attorney fees, executor fees, filing fees, appraiser fees, and other charges. As a rule of thumb, the TOTAL COST APPROXIMATES 4-6% of the value of the assets that are being probated.

Beyond the Grave - Gerald Condon

No matter what the cost, it really is a shame so many families go through this when GOOD PLANNING COULD ALLOW THEM TO AVOID IT ALTOGETHER.

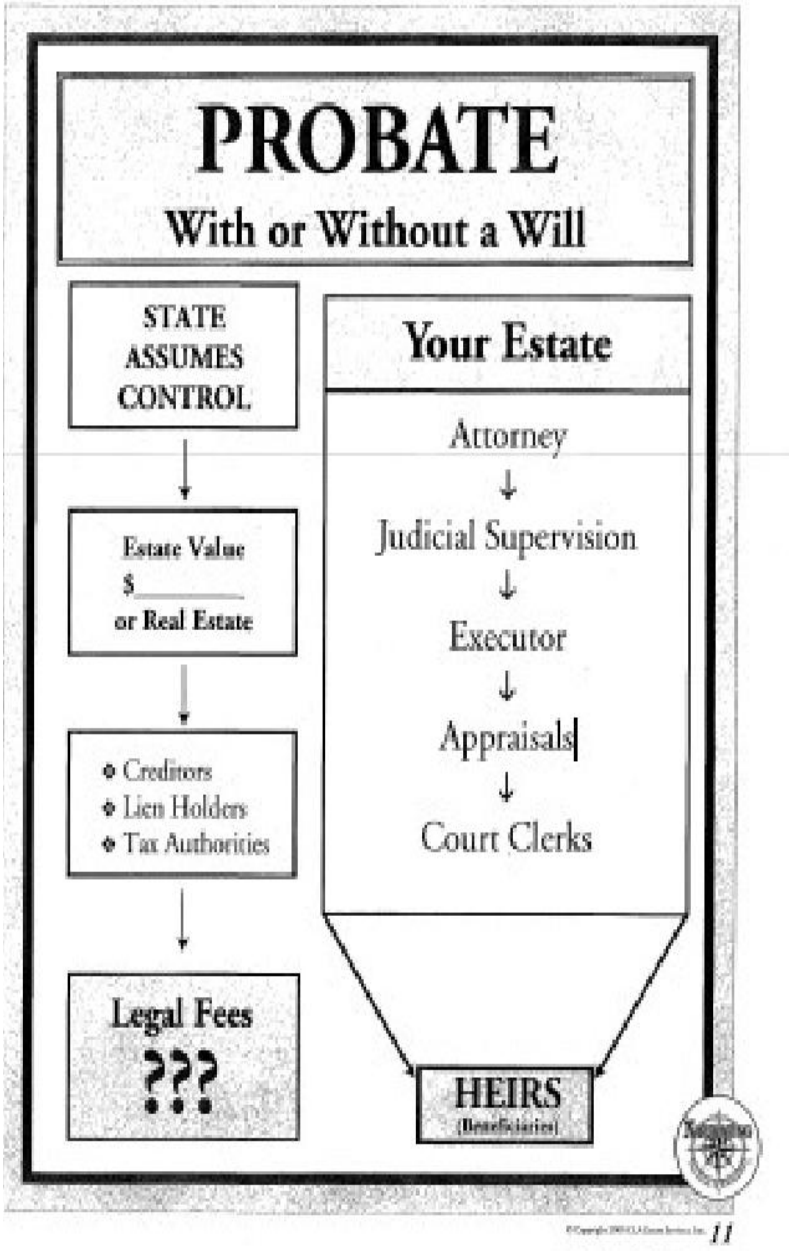
Charles Loper, Jr.
CLA Estate Services, Inc.
Founder/CEO

WHO KNOWS?

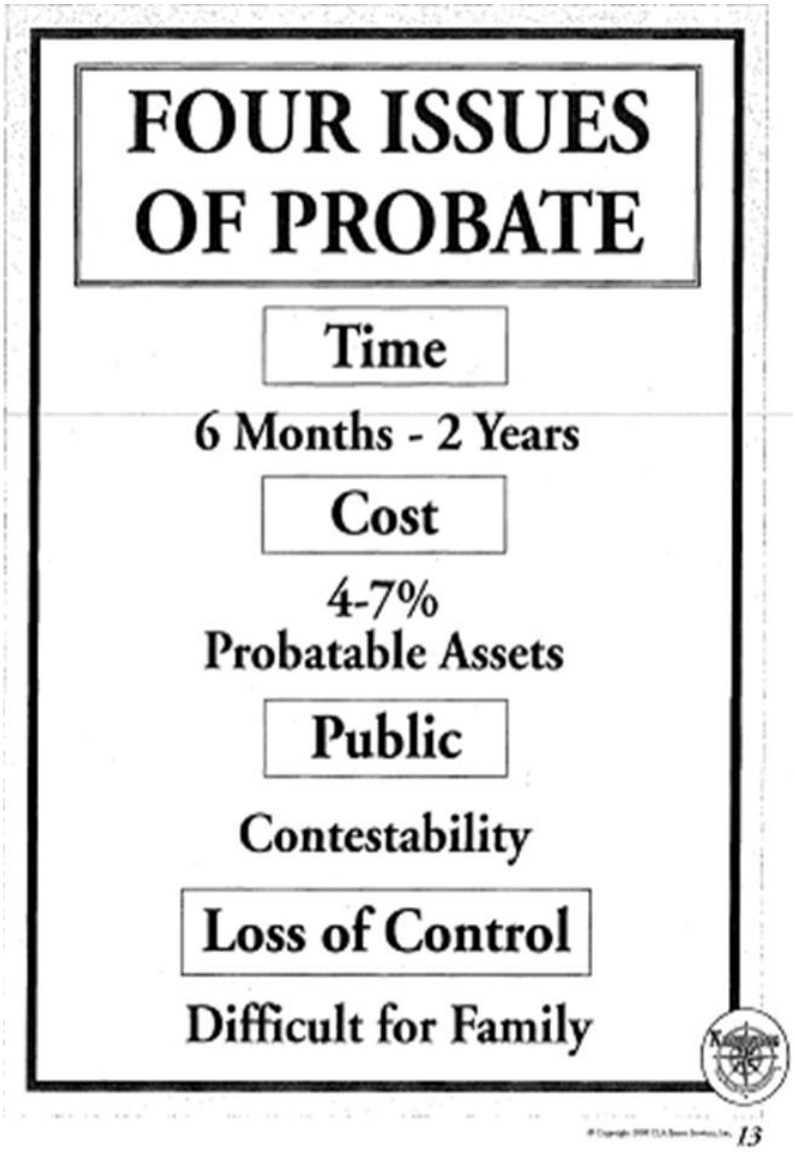
12

e. CLA's workbook also contains a page posing the question (in all capital letters) "HOW MUCH

DOES PROBATE COST?" and answering "WHO KNOWS?" at the bottom of the page. Ex. 421 at CESI 000032. The page contains quotes that purport to be from authorities such as "Elder Law Solutions" and "AARP Consumer Affairs Section" stating that the cost of probate is "MORE THAN 7% of the gross value of the estate," that an attorney's fee combined with a personal representative's fee "can deplete an estate[']s value by "5-6% percent OR MORE," and that the "TOTAL COST APPROXIMATES 4-6% of the value of the assets that are being probated." *Id.* These statements are followed by a quote from CLA's founder that "GOOD PLANNING COULD ALLOW THEM TO AVOID IT ALTOGETHER," id., presumably referring to the probate process or its costs. These statements vastly overstate the general cost of probate administration in Washington. Dkt. No. 66 at ¶ 36. While some states have statutory fee schedules based on a percentage of estate assets, Washington does not follow that approach. Dkt. No. 66 at ¶¶ 17, 36; Dkt. No. 56 at ¶ 13. Most of the fees that contribute to the cost of probate administration in Washington, such as tax return preparation fees, legal fees, fiduciary fees, and appraisal fees, cannot be avoided with revocable trust planning. Dkt. No. 66 at ¶¶ 17, 36; Dkt. No. 56 at ¶ 13. CLA's materials nowhere indicate that such costs are involved when a consumer sets up a revocable trust.


PROBATE
With or Without a Will
STATE ASSUMES CONTROL
Estate Value
$_____
or Real Estate
Creditors
Lien Holders
Tax Authorities
Legal Fees
???
Your Estate
Attorney
Judicial Supervision
Executor
Appraisals
Court Clerks
HEIRS
(Beneficiaries)
11

f. CLA's workbook also includes a page titled "FOUR ISSUES OF PROBATE." Ex. 421 at CESI 000033. The first issue is "time," and the workbook indicates that probate takes six months to two years. *Id.* In Washington, revocable living trusts are not necessarily administered in less time than probate because both trust and probate administration require the same time-consuming tasks of resolving debts, paying taxes, and collecting, valuing, managing and distributing property. 26 U.S.C. § 6012(b)(1), (4); RCW 19.36.020; RCW 11.42.085(1); RCW 11.44.015; RCW 11.48.020; RCW 83.100.050; RCW 11.68; Dkt. No. 66 at ¶ 12; Dkt. No. 56 at ¶¶ 17-18. The two primary reasons for delay in distribution of an estate are resolving the decedent's debts and resolving estate tax liabilities. Dkt. No. 66 at 19. Both estate executors and trustees of revocable trusts may make interim distributions of estate assets before these matters are resolved, but both do so at the risk of personal liability. *Id.*



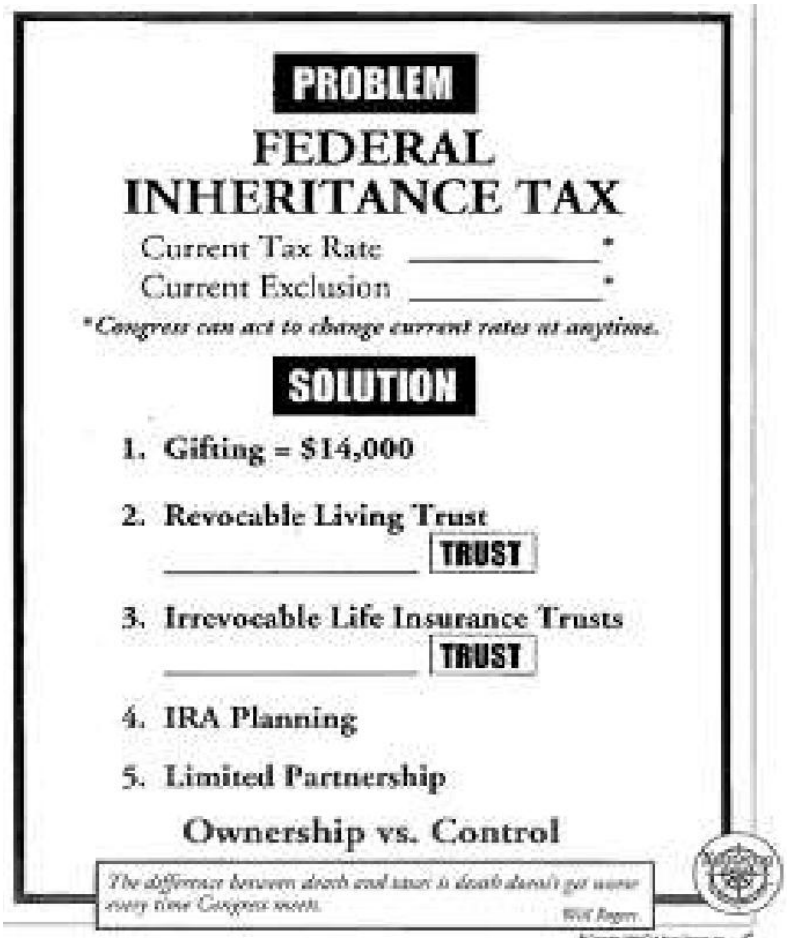
g. The workbook identifies cost as the second "issue of probate," and indicates that the cost will be 4 to 7 percent of probatable assets. For the reasons

explained above, this significantly overestimates the cost of probate in Washington.

h. The page lists "public" as the third issue of probate and suggests probate raises "contestability" concerns. However, revocable living trusts are not necessarily more private, nor are they invulnerable to challenge. Dkt. No. 56 at ¶ 15. In Washington, little is publicly disclosed in probate except the terms of the will. Dkt. No. 66 at ¶¶ 21, 41. Estate inventories are not required to be filed publicly. *Id.* An inventory must be provided only to specific parties such as heirs, beneficiaries and creditors, and only upon written request. Dkt. No. 56 at ¶ 19. Similarly, a trustee must provide a copy of a revocable living trust to beneficiaries and immediate family members after a trustor's death and provide an inventory or accounting if requested. *Id.* Both probate and revocable trust administration are "contestable" in the sense that beneficiaries or creditors may object to a component of the probate or trust administration, in which case some aspects may become public in litigation proceedings. Dkt. No. 66 at ¶¶ 21, 41. Regardless of whether an estate is administered through a revocable trust or probate, some aspects may become public if beneficiaries or creditors contest the administration. Dkt. No. 66 at ¶¶ 21-22; Dkt. No. 56 at ¶¶ 15-16.

i. CLA's workbook identifies "loss of control" as the fourth issue of probate, which is purportedly "difficult for family." Ex. 421. This is contrasted with revocable living trusts on a subsequent workbook page, which states in large capital letters "REVOCABLE LIVING TRUST," "YOU CONTROL DISTRIBUTION," and "YOUR SUCCESSOR TRUSTEE (distributes as per your direction)." *Id.* In Washington, the probate process does not strip a family of any more control than

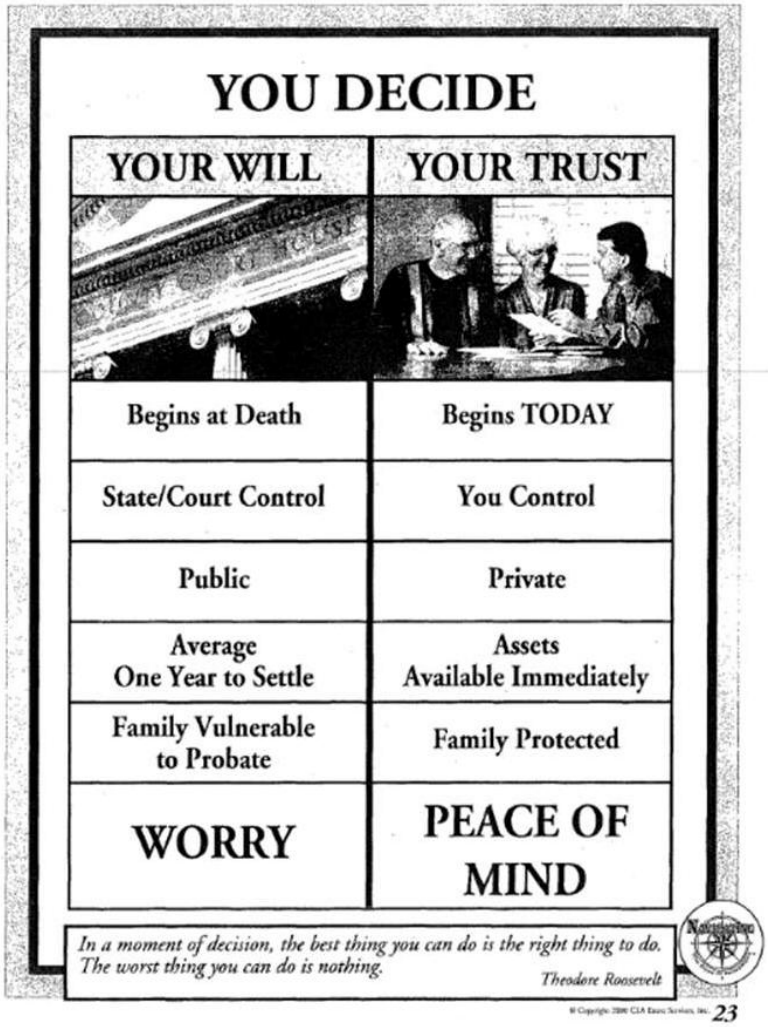
the appointment of a successor trustee of a revocable trust. Dkt. No. 66 at ¶¶ 22, 42. The decedent may designate family members or independent fiduciaries as either personal representatives in a will or trustees in a revocable trust. Just as a personal representative controls the probate administration, a trustee controls the administration of revocable trusts, and each owes the same fiduciary duties to a decedent. *Id.* Indeed, probate may be easier rather than more difficult for families than administration of a revocable trust because the personal representative typically obtains letters testamentary shortly after filing that may be presented to a bank or other financial institution to manage the asset or account. Dkt. No. 56 at ¶ 16. These institutions often require the trustee administering a revocable trust to use the institution's forms, which may require the trustee to consult an attorney. *Id.*



j. CLA's workbook also inaccurately suggests a revocable trust is a "SOLUTION" to the "PROBLEM" of federal inheritance tax. Ex. 421 at CESI 000025. There is no tax on the inheritance of assets (hence no federal inheritance tax). Both Washington and federal law provide for an estate tax, and there are several estate planning techniques to reduce the tax burden on an estate. Dkt. No. 66 at ¶¶ 25, 44. Some of these techniques, such as annual exclusion gift planning and planning with irrevocable trusts, are mentioned on the

page, but revocable trust planning to avoid probate offers no meaningful tax savings that cannot also be attained using a will. Dkt. No. 66 at ¶ 25.

k. CLA's workbook also indicates that a revocable living trust will avoid guardianship in the event of incapacity and "eliminate[s] court control." Ex. 421 at CESI 000029. In actuality, revocable trusts alone do not fully protect one who becomes incapacitated or avoid guardianship. Dkt. No. 66 at ¶¶ 44-46; Dkt. No. 56 at ¶ 11. Indeed, a revocable living trust may be a poor vehicle for avoiding guardianship because it does not allow the trustee to manage all of the incapacitated individual's income (such as income from social security or a pension) or assets (such as individual retirement accounts or 401(k) accounts, which cannot be put into a revocable trust during the trustor's lifetime). Dkt. No. 56 at ¶ 11. CLA's workbook does not mention the use of durable powers of attorney, which are the most common means of avoiding guardianship. Dkt. No. 66 at ¶¶ 28, 45-46; Dkt. No. 56 at ¶ 11.



YOU DECIDE

YOUR WILL	YOUR TRUST
Begins at Death	Begins TODAY
State/Court Control	You Control
Public	Private
Average One Year to Settle	Assets Available Immediately
Family Vulnerable to Probate	Family Protected
WORRY	PEACE OF MIND

In a moment of decision, the best thing you can do is the right thing to do. The worst thing you can do is nothing.
Theodore Roosevelt

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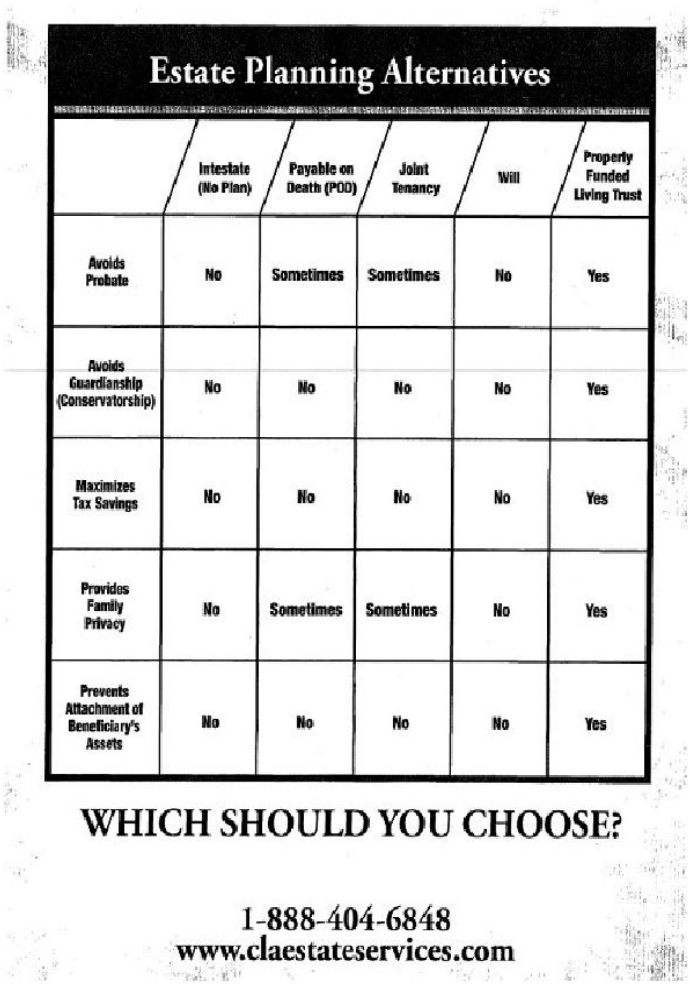
l. CLA repeats and summarizes the inaccuracies discussed above on a page titled "YOU DECIDE" that consists of a table comparing wills and trusts. Ex. 421 at CESI 000043. According to the chart, a will results in state/court control, is public, takes an average of one year to settle, and leaves the family "vulnerable to probate." A trust, in contrast, is represented as being

controlled by the consumer, private, allowing assets to become available immediately, and leaving the family protected. The word "WORRY" in large type summarizes the will column, while "PEACE OF MIND" in large type summarizes the trust column. The following quote, purporting to be from Theodore Roosevelt, appears at the bottom of the page: "In a moment of decision, the best thing you can do is the right thing to do. The worst thing you can do is nothing." *Id.* CLA's workbook leaves consumers with the net impression that a revocable trust is preferable regardless of individual circumstances.



Estate Planning Alternatives

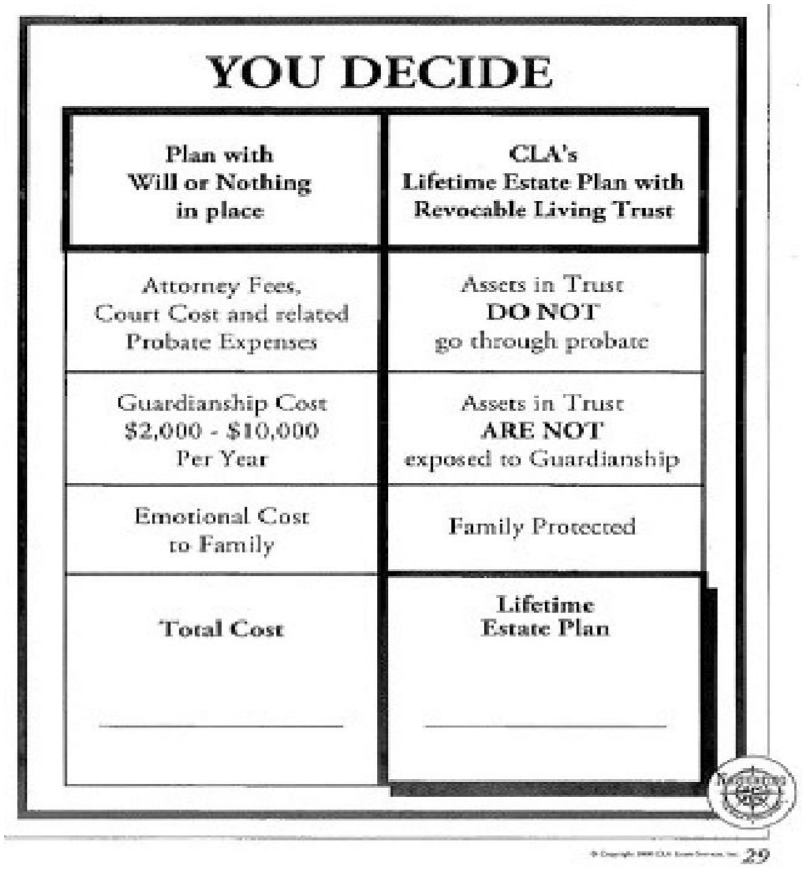
	Intestate (No Plan)	Payable on Death (POD)	Joint Tenancy	Will	Property Funded Living Trust
Avoids Probate	No	Sometimes	Sometimes	No	Yes
Avoids Guardianship (Conservatorship)	No	No	No	No	Yes
Maximizes Tax Savings	No	No	No	No	Yes
Provides Family Privacy	No	Sometimes	Sometimes	No	Yes
Prevents Attachment of Beneficiary's Assets	No	No	No	No	Yes

WHICH SHOULD YOU CHOOSE?

1-888-404-6848
www.claestateservices.com

m. Another type of summary appears toward the end of the workbook. Ex. 421 at CESI 000060. This summary page contains a table comparing estate planning alternatives (intestate, payable on death, joint tenancy, will, properly funded living trust) on whether they avoid probate, avoid guardianship, maximize tax savings, provide family privacy, and prevent attachment of beneficiary's assets. With the words "Yes,"

"No," and "Sometimes," the table purports to indicate which of these benefits applies to each estate planning alternative. The word "Yes" appears in the table only in relation to a "Properly Funded Living Trust," and indicates that every listed benefit applies only to living trusts and is always available with a living trust. As explained above, this table misrepresents Washington law, the Washington probate process, and the relative benefits of revocable living trusts in Washington.



YOU DECIDE

Plan with Will or Nothing in place	CLA's Lifetime Estate Plan with Revocable Living Trust
Attorney Fees, Court Cost and related Probate Expenses	Assets in Trust **DO NOT** go through probate
Guardianship Cost $2,000 - $10,000 Per Year	Assets in Trust **ARE NOT** exposed to Guardianship
Emotional Cost to Family	Family Protected
Total Cost	**Lifetime Estate Plan**

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n. Finally, the workbook offers a decision point. On a page with "YOU DECIDE" at the top, the characteristics of planning with a will and planning with

CLA's Lifetime Estate Plan with a revocable living trust are compared. Ex. 421 at CESI 000049. According to CLA, a will entails attorney fees, court costs and related probate expenses, guardianship costs of $2,000 to $10,000 per year, and emotional cost to the family. In contrast, planning with a revocable living trust means that assets do not go through probate, assets are not exposed to guardianship, and the family is protected. These descriptions of the relative benefits of revocable living trusts are not accurate and are materially misleading for the reasons set forth above. CLA used these deceptive tactics to induce attendees at its seminars to purchase a CLA Lifetime Estate Plan with a revocable living trust.

2. Offering to Gather, and Gathering, Information for Estate Distribution Documents

13. After alarming consumers about probate and the necessity of revocable living trusts during its estate-planning seminars, CLA marketed and sold its Lifetime Estate Plan as the solution, touting it as a full-service estate planning package in which CLA would assist consumers in estate planning to protect their assets and heirs, ensure their estate passes to their heirs, provide access to attorneys to draft estate documents, and support and coordinate the work of the attorneys. Ex. 421 at CESI 000021, 000023, 000045-47.

14. CLA's workbook states that CLA's Lifetime Estate Plan includes regular meetings with CLA representatives to review and update estate distribution documents, including a three-month review and annual reviews "throughout [the] lifetime of the Estate Plan to ensure the plan is kept up to date with tax, financial and family changes." Ex. 421 at CESI 000046.

15. Page 1 of CLA's workbook represents that CLA "[c]oordinates nonlegal services along with legal services provided by independent attorneys into a Lifetime Estate Planning Package," and that CLA "[c]oordinate[s], through an independent attorney, the implementation of the client's Estate Planning documents." Ex. 421 at CESI 000021. CLA ESI Vice President John Long testified that CLA's coordination of the non-legal aspects of a client's estate plan included gathering the information the attorney needed to create "a good estate plan." Long Dep. at 49:9-49:18.

16. CLA's workbook states on page 25 that CLA's "independent" referral attorneys will provide the following services: (1) "Evaluate client needs and recommend appropriate documents i.e. (Will, Revocable Living Trust, Etc.),"

(2) "Preparation of client's legal documents to include all legal changes within the first year," (3) "Deed preparation for two in-state properties," (4) "Document preparation," and (5) "Lifetime consultation regarding client's Estate Planning documents." Ex. 421 at CESI 000046.

17. The script that CLA's presenters follow for page 25 of the workbook states: "I want to show you the Legal Services Provided By Estate Planning Attorneys as a part of this plan." Ex. 483 at CLA_ESI001391. The script directs agents to explain:

> As a part of your Complete Estate Plan, your attorney, in addition to basic document preparation, will include the following Extended Legal Services. You will receive lifetime consultation concerning Estate Planning documents. That means that anytime in the future, if you have questions

> or concerns about your plan, your consultation is done at no charge. Any changes to your documents within the first year are done at no cost to the client. Folks, this is a great benefit.

Id.

18. The script directs agents to tell clients that "the attorney does the legal work . . . CLA does the leg work." Ex. 483 at CLA_ESI001393.

19. After the seminar presentation, the CLA's presenter, who is also CLA's sales representative, would offer to meet one-on-one with each workshop attendee for a "complimentary review of your personal situation," either immediately following the workshop or shortly after the workshop at the consumer's home. Ex, 421 at CESI 000053.

20. When a consumer decided to purchase CLA's Lifetime Estate Plan, the CLA sales representative reviewed and completed a series of forms with the consumer that CLA later provided to the referral attorney. First, the sales representative worked with the client to complete a Client Information Form that identified the client's name, contact information, emergency contacts, reasons for purchasing the Lifetime Estate Plan, value of the estate, and number of real estate holdings. E.g., Exs. 135, 176.

21. CLA sales representatives also reviewed and completed with consumers a disclosure form that identified CLA's services and authorized CLA to provide the consumer's information to the referral attorney, an authorization form allowing the referral attorney to contact the client, and a form identifying the consumer's workshop salesperson, client services coordinator, and referral attorney. E.g. Exs. 135, 663.

22. CLA charged approximately $2,500 to $3,000 for the Lifetime Estate Plan after a "discount" CLA typically provided to seminar attendees to encourage them to promptly purchase the Plan. See Answer ¶ 5.29.

23. As detailed in Plaintiff's Motion for Partial Summary Judgment, Dkt. No. 135, CLA continued to gather information for use in the preparation of a client's estate distribution documents after its agents completed the Client Information forms. This included gathering additional information and documents needed by referral attorneys to prepare consumers' estate distribution documents, such as copies of deeds or more detailed information about assets and beneficiaries throughout the referral attorney's representation of the client.

24. The Court has already determined that CLA's conduct as established in Plaintiff's first motion for partial summary judgment violated the Estate Distribution Documents Act, RCW ch. 19.295, and the Consumer Protection Act, RCW ch. 19.86. This conduct included (1) offering to gather information for the preparation of estate distribution documents when CLA represented that would support and coordinate with consumers' attorneys by collecting information for the attorneys' use in preparing consumers' estate distribution documents; (2) gathering information for the preparation of estate distribution documents after consumers purchased CLA's Lifetime Estate Plan through the completion of Client Information forms; and (3) gathering information during in-home delivery and review meetings about changes needed to the client's estate documents, and preparing Change Forms for attorneys describing these changes. Dkt. No. 135 (State's Motion for Partial Summary Judgment); Dkt No. 171 (Order dated July 19, 2019). Violations of the

EDDA are per se violations of the CPA. RCW 19.295.030. The Court ruled that each EDDA violation is a separate violation of the CPA. Dkt. No. 171 (Order dated July 19, 2019).

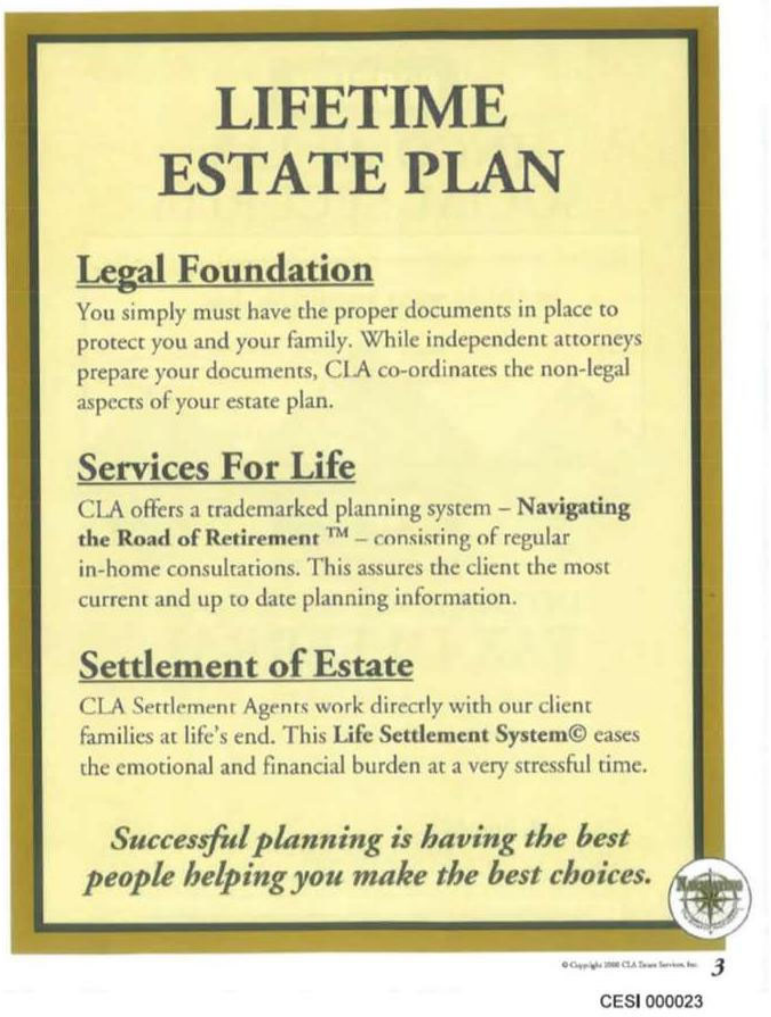
25. CLA was put on notice that its practices could violate Washington law by attorney Caroline Suissa-Edmiston, who declined to receive referrals after attending a CLA workshop and concluded that CLA's business model could violate Washington law. Suissa-Edmiston Testimony (Nov. 16, 2020). After making this determination, the attorney sent a letter to Chris Conger, then Senior Director for CLA Estate Services, recommending that CLA "check into RCW 19.295 to make sure that you are in compliance with Washington Law." Ex. 485. Mr. Conger testified that he did not recall any changes being made to CLA practices after he received the letter. Conger Dep. at 101:4-101:13.

26. CLA sold 210 Lifetime Estate Plans in Washington since November 3, 2015. Ex. 454. CLA received $2,565,626 in revenue from sales of its Lifetime Estate Plan during the time it did business in Washington from 2008 to 2018. *Id.* Accordingly, CLA completed at least 210 Client Information Forms.

3. Deceptive Marketing of In-Home Meetings

27. CLA did not clearly explain to seminar attendees that CLA representatives who conducted promised in-home review meetings were licensed insurance agents, working on commission, who, in addition to gathering information to ensure the estate plan was up to date, would use the in-home consultations to learn about consumers' assets and market annuities to them. Compton Testimony (Nov. 16, 2020); see Dkt. No. 23 (Answer) ¶¶ 5.40-5.44 (admitting CLA insurance agents discussed consumers' financial planning,

changes to estate plans, and whether the estate plan was up to date at review meetings).



LIFETIME ESTATE PLAN

Legal Foundation

You simply must have the proper documents in place to protect you and your family. While independent attorneys prepare your documents, CLA co-ordinates the non-legal aspects of your estate plan.

Services For Life

CLA offers a trademarked planning system – **Navigating the Road of Retirement ™** – consisting of regular in-home consultations. This assures the client the most current and up to date planning information.

Settlement of Estate

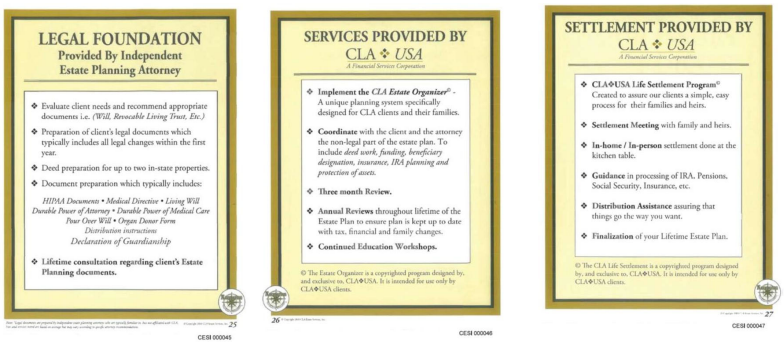
CLA Settlement Agents work directly with our client families at life's end. This **Life Settlement System©** eases the emotional and financial burden at a very stressful time.

Successful planning is having the best people helping you make the best choices.

 3

CESI 000023

28. CLA's workbook contains several pages describing the robust estate planning services CLA promised to provide through the Lifetime Estate Plan. Page 3 introduces the Plan as including a "Legal Foundation," "Services for Life," and "Settlement of Estate." Ex. 421 at CESI 000023.



29. Pages 25, 26 and 27 of the workbook describe in more detail each of these services. The "Legal Foundation Provided By Independent Estate Planning Attorney" included evaluating client needs and recommending appropriate documents, preparation of legal documents, deed preparation, document preparation and Lifetime consultation regarding the client's estate planning documents. Ex. 421 at CESI 000045. The "Services Provided By CLA USA" included implementing the CLA Estate Organizer, coordinating with the client and the attorney the non-legal part of the estate plan, three month review meetings, annual review meetings throughout the lifetime of the estate plan "to ensure plan is kept up to date with tax, financial and family changes," and continued education workshops. Ex. 421 at CESI 000046. The "Settlement Provided by CLA" included a life settlement program, settlement meeting with family and heirs, "in-home/in-person settlement done at the kitchen table," "guidance in processing of IRA, pensions, social security, insurance, etc.," distribution assistance, and finalization of the Lifetime Estate Plan. Ex. 421 at CESI 000047.

30. The workbook script associated with page 26 of the workbook describes the person who will come to consumers' homes as "a CLA financial planner" who can "help you in many ways including financial

guidance, tax evaluation, long term health planning, and legacy planning." Ex. 483 at CLA_ESI001393. The script makes no mention that the person who will come to consumers' homes will be an insurance agent coming to sell annuities.

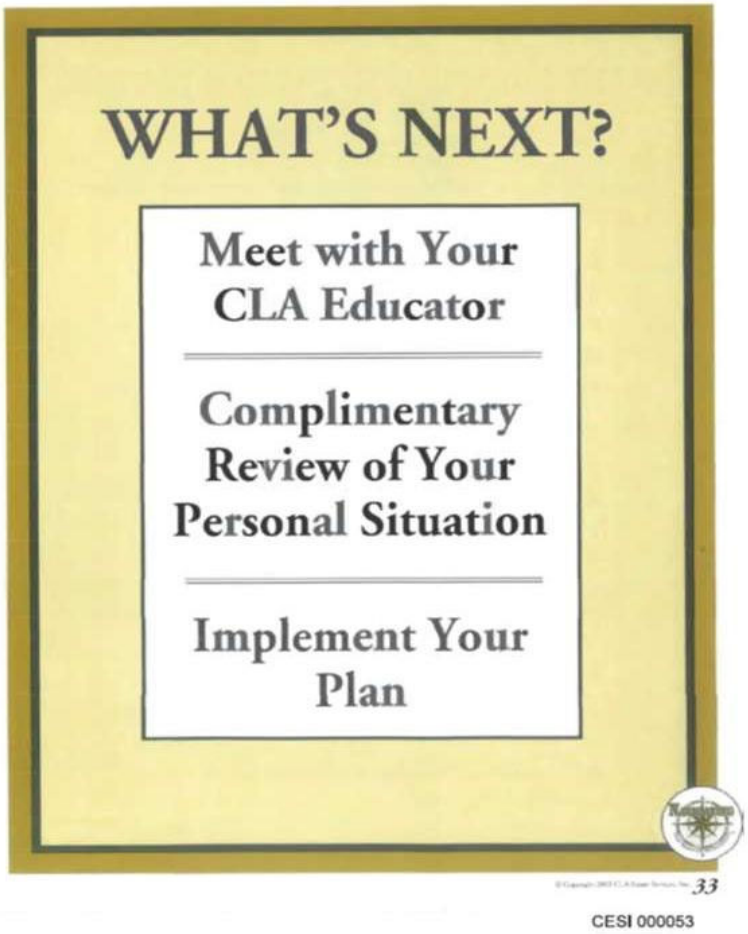
31. The script for page 26 also offered to gather information for the preparation of estate distribution documents at delivery, 90-day and review meetings:

> [Y]our CLA Planner will be coordinating the legal work done by your attorney. If you have chosen a Revocable Living trust as your legal foundation we will bring it to your home, notarize it, and go over everything with you. This will be done under the direction of the estate planning attorney who prepared the documents. I like to put it this way. The attorney does the legal work. CLA does the leg work. Does that make sense? Do you remember earlier when I told you about how important it is to get your assets funded into your trust[?] Your CLA planner will do that work with you. We will help you with the deed work done by your attorney. We will help with all your financial accounts, your insurance, your IRAs and any other things that are included in your estate. By the way. Do you think a typical document preparing attorney will do all of this for you? Of course not.
>
> Three months after we deliver your documents we are going to come back out to your home for a Review. Why do you think we do that? Just to make sure nothing was left out and everything is going smoothly. Also, you might need to fine tune your wishes and directions at that time. Does that make sense?

> Finally, there is a[n] Annual Review. Many of our clients feel that this might be the most important thing CLA does for them. This annual review will be conducted in your home, every year, by a CLA financial planner. These folks can help you in many ways including financial guidance, tax evaluation, long term health planning, and legacy planning. They will help you keep your planning on the right track.

Ex. 483 at CLA_ESI001392-93.

32. CLA seminar presenter Nyren Compton testified that he did not discuss the sale of annuities when he was discussing any of these workbook pages related to CLA's services. Testimony of Nyren Compton (Nov. 16, 2020).



33. The workshop script used by CLA's presenters ended with page 33 of the workbook, a page entitled "What's Next?" Ex. 421 at CESI 000053; Ex. 483 at CLA_ESI001399. The script concludes with the presenter stating for those ready to get started: "I will gather some basic information on behalf of the estate planning attorney in order for him to start the process. Is everybody with me? OK. Let's pull out that sheet we looked at right before our break." Ex. 483 at CLA_ESI001399.

34. CLA's workbook contains only two references to insurance. The seventh of eight bullet points on page 1 of the workbook mentions that CLA "[o]ffers full line of insurance and related products to assist client in the protection and preservation of their estate." Ex. 421 at CESI 000021. But the script for this page of the workbook describes the CLA agents who will conduct in-home meetings as "financial professionals that perform the service work and settlement assistance for my clients" and does not disclose that they are insurance agents working on commission. Ex. 483 at CLA_ESI001378. In addition to performing service work and settlement assistance, the script states that these financial professionals will "work with the attorneys to implement your plan," "give you a complete review of your financial situation including things like budgeting, income planning, and asset protection," "can offer you a full line of insurance products if you have a need," "[t]hings like long-term care insurance, life insurance, final expense insurance, and various type of annuity products," and "also provide all manners of legacy planning and end of life guidance to our clients' families." *Id.* Like the workbook page, the script embeds the mention of insurance in a broad list of estate planning services and presents it only as something that can be offered if needed, not as something that must occur for CLA's agents to make a living.

35. The second reference to insurance in the workbook is on page 34, after the last page addressed in the workshop script. Ex. 421 at CESI 000054. But this page simply lists purported benefits of annuities under the title "Asset Preservation Provided by CLA." and says nothing that would alert a consumer that the CLA representative conducting in-home meetings would be an insurance agent working almost exclusively on commission.

36. Nyren Compton testified that he typically spent 30 seconds or less on this page, out of the 2.5-3 hours that the seminars typically lasted, and that it was the only time he would mention annuities during the seminar. Compton Testimony (Nov. 16, 2020). Mr. Compton testified that he never told consumers that CLA USA agents would try to sell them insurance at the in-home meetings. *Id.*

37. Consumers testified that insurance and annuities were not discussed at the seminars. E.g., Ottosen Dep. at 15:25-16:2 ("Q. Was there any reference during the seminar to insurance or annuities? A. No."); Clawson Dep. at 24:24-25:1 ("Q. On that point during the seminar, was there any reference to insurance or annuities? A. No.").

38. Consumers did not understand that CLA sold insurance. Instead, they believed CLA was offering estate plans that would avoid probate. E.g., Ottosen Dep. at 27:6-12 ("Q. What was your understanding of the services that CLA was offering at the seminar? A. Just keep our children from going through probate and have a will. Q. Is there anything else that you understood CLA to be offering? A. No."); Lindenthal Dep. at 92:6-93:10 ("[W]hen my husband and I signed up for this we thought we were getting just say a trust, things put in a trust. We never thought we would be changing anything as far as our investments.").

39. Consumers also did not understand that the in-home review meetings CLA provided as part of the Lifetime Estate Plan would be conducted by an insurance agent who would attempt to sell them annuities. E.g., Ottosen Dep. at 21:5-22:1 ("Q. Did you understand that CLA USA would talk to you about insurance products? A. No."); D. Clawson Dep. at 33:22-34:9 ("Q. Is [offering a full line of insurance and related

products] consistent with your understanding of what CLA USA was offering? A. No."); Fogelman Dep. at 33:10-13 ("Q. Based on information you received from CLA, did you expect the CLA agents who came to your home to sell annuities to you? A. No.").

40. Only after consumers participated in the hours-long estate-planning seminar and received CLA's marketing materials and workbook that promised robust estate planning services did CLA have consumers sign a Consumer Information and Disclosure Agreement that stated in fine print that CLA agents "may discuss insurance solutions that would benefit planning" at in-home meetings. See Ex. 1005.

41. When shown the disclosure agreements they had signed, some consumers testified that this provision was not consistent with their expectations. Consumer James Ottosen, was asked whether a portion of a paragraph titled "Coordination of Services" in the disclosure form, which states "After your attorney completes your estate planning documents a CLA USA agent, who are licensed insurance representative [sic], will come to your home to assist you in implementing your estate plan, including notarization of necessary documents," was consistent with his understanding. He testified "Didn't know that." Ottosen Dep. at 32:23-33:6. Similarly, when consumer Myrna Lindenthal was asked if the "Coordination of Services" paragraph was consistent with her understanding of CLA's services, she testified "I – if you – I mean, when my husband and I signed up for this we thought we were getting just say a trust, things put in a trust. We never thought we would be changing anything as far as our investments." Lindenthal Dep. at 92:6-93:10.

42. CLA USA's Regional Manager David Nelson acknowledged that "no client bought a [Lifetime

Estate Plan] to buy insurance or annuity; they bought it . . . because they love someone, and they want to make sure their kids are fine." Nelson Dep. at 36:21-36:24.

B. In-home Meetings

1. Delivery Meetings

43. After a consumer purchased a Lifetime Estate Plan, a CLA referral attorney prepared a revocable living trust and other estate documents. Benson Testimony (Nov. 30, 2020). One of CLA's insurance salespeople (none of whom were attorneys) contacted the client to set up a delivery meeting to review and notarize the estate documents and help the client transfer assets into the trust. Gammel Testimony (Nov. 17, 2020).

44. CLA hired insurance agents who were not required to have any expertise in estate planning, securities, or financial planning to conduct its in-home meetings with consumers. Bradshaw Dep. at 23:16-24:11; Nelson Dep. at 21:3-21:14.

45. CLA's agents conducted 219 delivery meetings since November 3, 2015. Ex. 455 (CR 30(b)(6) Supplemental Responses stating number of delivery meetings was 221); Dkt. No. 188 at 4 (adjusting number of delivery meetings to 219).

46. CLA prepared a Delivery and Review Outline for its agents, which listed tasks to perform and questions to ask clients at delivery and review meetings. The information to be gathered from the clients was for the preparation of their estate distribution documents. Ex. 397.

47. At delivery meetings, CLA agents reviewed estate documents with the clients, inquired whether

any changes or corrections were needed to the trust documents, such as the names of trustees, successor trustees and beneficiaries, or the terms of the trust, and notarized the trust documents. Gammel Testimony (Nov. 17, 2020); Van Winkle Dep. at 71:17-73:10; Garrett Dep. at 72:14-73:11; Conger. Dep. at 106:22-108:17; Bradshaw Dep. at 25:14-26:15. The agents also asked clients to identify all assets comprising their estates, representing that this information was needed to assist funding their trusts. Gammel Testimony (Nov. 17, 2020); Van Winkle Dep. at 71:17-73:10; Conger Dep. at 106:22-108:17; Bradshaw Dep. at 25:14-26:15. If the attorney requested information and the client was delaying in getting it to them, CLA agents would help collect the information for the attorney. Conger Dep. at 83:19-83:25, 87:1-87:12.

48. Former CLA USA agent Alan Gammel testified that agents could make some changes to trust documents on the spot, such as changing a name if a fiduciary got married. Gammel Testimony (Nov. 17, 2020). For other changes, agents completed a Change Form. *Id.*; see, e.g., Ex. 492.

49. At delivery meetings, CLA's agents completed a Delivery Receipt that required them to confirm that they had offered to gather or gathered various information for the preparation of the client's estate distribution documents. The Delivery receipt required the agent and client to sign a page confirming that they had "verified that all applicable documents have been properly signed by all parties, dated, initialed, and notarized," that all assets to be transferred to the trust had been disclosed, that the client had received living trust warranty deeds on all property to be placed in the trust, that any changes needed had been submitted to CLA on a Change Form for processing, and

that a deed request form, if needed, had been filled out and submitted to CLA for processing. E.g., Ex. 177.

50. CLA's agents used CLA's proprietary Road of Retirement software to collect and discuss the client's asset information at each delivery and review meeting. Johnson Dep. at 157:16-158:16; Van Winkle Dep. at 62:12-62:22; Garrett Dep. at 78:12-78:16; Gammel Testimony (Nov. 17, 2020). CLA's training script stated that the Road of Retirement enabled "CLA to confirm the assets funded to the trust, to inspect the titles and beneficiaries on insurance and IRAs, and to make sure everything is titled correctly to protect your family." Ex. 414 at CUSA 000802. It produced a detailed profile of the consumer's financial circumstances and assets. Johnson Dep. at 157:16-158:16; Van Winkle Dep. at 62:12-62:22; Gammel Testimony (Nov. 17, 2020).

51. Although CLA agents represented to consumers that the Road of Retirement's purpose was to gather information for estate planning purposes, CLA expected its agents to use the Road to Retirement as a sales tool, to gather lists of assets that could be moved into annuity products the agents sold to clients. Johnson Dep. at 157:16-158:16; Van Winkle Dep. at 62:12-62:22; Gammel Testimony (Nov. 17, 2020).

52. CLA agent Mitchell Johnson testified that assisting with and delivering consumers' estate documents caused consumers to place their trust in him, which in turn allowed him to sell them insurance products. Johnson Dep. at 128:3-129:6; 130:9-130:12.

53. CLA's customers confirmed that they put their trust in CLA. Clawson Dep. 85:22-86:1; Fogelman Dep. at 18:4-12; Lindenthal Dep. at 39:2-7, 40:8-17.

54. No customers requested information about insurance products during delivery meetings. Johnson Dep. at 130:17-130:21. CLA Regional Manager David Nelson testified that: "No -- no client bought a service package to buy insurance or annuity. They bought it to make sure – because they love someone, and they want to make sure their kids are fine." Nelson Dep. 36:17-36:24; see also Fogelman Dep. at 33:10-33:13; Lindenthal Dep. at 15:17-16:3, 93:6-10; Clawson Dep. 38:23-39:4.

55. Consumers did not always understand that agents at delivery meetings were acting as both estate planning agents and insurance sale representatives. Johnson Dep. at 130:22-131:6.

56. CLA USA agent Mitchell Johnson testified that, in his experience, clients sometimes assumed he was the attorney who prepared estate documents because "to them, notarizing a legal document is a complicated thing and . . . you'd have to explain . . . what [a] durable power of attorney was, health care directive. . . . [s]o from their perspective, you were very knowledgeable and professional regarding the legal documents and finances." Johnson Dep. at 129:7-130:5.

57. Insurance agents benefited from CLA's business model because it provided "warm clients to visit." Nelson Dep. at 36:9-36:24. In other words, according to CLA Regional Manager David Nelson, CLA had clients expecting to be seen every year, and "[t]he likelihood of them saying no to you once they've paid for your free – your continued services is slim, so it's a much easier call-toappointment ratio. . . ." Nelson Dep. at 52:3-52:14.

58. CLA agent Mitchell Johnson found delivery meetings to be the most desirable meetings from a sales perspective. Johnson Dep. at 141:20-142:14. He

estimated that 65 percent of the "money generated" occurs at the delivery meeting and within two weeks afterwards. Johnson Dep. at 143:6-143:12.

59. CLA paid its agents only $25 to conduct delivery meetings. Ex. 189 at WA-AG 0001841; Ex. 514 at CLA 002842; Van Winkle Dep. at 36:2-36:5; Johnson Dep. at 143:19-143:21; Garrett Dep. at 56:16-56:25. At times, CLA's agents would spend hours driving to and from delivery and review meetings. Van Winkle Dep. at 40:19-42:6. Any additional compensation an agent received was only through commissions earned by selling annuities or other insurance products to the CLA clients whose homes they visited. Van Winkle Dep. at 42:7-42:14; Conger Dep. at 28:3-28:9.

60. The clear and strong inference to be drawn from this compensation scheme, coupled with the fact the CLA's agents were not required to have any expertise in estate planning or financial planning, is that the sale of annuity products to CLA's clients was CLA's overriding objective.

2. Review Meetings

61. CLA's Lifetime Estate Plan provided that approximately 90 days after the delivery meeting, and annually thereafter, CLA representatives would meet with clients in their homes with the stated purpose of determining whether the client's trust had been properly funded and whether any changes were needed to the client's estate distribution documents. Ex. 421 at CESI 000046; Ex. 483 at CLA_ESI001392-93.

62. CLA's agents conducted 1,259 review meetings since November 3, 2015. Ex. 455 (CR 30(b)(6) Supplemental Responses stating number of review meetings was 1,258); Dkt. No. 188 at 4 (adjusting number of review meetings to 1,259).

63. At 90-day and annual review meetings, CLA agents reviewed clients' estate distribution documents and inquired about any changes that had occurred regarding their estate documents or assets since the previous review meeting. Garrett Dep. at 74:13-75:4; Bradshaw Dep. at 32:10-34:4; Gammel Testimony (Nov. 17, 2020).

64. At each review meeting, CLA agents offered to gather, or gathered, information for the preparation of the client's estate distribution documents. This included completing a Periodic Review Form (Ex. 416) at each meeting. Gammel Testimony (Nov. 17, 2020); Van Winkle Dep. at 45:14-46:3; Nelson Dep. at 77:5-77:17. Agents completed this form even when a review meeting took place by phone. Van Winkle Dep. at 45:14-46:3.

65. The Periodic Review Form identified the CLA agent as an "Estate plan review agent," and contained an acknowledgement stating that "CLA Estate Services reviewed my estate plan on ____." Ex. 416. When completing the Periodic Review Form, the CLA agent asked the consumer a series of questions about estate documents, property, beneficiary status and assets. Gammel Testimony (Nov. 17, 2020); see Exs. 265, 266, 416, 515, 664. Specifically, completing the Periodic Review Form required the agent to answer the following questions: (1) Are all of the names in the documents spelled correctly? If no, change/correction form attached? (2) Has all of the property, that the client wants transferred, been transferred to the trust? (3) Have all of the financial documents, that the client wants retitled, been retitled into the trusts? (4) Are all the beneficiaries correct on every insurance policy? (5) Are there any changes in beneficiary status (death or disassociation)? (6) Did any trustee die since initial application? If yes, whom? Settlement assistance

provided or requested? (7) Has any property been purchased, sold, inherited, or gifted since last review? (8) Have any CDs, Mutual Funds, IRAs, Pension Plans, Stock Funds, or Insurance policies been cashed in? (9) How does the client plan on funding their long term care needs?

66. If the client or agent identified a change that was needed to the client's estate distribution documents during a review or delivery meeting, CLA agents would either call the attorney to provide the information needed for the change, or collect the information on a Change Form and submit the change request to the referral attorney. Ex. 492; Garret Dep. at 85:9-85:25; Conger Dep. at 109:18-110:1; Van Winkle Dep. at 81:1-82:1.

67. According to CLA, it collected 94 written requests for changes, corrections, or amendments to clients' estate distribution documents since November 3, 2015. Ex. 455.

68. Agents were paid only $10 to conduct a review meeting. They obtained the bulk of their compensation through insurance sales at the meetings. Ex. 189 at WA-AG 0001841; Ex. 514 at CLA 002842; Van Winkle Dep. at 36:17-36:25; Johnson Dep. at 143:15-143:18; Garrett Dep. at 57:1-57:6.

3. Insurance Products Sold by CLA

69. CLA USA agents sold Washington consumers fixed indexed annuities from a limited number of insurance carriers. See Conger Dep. at 36:6-36:13.

70. The parties presented testimony of expert witnesses to opine on the characteristics of the equity indexed or fixed indexed annuities ("indexed annuities") CLA marketed and sold to Washington consumers.

The State presented the testimony of Dr. Craig J. McCann. Dr. McCann is a Chartered Financial Analyst with 30 years of experience as a financial economist. McCann Testimony (Nov. 18, 2020). The Court finds the testimony of Dr. McCann credible. CLA presented the testimony of John L. Olsen. Mr. Olsen holds certification related to the selling of insurance products, including indexed annuities, which he did for a number of years. Olsen Testimony (Dec. 1, 2020).

71. Indexed annuities, like those marketed and sold by CLA in Washington, are deferred annuities that are derivative contracts that can be tied to external equity indices, such as the S&P 500. McCann Testimony (Nov. 18, 2020).

72. Dr. McCann testified that indexed annuities like those marketed and sold by CLA pay a "very high commission that is not disclosed" to consumers, which he described as "extraordinary" compared to other financial products. McCann Testimony (Nov. 18, 2020). For example, Dr. McCann testified that other financial products, such as bonds, mutual funds, or variable annuities typically charge 0 to 4.5 percent commissions, whereas indexed annuities charge 10 to 12 percent. *Id.*

73. Dr. McCann further testified that the commission rate is important because issuers of indexed annuities recoup the commissions from consumers who purchase the products. He testified: "It creates a conflict of interest where the agents selling these products are motivated or incentivized to sell products that pay high commissions since they are not disclosed. That's a conflict in part because those commissions are paid by the investor. They come out of the investor's funds. Not directly, but indirectly, with absolute certainty they do." McCann Testimony (Nov. 18, 2020). Mr. Olsen also acknowledged that commissions are

"recouped over a period of years," if the purchaser does not incur surrender penalties, and that such penalties can also be a way the commissions are recouped. Olsen Testimony (Dec. 1, 2020).

74. Mr. Olsen also acknowledged that, for the CLA-offered annuity contracts he reviewed, surrender charges and market value adjustments can invade a consumer's principal, meaning that the principal is not inviolate. Olsen Testimony (Dec. 1, 2020).

75. According to Dr. McCann, indexed annuities like those marketed and sold by CLA in Washington are also notable for their illiquidity. This illiquidity stems from various aspects of the annuity, but especially due to the fact that the annuities have lengthy surrender-charge periods, such as 10 years. McCann Testimony (Nov. 18, 2020); see also Ex. 145 at WA-AG 170851 (reflecting a 10-year surrender-charge period, with a 10% charge rate for the first year of the annuity).

76. Dr. McCann testified that the riders on CLA customers' contracts are "insurance-like features" of annuity contracts that "add zero value" to the contracts. McCann Testimony (Nov. 18, 2020).

77. Dr. McCann testified that indexed annuities are derivative contracts that are "extraordinarily complex." McCann Testimony (Nov. 18, 2020). He also described the annuities CLA marketed and sold to Washington consumers as "opaque" to such a degree that even someone with a math Ph.D. would have difficulty understanding the likely future payoffs of the annuities. *Id.*

78. Dr. McCann opined that the indexed annuities CLA marketed and sold to Washington consumers are "the most complex investments that I believe I have ever observed." McCann Testimony (Nov. 18, 2020).

79. Dr. McCann testified that "market value adjustments" that issuers can make under the annuity contracts operate to shift the risk of the annuity from the issuer to the consumer. McCann Testimony (Nov. 18, 2020). Indeed, Dr. McCann testified that the consumer "bears all the risk," whereas the issuer "bears no risk." *Id.*

80. According to Dr. McCann, the lack of disclosure of the "true underlying economics, covered over by this Rube Goldberg machine of crediting formulas and insurance-like features, ensures . . . that no investor would ever understand these products." McCann Testimony (Nov. 18, 2020).

81. Dr. McCann's opinions regarding the complexity of the indexed annuities that CLA marketed and sold is support by consumer testimony. When asked whether she is familiar with annuities, Washington resident Dorothy Clawson answered, "No. I still don't know how they work. I just know that I lose money on them." Clawson Dep. at 70:24-71:2. With regard to surrender penalties, Mrs. Clawson testified that the CLA USA agent who sold her indexed annuities, Mitchell Johnson, "did not describe that there is a penalty on them if you draw your money out." Clawson Dep. at 71:3-13.

82. Dr. McCann's opinions are further supported by the testimony of CLA USA agents operating in Washington. Agent David Van Winkle testified that the average customer, and even the average agent, would not understand how the policies "are put together and made." Van Winkle Dep. at 98:2-98:5. He continued, "if you ask the average customer if they understood a rider, they won't. And the average agent probably wouldn't either." Van Winkle Dep. at 98:6-98:8. Likewise, CLA USA agent Alan Gammel, when

asked about his impression of consumers' general understanding of indexed annuities, testified, "I found that they often did not understand very well." Gammel Testimony (Nov. 17, 2020). This included, Mr. Gammel testified, consumers conflating a percentage cap on returns with a guaranteed minimum rate of return. *Id.*

83. Dr. McCann also valued the annuity contracts CLA marketed and sold to Washington consumers. Employing the "risk neutral valuation" technique, which he testified is a standard set of methodologies for valuing derivative contracts like indexed annuities, Dr. McCann found that the value of the contracts is not more than 73 to 86 cents on the dollar when purchased. McCann Testimony (Nov. 18, 2020). According to Dr. McCann, the actual value is "substantially less than that" when "the extreme illiquidity in these contracts" is taken into account. *Id.* CLA's expert did not attempt to provide a valuation to any of the annuity contracts that he reviewed and conceded that he is not qualified to employ the risk neutral valuation to value indexed annuity contracts. Olsen Testimony (Dec. 1, 2020).

84. Dr. McCann opined that the likely returns of the indexed annuities that CLA marketed and sold to Washington consumers "are far less than the likely returns of [more liquid] diversified portfolios of stocks and bonds. McCann Testimony (Nov. 18, 2020). Dr. McCann also stated that even for a risk-adverse investor, it would be preferable to purchase short and intermediate-term treasury securities, or a mix of such securities with some amount allocated to a stock portfolio. *Id.*

85. Dr. McCann ultimately concluded that "[n]o fully informed consumer who understood [the type of indexed annuity CLA sold Washington consumers]

would ever purchase it," and that he "feel[s] confident that there is zero chance that a fully informed investor would ever purchase one of these." McCann Testimony (Nov. 18, 2020).

86. CLA and its agents received commissions for every annuity they sold. CLA retained 65% to 70% of the commission, and the CLA agent received the remainder. See Ex. 189 at WA-AG 0001841; see also Ex. 455.

87. Since it began operating in Washington in 2008, CLA's review and delivery meetings resulted in the sale of hundreds of financial products to consumers, with commissions to CLA of $3,597,287.93 and to its agents of $1,826,163.16. Pl. Ex. 455.

4. CLA's Sales Requirements

88. CLA USA agents were evaluated based on the amount of insurance premiums they sold. Conger Dep. at 45:21-45:23; Garret Dep. at 62:16-63:11; Ex. 189 at WA-AG 0001841.

89. As of February 2014, sales agents had a minimum sales quota of $300,000 per month, which was communicated to the agents on a weekly basis. Ex. 417 at CUSA 037268.

90. CLA USA Regional Director David Nelson was also compensated in part based on sales that the agents he supervised made. Nelson Dep. at 111:6-111:8.

5. CIA's Oversight of Agents

91. CLA provided little training to or oversight of its agents who conducted in-home meetings with consumers. CLA USA Regional Manager David Nelson, who supervised CLA's Washington agents, testified that CLA's agents were independent insurance agents who did

not receive training from CLA. Nelson Dep. at 36:5-36:13, 37:13-37:21.

92. Mr. Nelson testified that he believed insurance companies provided training for CLA's agents, Nelson Dep. at 36:9-36:13, but CLA's expert John Olsen testified that insurance companies rarely provided such training. Olsen Testimony (Dec. 1, 2020). There is no evidence that any of CLA's Washington sales agents received training from any insurance company.

93. The EMC2 Ethics Handbook that CLA offered into evidence, Ex. 1210, bears a date of 2010, but CLA's Washington agents, Mitchell Johnson, David Van Winkle, and Michael Kelly began working for CLA in 2009 (Johnson Dep at 8:17-8:23; Exs. 1208, 1209) , before Ex. 1210 was created. None of these agents testified that they received ethics training from CLA, nor did any CLA employee testify that they witnessed any Washington agent being so trained.

94. Although CLA created the opportunity and motivation for its agents to aggressively market insurance products to seniors in their homes and derived significant financial benefit from the sales of these products, CLA took few steps to ensure that consumers were not taken advantage of or subjected to coercive sales tactics.

95. David Nelson, the CLA USA Regional Manager who supervised CLA's insurance agents in Washington, testified that he oversaw the service part of the CLA agents' work, but he did not exercise any oversight over the annuities sales part of the agents' work because he believed they were independent contractors responsible for their own behavior. Nelson Dep. at 112:19-113:9.

96. CLA did not take any steps to investigate allegations of Washington-agent misconduct, including the following:

a. Two CLA USA agents, David Van Winkle and Michael Kelly, had their contracts with the insurance carrier Forethought terminated for engaging in templating, or submitting multiple applications with identical information with just the name changed. Ex. 407. Their manager, David Nelson, did not take any disciplinary action against them or take any steps to determine whether they engaged in templating with any other carrier's contracts. Nelson Dep. at 100:23-101:23, 103:15-104:1. Nor did Mr. Nelson investigate whether any other agents were engaged in templating after learning about Forethought's termination of CLA's agents. Nelson Dep. at 101:24-102:1.

b. While he was a CLA USA agent, Alan Gammel reviewed an annuity sale made by CLA USA agent Mitchell Johnson that Mr. Gammel believed was unsuitable for the client because of penalties the client had incurred to move money into the account and would incur in the future to access the funds. Gammel Testimony (Nov. 17, 2020). Accordingly, Mr. Gammel suggested that the client cancel the contract. *Id.* Mr. Gammel also provided unrebutted testimony that the sales application contained incorrect information. *Id.* When he sent a detailed letter with an attached spreadsheet, Ex. 194, to his supervisor, Mr. Nelson, explaining why the sale was improper, Mr. Nelson did not investigate Mr. Johnson or the sale, and instead told Mr. Gammel to "back off," Ex. 196. Mr. Nelson admitted that, rather than investigate Mr. Johnson, he investigated the whistleblower, Mr. Gammel. Nelson Dep. at 123:14-123:20.

c. CLA USA agent David Van Winkle complained to his manager, David Nelson, that CLA USA agent Mitchell Johnson was engaged in the unethical practice of churning: "With Mitch [c]hurning his old book of CLA clients this is also cutting the dollars available for the few reviews assigned to me." Ex. 517. Churning, according to CLA USA National Director Chris Garrett, is "when you replace business just for the purpose of commission." Garrett Dep. at 102:19-102:24. Mr. Nelson admitted that he took no action to investigate the validity of Mr. Van Winkle's claim. Nelson Dep. at 119:19-120:24. Instead he chastised Mr. Van Winkle for sending the email. Ex. 517. Mr. Nelson was the Regional Manager in charge of supervising CLA's Washington insurance sales agents, but he believed that taking steps to ensure that the agents he managed were not churning "was not part of my responsibility."[2] Nelson Dep. at 41:23-41:25.

d. CLA USA agent Michael Kelly would attempt to preserve his sales by instructing customers to tell their brokerage company that they did not want their advisor or anyone else with the brokerage firm to speak with them, thus giving Mr. Kelly full control over the client's knowledge. Ex. 516. Mr. Nelson was aware of this conduct and did not seek to stop it. Nelson Dep. at 96:22-97:8

96. CLA received a disproportionately large number of complaints about its Washington and Oregon agents. Ex. 401. CLA's National Sales Director noted that it

[2] Although Mr. Nelson testified that he believed an employee in "new business" would notify him if there was evidence of churning, Nelson Dep. at 145:7-145:10, no "new business" employee testified in this matter about CLA's processes and procedures.

was baffling "how agents can have so many clients upset enough to call and complain." Ex. 401.

97. Mr. Nelson testified that he never investigated any agents for churning, for submitting inaccurate information in annuities applications, or for failing to disclose material terms in insurance contracts like surrender penalties; and that he investigated only one instance of templating. Nelson Dep. at 147:4 147:12, 147:25-148:13.

98. On the other hand, Mr. Nelson admitted that he investigated every instance of "selling away," that is, selling products not offered by CLA, thus depriving CLA of commissions. Nelson Dep. at 149:3-149:4. Both Mr. Nelson and National Sales Director Chris Garrett testified that the only times they terminated sales agents was when they sold non-CLA products to CLA customers or did not meet sales requirements. Nelson Dep. at 47:4-47:8, 137:9-138:21; Garret Dep. at 67:21-68:3.

99. Washington CLA clients Dorothy Clawson, Janice Ward, James Ottosen, Myrna Lindenthal, and Diane Fogelman all credibly testified that CLA agents engaged in improper sales practices or misconduct when selling them annuities:

a. Ms. Clawson testified that Mitchell Johnson failed to disclose material terms of the annuity he was selling her, including that should would be charged a surrender penalty if she drew funds out of her annuity. Clawson Dep. at 70:21-71:13; 122:11-123:1. Ms. Clawson ultimately needed to draw money from the annuity causing her to pay a penalty. Clawson Dep. at 78:18-79:7. Ms. Clawson also testified that Mr. Johnson falsely promised that her annuity would make seven percent interest per year. Clawson Dep. at 77:15-

77:19, 123:23-124:1, 213:12-214:3. The Court finds the testimony of Ms. Clawson credible.

b. Ms. Lindenthal testified that CLA USA agent Mitchell Johnson sold her an annuity that was not suitable for her family's needs, that she lost sleep over the sale, and that she ultimately cancelled it. Lindenthal Dep. 26:22-28:16. She further testified that she lost $16,000 as a result of another annuity she purchased from CLA. Lindenthal Dep. at 49:5-49:10. The Court finds the testimony of Ms. Lindenthal credible.

c. Ms. Fogelman testified that CLA's agent failed to adequately disclose that she would pay a rider fee for her annuity and that she lost retirement savings as a result of purchasing the annuity. Fogelman Dep. 37:25-38:5; 45:4-45:24. The Court finds the testimony of Ms. Fogelman credible.

d. Mr. Ottosen testified that CLA's sales agent engaged in high pressure sales tactics, Ottosen Dep. at 44:23-45:5, 48:1-48:10, 120:24-121:17, and signed him up for a Lifetime Income Benefit Rider without his knowledge, Ottosen Dep. at 60:24-62:4. The Court finds the testimony of Mr. Ottosen credible.

e. Ms. Ward testified that many of the signatures on her annuities applications were not hers. Ward Dep. 55:1-16, 57:19-58:1, 58:11-58:17, 87:11-87:20, 93:11-94:4. She further testified that information concerning her assets that CLA USA agent Mitchell Johnson included on her annuities applications was incorrect. Ward Dep. 89:15-90:11, 91:16-93:4. The Court finds the testimony of Ms. Ward credible on this subject.

97. CLA USA's President, James Bradshaw admitted that "sadly I think the Executive Leadership (me

included) SAY that we value behaviors/standards more than sales results but we really value SALES results first and handle behavior/culture issues reactively rather than proactively." Ex. 417 at CUSA 037270.

98. CLA did not have any procedures established to ensure that agents did not sell financial products to clients with diminished cognitive abilities. Nelson Dep. at 38:18-39:6.

99. The client deposition testimony submitted as evidence, including the testimony cited in the preceding paragraphs, establishes that many of the seniors to whom CLA marketed its products were financially unsophisticated and unequipped to understand the complex and opaque insurance products CLA sold them.

C. Eagle Financial Group and Eagle Estate Services

100. Since this litigation began, CLA USA has rebranded itself as Eagle Financial Group. When asked if the services Eagle offers are different from those offered by CLA USA, former CLA USA Regional Manager (now Eagle Regional Manager) David Nelson testified: "No. Some of the verbiage is different, so we use 'Eagle' now. We don't – we only call them – we may call them to tell them that we're the folks at CLA USA, you know, but when we get there, we have a flyer that we give them and explain that we've rebranded." Nelson Dep. at 19:16-19:22. Eagle Financial Group does not currently operate in Washington. Bradshaw Dep. at 14:2-14:12. Elsewhere in the country, Eagle Financial Group now performs the in-home reviews for the clients who purchased Lifetime Estate Plans from CLA ESI. Bradshaw Dep. at 17:11-17:16.

101. Similarly, CLA ESI no longer exists, and its former executives hold similar or identical posts in a

new company called Eagle Estate Services. Former CLA ESI Vice President John Long (now Eagle Estate Services Vice President) testified that the services Eagle Estate Services offers are similar to those formerly offered by CLA ESI with "some changes and things in the way we market . . . and acquire clients, and meet people. Long Dep. at 12:1-12:19.

II. CONCLUSIONS OF LAW

1. This Court has jurisdiction over the persons and subject matter at issue in this case.

2. King County is the appropriate venue for this action.

A. Consumer Protection Act

3. The Consumer Protection Act (CPA), RCW 19.86, prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. The CPA is to be "liberally construed that its beneficial purposes may be served." RCW 19.86.920. To establish liability under the CPA, a plaintiff must show the existence of: "(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, and (3) public interest impact." *State v. Mandatory Poster Agency, Inc.*, 199 Wn. App. 506, 518, 398 P.3d 1271 (2017).

4. For a private plaintiff, Washington courts apply two additional requirements for showing liability under the CPA: injury and causation. These additional elements do not apply, however, to a CPA action brought by the Attorney General. *Id.* ("Unlike a private plaintiff under the CPA, the State is not required to prove causation or injury."); *State v. Kaiser*, 161 Wn. App. 705, 719, 254 P.3d 850 (2011) (same). Thus, no showing of injury or causation is required to establish liability in this case.

5. The plaintiff in a CPA action, whether brought by the Attorney General or a private party, may establish liability on the basis of either "unfair" or "deceptive" acts, or both. *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013).

6. The terms "unfair" and "deceptive" are not defined under the CPA. The Washington Supreme Court, accordingly, "has allowed the definitions to evolve through a gradual process of judicial inclusion and exclusion." *Id.* at 785.

7. In *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 50, 204 P.3d 885 (2009), the Supreme Court held that, for purposes of the CPA, deception exists "if there is a representation, omission or practice that is likely to mislead a reasonable consumer."

8. "[A] communication may be deceptive by virtue of the net impression" it conveys. Panag, 166 Wn.2d at 50 (emphasis added); *Mandatory Poster*, 199 Wn. App. at 519 ("A deceptive act or practice is measured by the net impression on a reasonable consumer."). This means that a communication may be deceptive, for purpose of the CPA, "even though it contains truthful information." *Panag*, 166 Wn.2d at 50; *see also F.T.C. v. Cyberspace.Com LLC*, 453 F.3d 1196, 1200 (9th Cir. 2006) ("A solicitation may be likely to mislead by virtue of the net impression it creates even though the solicitation also contains truthful disclosures.").[3]

9. A CPA plaintiff "need not show the act in question was intended to deceive, only that it had the

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[3] In construing and applying the CPA, Washington courts may look to, but are not bound by, federal court decisions interpreting the Federal Trade Commission Act. Panag, 166 Wn.2d at 47; RCW 19.86.920.

capacity to deceive a substantial portion of the public." *Panag*, 166 Wn.2d at 47 (emphasis added).

10. In evaluating capacity to deceive, the Court should look not to the most sophisticated consumers, but rather to the least. *Id.* at 50.

11. "The purpose of the capacity-to-deceive test is to deter deceptive conduct before injury occurs." *Hangman Ridge*, 105 Wn.2d 778, 785, 719 P.2d 531 (1986).

12. Whether an act had the capacity to deceive a substantial portion of the public is a question of law. *State v. LA Investors, LLC*, 2 Wn. App. 2d 524, 538-39, 410 P.3d 1183 (2018); *Mandatory Poster*, 199 Wn. App. at 519-20.

13. The State is not required to prove that the unfair or deceptive acts actually injured consumers or that consumers relied on deceptive acts. *State v. Living Essentials, LLC*, 8 Wn. App. 2d 1, 15, 436 P.3d 857 (2019); *cert. denied*, No. 19-988, 2020 WL 5882220 (U.S. Oct. 5, 2020).

14. Because a CPA claim does not require a finding of an intent to deceive or defraud, "good faith on the part of the seller is immaterial." *Id.* at 15-16.

15. Unfair acts or practices violate the CPA, even if they are not deceptive. *See Klem*, 176 Wn.2d at 787. An act may be "unfair" if it offends public policy, as established by statutes, the common law, or otherwise; is immoral, unethical, oppressive, or unscrupulous; or causes substantial injury to consumers. *Rush v. Blackburn*, 190 Wn. App. 945, 962-63, 361 P.3d 217 (2015).

16. "Trade" and "commerce" are defined in the CPA and include "the sale of assets or services, and any

commerce directly or indirectly affecting the people of the state of Washington." RCW 19.86.010(2).

17. In determining whether unfair or deceptive conduct affects the public interest, courts look to the following factors: (1) whether the alleged acts were committed in the course of defendant's business; (2) whether there was a pattern or generalized course of conduct; (3) whether the acts were repeated; (4) whether there is a real and substantial potential for repetition of defendant's conduct; and (5) if the act complained of involved a single transaction, whether many consumers were affected or likely to be affected by it. *See Hangman Ridge*, 105 Wn.2d at 790; see also RCW 19.86.093 (setting forth elements of public interest in private CPA actions). No factor is dispositive, nor is it necessary that all be present to establish public interest impact. *Hangman Ridge*, 105 Wn.2d at 791.

18. "[I]t is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest." *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 178, 159 P.3d 10 (2007), *aff'd sub nom. Panag*, 166 Wn.2d 27 (2009) (quoting *Hangman Ridge*, 105 Wn.2d at 790). Even a deceptive act that affects only one consumer may impact the public interest, if it is capable of repetition. *Travis v. Wash. Horse Breeders Ass'n, Inc.*, 111 Wn.2d 396, 407, 759 P.2d 418 (1988).

19. The Court granted the State's motion for partial summary judgment on July 19, 2019, finding that CLA violated the CPA during its estate-planning seminars and one-on-one meetings with consumers by misrepresenting probate law, trust law, federal law, and the relative advantages of estate-planning methods in Washington, and by creating a deceptive net impression

that a revocable trust is necessary to protect assets and heirs. Dkt. No. 171 (Order dated July 19, 2019). The Court also determined that "[e]ach deceptive act or practice is a separate violation of the CPA." *Id.*

20. The Court now finds that CLA's marketing of its Lifetime Estate Plan at its estate-planning seminars was unfair and deceptive, and violated the CPA. CLA deceptively promoted its Lifetime Estate Plan as a robust package of estate-planning services that included in-home meetings with CLA agents to review consumers' estate plans to ensure they were up to date. CLA's marketing failed to disclose in any meaningful way that the agents conducting the in-home meetings would be licensed insurance agents working on commission who would use the meetings as opportunities to learn about seniors' finances and aggressively market annuities and insurance products to them. CLA's failure to adequately disclose these facts left consumers with the deceptive net impression that they were purchasing robust estate planning services, and not in-home visits from commission-motivated insurance agents. *Panag*, 166 Wn.2d at 50 (deception exists "if there is a representation, omission or practice that is likely to mislead" a reasonable consumer).

21. Two ambiguous references to insurance in CLA's workbook, which discusses estate planning on nearly every page, are insufficiently prominent and unambiguous to cure the multiple hours' worth of deceptive representations CLA made to consumers at its estate planning seminars. *LA Investors*, 2 Wn. App. 2d at 544 (disclosures do not cure potential for deception unless they are "sufficiently prominent and unambiguous to change the apparent meaning of [misleading impressions] and to leave an accurate impression."). Even if these references were noticed by

consumers, they did not adequately disclose that CLA agents would use review meetings as opportunities to market insurance products to them and would be compensated only if they succeeded in doing so.

22. It was only after consumers participated in the hours-long estate-planning seminar and received CLA's marketing materials and workbook that promised robust estate planning services that CLA had consumers who decided to purchase a Lifetime Estate Plan sign a densely worded Consumer Information and Disclosure Agreement. The Disclosure Agreement stated in fine print that CLA agents "may discuss insurance solutions that would benefit planning" at in-home meetings. *See* Ex. 1005. This language is not sufficient to cure the potential for deception created at CLA's estate planning seminars. *See LA Investors*, 2 Wn. App. 2d at 543-44 (holding that numerous disclosures in all capital letters on a two-page mailer were insufficient to cure the mailer's capacity for deception); *Mandatory Poster*, 199 Wn. App. At 523-24 (holding that numerous disclaimers in a mailer stating it was not a government document not did not cure the misleading net impression that the sender was associated with a government agency). Moreover, the timing of the disclosure in the agreement renders it insufficient. *Robinson v. Avis Rent a Car System, Inc.*, 106 Wn. App. 104, 116 (2001) ("[A] practice is unfair or deceptive if it induces contact through deception, even if the consumer later becomes fully informed before entering into the contract.").

23. CLA created the opportunity for its agents to market insurance products to consumers in their homes, stood to benefit financially from its agents' sales, and created a compensation system that ensured its agents would have to sell its clients annuities to make a living. Yet CLA made little effort

to provide safeguards to protect its clients from being taken advantage of by overly aggressive or improper sales tactics.

24. CLA's marketing and sales of Lifetime Estate Plans and insurance products to Washington consumers represent "trade or commerce" under the CPA.

25. CLA's conduct affected the public interest. The conduct occurred in the course of CLA's business, was part of a pattern or generalized course of conduct, was repeated, and affected thousands of consumers.

B. The Estate Distribution Documents Act

26. The Estate Distribution Documents Act, RCW ch. 19.295, makes it is unlawful to use "living trusts" as a marketing tool by non-lawyers to generate sales leads. It expressly prohibits persons not licensed to practice law from the "unscrupulous practice of marketing legal documents as a means of targeting senior citizens for financial exploitation." The legislature prohibited the practice because it endangers consumers' financial security and may frustrate their estate-planning objectives. RCW 19.295.005.

27. The EDDA prohibits a person from marketing estate distribution documents, directly or indirectly, unless the person is authorized to practice law in Washington.

28. "'Market' or 'marketing' includes every offer, contract, or agreement to prepare or gather information for the preparation of, or to provide individualized advice about an estate distribution document." RCW 19.295.010(4).

29. "Gathering information" means "collecting data, facts, figures, records and other particulars about a

specific person or persons for the preparation of an estate distribution document." RCW 19.295.010(3).

30. Because the EDDA prohibits gathering, or offering to gather, information, it does not matter for purposes of establishing liability whether the information is ultimately used by an attorney in preparing estate documents. The EDDA contains no provision releasing a party who gathered or offered to gather information in violation of the statute from liability if an attorney later decides to use or not to use the information.

31. Violations of the EDDA are *per se* violations of the CPA. RCW 19.295.030.

32. In its ruling on Plaintiff's motion for partial summary judgment, Dkt. No. 135, the Court found that CLA violated the EDDA by (1) offering, at its estate-planning seminars, to coordinate with consumers' referral attorneys by gathering information for the preparation of consumers' estate distribution documents; (2) gathering information for the preparation of estate distribution documents on Client Information Forms when consumers purchased a Lifetime Estate Plan; and (3) gathering information about changes needed to the client's estate documents and submitting Change Forms to attorneys describing these changes. Dkt. No. 171 (Order dated July 19, 2019).

33. The Court now finds that CLA violated the EDDA by offering to gather (at CLA estate-planning seminars), and by gathering (at in-home meetings), information for the preparation of estate distribution documents at each of the delivery and review meetings it held with Washington consumers.

34. At its estate-planning seminars, CLA offered to gather information for the preparation of estate distribution documents in violation of the EDDA by

promoting, as part of its Lifetime Estate Plan delivery and review meetings to ensure estate plans are kept up to date with any necessary changes. The workbook CLA used at estate-planning seminars marketed the Lifetime Estate Plan by offering "Annual Reviews throughout lifetime of the Estate Plan to ensure plan is kept up to date with tax, financial and family changes." Ex. 421 at CESI 000046. The script that workshop agents followed at the seminars also contained offers to gather information for the preparation of estate distribution documents at delivery, 90-day, and review meetings:

> [Y]our CLA Planner will be coordinating the legal work done by your attorney. If you have chosen a Revocable Living trust as your legal foundation we will bring it to your home, notarize it, and go over everything with you. This will be done under the direction of the estate planning attorney who prepared the documents. I like to put it this way. The attorney does the legal work. CLA does the leg work. Does that make sense? Do you remember earlier when I told you about how important it is to get your assets funded into your trust[?] Your CLA planner will do that work with you. We will help you with the deed work done by your attorney. We will help with all your financial accounts, your insurance, your IRAs and any other things that are included in your estate. By the way. Do you think a typical document preparing attorney will do all of this for you? Of course not.
>
> Three months after we deliver your documents we are going to come back out to your home for a Review. Why do you think we do that? Just to make sure nothing was left out and everything is going smoothly. Also, you might need to fine tune

> your wishes and directions at that time. Does that make sense?
>
> Finally, there is a[n] Annual Review. Many of our clients feel that this might be the most important thing CLA does for them. This annual review will be conducted in your home, every year, by a CLA financial planner. These folks can help you in many ways including financial guidance, tax evaluation, long term health planning, and legacy planning. They will help you keep your planning on the right track.

Ex. 483 at CLA_ESI001392-93.

35. After offering to gather information for the preparation of estate distribution documents in marketing the Lifetime Estate Plan, CLA offered to gather, and gathered, information for the preparation of estate distribution documents at each of the delivery and review meetings it held with Washington consumers who purchased the Plan.

36. At each delivery meeting, CLA's agents completed a Delivery Receipt that required them to confirm that they had offered to gather or gathered various information for the preparation of the client's estate distribution documents. The Delivery receipt required the agent and client to sign a page confirming that they had "verified that all applicable documents have been properly signed by all parties, dated, initialed, and notarized," that all assets to be transferred to the trust had been disclosed, that the client had received living trust warranty deeds on all property to be placed in the trust, that any changes needed had been submitted to CLA on a Change Form for processing, and that a deed request form, if needed, had been filled out and submitted to CLA for processing. *E.g.*, Ex. 177.

37. At each 90-day and annual review meeting, CLA agents offered to gather, or gathered, information for the preparation of estate distribution documents by reviewing clients' estate distribution documents and inquiring about any changes that had occurred regarding their estate documents or assets since the previous review meeting. At each meeting, agents completed a Periodic Review Form that required them to ask the consumer a series of specific questions about whether estate documents were up to date, whether all property had been transferred to the trust, whether all financial documents were retitled into the trust, whether all beneficiaries were correct, whether there were any changes in beneficiary status, whether any trustee had died, whether any property or investments had been sold, and how the consumer planned to fund long-term care needs.

38. CLA also gathered information for the preparation of estate distribution documents when a client or agent identified a change that was needed to the client's estate distribution documents during a review or delivery meeting. In that event, CLA agents would either call the attorney to provide the information needed for the change, or collect the information on a Change Form, and submit the change request to the referral attorney.

39. CLA used living trusts as a marketing tool for purposes of gathering information for estate distribution documents, which the legislature has deemed a "deceptive means of obtaining personal asset information and of developing and generating leads for sales to senior citizens." RCW 19.295.005. CLA's conduct in delivery and review meetings is precisely the type of unfair or deceptive conduct the EDDA prohibits. CLA's EDDA violations created the opportunity for it

to sell annuities to consumers, which is the culmination of CLA's scheme and the precise outcome the legislature intended the EDDA to prevent.

40. As the Court has already recognized, each EDDA violation is a separate violation of the CPA. Dkt. No. 171 (Order dated July 19, 2019). C. Remedies

41. The CPA provides for a range of remedies for CLA's violations of the CPA, including injunctive relief, restitution, costs and fees, and civil penalties of up to $2,000 per violation. RCW 19.86.080(1)-(2); RCW 19.86.140. These remedies are complementary components that, together, comprehensively address unfair and deceptive practices: civil penalties deter such practices; injunctive relief prevents such practices from continuing; and restitution restores money or property acquired unlawfully from such practices. Thus, this array of remedies broadly protects and benefits the public by deterring future violations of the CPA, halting current violations, and restoring the status quo after past violations.

1. Restitution

42. The CPA confers broad equitable powers upon Washington trial courts to fashion appropriate equitable remedies, including authorizing restitution of "moneys or property which may have been acquired by means of any act declared unlawful or prohibited" by the Act. RCW 19.86.080(2).

43. Disgorgement of illegal gains, rather than consumer loss, is the usual measure of restitution under the CPA and analogous Federal Trade Commission Act case law. *See State v. LG Electronics, Inc.*, 185 Wn. App. 123, 144 n.33, 340 P.3d 915 (2014) (distinguishing between damages and restitution, and recognizing the latter "measures the remedy by the defendant's

gain and seeks to force disgorgement of that gain"), *aff'd*, 186 Wn.2d 1, 375 P.3d 636 (2016); *FTC v. Commerce Planet, Inc.*, 815 F.3d 593, 603 (9th Cir. 2016).

44. Illegal or unjust gains are measured by the defendant's net revenues, which is the amount consumers paid for the product or service minus refunds and chargebacks, not by net profits. *See FTC v. Bronson Partners, LLC*, 654 F.3d 359, 374-75 (2d Cir. 2011) ("[I]t is well established that defendants in a disgorgement action are 'not entitled to deduct costs associated with committing their illegal acts.'"); *FTC v. Direct Mktg. Concepts, Inc.*, 624 F.3d 1, 14-16 (1st Cir. 2010).

45. No statute of limitations applies to claims for restitution brought by the Attorney General under the CPA. *State v. LG Electronics, Inc.*, 186 Wn.2d 1, 9-12, 375 P.3d 636 (2016).

46. The Court rejects Defendants' argument that the amount of restitution should be reduced to account for alleged (largely hypothetical) value Defendants claim that consumers received from the Lifetime Estate Plan. Even if Defendants could establish that their services provided some value to consumers, it is "the fraud in the selling, not the value of the thing sold" that informs a restitution award. *FTC v. Figgie Int'l, Inc.*, 994 F.2d 595, 606 (9th Cir. 1993) (explaining that customers who purchase rhinestones sold as diamonds should get all of their money back, not only the difference between what they paid and a fair price for rhinestones because the seller's misrepresentations tainted the customers' purchasing decisions; if told the truth, perhaps they would not have purchased rhinestones at all). CLA sold the Lifetime Estate Plan, and ultimately gained access to seniors' living rooms

to sell annuities to them, only by misrepresenting probate law, trust law, federal law, and the relative advantages of estate-planning methods in Washington and creating a deceptive net impression that a revocable trust is necessary to protect assets and heirs in violation of the CPA; by creating a deceptive net impression regarding the nature of the in-home meetings included in the Plan and failing to adequately disclose those meetings would be conducted by insurance agents paid by commission in violation of the CPA; and by promising to gather information for the preparation of estate distribution documents in violation of the EDDA. Moreover, a restitution award cannot be reduced by any alleged value provided by in-home meetings when Defendants violated the EDDA at each meeting by offering to gather, and gathering information for the preparation of estate distribution documents.

47. Moreover, "the existence of some satisfied customers does not constitute a bar to liability or an award of restitution." *FTC v. Inc21.com Corp.,* 745 F. Supp.2d 975, 1011 (N.D. Cal. 2010) (emphasis in original).

48. CLA ESI received $2,565,626 in revenue from sales of the Lifetime Estate Plan (also referred at certain times during this trial as a "Service Package"). Ex. 454.

49. CLA USA received $3,597,287.93 in commissions for the sale of insurance products in Washington. Ex. 455. This figure does not include the $1,826,163.16 CLA USA agents received in commissions in Washington. *Id.*

50. "An award of prejudgment interest is appropriate where a party retains funds rightly belonging to

another party and thereby denies the party the use value of the money." *Arzola v. Name Intelligence, Inc.*, 188 Wn. App. 588, 595, 355 P.3d 286 (2015). Here, CLA's sales data and amounts are readily ascertainable. Ex. 456. Accordingly, the Court orders that CLA shall pay prejudgment interest on the restitution it provides at a rate of 12% per annum. *See Public Utility Dist. No. 2 of Pacific Co. v. Comcast of Washington IV, Inc.*, 184 Wn. App. 24, 80-81, 336 P.3d 65 (2014)

51. The Court orders Defendants to pay $2,565,626 in restitution to who purchased CLA's Lifetime Estate Plan (or Service Package) in Washington, plus prejudgment interest at a rate of 12% per annum. Defendants shall pay to each consumer who purchased a Lifetime Estate Plan the amount of revenue CLA ESI received from the sale plus prejudgment interest at a rate of 12% per annum.

52. The Court also orders Defendants to pay $3,597,287.93 in restitution to each consumer to whom they sold insurance products in Washington, plus prejudgment interest at a rate of 12% per annum. Defendants shall pay to each consumer who purchased such a product the total amount of commission CLA USA received for the sale plus prejudgment interest at the rate of 12% per annum.

53. In the event that Defendants are unsuccessful after diligent attempts to locate and compensate any consumer to whom they are required to pay restitution under this Order, the funds due to that consumer shall go to the State. Any such amount distributed to the State shall be used for future monitoring and enforcement of this Order, future enforcement of RCW 19.86 and RCW 19.295, or for any lawful purpose in the discharge of the Attorney General's duties at the sole discretion of the Attorney General.

2. Civil Penalties

a. Number of CPA Violations Subject to Penalties

54. The CPA mandates that "[e]very person who violates RCW 19.86.020 shall forfeit and pay a civil penalty of not more than two thousand dollars for each violation." RCW 19.86.140.

55. The CPA does not limit the possible number of violations to the number of aggrieved consumers; rather, each unfair or deceptive act is a separate violation. *Ralph Williams' North West Chrysler Plymouth, Inc.*, 87 Wn.2d 298, 316-17, 553 P.2d 423 (1976) ("We decline to follow the one-violation-per-consumer rule."); LA Investors, 2 Wn. App. 2d at 545-46 (holding that "[e]ach deceptive act is a separate violation").

56. The Court has previously determined that CLA engaged in "unfair and deceptive practices in its estate-planning seminars and one-on-one meetings with consumers by (a) misrepresenting probate law, trust law, federal law, and the relative advantages of estate-planning methods in Washington in its estate-planning seminars; and (b) creating a deceptive net impression that a revocable trust is necessary to protect assets and heirs." Dkt. No. 171.

57. The Court has now also determined that CLA's marketing of its Lifetime Estate Plan at its estate-planning seminars was unfair and deceptive, and violated the CPA. CLA deceptively promoted its Lifetime Estate Plan as a robust package of estate-planning services that included in-home meetings with CLA agents to review consumers' estate plans to ensure they were up to date, and failed to disclose in any meaningful way that the agents conducting the in-home meetings would be licensed insurance agents

working on commission who would use the meetings as opportunities to learn about seniors' finances and aggressively market annuities and insurance products to them. CLA's failure to adequately disclose these facts left consumers with the deceptive net impression that they were purchasing robust estate planning services, and not in-home visits from commission-motivated insurance agents.

58. Accordingly, CLA's CPA violations include: (1) its misrepresentations regarding probate law, trust law, federal law, and the relative advantages of estate-planning methods in Washington, and its creation of a deceptive net impression that a revocable trust is necessary to protect assets and heirs, at estate planning seminars which collectively were attended by 1,765 consumers since November 3, 2015; (2) its deceptive marketing of the Lifetime Estate Plan and creation of a deceptive net impression that consumers were purchasing robust estate planning services (rather than in-home visits from insurance agents) at estate planning seminars, which collectively were attended by 1,765 consumers since November 3, 2015.[4]

59. The Court has already found that CLA violated the EDDA at its estate planning seminars by (1) offering at estate-planning seminars to coordinate with consumers' referral attorneys; (2) gathering information for the preparation of estate distribution documents on Client Information Forms when consumers purchased a Lifetime Estate Plan; and (3) gathering information

[4] The State does not seek penalties for acts and practices that occurred prior to November 3, 2015, the date on which the parties entered a tolling agreement. Limiting penalties to conduct occurring after November 3, 2015 renders moot any argument that penalties should be reduced based on the timing of the State's lawsuit.

about changes needed to the client's estate documents on Change Forms for attorneys describing these changes. Dkt No. 171 (Order dated July 19, 2019).

60. The Court has now also determined that CLA also violated the EDDA by offering at estate-planning seminars to conduct regular review meetings to review consumers' estate distribution documents for needed changes if consumers purchased CLA's Lifetime Estate Plan, and by gathering such information at each review meeting with consumers who purchased the Plan.

61. Accordingly, CLA's EDDA violations include (1) its offers to gather information for the preparation of estate documents at its estate-planning seminars, which collectively were attended by 1,765 consumers since November 3, 2015; (2) each of the 210 instances in which CLA agents gathered information on the Client Information Forms that agents completed when CLA sold Lifetime Estate Plan since November 3, 2015; (3) each of the 94 instances in which CLA agents gathered information on Change Forms indicating to referral attorneys changes needed to client's estate documents since November 3, 2015; and (4) each of the 219 delivery meetings and 1,259 review meetings since November 3, 2015 at which CLA agents reviewed consumers' estate documents or financial information.

62. CLA distributed its workbook, which (1) contained the misrepresentations regarding probate law, trust law, federal law, and the relative advantages of estate-planning methods in Washington that violated the CPA, and created a deceptive net impression that a revocable trust is necessary to protect assets and heirs, also in violation of the CPA; (2) contained the deceptive marketing of the Lifetime Estate Plan that created a deceptive net impression that consumers

were purchasing robust estate planning services and not in-home visits from insurance agents; and (3) offered to gather information for estate distribution, to every seminar attendee.

63. CLA's seminar presenters further repeated the workbook's contents to every seminar attendee by following the workbook and a CLA script to guide their presentations.

64. CLA also offered to gather, or gathered, information for the preparation of estate distribution documents at each of the 1,478 delivery meetings and review meetings it conducted in Washington.

65. Accordingly, CLA violated the CPA the following number of times within the November 3, 2015 statute of limitations period:

Violation	Calculation Method	Total
Deceptive probate and trust representations	1 per seminar attendee	1,765
Offer to gather information for estate distribution at seminars	1 per seminar attendee	1,765
Deceptive Marketing of In-Home Meetings	1 per seminar attendee	1,765
Client Information Forms	1 per Lifetime Estate Plan sale	210
Delivery and review meetings	1 per meeting	1,478 (includes 94 instances when Change Forms were completed)

b. Amount Per Violation

66. The penalty amount for each CPA violation, and the factors to consider in making the determination, are within the Court's discretion. *Living Essentials*, 8 Wn. App. 2d at 17 ("While RCW 19.86.140 provides that a statutory penalty for violating the CPA is mandatory, it leaves the amount of the penalty and the factors to consider within the trial court's discretion.").

67. The CPA does not specify the factors to be considered in determining the size of a civil penalty, but elimination of the benefits of noncompliance with the law is an "essential element" of a penalty award, so that there is no incentive to violate the law. *U.S. Department of Justice v. Daniel Chapter One*, 89 F. Supp. 3d 132, 152-53 (D.D.C. 2015); *Living Essentials*, 8 Wn. App. 2d at 36 ("[N]o one should be permitted to profit from unfair and deceptive conduct."). "[T]he need to eliminate any benefits a defendant received from the violation[s] . . . is completely separate from any consumer redress or disgorgement ordered by the Court." *Daniel Chapter One*, 89 F. Supp. 3d at 152 (internal citations and quotation marks omitted). To have any deterrent effect, a penalty "must be large enough to be more than just an acceptable cost of doing business," and therefore "should be higher than the amount the defendants benefitted and the amount of any consumer redress award." *Id.* at 152-53.

68. In addition to deterrence, courts may consider factors such as a lack of good faith, public injury, ability to pay, and necessity of vindicating the government's authority when assessing penalties. *See, e.g., U.S. v. Reader's Digest Ass'n, Inc.*, 662 F.2d 955, 967 (3d Cir. 1981).

69. A penalty of four times the amount of restitution awarded is "clearly reasonable" under Washington law. *State v. WWJ Corp.*, 138 Wn.2d 595, 600, 980 P.2d 1257 (1999). When restitution is also awarded, Washington courts have commonly awarded penalties in the amount of two to five times the amount of restitution. *See, e.g., Mandatory Poster*, 199 Wn. App. at 513 ($793,540 penalty, $362,625 restitution); *LA Investor*s, 2 Wn. App. 2d at 530, 535 ($2,569,980 penalty, $862,855 restitution); *Ralph Williams*, 87 Wn.2d at 309 ($857,500 total penalties, $142,000 total restitution).

70. CLA's conduct warrants a significant penalty award. CLA did not act in good faith, it caused public injury, it has not demonstrated an inability to pay, and a significant penalty is necessary to deter further misconduct.

i. Lack of Good Faith

71. The Court finds that CLA did not act in good faith because its violations of the CPA and EDDA were not isolated instances or the result of occasional poor judgment, but represented a deliberate scheme to develop and exploit leads for the sale of annuities. CLA used scare tactics to instill fear in seniors that they would be left vulnerable and their families unprotected unless they purchased CLA's Lifetime Estate Plan and set up revocable living trusts, which in turn gave CLA agents access to their living rooms and their assets to aggressively market complex annuities.

72. CLA failed to provide any meaningful oversight for its agents, and ignored repeated complaints of agent misconduct, including churning allegations, templating allegations, and issues with falsified information on annuities sales applications. CLA was aware that its

Washington agents in particular were the subject of a disproportionately high number of complaints.

73. CLA USA's President admitted that "sadly I think the Executive Leadership (me included) SAY that we value behaviors/standards more than sales results but we really value SALES results first and handle behavior/culture issues reactively rather than proactively." Ex. 417 at CUSA 037270.

74. CLA USA represented itself as a "financial services" company, but the only financial services it provided was the sale of a narrow range of high-commission insurance products. The annuities CLA sold were incomprehensively complex, so consumers placed their full trust in CLA to have their best interests in mind. CLA took advantage of the trust relationship they established through ostensibly assisting consumers with their estate affairs in order to market annuities that, according to Plaintiff's expert, no fully informed consumer would ever purchase.

75. CLA was on notice of the EDDA's requirements no later than 2009, when it received a letter from attorney Caroline-Suissa Edmiston bringing the EDDA to the attention of CLA's executives and encouraging them to consider whether their practices were in compliance with the law, but CLA did not change any practices after receiving the letter. *See* Ex. 485.

76. CLA likewise ignored trust mill concerns of its own agent, Michael Kelly. *See* Ex.395

77. The Washington Supreme Court's holding in *WWJ* is particularly relevant here. In *WWJ*, 138 Wn.2d at 604-05, the Supreme Court considered the trust relationship that the defendant created with consumers as pertinent factor in determining that the maximum penalty of $2,000 per violation was

warranted. Here, as in *WWJ*, the Court finds that CLA's conduct abused the trust of seniors, a class of consumers who are particularly vulnerable to financial harm.

ii. Public Injury

78. Another factor courts have considered in awarding penalties is harm to the public. *Daniel Chapter One*, 89 F. Supp. 3d at 149-150. Injury to the public may be found when consumers have lost money due to the defendant's unfair and deceptive conduct. *Id.* at 151. Courts also find injury to the public when deceptive materials reach the public. *Id.*; *Reader's Digest*, 662 F.2d at 969. Neither consumer confusion nor actual deception is required, as the CPA is intended to prevent material having a capacity to deceive consumers from reaching the public. *See Reader's Digest*, 662 F.2d at 969.

79. This factor also weighs in favor of substantial civil penalties. CLA and its agents gained $7,989,077.09 in revenue in Washington from sales of Lifetime Estate Plan and the commissions it received from annuity sales. Consumers who purchased CLA's Lifetime Estate Plan paid money for the opportunity to have CLA insurance agents review their private asset information and aggressively sell them annuities at meetings the consumers believed were to review and update their estate plans. Moreover, the public was harmed each and every time CLA distributed its workbooks, which the Court has determined were deceptive, to consumers at its estate-planning seminars. CLA created a compensation system that incentivized aggressive sales, but exercised little oversight over its agents' sales practices. The annuities CLA sold Washington consumers at the culmination of the scheme were complex, opaque, and illiquid products that were

difficult for consumers to understand and that typically included significant surrender penalties and lengthy surrender periods.

iii. Ability to Pay

80. From 2013 through 2017, CLA ESI had gross national receipts or sales of $24,027,334. CLA ESI 30(b)(6) Dep. (Oct. 30, 2020). During that same time period, CLA USA collected $82,198,126 in gross national sales. CLA USA 30(b)(6) Dep. (Oct. 30, 2020). CLA collected $6,162,913.93 in net revenues in Washington. Exs. 454, 455. To the extent CLA's balance sheets reflect a loss, it is due to CLA paying over $39 million in "management fees" between 2013 and 2017 to a company that has the same ownership as CLA. *See* CLA ESI 30(b)(6) Dep. of Charles Loper III at 10:10-11: 20; *see generally* CLA ESI 30(b)(6) Dep. of Charles Loper III (Oct. 30, 2020); CLA USA 30(b)(6) Dep. of Charles Loper III (Oct. 30, 2020). CLA did present any evidence regarding its financial position in 2018, 2019, or 2020, and has not demonstrated an inability to pay a significant penalty.

iv. Total Penalties

81. Taking all of the above factors into consideration, the Court finds that a substantial penalty award is warranted to ensure that CLA does not profit from its numerous violations of Washington law, and to protect the public.

82. The Court awards penalties as follows:

	Number of Violations	Amount Per Violation	Total
Estate Planning Seminars:			
Probate/Trust Misrepresentations (CPA)	1,765	$667	$1,177,255
Deceptive Marketing of LEP & In-Home Meetings (CPA)	1,765	$667	$1,177,255
Offering to gather information for EDD (EDDA)	1,765	$666	$1,175,490
Sale of Lifetime Estate Plans:			
Client Information Forms (EDDA)	210	$2,000	$420,000
In-Home Meetings:			
In-Home Delivery Meetings (EDDA)	219	$2,000	$438,000
In-Home Review Meetings (EDDA)	1,259	$2,000	$2,158,000
TOTAL			$6,546,000

3. Injunctive Relief

83. The CPA empowers the Attorney General to bring an action "to restrain and prevent the doing of any act herein prohibited or declared to be unlawful." RCW 19.86.080.

84. The Court finds that injunctive terms are needed to ensure that CLA's violations do not reoccur.

85. Although CLA represents that it has largely ceased operating in Washington and Nationwide since this Court entered a preliminary injunction, Dkt. No. 83 (Order dated Aug. 24, 2018), "[v]oluntary cessation of allegedly illegal conduct does not moot the need for injunctive relief because there is still a likelihood of the illegal conduct recurring." *State v. Ralph Williams' North West Chrysler Plymouth, Inc.*, 82 Wn.2d 265, 272, 510 P.2d 233 (1973). "A heavier burden is placed on parties alleging abandonment of practices where the practices are discontinued subsequent, rather than prior, to institution of suit." *Id.* Here, CLA did not cease doing business in Washington until the State filed its lawsuit and the Court issued a preliminary injunction. Defendants' principals still engage in the marketing and sale of estate plans and insurance products in other states through Eagle Financial Group and Eagle Estate Services, Inc., demonstrating a potential for ongoing misconduct.

86. Accordingly, the Court hereby orders that Defendants and their successors, assigns, employees, contractors, representatives, officers, directors, principals, owners, and all others who are acting or have acted in concert or active participation with Defendants shall permanently engage in or refrain from engaging in the following acts and practices:

a. Defendants shall not engage in the following acts or practices without being authorized to practice law or without a statutory exemption:

i. Marketing estate distribution documents, as defined by RCW 19.295.010, in Washington or to Washington consumers;

ii. Providing individualized advice about a will, a trust, or an estate distribution document as defined

by RCW 19.295.010 in Washington or to Washington consumers;

iii. Gathering or offering to gather data, facts, figures, records, or other particulars about a specific person or persons for the preparation of an estate distribution document as defined by RCW 19.295.010 in Washington or with regard to Washington consumers; or

iv. Engaging in any other conduct in violation of RCW ch. 19.295.

b. Defendants shall not collect financial, asset, or estate information from any Washington consumer for use to develop or generate leads for sales of annuities, insurance, or any other financial product to consumers, or use such information collected by another person or entity to develop or generate such leads.

c. Defendants shall not make, directly or by implication, any material misrepresentations or omissions about Washington probate law, trust law, federal law, or the relative advantages of estate distribution mechanisms to consumers.

d. Defendants shall not attempt to dissuade any Washington consumer from consulting with a financial advisor, attorney, family member, or other advisor regarding estate planning.

e. Defendants shall not misrepresent the purpose of, nor deceptively market any meeting with Washington consumers or any meeting that takes place, including but not limited to delivery meetings, 90-day review meetings, annual review meetings, death settlement meetings, or any other meetings with Washington consumers or that take place in Washington.

f. Defendants shall not collect financial or asset information from any Washington consumer without clearly disclosing the reasons for the collection of such information and obtaining the consumer's express consent for each use of the consumer's data.

g. Defendants shall not attempt to sell annuities or any other insurance products to Washington consumers at any meeting that Defendants represent as being for any other purpose, including but not limited to estate planning or settlement.

h. Defendants shall not attempt to sell annuities or other insurance products to a Washington consumer at any meeting, in the consumer's home or elsewhere, without first taking the following steps:

i. At the time of scheduling a meeting with a Washington consumer, and again at least one week prior to the meeting if no response has been received, Defendants shall transmit a written notice to the consumer that clearly, conspicuously, and unambiguously explains the following:

1. If the consumer consents in writing, Defendants will market and/or discuss annuities and other insurance products at the meeting;

2. If the consumer does not consent in writing, Defendants will refrain from marketing or discussing annuities and other insurance products at the meeting;

3. The consumer is welcome to invite others to the meeting, including but not limited to family members, advisors, and financial planners;

4. The consumer may end the meeting at any time.

ii. The notice must contain the name, license number, mailing address and phone number of all persons who will attend the meeting. The notice must also contain a signature line on which the consumer may sign to indicate consent to having Defendants market and/or discuss annuities and other insurance products at the meeting.

iii. Defendants may contact a consumer to whom they have sent the notice but from whom they have not received written consent by phone to ask whether the consumer wishes to discuss annuities or other financial products during the meeting. During the call, Defendants must clearly and unambiguously provide the consumer oral notice of each item listed in paragraph (h)(i) and ask the consumer whether he or she wishes to sign the written notice.

iv. Defendants shall refrain from marketing or discussing annuities or other financial products during any meeting with a consumer who has not provided the written notice described in this paragraph.

i. Defendants shall use due diligence to ensure that each application for an insurance product it submits on behalf of a Washington consumer contains complete and accurate information about the consumer, including but not limited to the consumer's assets and financial information.

j. Defendants shall not misrepresent, directly or by implication or omission, to Washington consumers any material term of a sale, including but not limited to surrender periods, surrender penalties, income rider fees, and commissions that will be paid on the sale of any product.

k. Defendants shall provide clear, conspicuous and unambiguous notification in writing to

Washington consumers about each and every material term in any insurance products marketed to such consumers. Such notification shall be provided in addition to any information provided to the consumer in the insurance company's materials.

l. Defendants shall not provide investment advice to Washington consumers without being properly registered with the Washington Department of Financial Institutions, and shall not misrepresent their credentials to Washington consumers.

4. Costs and Fees

87. The CPA provides that "the prevailing party may, in the discretion of the court, recover the costs of said action including a reasonable attorney's fee." RCW 19.86.080(1). A plaintiff becomes a "prevailing party," for this purpose, "if the plaintiff has succeeded on any significant issue in litigation which achieved some of the benefit the parties sought in bringing suit." *State v. Living Essentials, LLC*, 8 Wn. App. 2d at 38.

88. In addition, "[c]entral to the calculation of an attorney fees award is the underlying purpose of the statute authorizing the attorney fees." *Id.* Applying that principle here, "[a]warding the State its fees and costs after a CPA action will encourage an active role in the enforcement of the CPA, places the substantial costs of these proceedings on the violators of the act, and will not drain the State's public funds." *Id.* at 38-39 (*quoting Ralph Williams*, 87 Wn.2d at 314-15).

89. The Court finds that the State is the prevailing party in this matter and CLA shall pay the State's costs and fees incurred in this matter. The State shall provide the Court and CLA its petition for costs and fees within twenty-one (21) days of the entry of these findings and conclusions.

DATED this 21st day of December, 2020.

Electronic signature appended
JUDGE MICHAEL R. SCOTT

APPENDIX D

Chapter 19.295 RCW
ESTATE DISTRIBUTION DOCUMENTS

RCW 19.295.005 Findings—Intent. The legislature finds the practice of using "living trusts" as a marketing tool by persons who are not authorized to practice law, who are not acting directly under the supervision of a person authorized to practice law, who are not a financial institution, or who are not properly credentialed and regulated professionals as specified under RCW 19.295.020 (5) and (6) for purposes of gathering information for the preparation of an estate distribution document to be a deceptive means of obtaining personal asset information and of developing and generating leads for sales to senior citizens. The legislature further finds that this practice endangers the financial security of consumers and may frustrate their estate planning objectives. Therefore, the legislature intends to prohibit the marketing of services related to preparation of estate distribution documents by persons who are not authorized to practice law or who are not a financial institution.

This chapter is not intended to limit consumers from obtaining legitimate estate planning documents, including "living trusts," from those authorized to practice law; but is intended to prohibit persons not licensed to engage in the practice of law from the unscrupulous practice of marketing legal documents as a means of targeting senior citizens for financial exploitation. [2009 c 113 § 1; 2007 c 67 § 1.]

RCW 19.295.010 Definitions. The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Estate distribution document" means any one or more of the following documents, instruments, or writings prepared, or intended to be prepared, for a specific person or as marketing materials for distribution to any person, other than documents, instruments, writings, or marketing materials relating to a payable on death account established under *RCW 30.22.040(9) or a transfer on death account established under chapter 21.35 RCW:

(a) Last will and testament or any writing, however designated, that is intended to have the same legal effect as a last will and testament, and any codicil thereto;

(b) Revocable and irrevocable inter vivos trusts and any instrument which purports to transfer any of the trustor's current and/or future interest in real or personal property thereto;

(c) Agreement that fixes the terms and provisions of the sale of a decedent's interest in any real or personal property at or following the date of the decedent's death.

(2) "Financial institution" means a bank holding company registered under federal law, a bank, trust company, mutual savings bank, savings bank, savings and loan association or credit union organized under state or federal law, or any affiliate, subsidiary, officer, or employee of a financial institution.

(3) "Gathering information for the preparation of an estate distribution document" means collecting data, facts, figures, records, and other particulars about a specific person or persons for the preparation of an estate distribution document, but does not include the collection of such information for clients in the customary and usual course of financial, tax, and associated

planning by a certificate holder or licensee regulated under chapter 18.04 RCW.

(4) "Market" or "marketing" includes every offer, contract, or agreement to prepare or gather information for the preparation of, or to provide, individualized advice about an estate distribution document.

(5) "Person" means any natural person, corporation, partnership, limited liability company, firm, or association. [2009 c 113 § 2; 2008 c 161 § 1; 2007 c 67 § 2.]

RCW 19.295.020 Marketing of estate distribution documents— Exemptions from chapter.

(1) Except as provided in subsection (2) of this section, it is unlawful for a person to market estate distribution documents, directly or indirectly, in or from this state unless the person is authorized to practice law in this state.

(2) A person employed by someone authorized to practice law in this state may gather information for, or assist in the preparation of, estate distribution documents as long as that person does not provide any legal advice.

(3) This chapter applies to any person who markets estate distribution documents in or from this state. Marketing occurs in this state, whether or not either party is then present in this state, if the offer originates in this state or is directed into this state or is received or accepted in this state.

(4) This chapter does not apply to any financial institution.

(5) This chapter does not apply to a certificate holder or licensee regulated under chapter 18.04 RCW for purposes of gathering information for the preparation of an estate distribution document.

(6) This chapter does not apply to an individual who is an enrolled agent enrolled to practice before the internal revenue service pursuant to Treasury Department Circular No. 230 for purposes of gathering information for the preparation of an estate distribution document. [2009 c 113 § 3; 2007 c 67 § 3.]

RCW 19.295.030 Violations—Application of consumer protection act. The legislature finds that the practices covered by this chapter are matters vitally affecting the public interest for the purpose of applying the consumer protection act, chapter 19.86 RCW. A violation of this chapter is not reasonable in relation to the development and preservation of business and is an unfair or deceptive act in trade or commerce and an unfair method of competition for purposes of applying the consumer protection act, chapter 19.86 RCW. [2007 c 67 § 4.]