BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

| | |
|---|---|
| In re<br><br>CHARLES NELSON BERRY, III<br><br>Lawyer Bar No (No. 8851) | Public No. 12#00011<br><br>FINDINGS OF FACT, CONCLUSIONS OF LAW AND HEARING OFFICER'S RECOMMENDATION |

Pursuant to Rule 10.13 of the Rules for Enforcement of Lawyer Conduct (ELC), a hearing was held before the undersigned Hearing Officer November 20-21, 2012. The Association was represented by Ms. Francesca D'Angelo. The Respondent was present and was represented by Mr. Kenneth S. Kagan. The parties were allowed to submit post hearing briefing on legal issues that arose during the hearing.

## I. FORMAL COMPLAINT

The Association charged Respondent with multiple violations of the Rules of Professional Responsibility arising from his issuance of a subpoena duces tecum for banking records following the termination of a dissolution action and after the appeal period had expired. The Association charged two counts of misconduct:

**COUNT 1** alleged that Respondent, by issuing a subpoena to Prevail Credit Union for



FITZER LAW LLC
950 Pacific Ave. Suite 400
Tacoma, WA 98402
(253) 327-1905

075

all documents pertaining to the accounts of Scott Anacker, after entry of the final decree violated RPC 4.4(a) and/or RPC 8.4 (d);

**Count 2** alleged that Respondent violated RPC 8.4(c) by misrepresenting to Prevail Credit Union that the subpoena was issued under the authority of an active case.

## II. HEARING & PROCEDURAL MATTERS

### A. Hearing

The hearing in this matter began on November 20, 2012 and concluded on November 21, 2012. Witnesses were sworn and presented testimony. Exhibits were admitted into evidence.

### B. Expert Testimony

Respondent identified Professor David Boerner as an expert on the topic of the correct interpretation of the Rules of Professional Responsibility. The Association moved to exclude the testimony, arguing that Profession Boerner's testimony went to the ultimate issue of law to be determined by the Hearing Officer.

The motion to exclude Profession Boerner's testimony was denied and he was permitted to testify. That testimony was of limited use in these proceedings. Professor Boerner did not have any specific knowledge of the laws relating to domestic relations cases, had not practiced in the area, and offered only general conclusions based on his discussions with family law practitioners. He admitted, however, that he had not discussed the specific issues pertinent to this hearing with family law practitioners. Finally, his legal conclusions regarding family law matters appear to conflict with the applicable statutory framework and current state of the law.

While his testimony was not as helpful as an expert in family law might have been, the



FITZER LAW LLC
950 Pacific Ave. Suite 400
Tacoma, WA 98402
(253) 327-1905

Hearing Officer did consider Professor Boerner' testimony in resolving certain issues regarding the recommended sanctions.

Having considered the evidence and argument of counsel, the Hearing Officer makes the following Findings of Fact, Conclusions of Law, and Recommendations which were proven by a clear preponderance of the evidence. **ELC 10.4 (b).**

## III. FINDINGS OF FACT

1. Respondent Charles Nelson Berry, III was admitted to the practice of law in the State of Washington on May 15, 1979.

2. On April 1, 1998, Respondent stipulated to having violated RPC 8.4(d) by engaging in conduct that was prejudicial to the administration of justice.

3. On May 18, 1998, the Disciplinary Board Approved the Stipulation and the agreed upon sanction of Reprimand.

4. For the last 25 years, 40-50% of Respondent's practice involved family law or domestic matters.

5. Respondent's practice averages three to four family law trials per year.

6. In 25 years of practice, Respondent has not had a case where there were undisclosed assets.

7. In October 2009, Respondent filed a dissolution action on behalf of Diane Anacker against Scott Anacker in King County Superior Court. Respondent issued no formal discovery requests on behalf of his client.

8. This matter was originally scheduled for trial in October 2010. Scott Anacker was initially represented by Michael Bugni. During the pendency of the case, Diane Anacker



FITZER LAW LLC
950 Pacific Ave. Suite 400
Tacoma, WA 98402
(253) 327-1905

accused Scott Anacker of concealing and/or mishandling assets. Despite this accusation, Respondent submitted no formal requests for production, interrogatories or requests for admissions.

9. In the fall of 2010, lawyer Lori Guevara replaced Mr. Bugni. At that time the discovery period had passed. Neither party had conducted formal discovery. The stated reason for the failure to conduct formal discovery was to save both parties' fees and costs.

10. Trial in the Anacker dissolution matter was held before the Honorable William L. Downing in King County Superior court on November 1 and 2, 2010. Both parties were represented by their attorneys.

11. The issues before the court were the appropriate division of assets and the appropriateness of maintenance for Diane Anacker.

12. A major issue at trial was whether or not Scott Anacker had hidden funds. Respondent cross-examined Mr. Anacker at length regarding the issue, and also questioned his client on direct on the same topic.

13. On November 2, 2010, during his closing argument to the court, Respondent asked that the court order the husband to produce statements from a specific bank account. The trial judge informed counsel that the time for discovery motions would have been before trial "not at the end of trial."

14. Respondent argued in response to that statement that "the court has a duty to administer all assets of the party. And it's clear that there are assets in the account that. . . haven't been disclosed."

15. The court responded by informing counsel that he could ask for inferences to be drawn, but "it's kind of tardy for disclosure."



FITZER LAW LLC
950 Pacific Ave. Suite 400
Tacoma, WA 98402
(253) 327-1905

16. The trial judge provided an oral ruling on the case on November 2, 2010.

17. The parties could not agree on a joint submission for Findings of Fact, Conclusions of Law and the Decree. Both parties submitted their own proposed pleadings and objections to the proposals of opposing counsel.

18. Respondent filed objections on behalf of his client, Diane Anacker, which contained the following language:

> Also, in particular, "Bank accounts in his name" should be limited to those accounts which the Respondent [husband] identified at trial. The evidence presented at trial showed that there is a substantial likelihood that the Respondent has bank accounts in his name where he is secreting money which he did not identify at trial. See also, paragraph 3.15 of the Petitioner's Proposed Decree of Dissolution.
>
> Exhibit 6 at p. 3.

19. Respondent also made the following argument in favor of his proposed mechanism for dividing undisclosed property:

> Paragraph 3.15 Given the clear inferences at trial that the Respondent did not fully disclose all of his bank accounts, and that he may be secreting additional property, the Petitioner proposes that the following language be included in the final Decree of Dissolution:
>
> > If any property worth more that $500 was not disclosed in the exhibits presented at trial is disclosed within thirty (30) days of the entry of this Decree, the value of that previously undisclosed property shall be divided 50/50. If any property worth more than $500 was not disclosed in the exhibits presented at trial is **not** disclosed within thirty (30) days of the entry of this Decree, that property, or its value, shall be awarded to the party to whom that property should have been disclosed.
> >
> > Exhibit 6, page 4. [Emphasis in original.]

20. Judge Downing adopted the Respondent's Findings of Fact, Conclusions of Law and Decree but made specific modifications thereto which rejected the arguments made in



FITZER LAW LLC
950 Pacific Ave. Suite 400
Tacoma, WA 98402
(253) 327-1905

Exhibit 6 for leaving open the issue relating to Scott Anacker's bank accounts.

21. On page 2 of Exhibit B to the Findings of Fact & Conclusions of Law, Judge Downing struck out the "phrase identified at trial" from the award of bank accounts to Scott Anacker. This same phrase was removed from Exhibit B to the Final Decree of Dissolution.

22. The effect of removing that phrase was to award to Scott Anacker all bank accounts in his name as of the date of entry of the decree regardless of whether they had been disclosed to the court at trial or not.

23. This conclusion is supported not only by the express terms of the documents but also by the deposition testimony of the trial judge who was specifically asked about this issue. He testified:

Q: Now, did that award Mr. Anacker's bank accounts to him without qualification, then? Is that the effect of that strikeout?

A: It appears to. If there's (sic) account that he has in a bank that is solely in his name, then it would be awarded to him.

Q: Was there anything in the decree that left open the issue of property distribution as to bank accounts?

A: There would not appear to be. Downing Deposition, p. 29; lines 1-10.

24. Judge Downing also struck out paragraph 3.15 of the Proposed Decree which would have provided a procedure for the division of undisclosed property.

25. The Findings of Fact, Conclusion of Law and Decree of Dissolution were entered on December 21, 2010. No appeal was taken therefrom. The trial court's division of the assets, including the award of all bank accounts in Scott Anacker's name to Scott Anacker, therefore became final and non-reviewable except pursuant to the terms of CR 60 on January 20, 2011.

26. As of the date that the Decree became final, there was no longer a case pending



FITZER LAW LLC
950 Pacific Ave. Suite 400
Tacoma, WA 98402
(253) 327-1905

in King County Superior Court pertaining to the Anacker dissolution.

27. As of the date that the Decree became final, Scott Anacker was awarded all bank accounts solely in name without qualification. Neither Diane Anacker nor Respondent had the right to access those accounts without seeking court permission.

28. Washington's statutes treat the issues of maintenance and child custody differently than the question of property divisions. As to property divisions, the parties to a dissolution action each have a strong interest in the finality of the property division which can only be overcome by resort to the trial court through properly supported motion practice.

29. In February 2011, Respondent learned from his client that Scott Anacker had paid his maintenance obligation with a check drawn on an account from Prevail Credit Union. This account had not appeared on materials provided during the informal discovery process and was not recognized by Respondent or his client.

30. Because the trial judge had disposed of all bank accounts in Scott Anacker's name, whether disclosed or not, the Prevail Credit Union Account was not, and could not be, an "un-administered asset."

31. Respondent did not contact the attorney for Scott Anacker to inquire about the Prevail Credit Union account.

32. On March 4, 2011, Respondent issued a subpoena to the Prevail Credit Union with a cover letter enclosing a Notice of Records Deposition and Subpoena Duces Tecum commanding the production of "All documents, including statements and records pertaining to all accounts being the name Scott L. Anacker." The subpoena also included Scott Anacker's date of birth.

33. The March 4, 2011 cover letter indicated that if Prevail Credit Union produced



FITZER LAW LLC
950 Pacific Ave. Suite 400
Tacoma, WA 98402
(253) 327-1905

the requested documents no later than March 21, 2011, then a personal appearance at the deposition set for March 22, 2011 would not be required.

34. The Respondent's subpoena duces tecum was issued under King County Superior Court Cause number 09-3-06670-5 SEA, the same cause number used for the dissolution matter between Scott and Diane Anacker.

35. On March 4, 2011, there was no active, pending case under this cause number.

36. Respondent did not seek court permission to issue a subpoena, nor did he seek to reopen the final decree pursuant to **CR 60** as required by **RCW 26.09.170 (1)**.

37. By issuing a subpoena pursuant to the authority of **CR 45**, an attorney affirmatively represents that an active, pending matter exists under that cause number.

38. Respondent intended his subpoena to Prevail Credit Union to be an affirmative representation that the Respondent had the legal authority to issue a subpoena on that date.

39. Respondent did not have the legal authority to issue a subpoena on March 4, 2011, as there was no matter pending pursuant to the cause number he provided.

40. The issuance of a subpoena duces tecum to provide documents by a certain date does not provide the same protection to the opposing party as does a motion to reopen or to permit discovery. A subpoena for financial records [1]is a unilateral act by an attorney upon which the recipient of subpoena duces tecum may rely to produce the documents at any time before the deadline without notice to the affected party.

41. In contrast, when a motion is made to either reopen or to permit discovery, a trial court, not the attorney, makes the decision as to whether the rights of the opposing party will be

[1] In contrast, a subpoena for medical records requires a specific waiting period before the documents are produced in order to allow the affected party an opportunity to bring the matter before the court. See RCW



FITZER LAW LLC
950 Pacific Ave. Suite 400
Tacoma, WA 98402
(253) 327-1905

affected.

42. An attorney issuing a subpoena to produce documents has a specific duty to ensure that he or she has authority to issue that subpoena.

43. Individuals have a privacy interest in their personal banking and financial interests. Absent emergent situations, not even law enforcement officers can obtain banking records without an order of the court.

44. There is no evidence that Respondent took steps to determine whether he actually had authority to issue a subpoena. There is no evidence Respondent researched the issue or consulted other attorneys. By failing to determine whether he had the legal authority to issue a subpoena after the decree dividing the assets became final, the Respondent acted negligently.

45. Respondent provided a copy of the subpoena duces tecum to the attorney for Scott Anacker by mailing the documents on March 4, 2011. Ms. Guevara received the documents on March 7, 2011, when she was in trial on another matter.

46. Ms. Guevara attempted to contact the Respondent on March 10, 2011 at least once by telephone. She left an urgent message for him to return her call.

47. Respondent testified that he inquired of his office staff regarding whether or not a call had been received and could not find that one had. This hearsay testimony was not objected to by the Association. However, this Hearing Officer did not find Respondent's testimony to be credible on this matter given his failure to respond to the letter referred to below.

48. Ms. Guevara sent a letter (via email and U.S. mail) informing the Respondent that the Anacker matter had been concluded, that there was no pending matter before the court,



FITZER LAW LLC
950 Pacific Ave. Suite 400
Tacoma, WA 98402
(253) 327-1905

and therefore the subpoena was improper. The letter specifically referred to her telephone call of March 10, 2011.

49. The letter requested that the Respondent respond by March 15, 2011.

50. Respondent did not call Ms. Guevara in response to her letter nor did he attempt to address the concerns she expressed in her letter to him.

51. This officer did not find Respondent's explanation for this failure to respond to Ms. Guevara credible. Confronted with a request for a response and an assertion that there had been prior attempts at direct communication, Respondent's failure to respond to Ms. Guevara's letter was not reasonable.

52. Ms. Guevara was leaving town and was unavailable to file the motion to quash. While her letter of March 14, 2011 threatened she would do so, and would request terms, Ms. Guevara was not in a position to file or attend a motion to quash. It was her intent to use the threat to force the Respondent to withdraw the subpoena.

53. Mr. Anacker incurred substantial liabilities in litigating the dissolution action. His monthly income was also reduced by the trial court's decision to grant his ex-wife $1750 a month in maintenance for a period of five years. He was therefore not in a financial position to expend more funds on the matter.

54. Ms. Guevara testified that she would have charged a retainer of $7500 to sort out the issues relating to the subpoena. Respondent's assertion that Mr. Anacker did have available funds is rejected. The testimony established that he had incurred $20,000 in fees in the initial dissolution and that he had borrowed the money to fund that litigation. Mr. Anacker testified further that he had set a goal of paying off the loan at $1,000 per month and had not paid it off at the time of these events.



FITZER LAW LLC
950 Pacific Ave. Suite 400
Tacoma, WA 98402
(253) 327-1905

55. Respondent did not rescind the subpoena duces tecum.

56. Due to out of town commitments Ms. Guevara did not file a motion to quash.

57. Mr. Anacker contacted Prevail Credit Union on the day before the deposition date. By the time he contacted his credit union, the documents had already been sent to the Respondent.

58. Respondent received Scott Anacker's banking records with Prevail Credit Union prior to the deposition date. Those records revealed that Scott Anacker had set up the account after the dissolution was final.

59. Respondent did not provide a copy of the records he obtained to either Ms. Guevara or Mr. Anacker.

60. By issuing a subpoena duces tecum representing that he had a legal right to Scott Anacker's bank records at Prevail Credit Union when he did not, the Respondent violated the grievant's legal right to maintain the privacy of his financial records post decree.

61. By issuing a subpoena duces tecum after the property division was final without permission of a court, the Respondent violated the grievant's legal interest in finality of the trial court's Decree of Dissolution.

62. The Respondent knowingly issued the subpoena duces tecum for Scott Anacker's Prevail Credit Union financial records even though the trial judge had specifically awarded all bank accounts to Scott Anacker.

63. The Respondent acted negligently in believing that he had the legal authority to issue subpoenas duces tecum following the entry of a final decree dividing the assets of the



FITZER LAW LLC
950 Pacific Ave. Suite 400
Tacoma, WA 98402
(253) 327-1905

parties to a dissolution.[2]

## IV. CONCLUSIONS OF LAW REGARDING CHARGED VIOLATIONS

Based on the foregoing Findings of Fact, the Hearing Officer makes the following conclusions of law:

**Count 1**: Count one alleges the Respondent violated **RPC 4.4(a)** and **RPC 8.4(c)** after the Court had specifically denied his motion to conduct post-trial discovery of Mr. Anacker's bank accounts, and had specifically rejected language in Respondent's Proposed Findings of Fact/Conclusions of Law that sought to leave open the possibility of awarding property discovered after the final decree.

**RPC 4.4(a)** states:

**RPC 4.4(a) Respect for the Rights of Third Persons**

> **(a)** In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

There is insufficient evidence to establish, by a clear preponderance, that the Respondent used the subpoena for no other substantial purpose "than to embarrass, delay or burden" Scott Anacker.

The more troubling issue is whether the method Respondent used, the issuance of a subpoena post decree, violated the legal rights of Scott Anacker. Analysis of that issue has three facets: 1) Whether the Respondent had knowledge that the court had

---

[2] This Officer is specifically distinguishing between the mental state the Respondent possessed regarding the distribution of bank accounts and his knowledge of his legal authority to issue subpoenas post dissolution decree generally. As described below, because of the arguments Respondent repeatedly advanced in his attempt to get the court to agree that the issue of undisclosed bank accounts remained open; Respondent cannot credibly maintain that he did not know the issue had been resolved against his client. In contrast, it is plausible that the Respondent insufficiently understood civil procedure and the finality of decrees that he could have made a mistake in this area. That conclusion did not relieve Respondent of his duty to inquire further, however, as to whether he had the legal authority to issue a subpoena. The failure to inquire forms the basis of the negligence finding.



FITZER LAW LLC
950 Pacific Ave. Suite 400
Tacoma, WA 98402
(253) 327-1905

definitively determined ownership of bank accounts in Scott Anacker's name; 2) Whether a subpoena regarding property issues can validly be issued after a decree becomes final; and 3) Whether receipt of the documents violated Scott Anacker's legal rights.

Respondent argues, in support of his position that he did not violate RPC 4.4(a), dissolution actions differ from other cases in that there is always jurisdiction to address issues that may arise post-trial. Specifically to this case the Respondent argues that the court had jurisdiction to deal with non-disclosed bank accounts. He asserts further that Judge Downing did not make a final allocation of all bank accounts and that the modifications of the Decree and Proposed Findings pertained to only the account discussed during closing. From that, Respondent reasons that his subpoena was a valid mechanism for determining whether or not Scott Anacker had failed to disclose a bank account prior to trial. He concludes therefore that he did not use a means of obtaining evidence that violated Mr. Anacker's legal rights.

These arguments are not persuasive. Here, the trial judge made a specific ruling regarding bank accounts. Respondent argued in favor of leaving the question of ownership open by advocating--repeatedly--for language which would have restricted the disposition of assets to only those bank accounts identified at trial. The trial court rejected these arguments.

The exhibits clearly establish this chain of events. Exhibit B to the FOF/COL and the Decree awarded to Scott Anacker any bank account in his name on the day the decree was entered.[3] That finding precludes the Respondent's analysis that if an account was undisclosed, it was un-administered property subject to post-decree litigation.

[3] Obviously any account established after the Decree was entered would also be Scott Anacker's separate property and not subject to the jurisdiction of the court.



FITZER LAW LLC
950 Pacific Ave. Suite 400
Tacoma, WA 98402
(253) 327-1905

There was no lack of clarity on this issue. Respondent made a motion[4] for discovery during his closing argument. Exhibit 3. Judge Downing responded by informing Respondent that the discovery should have taken place months before. Respondent then argued to the court that it "has a duty to administer all of the assets of the party. And it's clear that there are assets in the account that haven't been disclosed." Judge Downing responded by offering Respondent the ability to ask that inferences been drawn from that fact, but stated "it's kind of tardy to ask for disclosure." ***Id.***

Respondent argues that this passage relates only to the specific account he was discussing at the time. This argument fails because the Respondent himself broadened the application of the decree when he filed "Petitioner's Objections to Respondent's Proposed Final Orders." As outlined in Respondent's own argument in support of the proposed language, his proposal would have limited the award of bank accounts in Mr. Anacker's name to those that had been identified at trial. Exhibit 6, page 3. Judge Downing specifically rejected that language, and by inference, Respondent's argument that the court should leave open the question of ownership of undisclosed accounts.

This conclusion is consistent with Judge Downing's deposition testimony concerning the effect of the current language in the decree. Downing Deposition at 29, lines 1-10. It is also consistent with the plain language of the Decree and Findings of Fact and Conclusions of Law that were entered. Association Exhibit 7, Findings of Fact and Conclusions of law (property Awarded to Scott Anacker in exhibit B); Association Exhibit 8 Final Decree (property awarded to Scott Anacker in exhibit B.)

[4] Respondent denies that the request for discovery contained in Exhibit 3 is a "motion" apparently because he did not file any pleadings associated with it. That position ignores the fact that oral motions are frequently made during trial or hearings. At the close of the Association's case, for instance,



FITZER LAW LLC
950 Pacific Ave. Suite 400
Tacoma, WA 98402
(253) 327-1905

The conclusion Respondent and Diane Anacker had no right to obtain information regarding Scott Anacker's accounts disposes of the issue of whether Mr. Anacker's legal rights were violated. They were. Scott Anacker had a right to maintain the privacy of his financial accounts after the decree became final. Respondent, on behalf of his client, invaded Mr. Anacker's privacy rights and his right to rely on the finality of the decree.

This conclusion does not necessarily dispose of the question of whether RPC 4.4(a) was violated. A second question arises as to whether the method, use of a subpoena, was improper. Respondent and his expert, take the position that an improperly issued subpoena does not rise to the level of an ethical violation. To support this position they point to the fact the subpoena process includes a method of challenging the validity of the subpoena. They assert that the disclosure would not have taken place if Ms. Guevara had brought a motion to quash, notified Prevail Credit Union that there was an objection, or simply informed Respondent that the account had been opened after the date of the decree, or provided him with the signature card.

These arguments are unpersuasive if the Respondent had no right to issue a subpoena in the first place. This Officer concludes he did not. First, as discussed above, the issue of ownership of bank accounts in Scott Anacker's name had been definitively resolved by the trial judge as part of the dissolution proceeding. Given the fact the trial court repeatedly rejected the Respondent's arguments in favor of holding the issue open, it was not reasonable for him to conclude he had a right to seek this information.

Second, by its express terms, CR 45 requires that an action be "pending" at the time the subpoena is issued. There was no "pending" matter on March 4, 2011 under the case name and number used on the subpoena.

---

Respondent's Counsel moved for dismissal of the case, arguing that the Association had not met their burden. That motion was denied.



FITZER LAW LLC
950 Pacific Ave. Suite 400
Tacoma, WA 98402
(253) 327-1905

Respondent and his expert argue against this position by claiming that dissolution matters are different and that the court has continuing jurisdiction. **RCW 26.09.170,**[5] however, distinguishes between modifications for maintenance and child support and those involving the disposition of property. **RCW 26.090.170(1)** states in pertinent part: "The provisions as to property disposition may not be revoked or modified, unless the court finds the existence of conditions that justify the reopening of a judgment under the laws of this state." This language requires, at a minimum, that the Respondent seek court permission to conduct discovery post decree. It does not allow him to unilaterally issue a subpoena after the decree became final.

Respondent's attempt to equate the subpoena with a motion is also rejected. The former is a unilateral, self-executing document upon which the bank was entitled to rely. The latter is a request to the court for permission to take further action. Until the court grants that permission, the status quo is frozen. The practical impact of that distinction is seen in the present case. If a motion had been filed, the bank records would not have been disclosed to the Respondent until the trial court considered the motion. The trial court could have denied that motion even if there were no response by Ms. Guevara.[6] A subpoena, on the other hand, is a unilateral act upon which the recipient is entitled to rely upon in disclosing the records.

The conclusion that a motion rather than a subpoena was required is further supported by a case cited by Respondent in his post-hearing brief, ***Farmer v. Farmer,*** 172 Wn.2d 616, 625 (2011), wherein the party seeking production first asked the court for an order that the information needed to support her position be produced.

---

[5] Respondent's expert was unfamiliar with the specific statutes governing dissolution matters. That fact significantly undercut the value of his testimony.

[6] There is also evidence that at least one reason Respondent chose to use a subpoena rather than bringing a motion was a desire to avoid a potential award of attorneys' fees and costs, the threat of which the trial court had clearly signaled in another section of the decree.



FITZER LAW LLC
950 Pacific Ave. Suite 400
Tacoma, WA 98402
(253) 327-1905

Finally, this Officer rejects the Respondent's attempts to shift the blame for what occurred in this case onto either Ms. Guevara or Mr. Anacker. If the issuance of the subpoena was unlawful, the wrongful conduct occurred on the date that it was issued. Anything that occurred after that date goes to mitigation of the harm, not the existence of a breach of the ethical duty involved in the issuance of the subpoena. In resolving that issue, it should be noted that the Respondent's argument that Mr. Anacker and/or Ms. Guevara could have prevented the disclosure by simply filing an objection pursuant to CR 45 (c) is a misinterpretation of that rule. The cited provision allows the person who is commanded to produce documents the right to lodge an objection. In this case, that party was the Prevail Credit Union. While Mr. Anacker could have asked for Prevail to object, whether Prevail would have honored such a request made by Mr. Anacker is pure speculation. In light of Mr. Anacker's testimony that Prevail refused to provide him with the records they had provided to Respondent, it is not at all clear that Prevail would have honored the request to object to the subpoena.

Because Respondent issued a subpoena without authority to do so and obtained evidence which violated Mr. Anacker's legal rights, this Officer concludes that Respondent violated RPC 4.4 (a).

The Association also alleged a violation of RPC 8.4 (d). That section provides that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial to the administration of justice."

The Association cites ***In re Curran***, 115 Wn.2d 747, 766, 801 P. 2d 962 (1990) for the proposition that conduct prejudicial to the administration of justice extends to violations of practice norms and physical interference with the administration of justice. Association Brief at 7. Although the case stands for the proposition cited, the following additional language from



FITZER LAW LLC
950 Pacific Ave. Suite 400
Tacoma, WA 98402
(253) 327-1905

this case is determinative of the issue here. Citing Prof. G. Hazard, the court noted: "Professor Hazard, a leading authority on legal ethics, has stated that the rule against conduct prejudicial to the administration of justice should be construed to include only clear violations of accepted practice norms." *In re Curran,* 115 Wn.2d at 765. [Emphasis added.] Given the testimony of Prof. Boerner, this Officer finds that the Association has failed to prove, by a clear preponderance of evidence, that the Respondent's conduct was a "clear violation of accepted practice norms."

**Count 2:** Count two alleged a violation of **RPC 8.4 (c)** which prohibits a lawyer from engaging in conduct "involving dishonesty, fraud, deceit or misrepresentation." Pursuant to the rule of sui generis, this officer understands the term "misrepresentation" as used in this rule to include an intentional misrepresentation. Because this Officer concludes the Respondent acted negligently in believing he had authority to issue subpoenas post-decree, this Officer concludes the evidence on this count does not meet the clear preponderance standard. It should be noted that on both these matters, the evidence did rise to the level of preponderance of the evidence. Good arguments can be made that the higher standard was met. Nonetheless, consistent with the fact that doubts should be resolved in favor of the Respondent, this Officer concludes the higher evidentiary standard required by **ELC 10.4 (b)** has not been met. Count two is hereby dismissed.

## V. PRESUMPTIVE SANCTIONS

Determination of the appropriate sanction involves a two-step process applying ABA Standards for Imposing Lawyer Sanctions. ***In re Anschell***, 149 Wn. 2d 484, 69 P.3rd 844 (2003). The first step is to determine the presumptive sanction, considering the ethical duty violated, the lawyer's mental state, and the extent of the harm caused by the misconduct. ABA Std. 3; ***In re Whitt***, 149 Wn. 2d 707, 717, 72 P.3rd 173 (2003). The second step in the process is



FITZER LAW LLC
950 Pacific Ave. Suite 400
Tacoma, WA 98402
(253) 327-1905

to consider whether aggravating or mitigating factors should alter the presumptive sanction. ***In re Johnson***, 118 Wn. 2d 693, 701, 826 P.2d 186 (1992).

**COUNT 1** is the only count upon which this Hearing Officer finds misconduct. Violation of **RPC 4.4 (a)** implicates Respondent's duty to maintain the integrity of the legal process. **ABA Standard 6.2** applies to this count. **Standard 6.2** provides:

> **6.2 ABUSE OF LEGAL PROCESS**
>
> Absent aggravating or mitigating factors, upon application of the factors set out in Standard 3.0, the following sanctions are generally appropriate in cases involving failure to expedite litigation or bring a meritorious claim, or failure to obey any obligation under the rules of a tribunal, except for an open refusal based on an assertion that no valid obligation exists:
>
> **6.21** Disbarment is generally appropriate when a lawyer knowingly violates a court order or rule with the intent to obtain a benefit for the lawyer or another, and causes serious injury or potentially serious injury to a party or cause serious or potentially serious interference with a legal proceeding.
>
> **6.22** Suspension is generally appropriate when a lawyer knows that he or she is violating a court order or rule, and causes injury or potential injury to a client or a party, or cause interference or potential interference with a legal proceeding.
>
> **6.23** Reprimand is generally appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury of potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.
>
> **6.24** Admonition is generally appropriate when a lawyer engages in an isolated instance of negligence in complying with a court order or rule, and causes little or no actual or potential injury to a party or cause little or no actual or potential interference with a legal proceeding.

This officer concludes that the Respondent acted negligently in issuing the subpoena. The presumptive sanction is thus Reprimand.

## VI. AGGRAVATING CIRCUMSTANCES

Aggravating factors or circumstances are any considerations that may justify an increase



FITZER LAW LLC
950 Pacific Ave. Suite 400
Tacoma, WA 98402
(253) 327-1905

in the degree of discipline to be imposed. These factors apply to Respondent's conduct.

**ABA Std 9.22 (a) Prior Disciplinary Offenses.** Respondent stipulated to a Reprimand in 1998. The remoteness of that prior sanction weighs against this factor being given significant weight.

**ABA Std 9.22 (i) Substantial Experience in the Practice of Law.**

Respondent was first admitted to practice in May 1979. Consequently, at the time of the events in question, Respondent had been practicing law for almost 32 years. Our Supreme Court has applied this aggravator to lawyers with much less experience. ***See In Re the Disciplinary Proceeding of Ferguson***, 170 Wn. 2d 246 P.3rd 1236 (2011). [Aggravator applied to attorney with 11 years general practice experience.]

## VII. MITIGATING CIRCUMSTANCES

The following mitigating factors apply to this case:

**ABA Std. 9.32**

**(b) Absence of a dishonest or selfish motive;**

Respondent alleges, and the Association has not negated the proposition that Respondent was acting on behalf of his client in order to obtain needed information. Although the potential exists that the Respondent intentionally chose to use the subpoena duces tecum instead of bringing a motion in order to avoid the potential for attorneys' fees, there is insufficient evidence to substantiate that conclusion.

**(m) Remoteness of prior offenses.**

As noted above, the prior discipline occurred in 1998, 13 years before the conduct alleged here.



FITZER LAW LLC
950 Pacific Ave. Suite 400
Tacoma, WA 98402
(253) 327-1905

## VIII. RECOMMENDATION

This case presents a close question on the issue of whether the Respondent acted knowingly or negligently in violating **RPC 4.4(a)**. This officer was also troubled by the Respondent's personal attacks on Ms. Guevara and Mr. Anacker. Nonetheless, given the burden of proof required in these cases, the question has been resolved in Respondent's favor. The existence of aggravating factors, including Respondent's significant experience in the practice of law, and the fact that he has been reprimanded previously weigh in favor of some additional sanction other than a simple Reprimand.

This Officer recommends that Respondent be directed to cure the defects in his understanding of the Civil and Ethical Rules by attending at 15 hours of CLE devoted to Civil Procedure/Litigation and Ethics. These 15 hours should be in addition to those currently required to fulfill Respondent's mandatory educational requirements. Respondent should also be required to write a Letter of Apology to Scott Anacker. Costs associated with this proceeding should also be paid by Respondent.

As noted above, Count two should be dismissed as there is no finding of misconduct pertaining to this count.

DATED this 5th day of February 2013

Bertha Baranko Fitzer,
Hearing Officer

CERTIFICATE OF SERVICE

I certify that I caused a copy of the FOF, COL & HO's Recommendation to be delivered to the Office of Disciplinary Counsel and to be mailed to Kenneth Kagan, Respondent/Respondent's Counsel at 701 5th Ave #3600 Seattle, WA 98104 by Certified/first class mail, postage prepaid on the 5th day of February, 2013.

Clerk/Counsel to the Disciplinary Board



FITZER LAW LLC
950 Pacific Ave. Suite 400
Tacoma, WA 98402
(253) 327-1905