

FILED

FEB 06 2013

DISCIPLINARY BOARD

BEFORE THE  
DISCIPLINARY BOARD  
OF THE  
WASHINGTON STATE BAR ASSOCIATION

In re

CHARLES NELSON BERRY, III

Lawyer Bar No (No. 8851)

Public No. 12#00011

**AMENDED**

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:

1           **COUNT 1** alleged that Respondent, by issuing a subpoena to Prevail Credit Union for  
2 all documents pertaining to the accounts of Scott Anacker, after entry of the final decree  
3 violated **RPC 4.4(a)** and/or **RPC 8.4 (d)**;

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

## 6 7                                   **II. HEARING & PROCEDURAL MATTERS**

### 8           **A. Hearing**

9           The hearing in this matter began on November 20, 2012 and concluded on November  
10 21, 2012. Witnesses were sworn and presented testimony. Exhibits were admitted into  
11 evidence.

### 12           **B. Expert Testimony**

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

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

1 While his testimony was not as helpful as an expert in family law might have been, the  
2 Hearing Officer did consider Professor Boerner' testimony in resolving certain issues regarding  
3 the recommended sanctions.

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

### 8 III. FINDINGS OF FACT

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

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

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

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

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

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

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

23 8. This matter was originally scheduled for trial in October 2010. Scott Anacker  
24

1 was initially represented by Michael Bugni. During the pendency of the case, Diane Anacker  
2 accused Scott Anacker of concealing and/or mishandling assets. Despite bringing this  
3 accusation, Respondent submitted no formal requests for production, interrogatories or requests  
4 for admissions.

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

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

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

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

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

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

23 15. The court responded by informing counsel that he could ask for inferences to be  
24

1 drawn, but "it's kind of tardy for disclosure."

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

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

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

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

14 Exhibit 6 at p. 3.

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

17 Paragraph 3.15 Given the clear inferences at trial that the Respondent did not  
18 fully disclose all of his bank accounts, and that he may be secreting additional  
19 property, the Petitioner proposes that the following language be included in the  
20 final Decree of Dissolution:

21 If any property worth more than \$500 was not disclosed in the  
22 exhibits presented at trial is disclosed within thirty (30) days of the  
23 entry of this Decree, the value of that previously undisclosed  
24 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.

25 Exhibit 6, page 4. [Emphasis in original.]

26 20. Judge Downing adopted the Respondent's Findings of Fact, Conclusions of Law

1 and Decree but made specific modifications thereto which rejected the arguments made in  
2 Exhibit 6 for leaving open the issue relating to Scott Anacker's bank accounts.

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

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

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

11 He testified:

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

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

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

18 A: There would not appear to be.

19 **Downing Deposition, p. 29; lines 1-10.**

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

22 25. The Findings of Fact, Conclusion of Law and Decree of Dissolution were entered  
23 on December 21, 2010. No appeal was taken therefrom. The trial court's division of the  
24 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

1 20, 2011.

2 26. As of the date that the Decree became final, there was no longer a case pending  
3 in King County Superior Court pertaining to the Anacker dissolution.

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

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

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

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

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

20 32. On March 4, 2011, Respondent issued a subpoena to the Prevail Credit Union  
21 with a cover letter enclosing a Notice of Records Deposition and Subpoena Duces Tecum  
22 commanding the production of "All documents, including statements and records pertaining to  
23 all accounts being the name Scott L. Anacker." The subpoena also included Scott Anacker's  
24

1 date of birth.

2 33. The March 4, 2011 cover letter indicated that if Prevail Credit Union produced  
3 the requested documents no later than March 21, 2011, then a personal appearance at the  
4 deposition set for March 22, 2011 would not be required.

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

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

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

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

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

15 39. Respondent did not have the legal authority to issue a subpoena on March 4,  
16 2011, as there was no matter pending pursuant to the cause number he provided.

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

22 41. In contrast, when a motion is made to either reopen or to permit discovery, a trial

23  
24 <sup>1</sup> 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.



1 court, not the attorney, makes the decision as to whether the rights of the opposing party will be  
2 affected.

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

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

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

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

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

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

23 48. Ms. Guevara sent a letter (via email and U.S. mail) informing the Respondent  
24

1 that the Anacker matter had been concluded, that there was no pending matter before the court,  
2 and therefore the subpoena was improper. The letter specifically referred to her telephone call  
3 of March 10, 2011.

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

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

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

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

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

19 54. Ms. Guevara testified that she would have charged a retainer of \$7500 to sort out  
20 the issues relating to the subpoena. Respondent's assertion that Mr. Anacker did have available  
21 funds is rejected. The testimony established that he had incurred \$20,000 in fees in the initial  
22 dissolution and that he had borrowed the money to fund that litigation. Mr. Anacker testified  
23 further that he had set a goal of paying off the loan at \$1,000 per month and had not paid it off  
24

1 at the time of these events.

2 55. Respondent did not rescind the subpoena duces tecum.

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

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

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

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

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

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

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

21 63. The Respondent acted negligently in believing that he had the legal authority to  
22 issue a subpoena duces tecum following the entry of a final decree dividing the assets of the  
23  
24

1 parties.<sup>2</sup>

2 **IV. CONCLUSIONS OF LAW REGARDING CHARGED VIOLATIONS**

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

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

10 **RPC 4.4(a)** states:

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

12 **(a)** In representing a client, a lawyer shall not use means that have no substantial  
13 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.

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

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

20  
21 <sup>2</sup> This Officer is specifically distinguishing between the mental state the Respondent possessed regarding  
22 the distribution of bank accounts and his knowledge of his legal authority to issue subpoenas post  
23 dissolution decree generally. As described below, because of the arguments Respondent repeatedly  
24 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.

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

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

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

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

21  
22  
23 <sup>3</sup> Obviously any account established after the Decree was entered would also be Scott Anacker's separate  
24 property and not subject to the jurisdiction of the court.

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

8           Respondent argues that this passage relates only to the specific account he was  
9 discussing at the time. This argument fails because the Respondent himself broadened the  
10 application of the language in the decree when he argued in favor of leaving open all accounts  
11 in his pleading, “Petitioner’s Objections to Respondent’s Proposed Final Orders.” As outlined in  
12 Respondent’s own argument in support of the proposed language, his proposal would have  
13 limited the award of bank accounts to Mr. Anacker to those that had been identified at trial.  
14 Exhibit 6, page 3. Judge Downing specifically rejected that language, and by inference,  
15 Respondent’s argument that the court should leave open the question of ownership of  
16 undisclosed accounts that might exist in Scott Anacker’s name.

17           This conclusion is consistent with Judge Downing’s deposition testimony concerning the  
18 effect of the current language in the decree. **Downing Deposition at 29, lines 1-10.** It is also  
19 consistent with the plain language of the Decree and Findings of Fact and Conclusions of Law  
20 that were entered. Association Exhibit 7, Findings of Fact and Conclusions of law (property  
21 Awarded to Scott Anacker in exhibit B); Association Exhibit 8 Final Decree (property awarded  
22

23 <sup>4</sup> Respondent denies that the request for discovery contained in Exhibit 3 is a “motion” apparently  
24 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,

1 to Scott Anacker in exhibit B.)

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

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

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

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

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

1 number used on the subpoena.

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

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

18 The conclusion that a motion rather than a subpoena was required is further supported  
19 by a case cited by Respondent in his post-hearing brief, *Farmer v. Farmer*, 172 Wn.2d 616,  
20 625 (2011), wherein the party seeking production first asked the court for an order that the

21  
22 <sup>5</sup> Respondent's expert was unfamiliar with the specific statutes governing dissolution matters. That fact significantly undercut the value of his testimony.

23 <sup>6</sup> There is also evidence that at least one reason Respondent chose to use a subpoena rather than bringing  
24 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.



1 information needed to support her position be produced.

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

15 Because Respondent issued a subpoena without authority to do so and obtained evidence  
16 which violated Mr. Anacker's legal rights, this Officer concludes that Respondent violated **RPC**  
17 **4.4 (a)**.

18 In **Count One**, the Association also alleged a violation of **RPC 8.4 (d)**. That section  
19 provides that it is professional misconduct for a lawyer to "engage in conduct that is prejudicial  
20 to the administration of justice."

21 The Association cites *In re Curran*, 115 Wn.2d 747, 766, 801 P. 2d 962 (1990) for the  
22 proposition that conduct prejudicial to the administration of justice extends to violations of  
23 practice norms and physical interference with the administration of justice. Association Brief at  
24

1 7. Although the case stands for the proposition cited, the following additional language from  
2 this case is determinative of the issue here. Citing Prof. G. Hazard, the court noted: "Professor  
3 Hazard, a leading authority on legal ethics, has stated that the rule against conduct prejudicial to  
4 the administration of justice should be construed to include only clear violations of accepted  
5 practice norms." *In re Curran*, 115 Wn.2d at 765. [Emphasis added.] Given the testimony of  
6 Prof. Boerner, this Officer finds that the Association has failed to prove, by a clear  
7 preponderance of evidence, that the Respondent's conduct was a "clear violation of accepted  
8 practice norms." Respondent's testimony and that of his expert cast sufficient doubt on the  
9 practice norms to establish that the Association had not met its burden of proof on this issue.  
10 The Association's charge that the Respondent violated **RPC 8.4(d)** as alleged in **Count One** is  
11 therefore rejected.

12 As to **Count One**, only the first allegation, the violation of **RPC 4.4(a)** has been proven.

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

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

## V. PRESUMPTIVE SANCTIONS

Determination of the appropriate sanction involves a two-step process applying ABA Standards for Imposing Lawyer Sanctions. *In re Anshell*, 149 Wn. 2d 484, 69 P.3<sup>rd</sup> 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.3<sup>rd</sup> 173 (2003). The second step in the process is 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).

The charge that the Respondent violated **RPC 4.4(a)** as charged in **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 or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

1           **6.24** Admonition is generally appropriate when a lawyer engages in an  
2 isolated instance of negligence in complying with a court order or rule,  
3 and causes little or no actual or potential injury to a party or cause little or  
4 no actual or potential interference with a legal proceeding.

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

7                                                           **VI. AGGRAVATING CIRCUMSTANCES**

8           Aggravating factors or circumstances are any considerations that may justify an increase  
9 in the degree of discipline to be imposed. These factors apply to Respondent's conduct.

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

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

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

20                                                           **VII. MITIGATING CIRCUMSTANCES**

21           The following mitigating factors apply to this case:

22           **ABA Std. 9.32**

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

1 Respondent alleges, and the Association has not negated, the proposition that  
2 Respondent was acting on behalf of his client in order to obtain needed information. Although  
3 the potential exists that the Respondent intentionally chose to use a subpoena duces tecum  
4 instead of bringing a motion in order to avoid the potential for attorneys' fees, there is  
5 insufficient evidence to make such a finding based on a clear preponderance of evidence.

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

7 As noted above, the prior discipline occurred in 1998, 13 years before the conduct  
8 alleged here. This mitigating factor thus applies.

9  
10 **VIII. RECOMMENDATION**

11 This case presents a close question on the issue of whether the Respondent acted  
12 knowingly or negligently in violating **RPC 4.4(a)**. This officer was also troubled by the  
13 Respondent's personal attacks on Ms. Guevara and Mr. Anacker. Nonetheless, given the  
14 burden of proof required in these cases, the question has been resolved in Respondent's favor.  
15 This Officer concludes the Respondent violated **RPC 4.4(a)** but not **RPC 8.4(d)** as charged in  
16 **Count One**. Based on the conclusion that the Respondent acted negligently in believing he  
17 could issue a subpoena post-decree, the recommended sanction is a Reprimand.

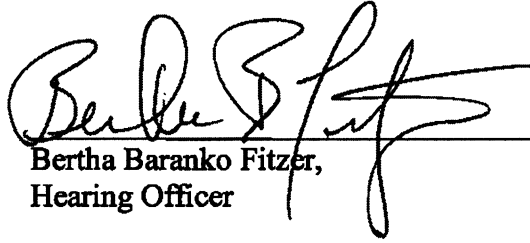
18 Because the Respondent knew, or should have known, that he had no right to the records  
19 in question, further sanctions are appropriate. In addition, the existence of aggravating factors,  
20 including Respondent's significant experience in the practice of law, and the fact that he has  
21 been reprimanded previously weigh in favor of some additional sanctions other than a simple  
22 Reprimand.

23 This Officer recommends that Respondent be Reprimanded, and that he be directed to  
24 cure the defects in his understanding of the Civil and Ethical Rules by attending at 15 hours of

1 CLE devoted to Civil Procedure/Litigation and Ethics. These 15 hours should be in addition to  
2 those currently required to fulfill Respondent's mandatory educational requirements.  
3 Respondent should also be required to write a Letter of Apology to Scott Anacker. Costs  
4 associated with this proceeding should also be paid by Respondent.

5 As noted above, **Count Two** should be dismissed as the Association has not met its  
6 burden of providing misconduct by a clear preponderance of the evidence and there is therefore  
7 no finding of misconduct pertaining to this count.

8 DATED this 6th day of February 2013.

9   
10 \_\_\_\_\_  
11 Bertha Baranko Fitzer,  
12 Hearing Officer

13 CERTIFICATE OF SERVICE

14 I certify that I caused a copy of the Amended PDE, COL & HO's Recommendation  
15 to be delivered to the Office of Disciplinary Counsel and to be mailed  
16 to Kenneth Kagan Respondent/Respondent's Counsel  
17 at DISH # 2500 Seattle WA 98104 by Certified/first class mail,  
18 postage prepaid on the 6th day of February, 2013

19 \_\_\_\_\_  
20 Clerk/Counsel to the Disciplinary Board