BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re CHARLES N. BERRY III, Lawyer (WSBA No.)	Proceeding No. 12#00011 DISCIPLINARY BOARD ORDER MODIFYING HEARING OFFICER'S DECISION

This matter came before the Disciplinary Board at its July 12, 2013 meeting, on automatic review of Hearing Officer Bertha B. Fitzer's February 6, 2013 decision recommending a reprimand, following a hearing.

The Board reviews the hearing officer's findings of fact for substantial evidence. The Board reviews conclusions of law and sanction recommendations de novo. Evidence not presented to the hearing officer or panel cannot be considered by the Board. ELC 11.12(b).

Having heard oral argument, reviewed the materials submitted, and considered the applicable case law and rules;

IT IS HEREBY ORDERED THAT the Hearing Officer's decision is adopted with the following modifications:[1] The Board corrects errors of law in the Hearing Officer's decision, concludes that Count 2 was proven, because a negligent misrepresentation does violate RPC 8.4(c), and agrees with the hearing officer that reprimand is the appropriate sanction in this matter. The Board finds that the Hearing Officer made several errors in her

[1] The vote on this matter was 11-0. Those voting were: Bray, Broom, Butterworth, Carrington, Coy, Dremousis, Ivarinen, McInvaille, Mesher, Neiland and Ogura.

WASHINGTON STATE BAR ASSOCIATION
1325 Fourth Avenue – Suite 600
Seattle, WA 98101-2539
(206) 733-5926

077

findings of fact based on an error of law. In marital dissolutions, the law is that:

(1) The Court can only divide property that is before it at trial.

(2) Undivided property is owned by the parties as tenants in common. *Yeats v. Estate of Yeats*, 90 Wn.2d 201, 203, 580 P.2d 617 (1978); *Chase v. Chase*, 74 Wn.2d 253, 444 P.2d 145 (1968); *Northwestern Life Ins. Co. v. Perrigo*, 47 Wn.2d 291, 287 P.2d 334 (1955).

If undivided property is discovered subsequent to finalization of the dissolution, a party must file a pleading to re-open the property division. This pleading can be a CR 60 motion, a partition action, or another motion accepted by the trial court. See e.g. *Seals v. Seals*, 22 Wash. App. 652, 590 P.2d 1301 (1979); *Farmer v. Farmer*, 172 Wn.2d 616, 259 P.3d 256 (2011).

The modifications in the hearing officer's decision are to remove this error of law from the findings of fact and conclusions of law. Most of the modifications are based on this error of law and not on any testimony or credibility determinations. Three modifications are based on the parties' agreement that the findings are not supported by the record. The Findings are amended as follows:

FINDING 22

The effect of removing that phrase was to award to Scott Anacker all bank accounts in his name disclosed to the court as of the date of entry of the decree.[2]

A court cannot divide property it does not know exists. In *Seals v. Seals,* 22 Wn.App, 652, 657 (1979) the Court stated "a trial court has the duty to dispose of all of the property of the parties which is brought to its attention in the trial of a divorce case." Property not divided

[2] Original Finding 22 stated: 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.

WASHINGTON STATE BAR ASSOCIATION
1325 Fourth Avenue – Suite 600
Seattle, WA 98101-2539
(206) 733-5926

by the court at trial is held by the parties as tenants in common. *Ross v. Pearson*, 31 Wn. App 609, 611-12, 643 P.2d 928 (1982), *rev. denied*, 97 Wn.2d 1030 (1982).

FINDING 25

> The Findings of Fact, Conclusions 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 before the court, including the award of all bank accounts in Scott Anacker's name to Scott Anacker, therefore became final on January 20, 2011. [3]

Any accounts not disclosed to the trial court, could not have been awarded to Scott Anacker by the Decree. Additionally, CR 60 is not the exclusive remedy.

FINDING 27

> As of the date that the Decree became final, neither Diane Anacker nor Respondent had the right to access those accounts without seeking court permission.[4]

Any accounts not disclosed to the trial court, could not have been awarded to Scott Anacker by the Decree.

FINDING 30

> This finding is stricken.[5]

The Prevail Credit Union account was not before the court at the time the property division was entered. It was opened after the property division was final. It could have been an un-

---

[3] Original Finding 25 stated: The Findings of Fact, Conclusions 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.

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

[5] Original Finding 30 state: 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 "unadministered asset."

WASHINGTON STATE BAR ASSOCIATION
1325 Fourth Avenue – Suite 600
Seattle, WA 98101-2539
(206) 733-5926

administered asset if it contained marital assets that were not disclosed during the trial.

FINDING 35

On March 4, 2011, there was no pending case under this cause number.[6]

CR 45 states that a subpoena may be issued by the court in which the action in pending. "Active" is not used in this court rule. Consequently, "active" is stricken from this finding.

FINDING 37

By issuing a subpoena pursuant to the authority of CR 45, an attorney affirmatively represents that a pending matter exists under that cause number.[7]

The word "active" is stricken from this finding because it is not used in CR 45. The Rule refers to a "pending" action.

FINDING 45

Respondent provided a copy of the subpoena duces tecum to the attorney for Scott Anacker by mailing the documents to her on March 4, 2011. Ms. Guevara received the documents on March 7, 2011, when she was preparing for trial on another matter.[8]

The parties agreed, and the record reflects, that Ms. Guevara was not in trial, but was preparing for trial.

FINDING 46

Ms. Guevara attempted to contact the Respondent on March 11, 2011 at least

---

[6] Original Finding 35 stated: On march 4, 2011, there was no active, pending case under this cause number.

[7] Original Finding 37 states: By issuing a subpoena pursuant to the authority of CR 45, an attorney affirmatively represents that a active, pending matter exists under that cause number

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

WASHINGTON STATE BAR ASSOCIATION
1325 Fourth Avenue – Suite 600
Seattle, WA 98101-2539
(206) 733-5926

once by telephone. She left an urgent message for him to return her call.[9]

The parties agree, and the record reflects that Ms. Guevara's attempted contact was on March 11, 2011, not march 10, 2011.

FINDING 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, and therefore the subpoena was improper. The letter specifically referred to her telephone call of March 11, 2011.[10]

The parties agree, and the record reflects, that Ms. Guevara's letter referred to her call of March 11, not March 10, 2011.

FINDING 62

> The Respondent knowingly issued the subpoena duces tecum for Scott Anacker's Prevail Credit Union financial records even though the dissolution proceeding was no longer pending. [11]

The error was issuing a subpoena duces tecum pursuant to CR 45 when the proceeding was no longer pending. The Prevail Credit Union account was not disclosed to the Court and, therefore, was not awarded to Scott Anacker in the Decree.

The Board agrees with the Hearing Officer's Conclusions of Law and sanction

---

[9] Original Finding 46 stated: 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.

[10] Original Finding 48 stated: 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, and therefore the subpoena was improper. The letter specifically referred to her telephone call of March 10, 2011.

[11] Original Finding 62 stated: 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.

WASHINGTON STATE BAR ASSOCIATION
1325 Fourth Avenue – Suite 600
Seattle, WA 98101-2539
(206) 733-5926

recommendation on Count 1.

The Board reinstates Count 2. Negligent misrepresentation is a violation of RPC 8.4(c). The Hearing Officer found that Respondent issued a subpoena under CR 45 in a dissolution matter that was no longer pending. She dismissed Count 2, stating:

> Pursuant to the rule of sui generis, this officer understands the term "misrepresentation" as used in this rule to require an intentional misrepresentation. Because this Officer concludes the Respondent acted negligently, not knowingly or intentionally, 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 Office concludes the higher evidentiary standard required by ELC 10.4(b) has not been met. Court two is hereby dismissed.

The Hearing Officer's decision is based on an error of law. RPC 8.4(c) is not limited to intentional misrepresentations either on its face or by caselaw. RPC 1.0 comment 5 differentiates fraud from negligent misrepresentation. Additionally, ABA Standard 6.1 False Statements, Fraud and Misrepresentation, includes sanctions for negligent misrepresentations. In this matter, the Hearing Officer found that Respondent issued a subpoena in a case that was no longer pending. [Findings 33 and 35]. The Hearing Officer also found that issuing a subpoena under CR 45 is an affirmative representation that a pending matter exists. [Finding 37] Taken together, these findings prove, by a clear preponderance of the evidence, that Respondent violated RPC 8.4(c). He negligently misrepresented to Prevail Credit Union that a pending dissolution matter existed and that he was authorized to issue a subpoena in that case. Consequently, the Board reinstates Count 2 and finds that it was proven.

WASHINGTON STATE BAR ASSOCIATION
1325 Fourth Avenue – Suite 600
Seattle, WA 98101-2539
(206) 733-5926

ABA Standard 6.13 applies to Count 2. This Standard states:

> Reprimand is generally appropriate when a lawyer is negligent either in determining whether statements or documents are false or in taking remedial action when material information is being withheld, and causes injury or potential injury to a party to the legal proceeding, or causes an adverse or potentially adverse effect on the legal proceeding.

The Board agrees with the Hearing Officer that the appropriate sanction in this matter is a reprimand.

Dated this 31st day of July 2013.

Nancy Ivarinen
Disciplinary Board Chair

CERTIFICATE OF SERVICE

I certify that I caused a copy of the DB Order Modifying HO's Dec/BOR 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 31st day of July, 2013.

Clerk/Counsel to the Disciplinary Board

WASHINGTON STATE BAR ASSOCIATION
1325 Fourth Avenue – Suite 600
Seattle, WA 98101-2539
(206) 733-5926