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SUPREME COURT  
STATE OF WASHINGTON  
May 11, 2015, 12:14 pm  
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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

In re

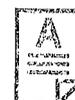
John David Ferrell,  
Lawyer (Bar No. 28922).

Supreme Court No. 201,400-3

ODC'S REPLY TO  
RESPONDENT'S ANSWER TO  
ORDER TO SHOW CAUSE

**A. INTRODUCTION**

On March 13, 2015, ODC filed a Petition for Interim Suspension under ELC 7.2(a)(3). The petition was necessitated by Respondent's failure to respond to a Request for Response to Grievance sent to him on November 19, 2014. On March 19, 2015, this Court ordered Respondent to show cause why the petition should not be granted. The Order to Show Cause was personally served on March 26, 2015, and on April 30, 2015, Respondent filed an Answer. Respondent claims that he has not responded to the November 19, 2014, Request for Response because he erroneously believed that "all concerns relating to [his] Trust Account had been considered by the Washington State Bar Association and had been dismissed with an Advisory Letter." Respondent adds that he is "now in the process of collecting [his] records."



ORIGINAL

Respondent's explanation of his failure to cooperate is not credible. From the evidence available thus far, including records obtained from Respondent's bank, it appears that Respondent has engaged, and may still be engaged, in serious misconduct with respect to his handling of client funds. More than six weeks after the Order to Show Cause was personally served, Respondent has yet to produce one single document in response to the November 19, 2014, Request for Response. Any further delay would be contrary to the interests of protecting the public and maintaining the integrity of the profession.

**B. RESPONDENT'S EXPLANATION OF HIS FAILURE TO COOPERATE IS NOT CREDIBLE**

Respondent's explanation of his failure to cooperate is not credible because it is perfectly clear that the grievance dismissed with an advisory letter on January 23, 2015, is not the same grievance that is currently under investigation. The grievance by Randolph Hernandez, ODC File No. 14-00220, was received on February 7, 2014.<sup>1</sup> As noted in the advisory letter attached to Respondent's Answer to Order to Show Cause, the Hernandez grievance alleged "lack of communication and inaction" by Respondent in a single family law matter. The investigation of the

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<sup>1</sup> Letter from Scott G. Busby to Kurt M. Bulmer and Randolph A. Hernandez dated November 13, 2014 ("Analysis Letter"), attached hereto as Appendix A, at pages 4 and 7.

Hernandez grievance was delayed by Respondent's failure to comply with a request for records sent to him in June 2014.<sup>2</sup> A summary and analysis of the investigation was sent to Mr. Hernandez and Respondent's counsel on November 13, 2014, and the matter was reported to a review committee under ELC 5.7(c).<sup>3</sup>

Late in the Hernandez investigation, at Respondent's non-cooperation deposition on September 18, 2014, ODC learned that for years Respondent had practiced law without a trust account while his typical fee agreement required an advance fee deposit before the commencement of services.<sup>4</sup> When he was asked about his handling of client funds other than those of Mr. Hernandez, Respondent refused to answer, citing his "Fifth Amendment right against self-incrimination."<sup>5</sup> The questions related both to the period before Respondent maintained a trust account and to his "current practices" since opening a trust account.<sup>6</sup> Respondent refused to answer, for example, when asked how he made withdrawals

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<sup>2</sup> Declaration of Disciplinary Counsel in Support of Petition for Interim Suspension, ¶ 4; *see also* Analysis Letter, attached hereto as Appendix A, at pages 4-5.

<sup>3</sup> Analysis Letter, attached hereto as Appendix A.

<sup>4</sup> Declaration of Disciplinary Counsel in Support of Petition for Interim Suspension, ¶ 6.

<sup>5</sup> Declaration of Disciplinary Counsel in Support of Petition for Interim Suspension, ¶ 8.

<sup>6</sup> *Id.*

from his trust account and whether he notified his clients before withdrawing their funds.<sup>7</sup>

Based on his deposition testimony, it appears that Respondent has not been safeguarding client property in accordance with the Rules of Professional Conduct (RPC). Accordingly, ODC opened a different grievance against Respondent, ODC File No. 14-01810, in the name of ODC under ELC 5.3(a).<sup>8</sup> The Request for Response to Grievance sent to Respondent on November 19, 2014, to which Respondent has yet to respond, clearly relates to the ODC grievance, not to the Hernandez grievance.<sup>9</sup> It references trust account records, operating account records, fee agreements, billing statements, and settlement statements for the period January 1, 2012, through September 30, 2014.<sup>10</sup> This period was chosen in consultation with the ODC Audit Manager in part because it overlaps the periods before and after Respondent opened a trust account.

Respondent's response to the November 19, 2014, Request for Response in the ODC grievance was already long overdue when the

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<sup>7</sup> The deposition testimony concerning these matters is at pages 16-17 and 26-28 of Appendix A to the Declaration of Disciplinary Counsel in Support of Petition for Interim Suspension.

<sup>8</sup> Declaration of Disciplinary Counsel in Support of Petition for Interim Suspension, ¶¶ 9-10.

<sup>9</sup> A copy of the November 19, 2014, Request for Response to Grievance is at Appendix D to the Declaration of Disciplinary Counsel in Support of Petition for Interim Suspension.

<sup>10</sup> *Id.*

review committee issued its January 23, 2015, order and advisory letter in the Hernandez grievance. The order and advisory letter clearly reference the Hernandez grievance, only the Hernandez grievance, and not the ODC grievance, which has never been reported to that review committee or any other review committee. Respondent could not have reasonably believed that the review committee order in the Hernandez grievance dismissed the ODC grievance. Respondent's explanation of his failure to cooperate with the investigation of the ODC grievance is not credible.

**C. THE AVAILABLE EVIDENCE SUGGESTS THAT RESPONDENT HAS ENGAGED, AND MAY STILL BE ENGAGED, IN SERIOUS MISCONDUCT IN HIS HANDLING OF CLIENT FUNDS**

On March 16, 2015, ODC issued a subpoena to KeyBank requesting records for Respondent's trust account and operating account for the period January 1, 2012, through September 30, 2014.<sup>11</sup> A copy of the subpoena was served on Respondent on the same date. The records requested from KeyBank are a subset of the records requested from Respondent on November 19, 2014. The trust account records requested from KeyBank are records that Respondent is required to maintain under RPC 1.15A(h)(2) and 1.15B(a). ODC received the records requested from KeyBank on April 3, 2015.

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<sup>11</sup> A redacted copy of the subpoena is attached hereto as Appendix B.

An ODC Senior Auditor conducted a preliminary analysis of the records obtained from KeyBank. The Preliminary Audit Report is attached hereto as Appendix C. The analysis is only preliminary because the records requested, but not received, from Respondent are needed to determine whose funds were deposited into and disbursed from Respondent's accounts and whether the deposits and disbursements were in accordance with the RPC. This preliminary analysis strongly suggests, however, that Respondent has engaged, and may still be engaged, in serious misconduct in his handling of client funds.<sup>12</sup>

**D. FURTHER DELAY WOULD BE CONTRARY TO THE INTERESTS OF PROTECTING THE PUBLIC AND MAINTAINING THE INTEGRITY OF THE PROFESSION**

Public confidence in the legal profession and the deterrence of misconduct require thorough, effective, and prompt investigation of alleged and apparent misconduct. *In re Disciplinary Proceeding Against McMurray*, 99 Wn.2d 920, 930-31, 655 P.2d 1352 (1983). A lawyer's failure to cooperate can only impede the investigation and undermine the effectiveness of the regulatory system. *Id.* Unless noncooperation has serious consequences, lawyers may be tempted to "stonewall" to prevent serious violations from coming to light. *Id.*

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<sup>12</sup> Preliminary Audit Report, attached hereto as Appendix C.

After a November 19, 2014, Request for Response to Grievance,<sup>13</sup> a January 14, 2015, “10-day letter,”<sup>14</sup> a March 13, 2015, Petition for Interim Suspension, a March 16, 2015, subpoena to his bank,<sup>15</sup> and an Order to Show Cause personally served on March 26, 2015,<sup>16</sup> Respondent finally states, on April 30, 2015, that he is only just “now in the process” of collecting his records.<sup>17</sup> This “process” should have been completed, not commenced, almost five months ago. As of this date, Respondent has produced not one single check register, fee agreement, billing statement, or any other document requested of him almost six months ago.

Any further delay would be contrary to the interests of protecting the public and maintaining the integrity of the profession. Respondent should be suspended from the practice of law until he fully complies with the Request for Response to Grievance issued to him on November 19, 2014.

#### **E. CONCLUSION**

For the forgoing reasons, ODC respectfully requests that the Petition for Interim Suspension be granted.

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<sup>13</sup> Declaration of Disciplinary Counsel in Support of Petition for Interim Suspension, ¶ 10.

<sup>14</sup> Declaration of Disciplinary Counsel in Support of Petition for Interim Suspension, ¶ 12.

<sup>15</sup> Attached hereto as Appendix B.

<sup>16</sup> The Declaration of Service is attached hereto as Appendix D.

<sup>17</sup> Answer to Order to Show Cause at 2.

DATED THIS 11th day of May, 2015.

Respectfully submitted,

OFFICE OF DISCIPLINARY COUNSEL



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Scott G. Busby, Bar No. 17522  
Senior Disciplinary Counsel  
1325 4<sup>th</sup> Avenue, Suite 600  
Seattle, WA 98101-2539  
(206) 733-5998

# APPENDIX A



# WSBA

OFFICE OF DISCIPLINARY COUNSEL

Scott G. Busby  
Senior Disciplinary Counsel

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November 13, 2014

Kurt M. Bulmer  
Attorney at Law  
740 Belmont Pl E Apt 3  
Seattle, WA 98102-4442

Randolph A. Hernandez  
9916 133rd St E #12-207  
Puyallup, WA 98373

Re: Grievance of Randolph A. Hernandez against John D. Ferrell  
ODC File No. 14-00220

Dear Mr. Bulmer and Mr. Hernandez:

We have completed our investigation, and we write to advise you of our conclusions before we report this matter to a Review Committee of the Disciplinary Board. Our analysis is based on interviews of Randolph Hernandez, Tami Hernandez, and John D. Ferrell; a review of the court file in *Tricinda-Grace Hernandez vs. Randolph Anthony Hernandez*, Pierce County Superior Court No. 02-3-00506-2; a review of Mr. Ferrell's client file for Mr. Hernandez; Mr. Ferrell's deposition; and a review of the documentation listed at the end of this letter.

We are recommending that the Review Committee order this matter to hearing. If you wish to provide additional information or address our analysis, you should do so before December 13, 2014. The Review Committee will be provided with the documentation listed at the end of this letter and with anything further that you send to us. All materials will become public when and if the Review Committee orders the matter to hearing or orders that an admonition be issued, unless the materials are covered by a protective order.

Mr. Hernandez hired Mr. Ferrell to modify an order of child support. Mr. Ferrell did not maintain a trust account, and deposited Mr. Hernandez's advance fee deposit into his operating account. Mr. Ferrell never sent Mr. Hernandez a billing statement, failed to respond to requests for information, and failed to keep Mr. Hernandez informed about the status of the matter. In the nearly two years since the representation began, Mr. Ferrell has never submitted Mr. Hernandez's request to modify child support to a judge for decision. In spite of multiple requests

and reminders, Mr. Ferrell failed to promptly respond to Disciplinary Counsel's request for his client file and his financial records relating to Mr. Hernandez.

#### FACTS AS DISCLOSED BY INVESTIGATION

In November 2012, Mr. Hernandez was referred to Mr. Ferrell through the WSBA Moderate Means Program.<sup>1</sup> Mr. Hernandez needed to modify an order of child support that was entered in 2002 when his prior marriage to Tricinda-Grace Hernandez was dissolved. The 2002 child support order was based on a Custody Decree/Parenting Plan/Residential Schedule which provided that Mr. Hernandez's son would reside with his mother, Mr. Hernandez's former wife. Since about September 2011, however, Mr. Hernandez's son had resided with Mr. Hernandez, without any financial support from Mr. Hernandez's former wife.

Mr. Hernandez and his wife, Tami Hernandez, met with Mr. Ferrell on November 26, 2012. The Fee Agreement that Mr. Hernandez and Mr. Ferrell signed at that meeting provided for an advance fee deposit of \$2,000, with services to be charged against the advance fee deposit at an hourly rate of \$112.50. The Fee Agreement further provided that "[t]he client will receive a monthly statement indicating charges and the balance in the advance fee deposit account." During the course of the representation, Mr. Ferrell never sent Mr. Hernandez a billing statement.

At their November 26, 2012, meeting, Mrs. Hernandez gave Mr. Ferrell a \$2,000 check for the advance fee deposit. Mr. Ferrell deposited the check into his operating account on the same date, even though the fees had not yet been earned. On November 29, 2012, the check was returned for insufficient funds, and on December 3, 2012, Mrs. Hernandez gave Mr. Ferrell a \$2,000 replacement check. Mr. Ferrell deposited the replacement check into his operating account on December 3, 2012, even though the fees had not yet been earned. Mr. Ferrell did not maintain a trust account.

At their November 26, 2012, meeting, Mr. and Mrs. Hernandez asked Mr. Ferrell if it was necessary to modify the prior Custody Decree/Parenting Plan/Residential Schedule given that Mr. Hernandez's son was then 18 years of age. Mr. Ferrell told them that it was.

Mr. Ferrell prepared a document entitled "Petition for Modification/Adjustment of Custody Decree/Parenting Plan/Residential Schedule," which he filed in the Pierce County Superior Court on December 20, 2012. Mr. Ferrell requested "an order modifying the prior custody decree/parenting plan/residential schedule . . . and approving the proposed parenting plan/residential schedule, which is filed with this petition." Mr. Ferrell also requested "an order establishing child support in conjunction with the proposed parenting plan/residential schedule, the child support worksheet and financial declaration are filed with this petition." Mr. Ferrell

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<sup>1</sup> The WSBA Moderate Means Program is a free referral panel designed to connect clients whose income is within 200–400% of the Federal Poverty Level to lawyers who offer legal assistance at a reduced fee. See [www.wsba.org/Legal-Community/Volunteer-Opportunities/Public-Service-Opportunities/Moderate-Means-Program](http://www.wsba.org/Legal-Community/Volunteer-Opportunities/Public-Service-Opportunities/Moderate-Means-Program).

noted the Petition for hearing on February 21, 2013.

Two days before the hearing, opposing counsel appeared on behalf of Mr. Hernandez's former wife. Opposing counsel pointed out that since Mr. Hernandez's son was 18 years of age, the court no longer had jurisdiction to modify the Custody Decree/Parenting Plan/Residential Schedule. On February 21, 2013, Mr. Ferrell filed a motion to dismiss his petition, and on that date the petition was dismissed.

On April 1, 2013, Mr. Ferrell filed a Petition for Modification of Child Support. Mr. Ferrell requested certain modifications of the 2002 child support order, including (1) child support payments to be paid to Mr. Hernandez by his former wife and (2) post-secondary educational support for Mr. Hernandez's son. Mr. Ferrell never noted the Petition for hearing, and he took no further action of record in the case after April 1, 2013.

Between April 1 and June 11, 2013, Mrs. Hernandez, on her husband's behalf, made several requests of Mr. Ferrell for information about the status of the matter. Mr. Ferrell did not respond. On June 10, 2013, Mrs. Hernandez sent an email to Mr. Ferrell stating as follows:

John,

When I dropped off paperwork to you in March, we discussed getting together to discuss a post [secondary] education plan for Jeremy. You said that we would need to do this before he graduated, but I have tried to email you several times since and also left a voice mail for you, but you have not responded. You haven't provided us with any information regarding the status of the case. We have not received any copies of the legal documents that you have filed (except for the notice of unavailability) and therefore have no way of knowing what's going on. As we told you in the beginning, we started legal action because we feel that Jeremy deserves support from both of his parents. Jeremy has been with us for almost 2 years and Randy has not received ANY help from Jeremy's mother whatsoever. When he came to live with us, he was failing in school and a year behind. He is now graduating with a high GPA, awards and scholarships, etc. He is starting a full time job on Monday and we are looking into college for him. Please let us know where we are to date and how we will proceed from here.

Sincerely,

Tami Hernandez

On June 11, 2013, Mr. Ferrell replied as follows:

Tami, thank you for your email. Documents were filed in April. I will follow up with copies of the filed documents to you shortly.

Mrs. Hernandez replied as follows:

What about the post education?

Mr. Ferrell replied as follows:

Included in the Petition. Please keep me updated when he enrolls in post secondary education.

Mrs. Hernandez never received the last reply from Mr. Ferrell.

Mr. Ferrell did not inform Mr. Hernandez that the Petition for Modification of Child Support had not been noted for hearing, and that no judicial action would be taken on the Petition until it was noted for hearing. Mr. Hernandez heard nothing from Mr. Ferrell after June 11, 2013. During the course of the representation, Mr. Ferrell never sent Mr. Hernandez a billing statement. By February 2014, more than 14 months after he hired Mr. Ferrell, Mr. Hernandez's request for modification of child support still had never been submitted to a judge for decision. Mr. Hernandez could not afford to hire another lawyer to expedite the litigation.

On February 7, 2014, Mr. Hernandez filed a grievance against Mr. Ferrell. On March 14, 2014, Mr. Ferrell provided a preliminary response. On June 11, 2014, Disciplinary Counsel sent Mr. Ferrell's counsel an Additional Request for Response to Grievance. Disciplinary Counsel requested Mr. Ferrell's client file for the grievant, as well as (1) his fee agreement, (2) billing statements relating to the grievant, (3) trust account and other financial records relating to the grievant, and (4) invoices or accountings relating to the grievant. On June 19, 2014, Mr. Ferrell's counsel requested another copy of the Additional Request for Response. On June 23, 2014, Disciplinary Counsel sent Mr. Ferrell's counsel the Additional Request for Response a second time.

On July 15, 2014, Disciplinary Counsel notified Mr. Ferrell's counsel that Mr. Ferrell's response was overdue. On July 16, 2014, Disciplinary Counsel notified Mr. Ferrell's counsel under ELC 5.3(h) that Mr. Ferrell must provide the requested documents within ten days or be subject to a noncooperation deposition, as well as discipline for noncooperation.

On August 5, 2014, Disciplinary Counsel issued a noncooperation subpoena under ELC 5.3(h) for a deposition on August 28, 2014. On the same date, Disciplinary Counsel sent a copy of the subpoena to Mr. Ferrell's counsel with a cover letter. The subpoena was sent out for service, but Mr. Ferrell was not served.

On August 25, 2014, Disciplinary Counsel notified Mr. Ferrell's counsel that the deposition would be rescheduled, and asked whether he would accept service of a new subpoena on Mr. Ferrell's behalf.

On August 26, 2014, Disciplinary Counsel issued a noncooperation subpoena under ELC 5.3(h) for a deposition on September 16, 2014. On the same date, Disciplinary Counsel sent a copy of the subpoena to Mr. Ferrell's counsel with a cover letter. On August 27, 2014, Mr. Ferrell was served.

Between June 11, 2014 and September 12, 2014, Mr. Ferrell provided no response to any of Disciplinary Counsel's communications, except for the June 19, 2014, request for another copy of the Additional Request for Response. On September 12, 2014, Mr. Ferrell, through counsel, finally provided his client file and asked "that the deposition be either cancelled or continued." Mr. Ferrell provided no billing statements and no trust account records. Mr. Ferrell's deposition was continued to September 18, 2014.

At his deposition, Mr. Ferrell admitted that he did not maintain a trust account until "approximately [the] summer of 2013," even though his typical fee agreement provided for an advance fee deposit. He admitted that he had not provided a billing statement to Mr. Hernandez, even though his fee agreement provides that "[t]he client will receive a monthly statement indicating charges and the balance in the advance fee deposit account." He admitted that he had no time records for Mr. Hernandez, even though his fee agreement provides that he will charge his time against the advance fee deposit at an hourly rate. He testified that he took no action on the Petition for Modification of Child Support after April 1, 2013, because he was waiting for "some actual hard costs" on post-secondary education. He testified that he had received the June 11, 2014, Additional Request for Response to Grievance and the July 16, 2014, notice that his response was overdue, but "wasn't quite sure how to take the steps to respond."

#### VIOLATION ANALYSIS

RPC 1.15A(b) provides that a lawyer must not use, convert, or borrow a client's funds for the lawyer's own use. RPC 1.15A(c) provides that a lawyer must hold client funds separate from the lawyer's own property. RPC 1.15A(c)(1) provides that a lawyer must deposit and hold client funds in a trust account. RPC 1.15A(c)(2) provides that a lawyer must deposit into a trust account legal fees and expenses that have been paid in advance, to be withdrawn by the lawyer only as fees are earned or expenses incurred. It appears that Mr. Ferrell may have violated RPC 1.15A(b) and 1.15A(c) by depositing Mr. Hernandez's advance fee deposit into his operating account.

RPC 1.3 provides that a lawyer shall act with reasonable diligence and promptness in representing a client. RPC 3.2 provides that a lawyer shall make reasonable efforts to expedite litigation consistent with the interests of the client. It appears that Mr. Ferrell may have violated RPC 1.3 and 3.2 by failing to submit Mr. Hernandez's request to modify child support to a judge for decision in the nearly two years since the representation began.

RPC 1.4 provides that a lawyer shall reasonably consult with the client, keep the client reasonably informed about the status of the matter, and promptly comply with reasonable requests for information. It appears that Mr. Ferrell may have violated RPC 1.4 by failing to send Mr. Hernandez a billing statement, failing to respond to requests for information, and failing to keep Mr. Hernandez informed about the status of his matter.

RPC 8.4(l) provides that it is professional misconduct for a lawyer to violate a duty imposed by the ELC in connection with a disciplinary matter; including the duties imposed by ELC 5.3(f) and 5.3(g). Under ELC 5.3(f), a lawyer must promptly respond to any inquiry or request for

information relevant to a grievance or a matter under investigation. Under ELC 5.3(g), a lawyer must furnish copies of requested records, files, and accounts. It appears that Mr. Ferrell may have violated the RPC 8.4(l) by failing to promptly respond to the June 11, 2014, Additional Request for Response to Grievance.

Because it appears that Mr. Ferrell may have violated the RPC, we will be forwarding this matter to a Review Committee for its consideration. The Review Committee has wide discretion and may dismiss the grievance, dismiss with an advisory letter, issue an admonition or order the matter to a hearing for a public determination of the violations and the appropriate disciplinary sanction.

#### SANCTION ANALYSIS

The Washington Supreme Court has held that the American Bar Association *Standards for Imposing Lawyer Sanctions* (1991 ed. & Feb. 1992 Supp.) (“ABA Standards”) provide the appropriate framework to impose disciplinary sanctions. *In re Disciplinary Proceeding Against Halverson*, 140 Wn.2d 475, 492, 998 P.2d 833 (2000); *In re Disciplinary Proceeding Against Johnson*, 114 Wn.2d 737, 745, 790 P.2d 1227 (1990). The ABA Standards require examination of (1) the duty violated, (2) the lawyer’s mental state, (3) the extent of actual or potential injury caused by the lawyer’s conduct, and (4) aggravating and mitigating factors. The nature of the duty violated together with the lawyer’s mental state and any potential injury generally determine the presumptive sanction to be applied.

ABA Standards std. 4.1 applies to violations of RPC 1.15A. It appears that Mr. Ferrell knew that he was dealing improperly with client funds, and that he caused injury to his client by appropriating his client’s funds before they were earned. The presumptive sanction thus appears to be at least suspension under ABA Standards std. 4.12.

ABA Standards std. 4.4 applies to violations of RPC 1.3 and 1.4. In failing to send Mr. Hernandez a billing statement, failing to respond to his requests for information, failing to keep him informed, and failing to obtain any judicial action on his request to modify child support, it appears that Mr. Ferrell acted at best negligently, and that he caused injury to his client. The presumptive sanction thus appears to be at least reprimand under ABA Standards std. 4.43.

ABA Standards std. 7.0 applies to violations of RPC 8.4(l). In failing to promptly respond to requests for records and information as required by ELC 5.3, it appears that Mr. Ferrell acted knowingly and caused injury to a client and to the legal system by unnecessarily delaying the investigation of Mr. Hernandez’s grievance. The presumptive sanction thus appears to be suspension under ABA Standards std. 7.2.

We believe the following aggravating factors identified in ABA Standards std. 9.22 may be raised:

- (d) multiple offenses;
- (i) substantial experience in the practice of law (admitted 1999).

We believe the following mitigating factor identified in ABA *Standards* std. 9.32 may be raised:

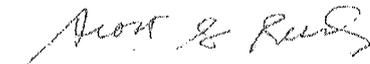
- (a) absence of a prior disciplinary record.

Aggravating or mitigating factors may cause the sanction to vary from the presumptive sanction.

CONCLUSION

For the reasons set forth above, the Office of Disciplinary Counsel is recommending that the Review Committee order the matter to hearing. The Review Committee will advise you of its decision.

Sincerely,



Scott G. Busby  
Senior Disciplinary Counsel

DOCUMENTATION<sup>2</sup>

1.  Disciplinary Counsel's analysis letter (with attachments, if applicable)
2.  Grievance
  - Grievance received on February 7, 2014
3.  Respondent's response to grievance and/or deposition (and Disciplinary Counsel's request for response, if applicable)
  - Response received on March 14, 2014
  - Additional Request for Response to Grievance, dated June 11, 2014
  - Email from Kurt Bulmer to Scott Busby, dated June 19, 2014
  - Email from Scott Busby to Kurt Bulmer, dated June 23, 2014

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<sup>2</sup> In accordance with the General Rules, the following personal identifiers will be redacted from the documents sent to the Review Committee: Social Security numbers, financial account numbers, driver's license numbers, telephone numbers, and dates of birth of minor children.

- Email from Scott Busby to Kurt Bulmer, dated July 15, 2014
  - Letter from Scott G. Busby to Kurt M. Bulmer ("10-day letter"), dated July 16, 2014
  - Subpoena Duces Tecum, dated August 5, 2014
  - Letter from Scott G. Busby to Kurt M. Bulmer, dated August 5, 2014
  - Email from Scott Busby to Kurt Bulmer, dated August 5, 2014
  - Email from Scott Busby to Kurt Bulmer, dated August 25, 2014
  - Subpoena Duces Tecum, dated August 26, 2014
  - Letter from Scott G. Busby to Kurt M. Bulmer, dated August 26, 2014
  - Email from Scott Busby to Kurt Bulmer, dated August 26, 2014
  - Letter from Kurt M. Bulmer to Scott G. Busby, dated September 12, 2014 (with client file).
  - Deposition of John D. Ferrell, taken September 18, 2014 (with Exhibits 1-5)
4.  Additional correspondence (from respondent, grievant or third parties)
- Letter from Randolph A. Hernandez, received April 2, 2014
  - Letter from John D. Ferrell to Scott G. Busby, received April 22, 2014
  - Email from Kurt Bulmer to Scott Busby, dated May 22, 2014
  - Email from Scott Busby to Kurt Bulmer, dated May 23, 2014
  - Letter from Kurt M. Bulmer to Randolph and Tami Hernandez, received June 13, 2014.
  - Letter from Randolph A. Hernandez to Kurt M. Bulmer, received August 4, 2014.
5.  Client File (all or selected documents)
6.  Court and other records (including dockets)
- Docket in *Tricinda-Grace Hernandez vs. Randolph Anthony Hernandez*, Pierce County Superior Court No. 02-3-00506-2.
  - Declaration of Service (Subpoena Duces Tecum), dated September 2, 2014
7.  Witness statements and/or depositions (other than Respondent's)

# APPENDIX B

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BEFORE THE  
DISCIPLINARY BOARD  
OF THE  
WASHINGTON STATE BAR ASSOCIATION

In re  John David Ferrell  Lawyer (Bar No. 28922).	ODC File No. 14-01810  SUBPOENA FOR PRODUCTION OF DOCUMENTS AND TANGIBLE THINGS
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THE STATE OF WASHINGTON TO:     **KeyBank, Records Custodian**

YOU ARE HEREBY COMMANDED under Rule 5.5 of the Rules for Enforcement of Lawyer Conduct (ELC) to produce and permit inspection of the following documents or tangible things at the place, and by the date and time specified below:

1. A copy of the signature card for KeyBank Account No. [REDACTED] 8540;
2. For the time period from January 1, 2012, through September 30, 2014, copies of all monthly bank statements for Account No. [REDACTED] 8540;
3. For the time period from January 1, 2012, through September 30, 2014, copies of all deposit slips, all deposited items, all checks written on the account, and all other transactions for Account No. [REDACTED] 8540, including, but not limited to, cash withdrawals and wire transfers;
4. A copy of the signature card for KeyBank Account No. [REDACTED] 8334;



1  
2 CR 45 Sections (c) and (d):

3 (e) Protection of Persons Subject to Subpoenas.

4 (1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

5 (2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

6 (B) Subject to subsection (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce and all other parties, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

7 (3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it:  
8 (i) fails to allow reasonable time for compliance;  
9 (ii) fails to comply with RCW 5.56.010 or subsection (e)(2) of this rule;  
10 (iii) requires disclosure of privileged or other protected matter and no exception or waiver applies; or  
11 (iv) subjects a person to undue burden, provided that the court may condition denial of the motion upon a requirement that the subpoenaing party advance the reasonable cost of producing the books, papers, documents, or tangible things.

12 (B) If a subpoena  
13 (i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or  
14 (ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

15 (d) Duties In Responding to Subpoena.

16 (1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

17 (2)(A) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

18 (B) If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information in camera to the court for a determination of the claim. The person responding to the subpoena must preserve the information until the claim is resolved.

# APPENDIX C

**OFFICE OF DISCIPLINARY COUNSEL  
PRELIMINARY AUDIT REPORT**

John David Ferrell: Bar # 28922

May 11, 2015

**SCOPE AND BACKGROUND**

I have preliminarily reviewed the bank records of lawyer John David Ferrell. The review was done at the request of Senior Disciplinary Counsel Scott Busby in connection with a grievance filed against Mr. Ferrell by the Office of Disciplinary Counsel (ODC). I am a Senior Auditor with the ODC and have been reviewing records related to lawyer trust accounts for nearly ten years.

During the period reviewed, Mr. Ferrell maintained a client trust account at KeyBank ending in 8540 and an operating account at KeyBank ending in 8334. The period of review for the trust account covered April 22, 2013<sup>1</sup> through August 31, 2014. The period of review for the general account covered June 15, 2012<sup>2</sup> through September 30, 2014.

I understand that this grievance, File No. 14-01810, was opened in October 2014 based on deposition testimony Mr. Ferrell gave in a different matter, File No. 14-00220. I have reviewed the transcript of Mr. Ferrell's deposition. At the deposition, Mr. Ferrell produced a fee agreement and a bank statement showing that he had placed a client's advance-fee deposit into his operating account. When asked if he had taken advance-fee deposits from other clients during the period when he did not maintain a trust account, Mr. Ferrell declined to answer, citing the Fifth Amendment. Mr. Ferrell stated that the fee agreement used in connection with that other matter was typical of his fee agreements. The purpose of the current investigation is to determine whether Mr. Ferrell properly safeguarded client funds in accordance with RPC 1.15A and 1.15B.

Despite the fact that Mr. Busby sent a November 19, 2014 letter requesting that Mr. Ferrell produce financial records, Mr. Ferrell has not done so. We were able to obtain some documents through a subpoena to KeyBank. While the bank records are sufficient to determine the amounts that went in and out of the accounts and the balance of each account, they are insufficient to identify which funds were client funds

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<sup>1</sup> The date the account was opened.

<sup>2</sup> The date the account was opened.

belonging in the trust account and which funds were earned fees belonging in the general account.

As discussed below, without receiving Mr. Ferrell's records regarding the sources of the deposits into the accounts, and his entitlement to the funds transferred out of the trust account or deposited directly into the general account, we cannot fully investigate whether Mr. Ferrell has converted client funds, or violated other provisions of the Rules of Professional Conduct regarding the handling of client funds.

## AREAS OF CONCERN

Although my preliminary review has been limited by the lack of records, my reconstruction of the trust and operating accounts from bank records provide enough information to raise issues of serious concern with regard to the safeguarding of client funds. Some of these issues are as follows:

1. Over the period reviewed, Mr. Ferrell made approximately 78 cash and credit card deposits to his operating account totaling almost \$84,000. Many of those were made during the time Mr. Ferrell did not maintain a trust account. The bank records do not provide the information we need about the source of those deposits to determine whether all or part of the \$84,000 was client funds required to be placed in a trust account, and whether the funds were handled properly. Moreover, the bank records do not provide the information we need about when client funds were earned, to determine whether the funds were converted and used by Mr. Ferrell before they were earned.

For lawyers such as Mr. Ferrell who charge hourly fees and require advance-fee deposits, it is my experience that large deposits in round-number figures are usually advance-fee deposits of client funds. Moreover, in such circumstances, deposits or transfers of earned hourly fees are seldom in large round-number figures, since the irregularities of the numbers of hours worked most commonly result in an irregular number in a billing statement to an hourly-fee client. However, in the bank records I reviewed here, almost all of Mr. Ferrell's deposits of cash and credit cards are round numbers, such as \$500 or \$1,000, all the way up to \$6,000. This raises a serious concern that some or most of these deposits may have been deposits of client funds that belonged in a trust account. Without Mr. Ferrell's records, particularly his checkbook, client ledgers, billing statements and fee agreements, we cannot determine to whom the funds belonged.

2. In light of the likelihood that Mr. Ferrell was depositing client funds into his operating account discussed above, it is of particular concern that Mr. Ferrell's operating account was overdrawn more than 170 days during the period reviewed.<sup>3</sup> Assuming, as appears likely, that Mr. Ferrell was depositing advance-fee deposits

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<sup>3</sup> The 170 overdraft days occurred between October 10, 2012, and September, 2014.

into his operating account, any client funds would usually have been depleted within two to three weeks of being deposited. Without Mr. Ferrell's records, we cannot determine whether or not Mr. Ferrell earned any client funds deposited before those funds were converted and spent. The only way to answer these questions is to examine Mr. Ferrell's records, including his check registers, client ledgers, fee agreements, billing statements, and invoices.

3. After he opened a trust account in April 2013, most of Mr. Ferrell's disbursements from that account were made without noting on the checks which clients the disbursements were for. Most of the funds disbursed went into his frequently overdrawn operating account.

Except for one cash withdrawal of \$3,082.09, all of the payments Mr. Ferrell made to himself out of trust, and not identified by client, were round amounts, typically \$500 or \$1,000.<sup>4</sup> In almost all cases, a corresponding deposit was made into the operating account to cure an overdraft. For example, on January 7, 2014, \$2,500 was disbursed from trust, and a corresponding deposit was made into the operating account. Prior to the deposit, the balance in the account was negative \$<917.66>. Accordingly, it appears that Mr. Ferrell withdrew funds from trust when he needed funds to cure an overdraft. Without Mr. Ferrell's records, we cannot determine whose funds they were, whether they were earned, or whether Mr. Ferrell gave notice to his clients before withdrawing them, as required by RPC 1.15A(h)(3). When he was asked at his deposition whether he notified his clients before withdrawing their funds, Mr. Ferrell declined to answer.

4. On December 27, 2013, \$51,092.09 was wired into Mr. Ferrell's trust account. We do not have any records which would explain what client that deposit was for or what the purpose of the deposit was. Since the date of the deposit, there have not been any large disbursements to a client that would appear to be related to that deposit. Most of the transactions following that deposit are Mr. Ferrell's round amount payments to himself. The trust account balance as of August 30, 2014 has fallen below the amount of that deposit without any noticeable disbursement of those particular funds to an individual other than Mr. Ferrell. Without Mr. Ferrell's records, we are not able to determine whose funds were deposited into trust and whether Mr. Ferrell should still be holding them.

## CONCLUSION

Based on my preliminary review of records obtained from KeyBank, I am unable to determine whether or not Mr. Ferrell is in compliance with RPC 1.15A and 1.15B. The records reviewed do, however, raise issues of serious concern, as described above.

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<sup>4</sup> As noted above, in my experience, transfers of earned hourly fees are seldom in large round-number figures, since the irregularities of the numbers of hours worked most commonly result in an irregular number in a billing statement to an hourly-fee client.

John David Ferrell  
Preliminary Audit Report  
May 11, 2015

The records requested of Mr. Ferrell are needed to determine whether Mr. Ferrell actions complied with the RPC and were adequate to safeguard his clients' property.

Respectfully Submitted



Cheryl M. Heuett  
Senior Auditor

Distribution: Scott G. Busby, Senior Disciplinary Counsel

# APPENDIX D

SUPREME COURT FOR THE STATE OF WASHINGTON

Case No. 201,400-3  
DECLARATION OF SERVICE

In re: John David Ferrell, (Bar No. 28922)  
An Attorney at Law

STATE OF WASHINGTON  
COUNTY OF KING ss



The undersigned, being first duly sworn on oath deposes and says: That he/she is now and at all times herein mentioned was a citizen of the United States, over the age of eighteen years, not a party to or interested in the above entitled action and competent to be a witness therein.

That on 3/26/2015 at 1:20 PM at the address of 14202 67th Ave NW, Gig Harbor, within Pierce County, WA, the undersigned duly served the following document(s): Certified Copy of Order to Show Cause; ODC'S Petition for Interim Suspension [F.C. 7.2(a)(3)]; Declaration of Disciplinary Counsel in Support of Petition for Interim Suspension; Declaration of Mail Service in the above entitled action upon John David Ferrell, by then and there personally delivering 1 true and correct sett(s) of the above documents into the hands of and leaving same with John David Ferrell.

Physical description of person served: Gender: Male | Race: White | Age: 50 | Height: 5' 11" | Weight: Medium | Hair: Brown

I declare under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATE: 3/27/2015  
TOTAL \$ 140.00



SL

  
B. Varela  
Registered Process Server  
License#: 1116263 - Expiration Date: 3/8/2016  
Seattle Legal Messengers  
4201 Aurora Avenue N, #200  
Seattle, WA 98103  
(206) 443-0885

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

RECEIVED BY E-MAIL

In re

John David Ferrell,  
  
Lawyer (Bar No. 28922)

Supreme Court No. 201,400-3

DECLARATION OF  
SERVICE BY MAIL

The undersigned Disciplinary Counsel of the Office of Disciplinary Counsel (ODC) of the Washington State Bar Association declares that he caused a copy of ODC'S REPLY TO RESPONDENT'S ANSWER TO ORDER TO SHOW CAUSE to be mailed by regular first class mail with postage prepaid on May 11, 2015 to:

John David Ferrell  
John D. Ferrell, PLLC  
PO Box 1357  
Gig Harbor, WA 98335-3357

The undersigned further declares that he caused a copy of ODC'S REPLY TO RESPONDENT'S ANSWER TO ORDER TO SHOW CAUSE to be emailed to John David Ferrell at [john@ferrell-law.net](mailto:john@ferrell-law.net) on May 11, 2015.

Dated this 11<sup>th</sup> day of May, 2015.

The undersigned declares under penalty of perjury under the laws of the state of Washington that the foregoing declaration is true and correct.

May 11, 2015 Seattle WA  
Date and Place

Scott G. Busby  
Scott G. Busby, Bar No. 17522  
Senior Disciplinary Counsel  
1325 4th Avenue – Suite 600  
Seattle, WA 98101-2539  
(206) 733-5998

## OFFICE RECEPTIONIST, CLERK

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**To:** Scott Busby  
**Cc:** John Ferrell; Chandler, Desiree R.  
**Subject:** RE: In re John David Ferrell, Supreme Court No. 201,400-3

Received 5-11-2015

Supreme Court Clerk's Office

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

**From:** Scott Busby [mailto:ScottB@wsba.org]  
**Sent:** Monday, May 11, 2015 12:11 PM  
**To:** OFFICE RECEPTIONIST, CLERK  
**Cc:** John Ferrell; Chandler, Desiree R.  
**Subject:** In re John David Ferrell, Supreme Court No. 201,400-3

Attached for filing are:

1. ODC'S Reply to Respondent's Answer to Order to Show Cause; and
2. Declaration of Service

Thank you,  
Scott G. Busby

---

Scott G. Busby, Senior Disciplinary Counsel  
Washington State Bar Association  
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Seattle, WA 98101-2539  
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