Schafer Law Firm

Attorney:
Douglas A. Schafer

Rust Building, Suite 1050
950 Pacific Avenue
P.O. Box 1134
Tacoma, Washington 98401-1134
(253) 383-2167 (Fax: 572-7220)

January 16, 2001

WSBA Disciplinary Board
c/o Julie Shankland, Clerk/Counsel
Washington State Bar Association
2101 - 4th Ave., 4th Floor
Seattle, WA 98121-2330

Re: In re Douglas Schafer; Public No. 00#00031

Dear Disciplinary Board Members:

At the Disciplinary Board hearing on this case on Friday, January 12, 2001, Mr. Weatherhead inquired of my co-counsel, Mr. Newman, whether the phrase "lawyer reasonably believes necessary" expresses an *objective* or a *subjective* standard where the phrase appears in RPC 1.6 (b) as follows:

> (b) A lawyer may reveal such confidences or secrets to the extent the lawyer reasonably believes necessary:
> (1) To prevent the client from committing a crime; and . . . .

Mr. Weatherhead requested a post-hearing letter citing any cases that provide guidance on the question that he raised. Mr. Newman asked me to respond, and this letter is in response to Mr. Weatherhead's request.

The "Terminology" section of both the ABA Model Rules and the Washington RPCs includes the following definitions:

> "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true. A person's belief may be inferred from circumstances.
>
> "Reasonable belief" or "reasonably believes" when used in reference to a lawyer denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

Though I found no cases from Washington or other courts that directly address Mr. Weatherhead's question, I assert that the quoted definition of "believes" expresses a *subjective* standard—"that the person involved *actually* supposed the fact in question to be true"—in contrast to what a hypothetical reasonable person might have supposed. The quoted definition of "reasonably believes" expresses that a lawyer's *subjective* belief must be reasonable under the circumstances of that particular lawyer at that particular time. Those circumstances would include the lawyer's observations, and the lawyer's background and experience.

Although the word "reasonable" usually implies an *objective* standard, the phrase "reasonable subjective belief" is now frequently used by Washington courts in deciding if an attorney-client relationship exists. In *Bohn v. Cody*, 119 Wn.2d 357, 363, 832 P.2d 71 (1992), the Washington Supreme Court stated:

> "The existence of the [attorney-client] relationship turns largely on the client's subjective belief that it exists. The client's subjective belief, however, does not control the issue unless it is reasonably formed based on the attending circumstances, including the attorney's words and actions." [Citations omitted.]

Citing *Bohn*, Judge Grosse stated in *Teja v. Saran*, 68 Wn. App. 793, 795, 846 P. 2d 1375 (1993), "The existence of an attorney/client relationship is . . . based upon the client's reasonable subjective belief that such a relationship exists." Similarly, Judge Seinfeld stated in *State v. Siriani* (Wash. Ct. of App., Div. II, No 23280-4-II, filed 12-21-00, unpublished), "The key to determining if an attorney-client relationship exists is whether the party claiming the relationship has a reasonable subjective belief that the relationship exists."

As stated above, the reasonableness of a lawyer's subjective belief concerning prevention of a crime must take into account the particular lawyer's background and experience. For example, it might be reasonable for a business lawyer unfamiliar with criminal codes or statutes to subjectively believe it to be a continuing crime for conspirators to withhold $1 million or more from a bequest due a public hospital, though a prosecutor might consider it merely a civil matter.

I previously argued the relevance to RPC 1.6(b)(1) of a lawyer's background in Respondent's Reply re: RPC 1.6(b)(1) (Preventing Commission of a Crime) **[Bar File #100]**. The *Business Law Today* article that I cited on page 3 of my August 19, 1996, letter to then Disciplinary Counsel Julie Shankland **[Exhibit #D-4]** described the continuing nature of undiscovered fraud as follows:

> "[O]ne of the principal differences between fraud and crimes like murder and robbery is that the cover-up and delay in discovery of the existence of the loss occasioned by the fraud are a necessary part of the fraud itself. So, for such time as the victim is kept unaware that the perpetrator has committed a fraud, the fraud may fairly be said to be continuing."

G. Bermant & S. Lorne,"Balancing Act: The noisy withdrawal. ABA opinion weighs subtleties of client fraud, lawyer confidentiality." (ABA Section of Business Law, *Business Law Today*, July/August 1993, Pg. 40, quote at pg. 45 **[Bar File #107]**.

I believe that the referenced items from the record of this disciplinary proceeding are all relevant to the issue raised by Mr. Weatherhead, and I hope that the Disciplinary Board members will review those items as well as all of other items that were placed in the record specifically for their review.

I enclose for the convenience of the Board members a copy of Connecticut Bar Association Ethics Committee Informal Opinion 95-17 (May 1, 1995) that I discussed with reference to RPC 8.3(c) on pages 6 and 7 of my Response by Respondent to Bar Association's Counterstatement. The Connecticut Bar staff had kindly faxed the opinion to me.

Thank you for considering this letter.

Very truly yours,

Douglas A. Schafer

Enclosure
cc: Christine Gray, Disciplinary Counsel
Shawn T. Newman, Co-Counsel
Donald H. Mullins, Co-Counsel