IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Disciplinary
Proceedings Against

DOUGLAS SCHAFER

Lawyer (Bar No. 8652)

AMENDED BRIEF OF AMICUS CURIAE

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This amended amicus brief is submitted to the Court because the author believes that the additional information included here will assist the court in reaching its decision. This matter arises in the context of a probate and trust proceeding involving the Estate of Charles Hoffman. The facts are found at *In the Matter of the Disciplinary Proceedings Against the Honorable Grant L. Anderson*, 138 Wn.2d 830, 981 P.2d 426, 833, (1999). Grant Anderson was appointed as the personal representative (executor) of the Estate of Charles Hoffman, when Mr. Hoffman died in 1989.[1] In January, 1993, the Hoffman estate was closed and its assets, including the stock of Hoffman-Stevenson, Inc. and Pacific Lanes, Inc., were transferred to a trust.[2]

This brief presents the following arguments and related analysis for consideration by the court:

I. **The personal representative is the agent of an estate, and all others who assist in the probate are subagents of the estate.**

II. **The subagents of an estate cannot assert any attorney-client privilege between themselves with respect to actions taken against the interest of the principal estate.**

III. **In probate proceedings, only the *court* can protect the estate and beneficiaries.**

IV. **As a subagent, Mr. Schafer was required to act on**

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[1] *In the Matter of the Disciplinary Proceedings Against The Honorable Grant L. Anderson*, 138 Wn.2d 830, 837, 981 P.2d 426 (1999)

[2] *Id.* at 836

behalf of the principal and no attorney-client privilege can be asserted by Mr. Hamilton with respect to actions to be taken in fraud of the principal.

V. **A lawyer owes a duty to an estate and the court to disclose constructive fraud, since the court is otherwise unable to protect the estate.**

VI. **The crime-fraud exception to the attorney-client privilege is based on common law.**

VII. **Attorney discipline must be directly related to pursuing confidence in the legal profession, not to protect fraud upon the court.**

Each of these areas of discussion is explained in further detail in the following sections.

I. THE PERSONAL REPRESENTATIVE IS THE AGENT OF AN ESTATE, AND ALL OTHERS WHO ASSIST IN THE PROBATE ARE SUBAGENTS OF THE ESTATE.

The entire intent of a probate is to assure that the estate of the deceased person is correctly distributed to the beneficiaries according to the terms of the will and applicable statutes. The entire purpose of the probate process is to assure that the estate is appropriately managed and distributed. The estate is the legal entity created by the death of the individual who prepared the will and owned the property that becomes subject to probate.

In agency terms, the estate is the principal and the personal representative is the agent. Black's Law Dictionary defines the term "agent" as follows: "A person authorized by another to act for him, one intrusted with another's business. (citations omitted)

One who represents and acts for another under the contract or relation of agency."[3]

The term "executor" is defined: "A person appointed by a testator to carry out the directions and requests in his will, and to dispose of the property according to his testamentary provisions after his decease."[4]

As the named and appointed agent, the personal representative is responsible for acting on behalf of the estate in a fiduciary capacity. "Fiduciary" is defined:

> The term is derived from the Roman law, and means (as a noun) a person holding the character of a trustee, or a character analogous to that of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires. A person having duty, created by his undertaking, to act primarily for another's benefit in matters connected with such undertaking. As an adjective it means the nature of a trust; having the characteristics of a trust; analogous to a trust; relating to or founded upon a trust or confidence.
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> A person or institution who manages money or property for another and who must exercise a standard of care in such management activity imposed by law or contract; *e.g.* executor of estate. . . .

In a nonintervention probate, the function of the court is to confirm the legal authority of the personal representative and to intervene in the probate process

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[3] *Black's Law Dictionary*, 5th Ed., 59 (1979) West Publishing

[4] *Id.*, at 311

if any issues are raised about the actions of the personal representative. The superior courts have the authority, under RCW 11.28.250, to revoke letters testamentary.

When the personal representative employs an attorney, it is to assist the personal representative in the proper administration of the estate.[5] When an attorney is the personal representative, he has the knowledge to properly administer the estate. Therefore, he is representing the estate and not himself. Other persons who assist the personal representative with respect to the probate estate, are subagents of the estate.[6] Only the court has the authority to assure that the interests and directives of the principal (the estate) are followed by all agents.

II. THE SUBAGENTS OF AN ESTATE CANNOT ASSERT ANY ATTORNEY-CLIENT PRIVILEGE BETWEEN THEMSELVES WITH RESPECT TO ACTIONS TAKEN AGAINST THE INTEREST OF THE PRINCIPAL ESTATE.

As is firmly established in agency law, the personal representative (agent) and subagents are held to a high fiduciary standard in their actions on behalf

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[5] *In the Estate of Larson*, 103 Wn.2d 517, 521, 694 P.2d 1051 (1985).

[6] Black's Law Dictionary defines subagent in the following manner: One authorized by agent to help perform functions for principal. Generally, absent express or implied authority, an agent has no authority to appoint a subagent. The subagent is subject to control by both agent and principal. Restatement, Second, Agency Section 5. *Black's Law Dictionary*, 5th Ed., 59 (1979) West Publishing Company.

of the estate (principal).[7] Any act *as an agent* against the interests of the principal is fraud against the principal. Further, if the personal representative is an attorney, there can be no attorney-client privilege between the personal representative (agent) and any subagents when acts are taken in fraud of the principal, whom all agents are representing. All privilege runs to the estate (the principal). If the personal representative (agent) acts outside of the authority provided by the estate (principal), the personal representative has breached his or her fiduciary duty; there can be no assertion of privilege by the personal representative or any subagents that is against the interests of the estate.

In the instant case, the personal representative and agent (Mr. Anderson) enlisted a subagent (Mr. Hamilton) to take actions with respect to the estate, as a co-conspirator. The Court stated, "Moreover, Judge Anderson thought it would be too complicated to sell the business through conventional financing arrangements, so he approached Mr. Hamilton, who expressed interest in buying the bowling alley.[8]" In turn, as a subagent, Mr. Hamilton went to an attorney (Mr. Schafer) for

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[7] *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 37, 948 P.2d 816 (1997)

[8] *In the Matter of the Disciplinary Proceedings Against the Honorable Grant Anderson*, at 834

assistance in purchasing the bowling alley for less than fair market value from the estate, so that Mr. Schafer also became a subagent of the estate. At no time was the relationship between Mr. Hamilton and Mr. Schafer outside of the agency relationship, but it at all times was formed solely for the purpose of cooperative action involving the estate. Acting on behalf of the estate, Mr. Schafer then disclosed information about conversations with Mr. Hamilton, who has attempted to assert an attorney-client privilege between them.

This is not the case of an individual acting on his or her own, seeking personal legal advice. This is the case of an subagent of an estate involving another subagent in planned actions. As an estate agent, Mr. Hamilton cannot assert attorney-client privilege with Mr. Schafer, when Mr. Hamilton seeks to take action in fraud of the estate. As soon as he became a subagent, Mr. Schafer's duty was to act on behalf of the estate principal and not in fraud of the estate. There is no privilege to be asserted by Mr. Hamilton, and no breach of privilege by Mr. Schafer, who has acted only in the interest of the principal estate. Further, this Court found, "Additionally, both Judge Anderson and Mr. Hamilton testified that when the sale did not close as planned, Mr. Hamilton took over management of the

bowling alley."[9] This clearly demonstrates that Mr. Hamilton was acting as a subagent of the Estate of Charles Hoffman.

III. WHEN A PROBATE IS COMMENCED, IT IS THE DUTY OF THE *COURT* TO PROTECT THE ESTATE AND BENEFICIARIES.

As discussed *supra*, the personal representative is the agent of the estate. As agent, the personal representative is obligated to exercise the utmost good faith and diligence in administering the estate in the best interests of the heirs.[10] When the agent, as a fiduciary, seeks to use the property of the estate obtain a pecuniary benefit for himself, he breaches his duty to the estate. The Court of Appeals has stated:[11]

> The law is that a trustee is under a duty to the beneficiary to administer the trust solely in the interest of such beneficiary, and, in doing this, an undivided loyalty to the trust is required. The trustee is not permitted to make a profit out of the trust.

Since the personal representative is an agent and fiduciary, he is held to the same standards as the trustee of a trust. The Court of Appeals has ruled, "An executor, executrix or administrator of an estate of a deceased person acts in a trust capacity, and must

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[9] *In the Matter of the Disciplinary Proceedings Against Grant L. Anderson*, at 846

[10] *Matter of the Estate of Larson*, 103 Wn.2d 517, 694 P.2d 1051 (1985)

[11] *In the Estate of Winslow*, 30 Wn.App. 575, 578, 636 P.2d 505 (1981)

conform to the rules governing a trustee."[12] And in turn, all subagents become fiduciaries. There are two reasons the trust statutes of the Revised Code of Washington apply in this case. First, the bowling alley was an asset of the Hoffman Estate and trust principles apply. Secondly, the bowling alley was transferred into a trust, and Mr. Hamilton operated the business on behalf of the trust. For these reasons, RCW 11.100.130 is applicable:

> **Person to whom power of authority to direct or control acts of fiduciary or investments of a trust is conferred deemed a fiduciary-Liability**
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> Whenever power or authority to direct or control the acts of a fiduciary or the investments of a trust is conferred directly or indirectly upon any person other than the designated trustee of the trust, such person shall be deemed to be a fiduciary and shall be liable to the beneficiaries of the trust and to the designated trustee to the same extent as if he or she were a designated trustee in relation to the exercise or nonexercise of such power or authority.

Mr. Hamilton was clearly a fiduciary of both the Estate of Charles Hoffman, and the trust that was established with the assets of Mr. Hoffman's estate.

IV. AS A SUBAGENT OF WILLIAM HAMILTON, MR. SCHAFER WAS REQUIRED TO ACT ON BEHALF OF THE PRINCIPAL (THE ESTATE OF CHARLES HOFFMAN) AND NO ATTORNEY-CLIENT PRIVILEGE CAN BE ASSERTED BY MR. HAMILTON WITH RESPECT TO ACTIONS TO BE TAKEN IN FRAUD OF THE PRINCIPAL.

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[12] *Id.* at 578

The instant case involves the issue of the relationship formed between Mr. Hamilton and Mr. Schafer, and whether Mr. Schafer violated the attorney-client privilege. The Bar Association found that Mr. Schafer had violated RPC 1.6, by revealing the confidences of his client, William Hamilton. Mr. Hamilton told Mr. Schafer that he (Mr. Hamilton) wanted Mr. Schafer to form a corporation for the purpose of leasing or purchasing Pacific Lanes from the probate estate of Charles Hoffman. (Brief of WSBA at page 3, and Appendix A at 2 Paragraphs 4-6, and CP 24.) Mr. Hamilton told his attorney, Douglas Schafer that the price for the bowling alley was significantly less than fair market value. (Brief of WSBA at pages 3-4.) Mr. Schafer revealed the comments of his client and reported the transaction to various authorities.

Mr. Schafer believes his conduct was permitted under various theories, including RPC 1.6 (c), which states:

> A lawyer may reveal to the tribunal confidences or secrets which disclose any breach of fiduciary responsibility by a client who is a guardian, personal representative, receiver, or other court appointed fiduciary.

In response to the argument that RPC 1.6(c) permitted Mr. Schafer to disclose Mr. Hamilton's confidences, the Bar points out that attorney Schafer's client was William Hamilton, and that Mr. Hamilton was

not a court-appointed fiduciary, but a third party. Mr. Hamilton leased or purchased property of the probate estate from the personal representative/attorney, Grant Anderson. The Bar neglects to observe that this was not an arm's length transaction, that both Mr. Hamilton and Mr. Schafer were acting together as subagents of the estate, and were held to the highest fiduciary standard in this capacity. [13]

Mr. Hamilton was an agent and fiduciary of the estate, and his purchase of the property for less than fair market value was a constructive fraud. Conduct that has all of the actual consequences and legal effects of actual fraud is constructive fraud.[14] Where property is fraudulently transferred, it is held in constructive trust.[15] In *Consulting Overseas Management, LTD. v. Shtikel*[16] the Court said,

> A constructive trust is an equitable remedy that "compel[s] restoration, where one through actual fraud, abuse or confidence reposed and accepted, or through other

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[13] *Estate of Larson at 520*

[14] *Green v. McAllister*, et al., 103 Wn.App 452, 467, 14 P.3d 795, (2000) (The Court cited *Dexter Horton Bldg. Co v. King County*, 10 Wn.2d 186, 191, 116 P.2d 507 (1941)), See also, *In re the Marriage of Petrie*, 105 Wn.App. 268, 276, 19 P.3d 443 (2001)

[15] *Consulting Overseas Management, LTD, v. Shtikel*, 105 Wn.App. 80, 86-87, 18 P.3d 1144 (2001) (Professor Tuttle at fn 50 cites *Seminole Nations v. United States*, 316 U.S. 286, 296-97 (1942))

[16] 105 Wn.App. 80, 86-87, 18 P.3d 1144 (2001)

> questionable means, gains something for himself, which, in equity and good conscience, he should not be permitted to hold. Although courts will typically impose a constructive trust in cases of "fraud, misrepresentations, bad faith or overreaching" they may also do so "in broader circumstances not arising to fraud or undue influence." Such trusts arise "where the retention of the property would result in the unjust enrichment of the person retaining it." Indeed, the primary purpose of a constructive trust is to prevent unjust enrichment.

As an agent of the estate and a constructive trustee of the Pacific Lanes property, Mr. Hamilton had a fiduciary duty to the Estate of Charles Hoffman. *In Green v. McAllister*,[17] "This court has defined constructive fraud as failure to perform an obligation, not by an honest mistake, but by some 'interested or sinister motive.'"[18]

Experts in the field of ethics have addressed the issue of third party liability. In an exhaustive treatise on the subject,[19] Professor Tuttle states:

> The prophylactic character of fiduciary law is reflected not only in its remedies, but also in its scope. Fiduciary law reaches beyond the relationship itself to include third parties who deal with fiduciaries. Section 326 of the Restatement (Second) of

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[17] 103 Wn.App. 452, 468, 14 P.3d 795 (2000)

[18] *In re Estate of Marks*, 91 Wn.App. 325, 336, 957 P.2d 235, *review denied*, 136 Wn.2d 1031, 972 P.2d 466 (1998)

[19] Robert W. Tuttle, *The Fiduciary's Fiduciary: Legal Ethics in Fiduciary Representation*, University of Illinois Law Review, 889 (1994)

> Trusts reflects the general rule: "A third person who, although not a transferee of trust property, has notice that the trustee is committing a breach of trust and participates therein is liable to the beneficiary for any loss caused by the breach of trust. (citation omitted) Sections 874 and 876 of the Restatement (Second) of Torts together express a similar rule. Section 874 states that "one standing in a fiduciary relation with another is subject to liability to the other for harm resulting from a breach of the duty imposed by the relations. (citation omitted) Section 876 extends tort liability to "Persons Acting in Concert"

RPC 1.6(b)(1) permits an attorney to disclose a future crime or continuing fraud. In a past crime, the attorney is consulted for the purpose of defending the individual, where in cases of future crimes, he or she is not preparing a defense, but may be giving legal advice regarding carrying out a crime or fraud.[20] In the instant case, the purchase of Pacific Lanes was a continuing constructive fraud upon the estate and the court, which resulted in a constructive trust.[21]

William Hamilton was not an innocent third party, nor was he a BFP. He was an agent of the estate, acting on behalf of the estate through his participation in a fraud. He was engaged in a conspiracy with the personal representative (who was the trustee and agent) to transfer the assets of the estate for less than fair

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[20] *State v. Pawlyk*, 115 Wn.2d 457, 489, 800 P.2d 338 (1990).

[21] *In re the Marriage of Petrie*, 105 Wn.App. 268, 276, 19 P.3d 443 (2001)

market value. This conspiracy was apparently continuing: "Twice in December 1995, Mr. Hamilton, Mr. Schafer's client, told Mr. Schafer to stop investigating Anderson." (Page 5 of the WSBA Brief, and Appendix A at 4-5 Paragraph 15-18 (CP 26-27).) Further, the conspiracy was not only committed on the Estate of Charles Hoffman, it was committed on the court. In reviewing Judge Anderson's actions, this Court found,

> Judge Anderson violated Canons 1 and 2A of the Code of Judicial Conduct by accepting an offer from William Hamilton to have his car loan payments made by William Hamilton during the same time Judge Anderson and William Hamilton negotiated a reduction of $92,829 in the amount owed by Hamilton's company, Pacific Recreation Enterprises, Inc. to Pacific Lanes, Inc.[22]

At page 849, the Court held:

> The Commission has met its burden of proving that Judge Anderson's acceptance of the car loan payments was, in fact, consideration for negotiating the sale of the Hoffman estate's bowling alley business.[23]

V. A LAWYER OWES A DUTY TO AN ESTATE AND THE COURT TO DISCLOSE CONSTRUCTIVE FRAUD, SINCE THE COURT IS OTHERWISE UNABLE TO PROTECT THE ESTATE.

The attorney-client privilege has been the subject of much debate among legal experts. On this subject, Professor Tuttle states,

> The lawyer's duty of loyalty to the client

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[22] *In the Matter of the Disciplinary Proceedings Against the Honorable Grant Anderson*, at 844

[23] *Id.*, at 849

> demands, as a central corollary, that the lawyer not reveal the client's confidential information without consent. A complex set of reasons justify the moral duty of confidentiality. When a client feels free to disclose all information to his attorney, without fear that the attorney will disclose the information to others, the attorney is better able both to represent the client (promoting justice) and to dissuade the client from undertaking wrongful acts (promoting social utility). In addition, the lawyer's duty to maintain confidentiality reinforces the trust relationship between the attorney and client. By sharing secrets with the lawyer, the client makes himself vulnerable to harm by the lawyer. A strong principle of confidentiality assures the client that his trust and vulnerability will not be betrayed.
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> The law of lawyers reflects the moral duty of confidentiality in two areas: the attorney-client evidentiary privilege and the confidentiality rules . . . . The lawyer's duty of confidentiality seems to swallow up lesser obligations, perhaps even the lawyer's moral duty to protect the client's beneficiary. But the duty of confidentiality is not absolute.[24]

Another noted authority, Professor Patrick E. Longan, also has examined the ambiguities in the Rules of Professional Conduct,[25] when he writes:

> The existing authorities send mixed message to the lawyer (who is representing a fiduciary who is breaching his or her duty). Comment 4 to Rule 1.14 of the Model Rules of

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[24] Professor Tuttle notes that ABA Model Rule 3.3 requires such disclosures as are necessary to avoid or correct a fraud on a tribunal. Need cite to Tuttle article at page 938

[25] P. Longan, *Middle-class Lawyering in the Age of Alzheimer's: the Lawyer's Duties in Representing a Fiduciary*, 70 Fordham Law Rev. 901 (December, 2001)

> Professional Conduct, which deals with the lawyer's duties to a client under a disability, states that "if the lawyer represents the guardian as distinct from the ward, and is aware that the guardian is acting adversely to the ward's interests, the lawyer may have an obligation to prevent or rectify the guardian's misconduct. See Rule 1.2(d). This appears to be a clear directive, but elsewhere the Rules seem to forbid any such action . . . . How can a lawyer prevent or rectify misconduct without telling someone about it? (Citation omitted) The Model Rules thus leave the lawyer relatively sure he has no ethical option to prevent or rectify misconduct by the guardian, but scratching his head about the Comment to 1.14 that says he may have such a duty after all.

The fiduciary relationships of subagents in a probate create an obligation for an attorney to disclose constructive fraud.

VI. THE CRIME-FRAUD EXCEPTION TO THE ATTORNEY-CLIENT PRIVILEGE IS BASED ON COMMON LAW.

Mr. Schafer argues that Mr. Hamilton's statements were not confidential, because they were made in furtherance of a crime or fraud. The WSBA argues that the crime-fraud exception should not be applied in the absence of rule-making. (Page 22 of the WSBA's Brief.) The Crime-fraud exception is not statutorily created, but has common law roots. In many jurisdictions, the rule has been codified. The Washington State Supreme Court has recognized and applied the crime-fraud exception. In *State v. Hansen*,[26] this Court held:

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[26] 122 Wn.2d 712, 720, 721, 862 P.2d 117, (1993)

> The attorney-client privilege is not applicable to a client's remarks concerning the furtherance of a crime, fraud, or to conversations regarding the contemplation of a future crime. (citations omitted) Hansen's statement that he was going to blow away the judge, prosecutor and public defender falls under this exception to the attorney-client privilege.

Thus, this Court has already recognized the crime-fraud exception in case law. Other states have applied the exception and explained its rationale. In *Fellerman v. Bradley*,[27] the Court held:

> The attorney-client privilege is indispensable in fostering a climate that is propitious for effective legal counsel and representation. . . . Its protections are the result of the judicial recognition that the public is well served by sound legal counsel based on full and candid communications between attorneys and their clients. "Preserving the sanctity of confidentiality of a client's discloses to his attorney will encourage an open atmosphere of trust * * *" (citations omitted)
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> Our decisional treatment of the privilege, however, recognized that it is not absolute. . . . (Citations omitted) The "crime or fraud" exception to the privilege represents a statutory recognitions of a situation in which the purpose of the privilege would not be served by its enforcement. The exception encompasses a type of communication that is alien to the fundamental reasons that underlie the privilege. This exception provides that the "privilege shall not extend to a communication in the court of legal services sought or obtained in the aid of the commission of a crime or a fraud." N.J.S.A. 2A:84A-20(2)(a); Evid.R 26(2)(a). We emphasized this *In Re Stein*, supra: "To bring

[27] 99 N.J. 493, 493 A.2d 1239 (1985)

> a matter within the role of 'privilege' there must be both professional employment and professional confidence. **A lawyer cannot be properly consulted professional for advice to aid in the perpetration of a fraud on a court. The claim of 'privilege' is that of the client and a fraudulent object or purpose puts him beyond the pale of the Law's protection."** (Emphasis added) [1 N.J. at 236, 62 A.2d 801.]

The crime-fraud exception to the attorney-client privilege is applied by many courts, even if not found in court rules or statutes. In 2000, the Supreme Court of Connecticut overruled prior law when it announced the application of the crime-fraud exception in *Olson v. Accessory Controls and Equipment Corp*.[28] The Court found that otherwise privileged communications may be stripped of their privileged status if the communications have been procured with an intent to further a civil fraud. Another recent case, *Lahr v. State of Indiana*,[29] held,

> Further, the attorney-client privilege is not absolute, and sometimes the larger society interest in preventing illegal conduct outweighs the equally important interest of safeguarding confidential communications. In such situation, the crime-fraud exception applies. Here, in determining that Kauffman could testify, the trial court relied upon *Green v. State* in which our supreme court recognized the crime-fraud exception: [An] attorney and client may not conspire to commit a crime and then contend that the communications between them as to the conspiracy is privileged. A fraudulent intent

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[28] 757 A.2d 14 (2000) 142 Lab.Cas. P 59, 132, 16 IER Cases 1050.

[29] 731 N.E.2d 479, 482 (2000)

> as well as criminality of propose may well remove the veil of secrecy from communications between attorney and client; where an attorney is consulted for the purpose of obtaining advice as to the preparation of a fraud, or in aid or furtherance thereof. The communications made to him by one having such purpose in view are not, according to most authorities, privileged.[30]

The *Lahr*[31] Court cited *Clark v. United States*[32] when it held:

> **It is clear that the attorney-client privilege is to be used to protect legitimate confidential client communications, not as a sword for suppressing the trust.** (Emphasis added)

Professor Tuttle analyzed the relationship between RPC 1.6 and RPC 1.2 by stating:

> The law protects communications between lawyer and client so that the lawyer can help the client conform his conduct to the law's requirements. As Model Rule 1.2(d) indicates, "a lawyer may discuss the consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." (Citation omitted) Although difficult to locate conceptually, there is a point at which a good faith discussion of the consequences of a course of conduct can shift to advice that encourages or facilitates the client's wrongful act. (Citation omitted) The

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[30] 731 N.E.2d 479, 483 (2000) citing *Green v. State,* 257 Ind. 244, 255-56, 274 N.E.2d 267, 273 (Ind 1971) and citing *Clark v. United States*, 289 U.S. 1, 53 S.Ct. 465, 77 L.Ed. 993 (1933).

[31] Id. at page 882-83

[32] *Clark v. United States*, 289 U.S. 1 at 15, 53 S.Ct. 465, 469-70 (citations omitted), 77 L.Ed. 993 (1933)

> former is privileged. The latter is not privileged, but is *forbidden by law that prohibits assisting or encouraging another's breach of trust.*[33] (Emphasis added)

The attorney-client privilege must not be used as a weapon by fiduciaries to perpetrate fraud upon an estate and the court.

VII. ATTORNEY DISCIPLINE MUST BE DIRECTLY RELATED TO PURSUING CONFIDENCE IN THE LEGAL PROFESSION, NOT TO PROTECT FRAUD UPON THE COURT.

This Court has said, "[T]he basic and underlying purpose of all attorney disciplinary action--be it censure, reprimand, suspension, or disbarment--is for the protection of the public and to preserve confidence in the legal profession as well as the judicial system."[34] In a case of historical significance involving the Watergate scandal,[35] the court said,

> Of all classes and professions, the lawyer is most sacredly bound to uphold the laws. He is their sworn servant; and for him, of all men in the world, to repudiate and override the laws, to trample them under foot, and to ignore the very bands of society, argues recreancy to his position and office, and sets a pernicious example to the insubordinate and dangerous elements of the body politic. It manifests a want to fidelity to the system of a lawful government which he

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[33] (Citing Hazard and Hodes, 1.6:103 (2nd ed. Supp. 1994))

[34] (*In re Greenlee*, 82 Wn.2d, 390, 510 P.2d 1120 (1973); *In re Hawkins*, 81 Wn.2d 504, 503 P.2d 95 (1972); *In re Steinberg*, 44 Wn.2d 707, 269 P.2d 970 (1954))

[35] *In the Matter of the Disciplinary Proceedings of Egil Krogh, Jr.*, 85 Wn.2d 462, 473, 536 P.2d 578 (1975)

has sworn to uphold and preserve.

Disciplinary actions must be based on the purpose of the law and legal profession, and applied only when an attorney has acted outside of the range of acceptable behavior as represented in the foundations of public trust. This Court should not permit an asserted attorney-client relationship among subagents to perpetrate a fraud upon an estate and the court.

Respectfully submitted this 1st day of March, 2002.

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