Public No. 00#00031

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Disciplinary Proceedings Against

DOUGLAS SCHAFER

Lawyer (Bar No. 8652)

ANSWERING BRIEF OF THE WASHINGTON STATE BAR ASSOCIATION

The Washington State Bar Association

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COUNTERSTATEMENT OF THE ISSUES

Having already disregarded his client's instruction not to disclose his client's confidences and secrets by revealing them to numerous law enforcement and disciplinary agencies, respondent lawyer Douglas Schafer, in April 1996, further deliberately and widely disclosed his client's confidences and secrets in a public appellate filing and to three newspapers. Should this Court affirm the conclusion of the Hearing Officer and the unanimous conclusion of the Disciplinary Board that Schafer's conduct violated the ethical rule of confidentiality, and decline to rewrite the confidentiality rule to create a *post hoc* justification for Schafer's conduct?

COUNTERSTATEMENT OF THE CASE

I. PROCEDURAL FACTS

On May 26, 1999, the Washington State Bar Association ("Association") filed a three-count Formal Complaint against Schafer. Clerk's Papers ("CP") 59-65.[1] Count One of the Complaint charged Schafer with violating Rule 1.6(a) of the Rules of Professional Conduct ("RPC") and his oath as a lawyer by revealing confidences and secrets of his client William L. Hamilton. After the Association advised the Hearing Officer that it did not intend to pursue Counts Two and

[1] Clerk's papers are designated as "CP" followed by the page citation to the record transmitted to the Court. Hearing exhibits are designated as "Ex." followed by the exhibit number. The transcript of the hearing proceedings is designated as "[date] RP" followed by the page citation to the transcript.

Three, he dismissed those counts on January 25, 2000. CP 224, 225-28.

The hearing occurred over the course of five days in July 1999. On August 21, 2000, Hearing Officer Lawrence R. Mills filed his Findings of Fact, Conclusions of Law and Hearing Officer's Recommendation, determining that Schafer had committed the violations charged in Count One and recommending the imposition of a six-month suspension. CP 23-44. On August 28, 2000, Schafer filed a motion to amend the Findings of Fact, Conclusions of Law and Hearing Officer's Recommendation. CP 453-56. On September 1, 2000, the Hearing Officer denied Schafer's motion to amend the August 21, 2000 Findings and Conclusions. CP 13-15. A copy of the Findings of Fact, Conclusions of Law and Hearing Officer's Recommendation is attached as Appendix A (CP 23-44).

On January 12, 2001, the Disciplinary Board reviewed this matter under Rule 6.1(a) of the Rules For Lawyer Discipline ("RLD") (providing for automatic review of suspension and disbarment recommendations). 1/12/01 RP. On May 5, 2001, the Board unanimously upheld the Hearing Officer's conclusion of law that Schafer violated RPC 1.6 and his oath as a lawyer, as charged in Count One of the Formal Complaint. By a vote of six to three, the Board increased the Hearing Officer's sanction recommendation to a one-year suspension. In so doing, the Board noted:

> This case is important because of what it is not. This is not a whistleblower case. This is not a case about a lawyer who was faced with deciding whether to violate his ethical duties to his

> client by disclosing the client's secrets or confidences to report alleged unethical conduct by a judge. The record in this case clearly establishes that this is a case of a lawyer who intentionally decided to disclose his client's confidences **in addition** to reporting unethical conduct by a judge.

CP 2-12 (emphasis added). A copy of the Disciplinary Board Order, including the Dissents, is attached to this Brief as Appendix B.

Schafer filed a Notice of Appeal on May 9, 2001. CP 1. The Chair of the Disciplinary Board subsequently imposed $8,801.26 in costs and expenses. CP 570.

II. SUBSTANTIVE FACTS

Between the early 1980's and 1992, Schafer represented William Hamilton on a variety of business and personal matters. On August 12, 1992, Hamilton telephoned Schafer and informed him that he wanted to form a corporation to purchase the Pacific Lanes bowling alley from the Estate of Charles C. Hoffman. Hamilton stated that he wanted to form the corporation quickly and asked Schafer to prepare the necessary documents. Schafer agreed to do so. Hamilton and Schafer had a meeting on August 17, 1992 to discuss the formation of the corporation. Appendix A at 2 ¶¶ 4-6 (CP 24).

During the August 12, 1992 telephone call or the August 17, 1992 meeting, Hamilton explained to Schafer why he wanted to form the corporation and why he wanted the work done quickly. Hamilton told Schafer that lawyer Grant L. Anderson was the personal representative and attorney for the Hoffman

estate; that Anderson had been "milking" the estate for four years; that Anderson was about to become a judge; that Anderson was selling the bowling alley quickly so that he could close the estate before he assumed the bench; that there was no time for an appraisal; that Anderson was giving Hamilton a good deal on the bowling alley, and that Hamilton would repay Anderson "down the road" by making Anderson a corporate secretary or something like that. In response to these statements, Schafer told Hamilton that he did not want to hear about it. Appendix A at 3 ¶¶7-8 (CP 25); Ex. A-7.

At that time Schafer did not believe that Hamilton's comments constituted particularly conclusive evidence of fraud. 7/17/00 RP at 66-70. Schafer researched the corporation name, prepared the corporation documents, obtained Hamilton's signature, and sent the documents to the Secretary of State. Hamilton paid Schafer approximately $300 in attorney's fees for his services. Appendix A at 3 ¶9 (CP 25).

In January 1993, Grant Anderson was sworn in as a Pierce County Superior Court judge. By the end of 1993, the transfer of the bowling alley was final. Appendix A at 3 ¶11 (CP 25); 7/17/00 RP at 72-73.

For nearly three years, between 1992 and July 1995, Schafer took no actions whatsoever to look into the circumstances of the bowling alley sale to his client, Hamilton. 7/17/00 RP at 71.

Then, in July 1995, Schafer was retained to represent Donald Barovic

regarding an estate matter filed in Pierce County Superior Court. Judge Anderson was assigned to hear the Barovic matter. Between July and November 1995, Schafer disagreed with and was unhappy with a number of Judge Anderson's rulings in the Barovic case, which occurred both before Schafer was involved in the case, and during his representation of Barovic. As a result, Schafer questioned Judge Anderson's professional competence, fitness as a judge, and integrity. Appendix A at 4 ¶¶12-13 (CP 26); Ex. A-7.

Immediately following an adverse ruling in Barovic on December 15, 1995, without even leaving the courthouse, Schafer began an investigation of Judge Anderson's role as the personal representative and attorney for the Hoffman estate. On the morning of December 15, 1995, Schafer checked out the Hoffman estate file in Pierce County Superior Court, Cause Number 89-4-00326-3. Schafer also reviewed his client file for Hamilton concerning the formation of Pacific Lanes Enterprises, the corporation formed to purchase Pacific Lanes bowling alley from the Hoffman estate. Appendix A at 4 ¶14 (CP 26); 7/17/00 RP 74-77; Ex. A-1, A-2.

In December 1995, Schafer approached Hamilton regarding Schafer's suspicions about Anderson. Twice in December 1995, Hamilton, Schafer's former client, told Schafer to stop investigating Anderson. Appendix A at 4-5 ¶15-18 (CP 26-27).

In December 1995 and January 1996, Schafer contacted numerous persons

in an attempt to further investigate Anderson's handling of the Hoffman estate, Appendix A at 5 ¶¶19-20 (CP 27), including the Attorney General's Office and the hospital that was the beneficiary of the Hoffman estate. 7/17/00 RP at 86-98.

On February 1, 1996, Schafer received a facsimile from Hamilton demanding that Schafer not disclose any confidential information he learned from Hamilton or Sound Banking. Appendix A at 5-6 ¶21 (CP 27-28); Ex. A-3.

On February 1, 1996, Schafer met with William Hamilton and Philip R. Sloan, a lawyer representing Hamilton. During the meeting, when Schafer informed Sloan and Hamilton about his investigation and efforts to expose Judge Anderson, Sloan instructed Schafer that he was not to disclose any communications between Hamilton and Schafer, and indicated that he would file a bar grievance if Schafer failed to protect Hamilton's confidential information. Appendix A at 6 ¶23 (CP 28).

Schafer replied that he did not "give a shit," that he did not like lawyers, and that he was going to do what he thought was right. 7/17/00 RP at 167. According to Schafer's own testimony, he advised Hamilton and Sloan that "[t]his guy [Anderson] has got to be exposed and I'm going to do it and I don't give a damn." 7/17/00 RP at 260.

On February 2, 1996, Schafer received a facsimile from Sloan, which instructed Schafer "not to disclose any communications re Grant Anderson to anyone. If you do – you will be in violation of RPC 1.6 ...." Appendix A at 6

¶24 (CP 28); Ex. A-4.

On February 2, 1996, Schafer filed a Motion of Prejudice against Judge Anderson in the Barovic matter. Ex. A-5. In his motion, Schafer included the following statement:

> In addition, I personally have been making inquiries into the handling by Judge Grant L. Anderson, during the almost four years, and particularly the last few months, before he became a judge, of the Estate of Charles C. Hoffman, (Cause No. 89-4-00326-3). Based upon the public documents that I have reviewed and the individuals with whom I have spoken, I believe that full investigation into his and his firm's handling of that estate is necessary.

Schafer did not, on February 2, 1996, name Hamilton or disclose the actual contents of Hamilton's 1992 communications to Schafer. Appendix A at 6-7 ¶25 (CP 28-29); Ex. A-5.

Shortly thereafter, Judge Anderson recused himself in the Barovic case. Appendix A at 7 ¶26 (CP 29).

Schafer prepared a February 16, 1996 document entitled, Declaration Under Penalty of Perjury." Ex. A-7. The Declaration stated, in pertinent part:

> On August 12, 1992, I was called by my client, William L. Hamilton, who I previously had advised in several matters including the formation in 1990 of Sound Banking Company (of which he was President/CEO, as he had been at Western Community Bank for about 25 years before its sale), and he requested that I form a new corporation for him immediately. He said that an attorney he knew, Grant Anderson, had been "milking" an estate for four years and was about to become a judge, so he needed to quickly sell the estate's business, Pacific Lanes, in order to close the estate before he took the bench. Hamilton said that he

> had agreed to buy the business. It was either in that phone conversation or when we met on August 17, 1992, that Hamilton commented that there was no time for an appraisal of the business, that Anderson was giving him a good deal, and that Hamilton would repay him "down the road" by paying him as corporate secretary or something like that. When I heard that comment, I told Hamilton, "I don't even want to hear about it!" I formed his corporation, Pacific Recreation Enterprises, Inc., and had no further involvement with him concerning the purchase of Pacific Lanes. My notes from those conversations and papers Hamilton gave me when we met reflect that the estate was that of Chuck Hoffman.

Thus, Schafer's "Declaration Under Penalty of Perjury" sets forth the comments that Hamilton made to Schafer over three years earlier during their attorney-client relationship, and that Hamilton expressly had instructed Schafer **not** to disclose. Ex. A-7.

On February 29, 1996, Schafer prepared a "memo" addressed to "Appropriate Public Officials." The memorandum stated that Schafer believed Anderson acted improperly in handling the Hoffman estate, and identified certain persons he believed to have participated in that misconduct. He did not name Hamilton as one whom he believed to have "participated" in that misconduct. Ex. A-8. The memo indicates that he is enclosing his Declaration Under Penalty of Perjury dated February 16, 1996. The contents of the memo focus upon Anderson's arrangements with Trendwest Resorts, Inc. and Surfside Resort, regarding which Hamilton had no involvement. Ex. A-8.

On or about February 6, 1996, Schafer met with John Ladenburg, Pierce

County Prosecuting Attorney. Schafer later provided the Pierce County Prosecuting Attorney's Office with his February 16, 1996 Declaration Under Penalty of Perjury (Ex. A-7).

On or about February 8, 1996, Schafer contacted the Federal Bureau of Investigation (FBI). Schafer later provided the FBI with a copy of his February 16, 1996 Declaration Under Penalty of Perjury (A-7). Appendix A at 8 ¶30 (CP 30); 7/17/00 RP at 144.

On February 13, 1996, Schafer met for several hours with Sally Carter-DuBois, an investigator with the Commission on Judicial Conduct (CJC). Schafer provided Ms. Carter-DuBois with a "briefcase full" of documents and discussed Schafer's allegations against Judge Anderson. When Ms. Carter-DuBois made comments indicating that she took Schafer's allegations seriously (for example, rating Schafer's complaint "13" on a scale of "1" to "10"), Schafer was encouraged that the CJC would follow through on his allegations. Schafer later provided the CJC with a copy of his February 16, 1996 Declaration Under Penalty of Perjury (A-7). Appendix A at 8-9 ¶32 (CP 30-31).

On March 1, 1996, Schafer sent a letter to David Walsh of the Attorney General's (AG) Office. Schafer enclosed his February 29, 1996 memorandum and February 16, 1996 Declaration with the letter. Appendix A at 10 ¶35 (CP 32).

In early March 1996, Schafer also sent his February 16, 1996 Declaration

and his February 29, 1996 memorandum to the Association, along with other documentation obtained during the course of Schafer's investigation into Anderson's conduct in handling the Hoffman estate. Appendix A at 10 ¶36 (CP 32).

In February or March 1996, Schafer also sent his February 16, 1996 Declaration and his February 29, 1996 memorandum to the Internal Revenue Service (IRS), criminal investigation division. Appendix A at 10 ¶37 (CP 32).

Schafer also provided to all or a number of the agencies non-public documents, including his own handwritten notes from his 1992 conversation with Hamilton regarding the bowling alley. Ex. A-14; 7/17/00 RP at 137.

Between February 1996 and April 25, 1996, motivated by a fear of civil lawsuit being filed against him by Hamilton, Schafer limited his dissemination of his February 16, 1996 Declaration Under Penalty of Perjury to government or disciplinary agencies. 7/17/00 RP at 152. As of April 26, 1996, to Schafer's knowledge, investigations were still pending at the CJC, WSBA, FBI, IRS, and the Pierce County Prosecuting Attorney's Office. 7/17/00 RP at 156.

On April 26, 1996, Schafer publicly filed a Motion for Discretionary Review with the Court of Appeals in the Barovic case. The motion challenged a March 1996 order from Judge Donald H. Thompson removing Schafer from the Barovic case. Although Judge Thompson had not reviewed the February 16, 1996 Declaration Under Penalty of Perjury in reaching his ruling, Schafer's February

16, 1996 Declaration was appended to his appellate motion. Appendix A at 11 ¶39 (CP 33); Ex. A-10.

In filing the Motion for Discretionary Review, including his Declaration revealing Hamilton's confidential information, Schafer did not intend to benefit his client, Barovic. As Schafer testified, his motives in filing the Motion were (1) to personally vindicate himself and (2) to expose Anderson as a corrupt judge. Appendix A at 11 ¶39 (CP 33); 7/17/00 RP at 151-52.

In filing his Motion for Discretionary Review, Schafer took no steps to avoid or to limit the revelation of his former client's communications to him -- such as requesting a protective order or redacting information directly obtained from Hamilton in 1992. Indeed, Schafer **wanted** to place in the public record the information he had obtained about Judge Anderson, including Hamilton's confidential information. Schafer testified that he did not request a protective order concerning any portion of the materials submitted in the appeal, commenting that "I was pleased that I was able to put this in a public court file, you know, under a basis that I felt I would be safe from that threatened civil suit that Bill Hamilton and Phil Sloan had threatened me with." 7/17/00 RP at 152??.

That same day, April 26, 1996, Schafer provided his February 29, 1996 memorandum and February 16, 1996 Declaration to the Seattle Post Intelligencer, to the Seattle Times, and to the Tacoma News Tribune. Appendix A at 11 ¶40 (CP 33); Ex. A-12.

In providing Hamilton's confidential information to the news media, his purpose was solely to expose publicly Grant Anderson, whom he believed to be corrupt. Schafer intentionally disseminated the information about Judge Anderson, including Hamilton's confidential communications, to the news media because it was an election year and he was hoping to motivate someone to run against Judge Anderson. Appendix A at 11 ¶41 (CP 33).

In April 1998, the Commission on Judicial Conduct issued a decision regarding charges brought against Grant Anderson, finding that Anderson "accept[ed] an offer from William Hamilton to have his car loan payments made by William Hamilton during the same time [January to March 1993] Judge Anderson and William Hamilton negotiated a reduction of $92,829 in the amount owed by Hamilton's company." Ex. D-18 at 6. On July 29, 1999, this Court issued a decision in *In re Anderson*, 138 Wn.2d 830, 981 P.2d 426 (1999), in which it found acts of misconduct by Grant Anderson. Ex. A-11. The facts set forth in this Court's opinion were uncontested for purposes of Schafer's disciplinary hearing. Ex. A-11.

ANALYSIS

I. STANDARD OF REVIEW

This court reviews the entire record consistent with its ultimate responsibility over lawyer discipline matters. *In re McMullen*, 127 Wn.2d 150, 162, 896 P.2d 1281 (1995). The Court will not, however, "substitute its own

evaluation of the credibility of the witnesses over that of the hearing examiner." *In re Dann*, 136 Wn.2d 67, 77, 960 P.2d 416 (1998). The court upholds the hearing officer's findings of fact if they are supported by a clear preponderance of the evidence, even if the evidence is disputed. *In re Huddleston*, 137 Wn.2d 560, 568, 974 P.2d 325 (1999). And the court upholds the hearing officer's conclusions of law if they are supported by the findings of fact. *Id.* at 568-69.

II. THE HEARING OFFICER AND THE DISCIPLINARY BOARD CORRECTLY DETERMINED THAT SCHAFER VIOLATED RPC 1.6

A. The Lawyer's Obligation of Confidentiality Is Set Forth In RPC 1.6

All lawyers are required to comply with this Court's Rules of Professional Conduct. Rule 1.6 of those Rules requires a lawyer to maintain the confidences and secrets of a client and not to disclose them to others. This obligation of confidentiality has for centuries been viewed as one of the most important obligations of a lawyer. Without the assurance that what clients tell their lawyers will be held in confidence, people would hesitate to get legal advice and clients would withhold from their lawyers sensitive information necessary to secure competent legal advice.

The confidentiality rule is fundamental to the lawyer-client relationship and the legal system itself:

> Both the fiduciary relationship existing between the lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to

> discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. . . . The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to the proper representation of the client but also encourages laymen to seek early legal assistance.

Seventh Elect Church in Israel v. Rogers, 102 Wn.2d 527, 535, 688 P.2d 506 (1984) (quotation omitted); *accord Swidler & Berlin v. United States*, 524 U.S. 399, 403, 118 S.Ct. 2081, 141 L.Ed.2d 379 (1998) (attorney-client privilege "is intended to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and the administration of justice") (quotation omitted). Exceptions to the confidentiality rule "should not be carelessly invoked." *In re Boelter*, 139 Wn.2d 81, 91, 985 P.2d 328 (1999) (lawyer threatened that he would be "forced" to reveal client's confidences in a suit to collect fees and falsely claimed that he had a disclosable tape recording of his conference with the client).

Specifically, RPC 1.6 provides that without client consent, a lawyer "shall not reveal confidences or secrets relating to representation of a client." RPC 1.6 delineates specific exceptions, permitting disclosure "to the extent the lawyer reasonably believes necessary": (1) to "prevent the client from committing a crime"; (2) to "establish a claim or defense on behalf of the lawyer . . . or pursuant to court order"; and (3) to "disclose any breach of fiduciary responsibility by a client . . . ." These exceptions must be construed narrowly. *See* Comments 14 & 19 to American Bar Association ("ABA") Model Rule of Professional Conduct

1.6.

Schafer repeatedly violated RPC 1.6 in 1996, by detailing Hamilton's confidences and secrets to prosecutorial authorities (including the Attorney General's Office, the Pierce County Prosecuting Attorney's Office, the Federal Bureau of Investigation and the Internal Revenue Service), to disciplinary authorities (including the Commission on Judicial Conduct and the Washington State Bar Association), in a publicly filed appellate brief (in the *Barovic* case), and to the press. None of these disclosures were permitted by one of the specific exceptions to RPC 1.6. Hamilton consented to none of these disclosures.

B. RPC 1.6 Expressly Prohibited Schafer's Disclosures of Hamilton's Confidences and Secrets

Schafer argues that his conduct was permitted by RPC 1.6. He asserts that his conduct is not covered by RPC 1.6 because the 1992 communications he received from his client were not "confidences or secrets." Respondent Lawyer's Opening Brief ("Schafer Br.") at 58-61. This argument lacks merit.

Here, there is no question that Hamilton's statements were made to the Schafer "in the context of an client-attorney relationship," Appendix A at 15 ¶6 (CP 37), and that Hamilton specifically instructed Schafer not to disclose Hamilton's 1992 communications. Appendix A at 15 ¶7 (CP 37). Under these circumstances, the client's communications were both a confidence and a secret under RPC 1.6.

Schafer has attempted to characterize Hamilton's statements as falling outside RPC 1.6 because they had "nothing whatsoever to do with Hamilton's purpose in coming to me." CP 75. To the contrary, Hamilton's statements regarding Anderson and the Hoffman estate were directly related to his reason for seeking Schafer's legal services. They explained why he wanted to form the corporation and why he wanted Schafer to do the work immediately.

Under the Terminology section of the RPCs, "confidence" is defined as information protected by the attorney-client privilege under applicable law. Thus, a "confidence" under RPC 1.6 is coextensive with the attorney-client privilege.[2] *Dietz v. Doe*, 131 Wn.2d 835, 842, n.3, 935 P.2d 611 (1997).

"Secret" is defined in the RPCs as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."[3] Thus, the duty of confidentiality as it applies to "secrets" encompasses a broad spectrum of information gleaned during the course of the

[2] The attorney-client privilege is codified in Revised Code of Washington 5.60.060(2) as follows:

> An attorney or counselor shall not, without the consent of his or her client, be examined as to any communications made by the client to him or her, or his or her advice given thereon in the course of professional employment.

[3] It appears that Schafer may also be using the RPC definition of secrets as a basis for arguing that RPC 1.6 should include a crime-fraud exception. That argument is addressed below at Section II.C.3.

attorney-client relationship, including public information. *See* Washington State Bar Association *Formal Opinion 188* (lawyer may not disclose client's criminal history to the court); *In re Huffman*, 328 Or. 567, 580, 983 P.2d 534 (1999) (disciplining lawyer for disclosing embarrassing and detrimental information regarding client's arguably criminal or fraudulent actions to client's new lawyer); *Lawyer Disciplinary Board v. McGraw*, 194 W.Va. 788, 799, 461 S.E.2d 850 (1995) (reprimanding lawyer for discussing information that was part of the public record).

The definitions of "confidence" and "secret" do not require that a client's communications be used in the representation in order to trigger the lawyer's duty of confidentiality, for such a requirement would defeat the purpose of the rule, which is to encourage the client to communicate fully with his lawyer so that the lawyer can identify relevant facts and give the client complete and informed advice. Clients routinely provide lawyers with an array of information, both relevant and irrelevant to their legal matters. It is the lawyer's responsibility to sift through the information and glean the facts necessary to the representation. If the "unnecessary" information loses its status as a "confidence" or "secret" through this sorting process, it would have a chilling effect on a client's willingness to communicate fully with his/her lawyer, particularly with regard to information that might be embarrassing or legally damaging. *See,* Comment 4, ABA Model Rule of Professional Conduct 1.6; Watt, Stuart, "*Confidentiality*

under the Washington Rules of Professional Conduct," 61 Wash. L. Rev. 913, 916-917 (1986).

Thus, Hamilton's statements to Respondent were made in the course of seeking and obtaining legal services, making them both a "confidence" and a "secret" under RPC 1.6.

C. RPC 1.6 Should Not Be Rewritten, *Post Hoc*, To Justify Schafer's Misconduct

Schafer's key contention on appeal is that RPC 1.6 should be modified in three ways: (1) by creating a new exception to the rule of non-disclosure to permit the reporting of the wrongdoing of a judge; (2) by dramatically broadening the existing "fiduciary" exception; and (3) by creating a new "crime-fraud" exception to the rule of non-disclosure. Schafer Br. at 25-55. Stating that, in essence, "the Rule is wrong" is not a viable defense to the pending charges against Schafer. RPC 1.6 is the carefully considered law in Washington, reflecting a delicate balance of competing interests.

RPC 1.6 should not be modified during the course of this disciplinary proceeding. *Cf. Pfaff v. U.S. Department of Housing and Urban Development*, 88 F.3d 379, 748 n.4 (9th Cir. 1996)("'[R]ulemaking is generally a better, fairer, and more effective method' of announcing a new rule than ad hoc adjudication") (quoting *Community Television of S. Cal. v. Gottfried*, 459 U.S. 498, 511, 103 S.Ct. 885, 893, 74 L.Ed.2d 705 (1983)). The rule of law requires established

rules, available to all, and upon which all can rely. This Court "has exclusive responsibility within the state for the administration of the lawyer discipline . . . system and has inherent power to maintain appropriate standards of professional conduct." RLD 2.1. General Rule 9 vests exclusive authority in this Court to adopt and amend our Rules of Professional Conduct. RPC 1.6 was adopted in 1985 by the Court following the procedure outlined in GR 9, which included publication of the proposed rule in the Washington Reports for comment. *See* 103 Wn.2d, Advance Sheet No. 8, March 15, 1985.

1. This Court Should Not Create A Judicial Wrongdoing Exception Outside Of Established Rulemaking Procedures

Schafer asserts that it was his moral duty to reveal his client's secrets and confidences because he was trying to expose wrongdoing committed by a judge, Grant Anderson. Schafer Br. at 25-29. This argument should be rejected not only because it is put forth outside of the rulemaking procedures, but also because it is inconsistent with the balance of interests explicitly set forth in the RPCs.

RPC 1.6 carefully sets forth the limited exceptions to the rule of confidentiality. In addition, RPC 8.3 carefully balances the interests of client confidentiality against the interests of exposure of wrongdoing by a lawyer or a judge. RPC 8.3 provides:

> (a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, should

> promptly inform the appropriate professional authority.
>
> (b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office should promptly inform the appropriate authority.
>
> (c) This rule does not require disclosure of information otherwise protected by Rule 1.6.

Certain principles are evident from the provisions of RPC 8.3. First, RPC 8.3(c) makes it clear that, under the RPCs, reporting of judicial misconduct does **not** take precedence over the duty of confidentiality . . . ." *See* ABA, *Annotated Model Rules of Professional Conduct* at 78, 578 (4th ed. 1999); Rofes, Peter K. "*Another Misunderstood Relation: Confidentiality and the Duty to Report,*" 14 Georgetown Journal of Legal Ethics 621, 626-267 (2001). Second, RPC 8.3(a) & (b) make clear that to the extent reporting of misconduct by a lawyer or judge is warranted, it should be made to the appropriate professional authority, and not to the newspapers.

Schafer claims that exposing judicial wrongdoing should invariably trump client confidentiality. Such a rule would lead to problematic results. For example, if a client were to seek legal advice by informing a lawyer that the client had bribed a judge to give a particular legal ruling, Schafer's rule would permit that lawyer to expose his client's wrongdoing publicly and subject that client to arrest and prosecution. Under Schafer's view, such a client would and should be denied effective legal assistance.

2. The Fiduciary Exception of RPC 1.6(c)

Schafer also asks this Court to rewrite the clear and unambiguous provisions of RPC 1.6(c), the exception to client confidentiality that relates to court-appointed fiduciaries. Schafer Br. at 51-55. But to entertain his request, the Court would need to ignore the plain language of the rule and instead adopt Schafer's result-oriented and misguided analysis of the policies underlying the exception.

RPC 1.6(c) provides for an exception to a lawyer's duty to keep his client's confidences and secrets:

> (c) 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.

(emphasis added). Plainly, Schafer's conduct does not fall within this exception. None of his disclosures were made "to the tribunal," i.e. the court that oversaw the estate being handled by Grant Anderson. None of his disclosures concerned any breach of duty "by a client" of Schafer. Schafer's client, William Hamilton was not a guardian, personal representative, receiver or other court-appointed fiduciary.

Schafer's policy arguments focus solely upon the policy behind creating an exception to RPC 1.6, without recognizing the critical and compelling policy reasons behind having a confidentiality rule at all. The exception of RPC 1.6(c) is

narrowly tailored, and limited by its clear and unambiguous terms, because of the very important policy reasons of fostering and protecting the attorney-client relationship that underscore the entirety of RPC 1.6.

3. This Court Should Not Create A Crime-Fraud Exception to Attorney-Client Confidentiality Outside Of Established Rulemaking Procedures

Schafer asks this Court to create, outside the rulemaking process, both (1) a confidentiality exception that would allow a lawyer to reveal client confidences and secrets in order to rectify or mitigate a client's criminal or fraudulent act when the client used the lawyer's services in furtherance of that act, Schafer Br. at 45-51, and (2) a much broader crime-fraud exception to RPC 1.6 that would permit a lawyer to reveal otherwise confidential client information, without limitation and without affording any protection to the client, whenever the client has used the lawyer's services in the commission of a criminal or fraudulent act. Schafer Br. at 29-49. This Court should decline Schafer's invitation to rewrite RPC 1.6 outside of the rulemaking procedures.

a) The Rectification/Mitigation Proposal

Schafer asserts that it was his moral duty to reveal Hamilton's secrets and confidences because he was trying to rectify a fraud committed upon a hospital, and claims that any person who disagrees with him is not moral. Schafer Br. at 51. As discussed below, this rectification/mitigation proposal has proven to be extremely controversial and has been repeatedly and consistently rejected by the

American Bar Association ("ABA").

In the early 1980's, the ABA Model Rules of Professional Conduct formed the starting point from which this Court adopted the RPCs in 1985, including RPC 1.6.[4] In both 1983 and 1991, the ABA rejected a proposed exception to Rule 1.6(b) of the ABA Model Rules of Professional Conduct (which is substantially similar to RPC 1.6(b)) that would have permitted a lawyer to reveal information relating to the representation "to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used."[5] ABA, *Annotated Model Rules of Professional Conduct* at 79 (4th ed. 1999). This past summer, by a vote of 255 to 151, the ABA again rejected a proposal to allow lawyers to disclosed financial fraud by a client if that client was using the lawyer's services to commit the fraud. Glater, Jonathan D., "*Lawyers May Reveal Secrets of Client, Bar Group Rules*," New York Times, August 8, 2001. Thus, a much narrower version of Schafer's proposed crime-

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[4] *Adoption, Amendment, and Abrogation of Rules of Court,* 104 Wn.2d 1101 (1985).

[5] In 1983, "the ABA, in recommending adoption of the Model Rules of Professional Conduct, eliminated the exceptions to confidentiality that had paralleled the crime-fraud exception to the attorney-client privilege." Cramton, Roger C. and Knowles, Lori P., "*Professional Secrecy and Its Exceptions: Spaulding V. Zimmerman Revisited*," 83 Minn.L.Rev. 63, 105-06 (1998).

fraud exception has already been rejected three times.[6]

b) The Broad Crime-Fraud Proposal

Schafer's broad proposal for a crime-fraud exception to the client confidentiality rule would permit a lawyer to reveal otherwise confidential client information, without limitation and without affording any protection to the client, whenever the client has used the lawyer's services in the commission of a criminal or fraudulent act. This proposal involves the wholesale importation of a body of case law developed outside of the interpretation of the RPCs, despite the lack of any precedent to do so, and ignores its conspicuous and intentional absence from the language of RPC 1.6 and from case law interpreting RPC 1.6. Schafer analyzes, at great length, outdated law and the law of other jurisdictions, Schafer Br. at 30-48, because the law of this State does not support his position.

Both the law of evidence and the law of professional ethics discuss "crime-fraud" issues, but in wholly different contexts. The principle of confidentiality in attorney-client relationships arises from two sources: (1) the

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[6] Respondent's opinion -- that RPC 1.6 should be rewritten to include an exception to permit disclosure when the client has used the lawyer's services had been used in furtherance of a criminal or fraudulent act -- is the subject of considerable debate among legal scholars and practitioners. *See* Zacharias, Fred C., *"Fact and Fiction in the 'Restatement of the Law Governing Lawyers': Should the Confidentiality Provisions Restate the Law?"*, 6 Georgetown Journal of Legal Ethics 903 (1993) (referring to attorney-client confidentiality as "one of the most controversial issues with which professional codes grapple"); ABA, *Annotated Model Rules of Professional Conduct* at 79 (4th ed. 1999); (referring to the crime-fraud issue as "the most controversial in the subject of confidentiality, if not the whole of legal ethics").

attorney-client privilege in the law of evidence and (2) the rule of confidentiality in professional ethics. Comment 5, ABA Model Rule of Professional Conduct 1.6. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. *Id.* When compared to the ethical confidentiality principle, the evidentiary attorney-client privilege is construed quite narrowly to prevent it from obstructing access to evidence. *See* Suryadevara, Omkar, "*Attorney-Client Confidentiality*," 5 Geo. J. Legal Ethics 173, 175 (1991).

There is no question that there exists a crime-fraud exception to the evidentiary attorney-client **privilege** – one which applies in the context of evidentiary rulings and permits disclosure of privileged information pursuant to court order.[7] That exception does not apply to the ethical attorney-client **confidentiality** protections set forth in RPC 1.6. That ethical rule prohibits both client confidences (which are privileged) and secrets (which are not) from being

[7] Under the crime-fraud exception, the attorney-client privilege does not apply to communications in which the client seeks advice in furtherance of an illegal or fraudulent scheme. *State v. Hansen*, 122 Wn.2d 712, 720, 862 P.2d 117 (1993); *Whetstone v. Olson*, 46 Wn. App. 308, 310, 732 P.2d 159 (1986).

divulged by a lawyer in the absence of a court order compelling disclosure.[8]

Schafer relies upon two California cases -- *General Dynamics Corporation v. Superior Court*, 7 Cal.4th 1164, 876 P.2d 487 (1994) and *Fox Searchlight Pictures, Inc. v. Paladino*, 89 Cal.App.4th 294, 106 Cal.Rptr. 906 (2d Dist. 2001) – in his attempt to support his broad importation of the "crime-fraud" exception from evidentiary law into ethics law. Those cases provide no support for his extreme views. First, it is critical to note that California's confidentiality rule is wholly dissimilar from Washington's, and is not even based upon the ABA's Model Rules.[9] Second, in *General Dynamics*, the Supreme Court of California held that corporate counsel could bring a wrongful termination case

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[8] The concept of ethical confidentiality is clearly distinct from the concept of evidentiary privilege. *See*, ABA, *Annotated Model Rules of Professional Conduct* at 79 (4th ed. 1999); *Seventh Elect Church in Israel*, 102 Wn.2d 527, 688 P.2d 506 (1984) (distinguishing "confidential" information that is covered by the attorney-client privilege from "secrets" which may not be privileged but are nonetheless protected by the ethics rule of confidentiality); *Fellerman v. Bradley*, 99 N.J. 493, 493 A.2d 1239 (1985) (holding that while a client's address was not protected from disclosure by the attorney-client privilege based on the crime-fraud exception, the client's address was a "secret" under the rule of confidentiality); *Lawyer Disciplinary Board v. McGraw*, 194 W.Va. 788, 799, 461 S.E.2d 850 (1995) (reprimanding lawyer for discussing his client's change of position on an environmental issue with a third party even though the disclosed information was part of the public record, noting that "[c]learly, respondent has confused the evidentiary attorney-client privilege with the ethical duty of attorney-client confidentiality").

[9] California's Business and Professions Code, section 6068, states that an attorney has a duty to "maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client," and, on its face carries no exceptions. California's exceptions to the professional code are therefore based upon other statutes and ethical rules. *Fox Searchlight Pictures*, 89 Cal. App.4th at 313.

against a former employer/client provided that the case could be established without breaching the attorney-client privilege, but required that the trial court apply various measures to allow the plaintiff lawyer to attempt to prove his case while protecting from disclosure client confidences. Significantly, the Court expressed grave concerns about a lawyer's public exposure of client confidences:

> [T]he . . . attorney who publicly exposes the client's secrets will usually find no sanctuary in the courts. Except in those rare instances when disclosure is explicitly permitted or mandated by an ethics code or provision or statute, it is never the business of the lawyer to disclose publicly the secrets of the client.

General Dynamics, 7 Cal.4th at 1190. Third, in *Fox Searchlight Pictures*, 89 Cal.App.4th at 314, a California Appeals Court held that in-house corporate counsel was entitled to disclose, to her own attorneys, allegedly confidential information so that her attorneys could assist her in determining whether that information was admissible evidence under an exception to the attorney-client privilege. As in *General Dynamics*, the *Fox* court stressed the importance of not disclosing confidences in public records and proceedings. *Id.* at 312.

Schafer also relies upon dicta contained in Illinois rulings in his attempt to support his broad importation of the "crime-fraud" exception from evidentiary law into ethics law. In *In re Marriage of Decker*, 153 Ill.2d 298, 606 N.E.2d 1094 (1992), the Supreme Court of Illinois held that a lawyer must obey a court order requiring the lawyer to disclose client communications that were not privileged by virtue of the crime-fraud exception to the evidentiary attorney-client privilege.

The *Decker* court nowhere held that the "crime-fraud" communication was not a "secret" within the meaning of the Illinois rule, it merely determined that it need not reach that issue because, "if this information could be considered a secret under the Code and Rules, it must also be disclosed in this situation." *Id.*, 606 N.E.2d at 1105. The Illinois rule, which differs substantially from Washington's, permits lawyers to reveal confidences or secrets as required by court order and to reveal the intention of a client to commit a crime.[10]

In contrast, ABA *Formal Opinion 92-366* interprets ABA Model Rule of Professional Conduct 1.6, which is substantially similar to RPC 1.6. Formal Opinion 92-366 indicates that, if a lawyer's services have been used in the past by a client to perpetrate a fraud and the fraud has ceased, the lawyer **may** but is not required to withdraw from representing the client. Significantly, the Opinion goes on to state that the lawyer may not disaffirm documents prepared in the course of the representation.

Schafer's rewriting of RPC 1.6 to encompass the evidentiary crime-fraud exception would create an anomalous and inappropriate result. Under the

[10] Schafer also cites to *Illinois State Bar Opinion 93-16*, which was issued as an educational service and does not have the weight of law. In that opinion, the Illinois Bar opined that it would be improper for a lawyer who learned that his client and the client's parents may have violated tax law, to disclose that fact without the client's consent. The opinion went on to note that the client had not used the lawyer's services in furtherance of any crime, and, in dicta, confuses the evidentiary crime-fraud exception to the attorney-client privilege with the ethical duty of attorney-client confidentiality.

evidentiary "crime-fraud" case law, clients are protected from unwarranted disclosures: (1) disclosure may be made only pursuant to court order, and (2) a court may order disclosure only upon a prima facie showing – not based upon the privileged material sought – that the client used the lawyer's services to further a crime or fraud. *See Escalante v. Sentry Ins. Co.*, 49 Wn.App. 375, 394, 743 P.2d 832 (Div. 1 1987), *rev.denied*, 109 Wn.2d 1025 (1988); *Whetstone v. Olson*, 46 Wn.App. 308, 311, 732 P.2d 159 (1986); *cf. In re Grand Jury Proceedings*, 87 F.3d 377, 380 (9th Cir.), *cert.denied*, 519 U.S. 945 (1996). Schafer's proposed incorporation of the "crime-fraud" case law into RPC 1.6 provides clients with no protection from unwarranted disclosures.

Given the considerable controversy and debate surrounding Schafer's proposed exceptions, and the fact that the narrower proposal has already been thrice rejected by the ABA, Schafer's modification of RPC 1.6 should not be made on a *post hoc* basis. Such a modification should only be made through the rulemaking processes discussed at page 18 above.

D. Schafer Failed To Meet the Requirement of RPC 1.6 – And Of Proposed Amendments to RPC 1.6 -- That Disclosure Be Limited To The Extent Reasonably Necessary

Perhaps the most compelling reason to affirm the Disciplinary Board's decision is that Schafer's disclosures were not reasonably necessary to accomplish the stated purpose of any exception in RPC 1.6 or of Schafer's other "moral" justifications.

Even when an exception to RPC 1.6 applies, a lawyer may only reveal confidences or secrets "to the extent the lawyer reasonably believes necessary." RPC 1.6(b). *See Boelter*, 139 Wn.2d at 91; Comments 14 & 19, ABA Model Rule of Professional Conduct 1.6. "The lawyer should only make such disclosures to the affected tribunal or other persons having a need to know and should make every effort to limit access to the information by arranging for protective orders or taking other appropriate actions." Watt, Stuart, "*Confidentiality under the Washington Rules of Professional Conduct*," 61 Wash. L. Rev. 913, 917 (1986).

This limitation on the extent of disclosure is a critical component of client confidentiality. None of the amendments to RPC 1.6 proposed by legal scholars would omit the requirement that disclosure be made only to the extent "reasonably necessary" to accomplish the purpose set forth in the applicable exception. Even in the minority of jurisdictions that permit lawyer disclosure to rectify or mitigate a crime or fraud when a client had used the lawyer's services to

commit the crime or fraud, those jurisdictions **limit** disclosure to the extent reasonably necessary.[11]

As the Hearing Officer found, Schafer's disclosures plainly went far beyond those reasonably necessary to report wrongdoing by a judge or to rectify or mitigate the effects of a past crime. Appendix A at 16-17 ¶¶10,12 (CP 38-39). The Hearing Officer found that Schafer could have reported his suspicions regarding wrongdoing by Grant Anderson based upon public records available to him in February 1996, without actually reporting the comments made by his client William Hamilton in 1992. Appendix A at 17 ¶12 (CP 39). The Disciplinary Board amplified this finding by commenting that Schafer could have reported judicial and lawyer misconduct without making disclosures to "the prosecutor's office, the FBI, the IRS and the press." Appendix B at 2 (CP 10). It further commented that Schafer could have taken steps to protect the actual communications from his client, noting:

> For example, [Schafer] could have submitted his investigation results, without the client's statements, and indicated that he had

[11] *See* Rule 1.6(c) of the Connecticut Rules of Professional Conduct; Rule 1.6(c) of the Hawaii Rules of Professional Conduct; Rule 1.6(b) of the Maryland Rules of Professional Conduct; Rule 1.6(c) of the Michigan Rules of Professional Conduct; Rule 1.6(b) of the Minnesota Rules of Professional Conduct; Rule 156(3) of the Nevada Rules of Professional Conduct; Rule 1.6(c) of the New Jersey Rules of Professional Conduct; Rule 1.6 of the North Dakota Rules of Professional Conduct; Rule 1.6(c) of the Pennsylvania Rules of Professional Conduct Rule; 1.6(b) of the South Dakota Rules of Professional Conduct; Rule 1.05(c) of the Texas Rules of Professional Conduct; Rule 1.6(b) of the Utah Rules of Professional Conduct; Rule 1.6(b) of the Virginia Rules of Professional Conduct; Rule 1.6(b) of the Wisconsin Rules of Professional Conduct

> additional attorney-client privileged information that could be provided, with appropriate protections, upon court order.

Id.

Schafer's brief attacks the Disciplinary Board's conclusions, and by implication the Hearing Officer's finding, as "silly and disingenuous." Schafer Br. at 16. In so doing, Schafer shows no recognition of RPC 1.6's requirement that any disclosure be limited "to the extent the lawyer reasonably believes necessary" to further the specified result. This is because Schafer's analysis lacks any understanding that RPC 1.6 is a careful balance between competing interests. He proposes instead a rule that would permit a lawyer to reveal -- to anyone -- and to any extent --client confidences and secrets in order to expose wrongdoing by a sitting judge.

Schafer has not assigned error to the Disciplinary Board's conclusion that Schafer could have reported judicial and lawyer misconduct without making disclosures to "the prosecutor's office, the FBI, the IRS and the press." Appendix B at 2 (CP 10). This conclusion is supported by uncontested evidence and findings of the Hearing Officer.

As of April 1996, Schafer had already reported his allegations about Anderson to criminal investigators, to the disciplinary authorities of the CJC and the Association, and to the hospital that allegedly was victimized by the sale of the bowling alley from the Hoffman Estate to Hamilton. Nonetheless, in April

1996, Schafer disclosed Hamilton's confidences or secrets to the Seattle Times, the Seattle Post-Intelligencer and to the Tacoma News Tribune. He also, in April 1996, publicly disclosed Hamilton's confidences and secrets in the appellate filing in the *Barovic* case. There can be no legitimate argument that these April 1996 press and public disclosures were reasonably necessary.

Moreover, the Hearing Officer's finding -- that Schafer could have reported judicial wrongdoing based upon public records without actually disclosing the communications from his client in 1992 -- is amply supported. A review of the voluminous information Schafer reported to the authorities in February and March 1996 reveals that the Hearing Officer was correct in concluding that Respondent could have reported wrongdoing by Grant Anderson without detailing his client's 1992 conversations. *See* Respondent's February 1996 summaries of his investigation into Grant Anderson's activities, Ex. A-7 and A-8, and the box of documents that he had gathered by that time, Ex. A-14. It is these documents and statements that reveal Schafer's knowledge and state of mind at the time that he disclosed his client's confidences and secrets. In order to claim that he needed to disclose the actual contents of his client's communications, Schafer criticizes the Association, the CJC, law enforcement, prosecutors and the press for their alleged **subsequent** failures to adequately or timely take action against Grant Anderson. 7/20/01 RP at 923-24; Schafer Br. at 16, 24. Such subsequent actions are irrelevant to whether Schafer disclosures

went beyond what he "reasonably believed necessary" at the time he disclosed his client's confidences and secrets.

Under the facts of this case, Schafer's calculated disclosures not only constituted a violation of RPC 1.6 as written, but also would have violated the ethics rules in those jurisdictions that do recognize a type of crime-fraud exception, because the scope of his disclosures was gratuitously overbroad.

E. Washington Whistleblower Provisions Provide No Refuge Regarding Schafer's Conduct

Apparently recognizing that the actual provisions of Washington "whistleblower" statutes do not apply to his case, Schafer argues that the policies supporting those statutes justify his conduct. Schafer Br. at 55-58. Schafer clearly fails to comprehend that courts apply statutes, not policies, and that statutory limitations on the scope of "whistleblower" protections also reflect policy decisions.

In his brief, Schafer relies upon the "Good Faith Communication to Governmental Agency Act" -- Revised Code of Washington (RCW) 4.24.500 - .520 -- as a defense to his broad disclosure of his client's confidences. RCW 4.24.510 provides:

> A person who in good faith communicates a complaint or information **to any federal, state, or local government**, or to any self-regulatory organization that regulates persons involved in the securities or futures business and that has been delegated authority by a federal, state, or local government agency and is subject to oversight by the delegating agency, is immune from civil liability

> for claims based upon the communication to the agency or organization regarding any matter reasonably of concern to that agency or organization. A person prevailing upon the defense provided for in this section shall be entitled to recover costs and reasonable attorneys' fees incurred in establishing the defense.

(emphasis added).

Even if RCW 4.24.510 applied to lawyer discipline proceedings, Schafer's conduct does not fall within the statute because his disclosures were made not only to "agenc[ies] of federal, state, or local government[s]," but were also made to others, including the press. But RCW 4.24.510 is not applicable here in any event, because Schafer is charged with a violation of the RPCs, and is not being sued for civil damages. "RCW 4.24.510 affords immunity only from 'civil liability,' that is, from the threat of a 'civil action for damages.'" *Port of Longview v. International Raw Materials, Ltd.*, 96 Wn.App. 431, 445, 979 P.2d 917 (1999). Here, the Association does not seek civil damages from Schafer. Instead, these proceedings involve the regulation of Schafer's license to practice law. Specifically, the Association seeks discipline against Schafer for disclosing the confidences and secrets of his client, in violation of RPC 1.6 and the oath[12] he

[12] *See* Admission to Practice Rule 5(d).

took when he was sworn in to practice law in the State of Washington.[13]

Accordingly, RCW 4.24.510 does not provide Schafer with a defense to the charged violation of RPC 1.6.

III. SCHAFER'S FOURTH ASSIGNMENT OF ERROR NEED NOT BE ADDRESSED

In his brief at pages 68-69, Schafer also challenges the Disciplinary Board's observation that two professors told Schafer that Schafer should not disclose his client's statements. Although Schafer claims that the Disciplinary Board made a "finding" on this issue, the Association believes that it merely characterized the finding of the Hearing Officer.[14] Since this Court is free to

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[13] Furthermore, RCW 4.24.510 does not apply to these proceedings because the legislature does not have the authority to enact legislation that would impinge upon the authority of the Supreme Court of Washington to regulate the conduct of lawyers. "'[T]he power to make the necessary rules and regulations governing the bar was intended to be vested exclusively in the supreme court, free from the dangers of encroachment either by the legislative or executive branches.'" *Matter of Washington State Bar Association*, 86 Wn.2d 624, 633, 548 P.2d 310 (1976) (quoting *Sharood v. Hatfield*, 296 Minn. 416, 426,210 NW.2d 275 (1973)). Thus, the Rules of Professional Conduct and Rules for Lawyer Discipline prevail over any legislative enactment. *Washington State Bar Association v. State*, 125 Wn.2d 901, 890 P.2d 1047 (1995). Any attempt by the legislature to encroach upon the Supreme Court's powers to regulate lawyers would be unconstitutional, and the court rules prevail. *Id.*; *Matter of Washington State Bar Association*, 86 Wn.2d at 633.

[14] Schafer has not challenged the Hearing Officer's finding that on February 5, 1996:

> Professor Strait advised Schafer that RPC 1.6 prohibited disclosure of a client's confidences or secrets without the client's consent, except to prevent the client from committing a crime. Professor Strait informed Schafer that the description of Judge Anderson's and Hamilton's conduct sounded like a past event; however, Professor Strait told Schafer that the question of whether fraud is a "continuing crime" is a gray area in the law.

Appendix A at 7 ¶27 (CP 29).

characterize the Hearing Officer's findings as it sees appropriate, the Association believes that there is no issue to be resolved on appeal.

IV. SCHAFER'S CONSTITUTIONAL ARGUMENTS ARE BASELESS

While it is difficult to discern precisely what Schafer's constitutional argument entails, he claims that the Disciplinary Board's application of RPC 1.6 to his conduct violates his right to petition the government and his right of free speech. Schafer Br. at 61-67. Remarkably, he does so without citation to any authority for the proposition that RPC 1.6 is unconstitutional on its face or as applied in a particular case. Instead, he simply asserts that the positions of the Office of Disciplinary Counsel, the Hearing Officer and the Disciplinary Board are "obviously unconstitutional." *Id.* at 67. Schafer's reasoning remains a mystery.

A party's citation to the constitution without accompanying analysis does not merit consideration by this Court. "[N]aked castings into the constitutional sea are not sufficient to command judicial consideration and discussion." *E.g.*, *State v. Blilie*, 132 Wn.2d 484, 493 n.2, 939 P.2d 691 (1997) (quoting *In re Rosier*, 105 Wn.2d 606, 616, 717 P.2d 1353 (1986)).

To the best of our knowledge, there is no case in the United States that holds that any version of RPC 1.6, or any specific application of RPC 1.6, violates the First Amendment rights of a lawyer. In determining whether a statute or rule is constitutional, the court must balance the First-Amendment "interests against

the State's legitimate interest in regulating the activity in question. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075, 111 S.Ct. 2720, 2745, 115 L.Ed.2d 888 (1991).

Schafer's right-to-petition argument ignores the plain facts of this case, which indicate that Schafer did far more than petition the government, he publicly filed his client's communications to him, and then submitted the material to the press. His right-to-petition argument refers to the Noerr-Pennington doctrine, which applies to antitrust cases, without explaining its applicability in a lawyer ethics case. Schafer Br. at 63-64.

Although his argument is unclear, it appears that Schafer considers his free-speech argument to rely upon his assertion that "[n]either the ODC, the hearing officer, nor the disciplinary board have ever raised any objection to Schafer's action in filing at that appellate court the Petition with its appendix of relevant papers." Schafer Br. at 65. This assertion is simply wrong. The very first sentence of the Association's brief to the Disciplinary Board criticizes Schafer's disclosure in the public appellate filing. CP 471-97. The Association's position that the appellate filing constituted a violation of RPC 1.6 is plainly and explicitly spelled out throughout its brief, particularly on pages 11 and 21. Similarly, the Disciplinary Board clearly considered the appellate filing to be a violation of RPC 1.6. It noted:

Mr. Schafer intentionally planned litigation to assist his effort to

> widely distribute his client's confidential statements. The Board cannot find other cases in Washington in which a lawyer intentionally plans to disclose client secrets, while protecting his own interests. The Board believes it is important that lawyers and the public understand that a lawyer should not selfishly protect his or her self while intentionally exposing the client to harm.

Appendix B at 3 (CP 11).

Schafer cites to *In re Discipline of Sanders*, 135 Wn.2d 175, 955 P.2d 369 (1998), to support his constitutional argument. That case holds that a judge did not violate the Code of Judicial Conduct by attending a March for Life rally and making brief comments regarding the "importance of the preservation and protection of innocent human life" and thanking supporters of his election. In reaching this conclusion, the *Sanders* Court balanced the judge's right to freedom of speech against the "public's legitimate expectations of judicial impartiality." Notably, the Court did not hold that the judicial canons were, on their face, unconstitutional. Instead, the Court concluded that, in light of the judge's free-speech interests, it would not read the judicial code so broadly as to include the conduct at issue in that case.

While Schafer does not bother to engage in a balancing analysis regarding his own conduct, it is clear that a balancing analysis would not support Schafer's argument. In *In re Kaiser*, 111 Wn.2d 275, 759 P.2d 392 (1988), this Court held that a judge violated the judicial canons by suggesting that he was a Democrat, by indicating that he was "tough on drunk driving," and by suggesting that the State

would not get a fair trial in his opponent's court.[15] In *Kaiser*, the court balanced the compelling state interest "in protecting the good reputation of the judiciary" against the judge's free-speech interests. The court concluded that the judge's statements fell squarely within the prohibitions of the judicial code and had "a directly detrimental effect on the compelling state interest of preserving the integrity of the judiciary." *Id.* at 289.

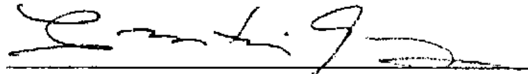
In this case, as noted above at pages 13-14, RPC 1.6 serves the compelling state interest of protecting client confidences and secrets, a concept fundamental to the lawyer-client relationship and the legal system itself. Schafer's conduct fell squarely within the prohibitions of RPC 1.6, and his conduct had a directly detrimental effect on the compelling interest of protecting client confidences and secrets. Thus, Schafer's constitutional argument is baseless.

[15] The Court also concluded that the judge's false or misleading advertising did not violate the judicial canons in the absence of evidence that he knew the advertising was false. *Id.* at 283-86.

CONCLUSION

A lawyer may not pick and choose which client confidences and secrets to respect based on the lawyer's own personal sense of justice, and then demand that this Court modify its rules accordingly. Douglas Schafer has allowed his own personal beliefs to usurp the rule of law. This Court should affirm the Hearing Officer's and Disciplinary Board's findings and conclusions, and adopt the Disciplinary Board's recommended sanction.

DATED this 14th day of October, 2001.



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