SUPREME COURT OF THE STATE OF WASHINGTON

In the Matter of the Disciplinary Proceeding Against DOUGLAS A. SCHAFER, an Attorney at Law.	Bar No. 8652 APPENDIX TO RESPONDENT'S OPENING BRIEF: LEGISLATIVE HISTORY OF RPC 1.6(c)

Attached to this cover sheet are 36 pages, constituting the history of the development of RPC 1.6(c) as provided to me in or about March 1999 from the archived records of the Board of Governors of the Washington State Bar Association by its General Counsel, Robert D. Welden.

September 6, 2001

Douglas A. Schafer, WSBA No. 8652

CERTIFICATE OF SERVICE

I certify that today I caused a copy of the foregoing "Motion to Accept Overlength Brief" to be sent by first class mail, postage paid, to:

Christine E. Gray, Disciplinary Counsel
Washington State Bar Association
2101 - 4th Ave., 4th Floor
Seattle, WA 98121-2330

I have also provided copies of it to my co-counsel, Shawn Newman and Don Mullins.

September 6, 2001

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GR 9 COVER SHEET

Proposed Amendment

Rules of Professional Conduct (RPC)

Rule 1.6

CONFIDENTIALITY

(1) Background. Attached is a recommendation from the Washington State Bar Association that RPC 1.6 be amended to authorize a lawyer to disclose confidences or secrets to a tribunal which reveal a breach of fiduciary responsibility by a client who is a court-appointed guardian, personal representative, receiver, or other court-appointed fiduciary.

The Rules of Professional Conduct Committee of the Washington State Bar Association, in its capacity of reviewing inquiries from Washington lawyers seeking interpretations of the Rules of Professional Conduct, had occasion to consider a lawyer's duties upon learning of serious misconduct, such as theft, by a client who is a fiduciary such as a personal representative, guardian or trustee. In summary, the Committee concluded that under the present confidentiality rule (RPC 1.6), the lawyer could not disclose serious misconduct by a fiduciary client. The Committee concluded that the lawyer's duties were limited to calling upon the client to rectify the misconduct and, if the client would not or could not do so, the lawyer in most circumstances must withdraw.

The Committee reached this conclusion based upon the following rules:

RPC 1.6 CONFIDENTIALITY

(a) A lawyer shall not reveal confidences or secrets relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in section (b).

(b) A lawyer may reveal such confidences or secrets to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a crime; or

(2) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, to respond to allegations in any proceeding concerning the lawyer's representation of the client, or pursuant to court order.

RPC 3.3 CANDOR TOWARD THE TRIBUNAL

(a) A lawyer shall not knowingly:

* * *

(2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by rule 1.6;

* * *

(c) If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the tribunal unless such disclosure is prohibited by rule 1.6.

RPC 4.1 TRUTHFULNESS IN STATEMENTS TO OTHERS

In the course of representing a client a lawyer shall not knowingly:

* * *

(b) Fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by rule 1.6.

The Committee was of the opinion that because these latter rules limit a lawyer's ability to disclose client conduct to that permitted by RPC 1.6, and because RPC 1.6 does not permit a lawyer to disclose either past criminal conduct or fraudulent conduct by a client, a lawyer may not disclose such misconduct by a fiduciary client.

The Committee recommended that the Board of Governors adopt a Formal Opinion to that effect. Upon review, the Board determined to take no action on the Committee's recommendation and referred the subject back to the Committee for consideration of whether the Rules of Professional Conduct should be amended to permit a lawyer who is representing a fiduciary client to disclose misconduct by that client.

After further consideration, the Committee recommended that RPC 1.6 be amended to permit the disclosure to the tribunal of misconduct by court-appointed fiduciaries. The basis and reasoning for this recommendation are fully set out in the attached Report of the Subcommittee on Rule Change Re: Misappropriation by Guardian or Personal Representative, and its exhibits.

(2) Purpose. The purpose of the recommended amendment to RPC 1.6 is to permit a lawyer to disclose to the tribunal misconduct by a court-appointed fiduciary so as to avoid permitting such a client from committing fraud upon the tribunal. Washington's Rules of Professional Conduct were adopted with the conscious intent that a lawyer's obligations to a client may take precedence over obligations to other parties. This proposed rule

change would not disturb that basic principle except in the specific instance of court-appointed fiduciaries.

(3) Washington State Bar Association Action. This proposed amendment was recommended to the Board of Governors by the Rules of Professional Conduct Committee. The Board unanimously approved this proposed rule change in November, 1989.

(4) Supporting Material. Attached is a copy of the proposed rule change, along with the materials presented to the Board of Governors at its November, 1989 meeting.

(5) Spokespersons. G. Douglas Ferguson, Chairperson, Rules of Professional Conduct Committee, P.O. Box 5397, Everett, Washington 98206; and Robert D. Welden, General Counsel, Washington State Bar Association, 500 Westin Building, 2001 Sixth Avenue, Seattle, Washington 98121.

(6) Hearing. A hearing is not recommended.

PROPOSED AMENDMENT

RULES OF PROFESSIONAL CONDUCT (RPC)

RULE 1.6

Confidentiality

(a) A lawyer shall not reveal confidences or secrets relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in sections (b) and (c).

(b) (No change.)

(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.

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ROBERT D. WELDEN
GENERAL COUNSEL

TO: The Board of Governors
FROM: Robert D. Welden, General Counsel
DATE: November 7, 1989
RE: Proposed Amendment to RPC 1.6

At the November Board meeting, the Board considered a proposed Formal Opinion from the Rules of Professional Conduct Committee regarding a lawyer's duties upon learning of serious misconduct by a personal representative, guardian or trustee. In summary, the Committee concluded that under the present confidentiality rule a lawyer could not disclose serious misconduct by such a fiduciary client. The Committee concluded that the lawyer's duties were limited to calling upon the client to rectify the misconduct, and if the client would not or could not do so, the lawyer in most circumstances must withdraw.

Committee member Leonard Cockrill appeared on behalf of the Committee to present the proposal, and the Board also heard from King County Prosecuting Attorney Norm Maleng speaking in opposition to that proposed opinion. After discussion, the Board took no action on the proposed opinion and referred the subject back to the Committee for consideration of whether the Rules of Professional Conduct should be amended to permit a lawyer representing a fiduciary to disclose serious misconduct by that client.

The Committee appointed a subcommittee chaired by Leonard Cockrill who reported back to the Committee at their September meeting. The Committee adopted the recommendation of the subcommittee and recommends that the Board of Governors recommend to the Supreme Court that RPC 1.6 be amended to permit the disclosure of misconduct by court-appointed fiduciaries to the court.

The Committee considered whether the rule should be amended to permit disclosure of misconduct of all fiduciary clients, and for reasons fully discussed in the subcommittee report, concluded that the rule should not be so broadly amended. The Committee did, however, consider how the rule could be amended to allow for such broad disclosure, and have included that with their report as "Exhibit A."

At the suggestion of one Board member, all Section chairpersons and other interested parties were advised of the Committee's proposed opinion and asked for their comments.

Responses were received from two Sections and King County Court Commissioner Stephen M. Gaddis. Commissioner Gaddis also received a copy of the subcommittee report and in a conversation with bar counsel advised that he thought the subcommittee's proposal was a proper approach.

There is an existing Formal Opinion, #58, issued in 1959. In its prior report to the Board, the Committee recommended that Opinion #58 be withdrawn as it is not consistent with the present Rules of Professional Conduct to the extent that it indicates that a lawyer faced with misconduct by a fiduciary would be required to withdraw from further representation of the fiduciary and "the court records should state the reason." It is the Committee's opinion that RPC 1.6 as it presently reads would not permit a lawyer to disclose the reasons for withdrawing.

If RPC 1.6 is amended as proposed by the Committee, opinion #58 would appear to be consistent with the proposed amendment. Therefore, if the Board adopts the proposed amendment to RPC 1.6, opinion #58 should remain as it is.

ATTACHMENTS:

1. Report of Subcommittee on Rule Change
2. Exhibit "A": Alternative Rule Amendment.
3. Exhibit "B": Notes Concerning the Interpretation of RPC 1.6.
4. Memorandum to WSBA Section Chairpersons and responses.
5. Letter from the Hon. Stephen M. Gaddis.
6. Formal Opinion 58.

RDW:jmm

REPORT OF SUBCOMMITTEE
ON RULE CHANGE
RE: MISAPPROPRIATION BY GUARDIAN
OR PERSONAL REPRESENTATIVE

August 30, 1989

The Board of Governors has requested the Rules of Professional Conduct Committee develop proposed amendments to the Rules of Professional Conduct (RPC) which would require attorneys to take positive action when they represent a fiduciary who is guilty of serious breach of his/her fiduciary responsibilities.

The specific question originally presented to this Committee was:

> "What are the duties of a lawyer representing an estate or guardianship when the personal representative or guardian has misappropriated estate funds or committed other serious misconduct."

The answer our Committee gave is that under the Washington RPC's the attorney has a duty first to counsel the client on the client's responsibilities as a fiduciary and on the lawyer's responsibilities under the RPC's. So far as misappropriation of funds is concerned, the attorney's counsel to the client would include the client's responsibility to promptly and fully reimburse the estate for all funds misappropriated and to hold the trust estate harmless from all loss and expense incident to the misappropriation.[1]

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[1] This responsibility is not found in the express language of the RPC's but arises by implication from RPC 1.2 which begins by saying a lawyer shall abide by a client's decision concerning the objectives of the representation subject to the injunction that a lawyer shall not counsel a client to engage in or assist a client in conduct known to be fraudulent, and that when a lawyer

The problem arises when, notwithstanding the attorney's counsel to the defaulting client, the client is either (a) unwilling or (b) unable to rectify the situation. A further problem arises in those situations when the client is able and willing to rectify the situation but insists that the attorney preserve his or her confidences. An even more difficult problem is confronted when the client is willing but unable to rectify the situation in the short run but a workout holds reasonable hope of satisfactory recovery -- provided the secrecy of the matter is preserved.

Our Committee's conclusion was that the Rules are clear that the attorney cannot assist the client in concealing past material breaches of fiduciary responsibility from discovery by the trust beneficiaries or the court. (RPC 1.15[a][1] and RPC 8.4[c])[2]

Our Committee further concluded that a attorney may not participate in court proceedings in which the lawyer is aware that his/her client is intentionally concealing material matter from the court (RPC 1.2[e] and RPC 3.3[a][2]) and, if the client insists on so proceeding, the attorney's only recourse is to seek to withdraw from the representation (RPC 3.3[d] and RPC

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understands the client expects assistance not permitted by the RPC's "or other law", the lawyer shall explain to the client the limitations on the lawyer's conduct (RPC 1.2[d]) which would include, of course, the responsibilities to refrain from any conduct involving dishonesty, deceit or misrepresentation or that is prejudicial to the administration of justice (RPC 8.4[c][d]).

[2] To so do would assist a fiduciary in deceiving his or her beneficiaries. That is conduct involving deceit of persons entitled to a full and faithful accounting of the client's stewardship. As such, the attorney's assistance in concealing the misconduct is itself professional misconduct under RPC 8.4(c).

1.5[a][1]).[3] The Committee also, however, reaffirmed the express injunction of Washington's RPC 3.3(a)(2) and RPC 3.3(c) that a lawyer may not disclose his misappropriation or malfeasance to the court when doing so would violate the confidence mandated by Rule 1.6 even if:

(i) Disclosure to the court is necessary to avoid assisting a fraudulent act (3.3[a][2]).

(ii) The lawyer comes to know during the course of the proceeding that the lawyer himself/herself has offered material evidence which is false. (RPC 3.3[c]).

The Board of Governors was unwilling to approve a formal Opinion which would candidly recognize that the Washington RPC's gave the Rule on confidentiality (RPC 1.6) such an overriding priority. It was proposed in this unequivocal language:

> The rule in Washington is that when a conflict develops between RPC 3.3 and RPC 1.6 and the client insists on preservation of the confidence under 1.6, the lawyer must preserve the confidence and withdraw in accordance with RPC 1.15(b)(1).

The Board did not disagree that the above is a correct reading of the Washington Rules. The Board felt that in the case of fiduciaries -- whose victims where the beneficiaries of their trust -- and especially in those situations where the fiduciary is court-appointed (as in the case of guardians and personal representatives), that the Rule should be otherwise. The Board

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[3] While a technical argument might be made that if the issue is "past" misappropriation the fraud is an accomplished fact and, hence, the lawyer's failure to disclose it to the court is not "assisting" a fraudulent act by the client prohibited by RPC 33(a)(2), such a reading perverts the ethical sense of the Rule itself.

of Governors requested that the RPC Committee develop, for the consideration of the Board of Governors, proposed amendments to the Washington Rules of Professional Conduct in this regard which the Board might then recommend to the Washington State Supreme Court.

In requesting the further assistance of the Committee, the Board of Governers did not give much guidance on precisely what it expects. It seems reasonable that their minimum expectation would be that the Rules be amended to require court-appointed fiduciaries to make appropriate disclosures to the court of misappropriation of estate funds or other serious misconduct by their court-appointed fiduciary clients. However, in referring the matter back to the Committee, the Board of Governors also asked that the Committee give consideration to a Rule articulating the responsibilities of attorneys representing private fiduciaries as well as court-appointed fiduciaries.

RULE CHANGE TO EXTEND TO ALL FIDUCIARIES NOT RECOMMENDED

Our subcommittee has considered the advisability of attempting to propose a special RPC that would include both court-appointed and private fiduciaries. The subcommittee strongly recommends against such a proposal. (See Exhibit "A" for an illustration of one approach to how the RPC's might be so amended if the full Committee desires to develop such a recommendation to the Board of Governors.)

The subcommittee feels that the changes should be limited to those which are necessary for the protection of the judicial process and should be carefully drawn to avoid making attorneys, in effect, gratuitous guardian ad-litems for every person having

an interest in a private trust, of which the attorney's client might happen to be the fiduciary!

The following hypotheticals illustrate some of the problems:

Hypothetical 1: Lawyer Bob's very good client Big Bucks, is a trustee of a $250,000.00 testamentary trust fund established by Big Bucks' father for the benefit of Big Bucks' two minor daughters (ages 16 and 17). Lawyer Bob drafted the Will and probated the father's estate (Big Bucks was the executor). Bob has continued as the family's lawyer. He explained to Big Bucks his trust responsibilities, advised him in the selection of the original trust assets on partition of Big Bucks' father's estate, and later counseled him as trustee regarding the liquidation and reinvestment of the trust. In the last few years, Big Bucks' business has come upon hard times and Lawyer Bob is helping him negotiate a sale of the stock of the company (a non trust asset). In discussing the factors that need to be attended to in the sale, Big Bucks confides in Lawyer Bob that some time ago he invested the entire trust fund in Big Bucks' business intending to give to the trust preferred stock -- or a twenty percent cumulative interest bearing debenture -- or "something like that", but he just hadn't gotten around to it. Neither Big Bucks' wife nor his 16 or 17 year old daughters want any action taken to cause trouble for Big Bucks, and the family has made it clear to Lawyer Bob that they expect him to "keep a lid" on Big Bucks' problems until the girls are old enough to legally release all claims against their father.

Hypothetical 2: Lawyer Tom's new client, Rev. Smith, consults him about Rev. Smith's widowed mother who is in the advanced stages of Alzheimer's disease. Rev. Smith is an only child. He is the holder of a Durable Power of Attorney signed by his mother some years ago. In the course of representation, Lawyer Tom routinely handled the sale of the family home for Rev. Smith using the Power of Attorney. The following year Rev. Smith contacts Lawyer Tom to handle the sale of a business in which Rev. Smith was a more or less silent partner with one of his parishioners. In the course of that representation, Rev. Smith confides in Lawyer Tom that he "borrowed" $25,000.00 of the sales proceeds on his mother's house to cover an embarrassing

> income tax problem of his own that he had not previously discussed with Lawyer Tom. Rev. Smith does not think it is a big deal because, with Lawyer Tom's assistance, he is on the verge of concluding the sale of the private business which will enable him to pay back his mother's estate. Rev. Smith is a respected member of the community and is the current president of the local ministerial association and is, after all, the sole heir of the estate of his mentally incompetent 96-year old mother. Lawyer Tom is not at all satisfied that the proceeds from the business sale will prove to be adequate to reimburse the mother's estate, which does not need the money in any event.

Both Lawyer Bob and Lawyer Tom recognize that their clients considered their matters family affairs and did not consider their actions fraudulent. Each client confided in his lawyer because he understood that the lawyer was representing him and because he expected the lawyer's help in rectifying the problem with complete discretion (translation -- to "preserve the secret").

Regardless of the Rules of Professional Conduct, both Lawyer Bob and Lawyer Tom have difficult practical and ethical problems on their hands. Under our present RPC's, the lawyers cannot do anything to assist either Big Bucks or Rev. Smith in <u>concealing</u> their wrongful misappropriation of funds, but neither attorney is under an ethical obligation to take some affirmative action to disclose or personally rectify the client's wrong except to advise the client concerning his legal obligation and to assist him in fulfilling that obligation.

The circumstances in which one can be said to be a "trustee" or to stand in a "fiduciary" relationship to another are virtually unlimited. Often the very existence of a "fiduciary" or a "trustee" relationship is the subject of bitter and protracted litigation. For the Rules of Professional Conduct to make distinctions between clients who are, or are perceived to

be, fiduciaries and other clients as respects the lawyer's obligations of client confidentiality and candor to the tribunal seems to the subcommittee most ill-advised.

SUBCOMMITTEE RECOMMENDATION

The subcommittee, in response to the Board of Governors' request, does recommend that Rule 1.6(a) be amended to read as follows:

RULE 1.6 CONFIDENTIALITY

(a) A lawyer shall not reveal confidences or secrets relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in sections (b) and (c).

(b) A lawyer may reveal such confidences or secrets to the extent the lawyer reasonably believes necessary:

(1) To prevent the client from committing a crime; or

(2) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, to respond to allegations in any proceeding concerning the lawyer's representation of the client, or pursuant to court order.

(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.

The subcommittee believes that if RPC 1.6 is so amended then RPC 3.3 (a) (2) which reads:

> "A lawyer shall not knowingly fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6"

would operate precisely as originally intended. The lawyer would not be relieved of his obligation to disclose material facts to the tribunal in situations where it was necessary to avoid assisting in fraudulent acts by his client <u>if the client is a court-appointed fiduciary</u> since such a disclosure would no longer be prohibited by Rule 1.6. At the same time, disclosure to any one but the tribunal would continue to be prohibited by Rule 1.6. Similarly, if the lawyer has offered material evidence in the course of representing a court-appointed fiduciary, the lawyer would be required to promptly disclose that fact <u>to the tribunal</u> under RPC 3.3(c) as that disclosure would no longer be prohibited by Rule 1.6.

Such a change would reach the major concern which the Board of Governors and our Committee has with Washington's present RPC's which require that the Rule on client's confidence take precedence over the Rule on candor to the Tribunal even in cases where the client is a court-appointed fiduciary and the victims of his fraud are the very beneficiaries whose interest the court proceedings were instituted to protect.

Such a modification of the Rule has the advantage of not disturbing the present Washington Rules of Professional Conduct or their hierarchy except in the specific instance of court-appointed fiduciaries.

The justification for the altering of priorities in the case of court-appointed fiduciaries is obvious:

1. There is a specific time in the course of representation when every thinking client and every thinking lawyer should understand that their attorney-client

relationship has moved out of the private and into the public arena, and that is when the client asks the court to vest or confirm in him powers which only courts can confirm.

2. Courts have both the right and the obligation to monitor estates and supervise the fiduciaries they appoint or confirm, and their lawyers. The purpose of the judicial proceeding is to assure that the court (not the fiduciary) is protecting the interest of the beneficiaries of the trust estate.

3. Properly understood, both the court-appointed fiduciary and his/her attorney are officers of the court charged with and sharing the same responsibility and exercising the power which the legislature has entrusted to the courts with respect to the estates of decedents and of those under legal disability.

4. Last (but certainly not least), attacking the problem by amending the Rule on client confidences is far preferable than making the ethical obligation rest on the very complex and arguable propositions that the lawyer who represents a fiduciary ipso facto has an attorney-client relationship with the beneficiaries of the trust.

Respectfully submitted,

LEONARD M. COCKRILL
BRYCE L. HOLLAND
GARY W. ROSS

EXHIBIT "A"
TO
REPORT OF SUBCOMMITTEE ON RULE CHANGE
RE: MISAPPROPRIATION BY GUARDIAN
OR PERSONAL REPRESENTATIVE

The Board of Governors requested the RPC Committee to consider a rule which would apply to <u>all</u> fiduciaries and, in effect, permit disclosure of serious fiduciary misconduct which would otherwise be prohibited by RPC 1.6. While the subcommittee unanimously recommends against such a rule change, it did so after giving the request careful consideration. That consideration included development of an approach to an amendment of the RPC's that would apply to all fiduciaries. The subcommittee considers what would be appropriate, should such a fundamental change in the rules be contemplated, would be an amendment to RPC 4.1 and RPC 1.6 and the addition of a new subdivision to RPC 1.2. This approach is illustrated as follows:

RPC 4.1
<u>TRUTHFULNESS IN STATEMENTS TO OTHERS</u>

In the course of representing a client a lawyer shall not knowingly:

(a) make a false statement of material fact or law to a third person; or

(b) <u>if the client is a fiduciary, fail to disclose a material fact to the beneficiaries of that trust, when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, or</u>

(c) <u>in situations other than (b) above,</u> fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

and amending Rule 1.6(a) as follows:

RULE 1.6
CONFIDENTIALITY

(a) A lawyer shall not reveal confidences or secrets relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, or are impliedly authorized because of the lawyer's professional obligation to trust beneficiaries (and where applicable the tribunal) of estates of which the client is the fiduciary, and except as stated in section (b).

The above changes might then be underscored by adding to RPC 1.2 a new Rule along the following lines:

RPC 1.2(f) An attorney who represents a fiduciary has special responsibilities to his client's trust beneficiaries. The circumstances may be such that an attorney-client relationship exists between the attorney and the trust beneficiary as well as between the attorney and the fiduciary, and in such cases RPC 1.6 must be applied in recognition that the representation is of multiple clients and RPC 1.6, 1.7, 1.8, 1.9, 1.10 and 2.2 apply. Where the circumstances are such that no actual attorney-client relationship exists between the attorney and the trust beneficiaries, the injunction of RPC 8.4 that a lawyer shall not engage in conduct involving "dishonesty, fraud and deceit or misrepresentation" requires that the lawyer not misrepresent factual matters to the trust beneficiary and further that the lawyer not conceal matters concerning the breach of the trustee's fiduciary responsibilities or fail to disclose such matters to the trust beneficiaries, and, where applicable, to the tribunal.

Because, by the above approach, disclosure to the trust beneficiaries and, in appropriate cases, the court is expressly excepted from the operation of Rule 1.6, no changes in Washington's RPC Rule 3.3 would be necessary.

While the subcommittee has considered amendments such as that proposed above because the Board of Governors requested that consideration, the subcommittee does not recommend the above changes.

EXHIBIT "B"
TO
REPORT TO SUBCOMMITTEE ON RULE CHANGE
RE: MISAPPROPRIATION BY GUARDIAN
OR PERSONAL REPRESENTATIVE

NOTES CONCERNING THE INTERPRETATION OF THE RULE

Note, there are four essential elements to the proposed new Rule 1.6(c):

(1) It is permissive, not mandatory: "The lawyer may reveal . . ."

(2) The exception is limited to disclosure to the court: ". . . to the tribunal . . ."

(3) The scope of the confidences and secrets that may be revealed to the court is very broad: ". . . which disclose any breach of fiduciary responsibility".

(4) The exception applies only as respects the secrets and confidences of clients who are court-appointed fiduciaries: ". . . by a client who is a guardian, personal representative, receiver or other court-appointed fiduciary".

To analyze the operation of the proposed rule change, one needs to focus on the interrelationship between the proposed new exception to the rule on preserving client confidences and the present rule on candor to the tribunal.

Rule 1.6(c) is permissive; Rule 3.3 is mandatory. Rule 1.6(c) permits, but does not mandate a lawyer revealing to the court client confidences or secrets which disclose a breach of fiduciary responsibility by a court-appointed fiduciary. It is Rule 3.3 which continues to articulate the circumstances in which disclosure to the tribunal is mandatory. Rule 3.3(a)(2) makes mandatory the disclosure to the tribunal of (i) any material fact, the disclosure of which (ii) is necessary to avoid assisting (iii) a criminal or fraudulent act (iv) by the client. Rule 3.3(e) makes mandatory the lawyer's obligation to make a disclosure to the court of the fact that (i) the lawyer has offered (ii) false material evidence, (iii) promptly upon the

lawyer learning of its falsity. Under the Washington Rules as they presently exist, the lawyer is relieved of these mandatory duties to make such disclosures to the court if to do so would require the lawyer to disclose the client's confidence or secret which the lawyer is obliged not to disclose by Rule 1.6. The proposed 1.6(c) carves out a new, very narrow, exception, i.e. disclosures to the tribunal of breach of fiduciary responsibility by a client who is a court-appointed fiduciary. Therefore, if the failure of the lawyer to disclose a material fact to the court would assist the criminal or fraudulent act by the client who is a court-appointed fiduciary, such disclosure would be permitted under Rule 1.6(c) and, therefore, mandated by Rule 3.3(a)(2). Similarly, if in the course of representing a court-appointed fiduciary the lawyer comes to know that he has offered false evidence (regardless of whether it relates to a criminal or fraudulent act), Rule 3.3(e) requires the lawyer to promptly disclose that fact to the tribunal and such disclosure would be permitted under Rule 1.6(c).

The proposed 1.6(c) is very limited as respects the clients to whom the exception applies (i.e. court-appointed fiduciaries), but very broad as to the scope of the acts or omissions that can be revealed (i.e. <u>any</u> breach of fiduciary duty). By contrast, Rule 3.3(a)(2) is unlimited as respects the clients, but very limited as respects the scope of the disclosures mandated (i.e. material facts necessary to avoid assisting a criminal or fraudulent act by the client).

Where a court-appointed fiduciary has been guilty of a breach of fiduciary responsibility, but disclosure of such breach is not necessary to avoid assisting a criminal or fraudulent act, the lawyer would not be obliged to disclose the breach to the court under 3.3(a)(2), but the lawyer would no longer be prohibited from making such disclosure under 1.6 because of the exception provided by the new 1.6(c).

As explained above, there would be circumstances under the proposed rule change when disclosure to the court would be neither mandated nor prohibited. That leaves the matter of disclosure up to the judgment of the lawyer. The subcommittee considered the advisability of limiting the rule change to disclosures necessary to avoid assisting criminal or fraudulent acts, but rejected that approach. The subcommittee was concerned that such a narrow exception would not reach many situations where public policy ought to at least permit the lawyer to be candid with the tribunal concerning the malfeasance or nonfeasance of his/her client. Perhaps the most probable hypothetical case would be the one where the client has

misappropriated estate funds but has fully reimbursed the estate. The client insists he/she did not understand the actions were improper since he/she never intended not to reimburse the estate and, in fact, has always been able to do so. Failure to disclose the past improper conduct would not assist a criminal or fraudulent act by the client and, hence, would not be required by RPC 3.3(a)(2). However, there has been a breach of fiduciary responsibility by the client who is a court-appointed fiduciary and the Rules of Professional Conduct should not prohibit the lawyer from revealing that fact to the court if the lawyer considers such disclosure to be advisable considering all of the circumstances. Such circumstances would logically include the client's culpability in the first instance, the client's motivation and extenuating circumstances, the probability or lack of probability of the client's future misconduct, the seriousness or lack of seriousness of the breach (is it a matter of substance and great importance or of form and/or minor importance?) and the known attitude of the affected beneficiaries.

In the case of the hypothetical above, if the lawyer believed the client acted out of ignorance and that future misconduct was highly unlikely, the situation would presumably be handled differently than if the lawyer suspected that his/her client was knowingly dishonest in the first instance and ought not be trusted in the future. The RPC's cannot provide a simple bright-line answer to every ethical problem a lawyer confronts, but they ought not put a lawyer in the position of not being able to be candid with the tribunal as respects breaches of trust by court-appointed fiduciaries in cases where the lawyer perceives that the proper administration of the trust estate dictates that disclosure be made. Under our present rule, all a lawyer can do if his client refuses to permit him to reveal the facts to the court is to withdraw. Under RPC 1.6(c), as proposed, the lawyer still has that option, but he also has the option of withdrawing and making a disclosure to the court concerning the breach.

Another probable hypothesis is a situation in which the client has not misappropriated funds but generally is not taking appropriate actions to preserve and conserve the estate and to keep the parties having an interest in the estate reasonably informed and generally disregards the advice of his/her attorney as respects such matters. Fraud is not involved, but the client is clearly disregarding his/her trust responsibilities. The lawyer ought to be in a position to strongly urge the client to mend his/her ways and if unsuccessful then the lawyer should withdraw, but he/she should not be precluded from disclosing to the tribunal that the fiduciary is pursuing an improper and potentially dangerous course.

Frequently, lawyers are confronted with situations wherein their client has acted improperly and the lawyer cannot persuade him/her to rectify the wrong, and the lawyer is left with no alternative but to withdraw from further representation. Indeed, that is the present effect of the interrelationship between RPC 1.6, 1.15(a)(1) and 3.3, and would remain unchanged except for the situation wherein the client is a court-appointed fiduciary and the confidence sought to be protected involves a breach of fiduciary responsibility. The rule would be unchanged so far as an attorney representing private fiduciaries is concerned. Attorneys are not prosecutors or public ombudsmen. Clients who consult them are entitled to anticipate that their secrets will be preserved. While they are not entitled to expect the assistance of the attorney to perform any improper act, they are entitled to expect that the attorney will not disclose the client's prior indiscretions. The circumstances may necessitate the attorney withdrawing from further representation, but only in very special circumstances permitted by Rule 1.6 may the attorney reveal the confidence. The rule ought to be different in the case of court-appointed fiduciaries. Both the attorney and the client turn to the court for either appointment or confirmation of the powers vested in the fiduciary. The court has supervisory and monitoring responsibilities. It is, in fact, the court which is charged with the proper administration of the estate through the fiduciary, both of whom rely upon the attorney. Beneficiaries understand that the court has appointed or confirmed the executor or the guardian. In such circumstances, it is appropriate that the attorney/client relationship between the attorney and the fiduciary ought not preclude the attorney from making those disclosures to the court which are reasonably necessary to enable the court to properly perform its function.

The subcommittee also considered the advisability of making the disclosure of breaches of fiduciary responsibility by court-appointed fiduciaries mandatory in every instance, but rejected that approach as well. The subcommittee's analysis of this alternative was substantially as follows:

> Disclosures which are necessary to avoid assisting criminal or fraudulent acts are already mandated by Rule 3.3. Further, under Rule 1.15(a)(1), the lawyer is obliged to withdraw from further representation of clients if the representation will result in a violation of the Rules of Professional Conduct. We are not considering a rule that suggests that lawyers may condone improper acts of their clients. What we have

under consideration here is to what extent should the lawyer be required to reveal secrets and confidences which he/she is privileged to know precisely because they represent the client. Obviously, the circumstances in which the rules should mandate such confidences be revealed ought to be carefully and narrowly drafted. The RPC's have already made the clear value judgment that the preservation of client confidences is a matter of the very highest importance in formulating rules of ethical conduct for lawyers. To require that every breach of fiduciary responsibility has to be called to the court's attention by the attorney for the fiduciary would be an unwarranted subordination of the values sought to be protected by the rule on client confidences to the values sought to be protected by the rule on candor to the tribunal. The cure would be totally disproportionate to the disease. The subcommittee was unanimous in its subjective attitude that every serious breach of a fiduciary responsibility by a court-appointed fiduciary ought to be disclosed to the court. However, we are here considering black-letter law and the advisability of mandating disclosures of certain client confidences, and the subcommittee was unanimous that it would be unworkable for such rules to require disclosure of breaches which are "serious" or "material and substantial" or which meet some other similar inherently indefinite, if not wholly subjective, test.

By excepting disclosures prohibited by 1.6 from those required to be made to the tribunal by 3.3, the Washington Rules have inadvertently created a situation wherein serious misconduct of court-appointed fiduciaries are protected from disclosure to the very court which confirmed the client's power and fiduciary responsibility in the first instance. So understood, our RPC's simply fail to take cognizance of the fact that court-appointed fiduciaries and the lawyers who represent them have a relationship to the tribunals from whom the fiduciaries ultimately derive authority over the estates of decedents, incompetents and insolvents. Such fiduciaries stand in a special relationship to the tribunal which is essentially vastly different from the ordinary litigant, and the ethical responsibilities of lawyers who represent such fiduciaries should reflect awareness of that fact.

It has been suggested that the problem might be circumvented by an analysis which concludes than an attorney/client relationship exists between the attorney hired by the fiduciary

and the heirs and/or creditors of a decedent's estate and the ward and/or creditors of an incompetent's estate. While multiple representation of the personal representatives and the heirs may, in fact, exist in specific situations, they are perceived by the subcommittee to be exceptions rather than the rule.

In the vast majority of situations, the fiduciary himself/herself/itself is the client, and the ethical obligations of lawyers are best addressed by recognizing that while court-appointed fiduciaries are entitled to the same confidentiality as any other client, by virtue of the authority confirmed in them by the court, that confidentiality does not extend to a right to have the fiduciary's attorney withhold from the court the client's breach of fiduciary responsibility. Where the situation does not involve a criminal or fraudulent act, whether disclosure is necessary and/or appropriate to enable the court to properly monitor and supervise the trust estate and/or to reasonably protect the interest of the trust beneficiaries is a determination to be made by the lawyer in light of all of the circumstances. When the lawyer determines that such a limited disclosure to the tribunal is necessary or appropriate, the Rules of Professional Conduct ought not preclude that disclosure.

WASHINGTON STATE BAR ASSOCIATION
500 WESTIN BUILDING • 2001 SIXTH AVENUE • SEATTLE, WASHINGTON 98121-2599
(206) 448-0307

ROBERT D. WELDEN
GENERAL COUNSEL

TO: WSBA Section Chairpersons
FROM: Robert D. Welden, General Counsel
DATE: January 26, 1989
RE: Lawyers and Miscreant Fiduciaries

The Rules of Professional Conduct Committee, in response to an inquiry, proposed that the Board of Governors adopt the attached as a Formal Opinion on the duties of a lawyer upon learning of serious misconduct (such as theft of estate funds) by a personal representative or guardian. In briefest summary, the Committee is of the opinion that under the Rules of Professional Conduct, the lawyer may not disclose such misconduct, but rather must call upon the client to rectify the misconduct, and if the client will not, to withdraw.

The Board neither approved or rejected this proposed opinion. However, they have referred the matter back to the Rules of Professional Conduct Committee for consideration of whether the Rules of Professional Conduct should be amended to permit (or require?) a lawyer representing a fiduciary client to disclose serious misconduct by that client. The Board specifically made the directive a broad one, to include all clients who act in a fiduciary capacity.

Because of the broad nature of this study and its potential impact upon wide segments of the Bar, I am advising all Section Chairpersons of the Committee's proposed opinion and of its present study so that the Sections may present any suggestions or comments to the Committee for their consideration. This is a subject of importance to many lawyers in this state, and I encourage all Sections whose members represent any fiduciary clients to give thought to this issue and to advise the Committee accordingly.

I request that any response be sent to me and I will forward it to the Committee. Thank you for your assistance.

SUITE 4400 · 1001 FOURTH AVENUE PLAZA · SEATTLE, WASHINGTON 98154 · (206) 624-3600

Riddell, Williams, Bullitt & Walkinshaw

LAW OFFICES

MICHAEL D. CARRICO

April 20, 1989

Robert D. Welden, Esq.
General Counsel
Washington State Bar Association
500 Westin Building
2001 Sixth Avenue
Seattle, WA 98121-2599

Re: WSBA Tax Section - Estate and Gift Tax Committee - Proposed Formal Opinion on Lawyers and Miscreant Fiduciaries

Dear Mr. Welden:

Alan Kane, Chairman of the Tax Section, asked the Section's Estate and Gift Tax Committee to review the Proposed Formal Opinion on lawyers and miscreant fiduciaries, "Duties of a Lawyer After Learning of Misconduct by a Personal Representative or Guardian," as attached to your January 26, 1989 memorandum. The Committee has polled its members, and I am writing to report to you on the results of the poll.

I enclose a copy of the ballot for your information. Only ten committee members responded. Of those ten, however, only two approved of the Proposed Formal Opinion; eight did not approve it. Of the eight not approving it, six voted in favor of the Rules of Professional Conduct Committee developing another Rule proposal on this issue or a proposal for legislation; only one committee member responding voted in favor of the WSBA taking no further action on the question.

I hope that these results are of help to you. Best regards.

Very truly yours,

Michael D. Carrico

MDC/jlh
Enclosure
4/20/89
cc: Alan H. Kane, Esq.

WASHINGTON STATE BAR ASSOCIATION, TAX SECTION COUNCIL

ESTATE AND GIFT TAX COMMITTEE

Proposed Formal Opinion: Lawyers and Miscreant Fiduciaries

Regarding Proposed Formal Opinion "Duties of a Lawyer after Learning of Misconduct by a Personal Representative or Guardian":

[ ] I approve of the Proposed Formal Opinion

[ ] I do not approve of the Proposed Formal Opinion

If you do not approve of the Proposed Formal Opinion, are you in favor of:

[ ] The WSBA Rules of Professional Conduct Committee developing another proposal regarding the Rules or a proposal for legislation, or

[ ] The WSBA taking no further action on this question?

PLEASE RETURN YOUR BALLOT AS SOON AS POSSIBLE. IT MUST BE RECEIVED NO LATER THAN APRIL 7, 1989.

BALLOTS SHOULD BE RETURNED TO:

Michael D. Carrico, Esq.
Riddell, Williams, Bullitt & Walkinshaw
4400 - 1001 Fourth Avenue Plaza
Seattle, WA 98154

_____
(Name of Committee Member)

C:\MDC\BALLOT.2

LAW OFFICES OF

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AND McNERTHNEY

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OF COUNSEL
LEO A. McGAVICK
RAY GRAVES

February 28, 1989

Mr. Robert D. Welden
General Counsel
Washington State Bar
Association
500 Westin Building
2001 Sixth Avenue
Seattle, WA 98121-2599

Dear Mr. Welden:

I am the Chairman of the Law Office Economics and Management Section's Executive Committee. At the February 10, 1989, meeting of the Executive Committee, we reviewed your correspondence of January 26, relative to "Lawyers and Miscreant Fiduciaries."

I think it fair to state that none of the committee members felt that the lawyer could simply walk away from the problem by withdrawing. We all recognize the difficulty in complying with a rule which would require the lawyer representing a fiduciary client to disclose serious misconduct. On the other hand, the lawyer is sometimes the only person who can prevent further damage from occurring. If the Committee had to vote on the issue, it would be in favor of requiring the lawyer to make the disclosure.

Thank you for the opportunity to participate.

Very truly yours,

L.B. McNerthney

LBM/tmf
1.4:30

Stephen M. Gaddis
COURT COMMISSIONER
KING COUNTY SUPERIOR COURT
SEATTLE, WASHINGTON 98104

March 21, 1989

Robert D. Welden
General Counsel
Washington State Bar Association
2001 - 6th Avenue, No. 500
Seattle, Washington 98121-2599

Re: Proposed Formal Opinion

Dear Mr. Weldon:

I received a copy of your memo dated January 26, 1989 with the proposed formal opinion regarding the duties of a lawyer after learning of misconduct by a personal representative or guardian. As a judicial officer responsible for hearing one third of the fiduciary hearings which arise in King County, I may have a slightly different perspective than a lawyer who represents such fiduciaries. However, I also had an active probate practice prior to my appointment to the bench, and offer the following:

First, I must acknowledge the need and right of all persons to be able to obtain representation. This necessarily means that the attorney-client relationship must remain inviolate, as to curtail this would effectively leave such persons without representation. There are some areas where limits may be justified, however, if there is a compelling interest that would be disserved, and if the limitations have been adequately and responsibly communicated at or before the time of establishment of the relationship. The closest analogy to which I could refer, is the limitation on the privileged relationship of health care providers, for cases in which there are allegations of child abuse or neglect.

When a person accepts a fiduciary appointment (which I remind is a voluntary representative relationship petitioned for and approved by the court) the person accepts responsibilities beyond his own personal obligations. If there is ever misconduct by the fiduciary, there is inevitably some form of conflict of interest between the person in office, and the persons being served. In this situation, I concur that the lawyer ought to counsel the client to rectify such misconduct. If the client cannot or will not rectify the conduct, it is appropriate for the lawyer to withdraw.

Robert D. Welden
March 21, 1989

Page 2

Beyond that, I take issue with the fact that the lawyer ought to do nothing further, and is even obligated to remain silent regarding the misconduct. Such would not only maintain the discreet nature of the misconduct, but in most cases will invariably exacerbate the situation as funds may be expended or wasted; statutes of limitations will run; and other irreparable harm will occur. As the King County Superior Court has stepped up its monitoring of guardianship cases in the last several years, there have been a number of lawyers who have stepped forward, in a variety of different ways, and alerted the court to the need for contact with the fiduciary, follow-up investigation, or appointment of a Guardian ad Litem. They have done this without quoting privileged communications, nor have they detailed the acts of malfeasance. In most cases, a mere referral to and review of the court file alerts us to areas of concern to be investigated. In other cases, the mere providing of information to the court that the attorney is out of touch with the fiduciary, is sufficient to occasion a file review leading to such further investigation.

The above practices are in the best interest of the incompetent persons, estates, and beneficiaries of the estates being supervised. It seems that the balance is met by provision of maximal protection to all parties. An obligation of the attorney to remain silent would unduly tip the scales in favor of only one of the competing interests of the person who serves in a fiduciary capacity, to the detriment of others in such conflicting situations. In support of an ethical rule which would require (or allow) the mere "alerting" of the court to the need to review a file I cite the following distinctions.

1. A lawyer representing a fiduciary is doing exactly that: he or she is not merely representing the person, but the office. Other comparable analogies in the law support this distinction, such as the lawyer who represents the president or officer of a corporation; or the prosecuting attorney who serves his or her municipal clients as well as the people.

2. Courts have the obligation to monitor estates and supervise fiduciaries and their counsel. Attorneys are officers of the ~~state~~ court and share this responsibility.

3. In nonprobate situations there is usually an adversary, which person or counsel maintains a balance of power which discourages malfeasance and has the ability to convene hearings to bring such information to light. In probate proceedings, however, there is usually no one with party status or standing to notice the error, do discovery or convene such hearings. Particularly in the case of guardianships, the ward is usually least able to understand or respond to malfeasance of a fiduciary, and may be least able to convene a court hearing to challenge such action.

4. Distinctions in the law cited above support such requirement, as that of the health care provider or therapist who have an obligation to serve their client, while they have a duty to report child abuse or neglect. Conscientious practitioners inform their clients and patients of this obligation when initiating the relationship or entering into an area where, absent such information, a breach of due process may occur.

5. In many situations an attorney having knowledge of misfeasance or malfeasance of the client he represents may do so with some understanding that the loss is monetary only, or that it may be fixed as it relates to the harm already done. Neither is the case in the representation of fiduciaries. A fiduciary, by nature of the office, has the ability to continue exercising such office so the harm may continue and grow in magnitude; and the harm done seldom is limited to mere monetary damages. Funds lost to a ward in a guardianship may profoundly affect the remaining quality of life of the person. Family relics and heirlooms lost in a probate proceeding leave beneficiaries with little but memories.

For the reasons stated above I would urge that the bar consider a ethical opinion, and necessary rules which would clarify the obligations of an attorney representing a fiduciary engaged in malfeasance or misfeasance of office. I would be pleased to meet with any groups involved in the development of such, and believe that in the development of such rules the Bar Association would be serving its highest office; that of fostering a practice of law whereby lawyers protect their clients and prevent the people from becoming victims of the law.

Sincerely,

Stephen M. Gaddis

SMG/jl
cc: WSBA Real Property, Probate & Trust Section
SKCBA Real Property, Probate & Trust Section

restricted to the same degree as all other lawyer by Canon 27. See Canon 45; Opinion 152."

It seems clear that the statement made in the summary of opinions of the Washington State Legal Ethics Committee, as set forth in the Bar News, was inadvertently made, and was incorrect. Those opinions have been searched and there was actually no opinion rendered during 1958 to the effect as indicated in this summary.

From the foregoing amendment to Canon 27 and the above mentioned opinion of the Ethics Committee of the American Bar Association it is quite clear that when properly authorized an attorney may use the terms "proctor in admiralty," or "admiralty attorney," or "patent lawyer" "patent attorney," or "trade-mark lawyer" or "trademark attorney," on letterheads and on his shingle. Otherwise, he is restricted the same as all other lawyers in the use of any special designation for his practice.

OPINION 58.

(December 1959)

Duties to Court and Client

You ask our opinion in respect to the duty of a lawyer to the court and to his client in circumstances such as these:

The lawyer represents an executor, administrator, guardian or other appointee of the court in a non-adversary proceeding. (We are not here dealing with a situation where a claimant, a creditor or other person with an adverse interest is represented by counsel, either of record or known to the lawyer.)

The executor, administrator, guardian or other court appointee neglects to file reports or do some other thing required by law or rule or order of court or in some other way fails in his duty to the court or the estate.

The lawyer has told his client what should be done. The client refuses or (without good reason reportable to the court) simply fails to supply the lawyer with the data essential to the report or refuses or fails to do whatever other act may be required of him.

Your question involves reconciliation of the duties of the lawyer to his client and to the court.

It is the duty of the lawyer to preserve the confidences of his client (Canon 37). This duty extends to non-disclosure of

acts by the client more serious than the nonfeasance here in question. But the lawyer has no duty to cooperate with or acquiesce in the failure of his client to fulfill his (the client's) obligations to the court.

We believe that after reasonable notice to the client and the latter's persistent failure to fulfill his obligations to the court (without sound reasons reportable to the court) the lawyer should withdraw from the case. Otherwise, at some point he becomes in *pari delicto* with his client.

The withdrawal of counsel should be with proper notice and formalities, all as shown by an order of court releasing the lawyer from further responsibility in the proceeding. In the absence of circumstances which the lawyer believes clearly justify his silence as to the reason for his withdrawal, the court record should state the reason.

The withdrawal will itself invite scrutiny of the proceedings by the court and result in whatever action the court deems just. We do not believe that the lawyer should suggest or participate in the issuance of a citation directed to his client unless (i) specifically ordered by the court to do so, or (ii) the act (or failure to act) of his client is so gross that the lawyer himself reaches the conclusion that, as an officer of the court, he should do so.

OPINION 59.

(December 1959)

Prosecuting Attorney As Attorney For P.U.D. District

[illegible] ask for an opinion of the Committee, and set forth in your letter the employment of two attorneys by the county and a P.U.D. District. In brief, the question presented by your letter would be whether or not it is proper for an attorney to act as a prosecuting attorney of a county, and at the same time be employed as an attorney for a P.U.D. District located in the same county. You ask whether this conflicts with Canon 6 of the Canons of Professional Ethics.

Among other things, it is stated in this Canon:

"Within the meaning of this Canon, a lawyer represents conflicting interests when, in behalf of one client, it is his duty to contend for that which duty to another client requires him to oppose."