BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re **DOUGLAS SCHAFER,** Lawyer (Bar No. 8652).	Public No. 00#00031 BAR ASSOCIATION'S COUNTERSTATEMENT IN SUPPORT OF HEARING OFFICER'S DECISION (RLD 6.3(b))

INTRODUCTION

In April 1996, Respondent disclosed -- to three newspapers and in a public appellate filing -- comments that his former client, Bill Hamilton, had made to him several years earlier during the course of the attorney-client relationship. He did so despite the fact that Mr. Hamilton had instructed him not to disclose those comments to anyone. In doing so, Respondent was motivated by personal vindication and his determination to cause then-judge Grant Anderson to lose his judicial seat in an upcoming election. Respondent had previously made allegations regarding Anderson's wrongdoing and disclosures of his client's confidences and secrets to the Judicial Conduct Commission, the Washington State Bar Association, the Pierce County Prosecuting Attorney's Office, the Federal Bureau of Investigation and the Internal Revenue Service. Nonetheless, Respondent made his April 1996 press disclosures despite the fact that each of those agencies was still considering Respondent's allegations, and had been doing so for less than two months. The Hearing Officer properly found that Respondent violated the client confidentiality

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rule set forth in Rule 1.6 of the Rules of Professional Conduct, and appropriately recommended imposition of a six-month suspension.

STATEMENT OF THE CASE

I. PROCEDURAL FACTS

On May 26, 1999, the Association filed a three-count Formal Complaint against Respondent. Bar File ("BF") 6. On January 6, 2000, the Association advised the Hearing Officer and the Respondent that it did not intend to pursue Counts Two and Three of the Complaint, and on January 25, 2000, the Hearing Officer dismissed those Counts. BF 47, BF 54.

The hearing occurred over the course of five days in July 1999. On August 21, 2000, the Hearing Officer filed his Findings of Fact and Conclusions of Law, determining that Respondent had committed the violation charged in Count One, and recommended the imposition of a six-month suspension. BF 109. On September 1, 2000, the Hearing Officer denied Respondent's motion to amend the August 21, 2000 Findings and Conclusions. BF 125.

II. SUBSTANTIVE FACTS

Between the early 1980's and 1992, Respondent represented William Hamilton on a variety of business and personal matters. On August 12, 1992, Mr. Hamilton telephoned Respondent and informed him that he wanted to form a corporation to purchase the Pacific Lanes bowling alley from the Estate of Charles C. Hoffman. Mr. Hamilton stated that he wanted to form the corporation quickly and asked Respondent to prepare the necessary documents. Respondent agreed to do so. Mr. Hamilton and Respondent had a meeting on August 17, 1992 to discuss the formation of the corporation. BF 109 at 2 ¶¶ 4-6.

During the August 12, 1992 telephone call or the August 17, 1992 meeting, Mr. Hamilton explained to Respondent why he wanted to form the corporation and why he wanted the work done

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quickly. Mr. Hamilton told Respondent that lawyer Grant L. Anderson was the personal representative and attorney for the Hoffman estate; that Mr. Anderson had been "milking" the estate for four years; that Mr. Anderson was about to become a judge; that Mr. 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 Mr. Anderson was giving Mr. Hamilton a good deal on the bowling alley, and that Mr. Hamilton would repay Mr. Anderson "down the road" by making Mr. Anderson a corporate secretary or something like that. In response to these statements, Respondent told Mr. Hamilton that he did not want to hear about it. BF 109 at 3 ¶¶7-8, Hearing Exhibit ("EX") A-7.

At that time Respondent did not believe that Mr. Hamilton's comments constituted particularly conclusive evidence of fraud. Hearing Transcript of July 17, 2000 ("[Date] Tr.") at 66-70. Respondent researched the corporation name, prepared the corporation documents, obtained Mr. Hamilton's signature, and sent the documents to the Secretary of State. Mr. Hamilton paid Respondent approximately $300 in attorney's fees for his services. BF 109 at 3 ¶9.

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. BF 109 at 3 ¶11; 7/17/00 Tr. at 72-73.

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

Then, in July 1995, Respondent 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, Respondent disagreed with and was unhappy with a number of Judge Anderson's rulings in the Barovic case, which occurred both before

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Respondent was involved in the case, and during his representation of Mr. Barovic. As a result, Respondent questioned Judge Anderson's professional competence, fitness as a judge, and integrity. BF 109 at 4 ¶¶12-13; EX A-7.

Immediately following an adverse ruling in Barovic on December 15, 1995, without even leaving the courthouse, Respondent 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, Respondent checked out the Hoffman estate file in Pierce County Superior Court, Cause Number 89-4-00326-3. Respondent also reviewed his client file for Mr. Hamilton concerning the formation of Pacific Lanes Enterprises, the corporation formed to purchase Pacific Lanes bowling alley from the Hoffman estate. BF 109 at 4 ¶14; 7/17/00 Tr. 74-77; EX A-1, A-2.

Twice in December 1995, Mr. Hamilton, Respondent's former client, told Respondent to stop investigating Mr. Anderson. BF 109 at 4-5 ¶15-18.

In December 1995 and January 1996, Respondent contacted numerous persons in an attempt to further investigate Mr. Anderson's handling of the Hoffman estate, BF 109 at 5 ¶¶19-20, including the Attorney General's Office and the hospital that was the beneficiary of the Hoffman estate. 7/17/00 Tr. at 86-98.

On February 1, 1996, Respondent received a facsimile from Mr. Hamilton demanding that Respondent not disclose any confidential information he learned from Mr. Hamilton or Sound Banking. BF 109 at 5-6 ¶21; EX A-3.

On February 1, 1996, Respondent met with William Hamilton and Philip R. Sloan, a lawyer representing Mr. Hamilton. During the meeting, when Respondent informed Mr. Sloan and Mr. Hamilton about his investigation and efforts to expose Judge Anderson, Mr. Sloan instructed Respondent that he was not to disclose any communications between Mr. Hamilton and

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Respondent, and indicated that he would file a Bar complaint if Respondent failed to protect Mr. Hamilton's confidential information. BF 109 at 6 ¶23.

Respondent 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 Tr. at 167. According to Respondent's own testimony, he advised Mr. Hamilton and Mr. 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 Tr. at 260.

On February 2, 1996, Respondent received a facsimile from Mr. Sloan, which instructed Respondent "not to disclose any communications re Grant Anderson to anyone. If you do – you will be in violation of RPC 1.6 ...." BF 109 at 6 ¶24; EX A-4.

On February 2, 1996, Respondent filed a Motion of Prejudice against Judge Anderson in the Barovic matter. EX A-5. In his motion, Respondent 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."

Respondent did not, on February 2, 1996, name Mr. Hamilton or disclose the actual contents of Mr. Hamilton's 1992 communications to Respondent. BF 109 at 6-7 ¶25; EX A-5.

Shortly thereafter, Judge Anderson recused himself in the Barovic case. BF 109 at 7 ¶26.

Respondent 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

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

On February 29, 1996, Respondent prepared a "memo" addressed to "Appropriate Public Officials." The memorandum stated that Respondent believed Mr. Anderson acted improperly in handling the Hoffman estate, and identified certain persons he believed to have participated in that misconduct. He did not name Mr. 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 Mr. Anderson's arrangements with Trendwest Resorts, Inc. and Surfside Resort, regarding which Mr. Hamilton had no involvement. EX A-8.

On or about February 6, 1996, Respondent met with John Ladenburg, Pierce County Prosecuting Attorney. Respondent later provided the Pierce County Prosecuting Attorney's Office with his February 16, 1996 Declaration Under Penalty of Perjury (Exhibit A-7).

On or about February 8, 1996, Respondent contacted the Federal Bureau of Investigation (FBI). Respondent later provided the FBI with a copy of his February 16, 1996 Declaration Under Penalty of Perjury (A-7). BF 109 at 3 ¶30; 7/17/00 Tr. at 144.

On February 13, 1996, Respondent met for several hours with Sally Carter-DuBois, an

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investigator with the Commission on Judicial Conduct (CJC). Respondent provided Ms. Carter-DuBois with a "briefcase full" of documents and discussed Respondent's allegations against Judge Anderson. When Ms. Carter-DuBois made comments indicating that she took Respondent's allegations seriously (for example, rating Respondent's complaint "13" on a scale of "1" to "10"), Respondent was encouraged that the CJC would follow through on his allegations. Respondent later provided the CJC with a copy of his February 16, 1996 Declaration Under Penalty of Perjury (A-7). BF 109 at 8-9 ¶32.

On March 1, 1996, Respondent sent a letter to David Walsh of the Attorney General's (AG) Office. Respondent enclosed his February 29, 1996 memorandum and February 16, 1996 Declaration with the letter. BF 109 at 10 ¶35.

In early March 1996, Respondent also sent his February 16, 1996 Declaration and his February 29, 1996 memorandum to the Washington State Bar Association (WSBA), along with other documentation obtained during the course of Respondent's investigation into Mr. Anderson's conduct in handling the Hoffman estate. BF 109 at 10 ¶36.

In February or March 1996, Respondent also sent his February 16, 1996 Declaration and his February 29, 1996 memorandum to the Internal Revenue Service (IRS), criminal investigation division. BF 109 at 10 ¶37.

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

Between February 1996 and April 25, 1996, motivated by a fear of civil lawsuit being filed against him by Mr. Hamilton, Respondent limited his dissemination of his February 16, 1996 Declaration Under Penalty of Perjury to government or disciplinary agencies. 7/17/00 Tr. at 152.

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As of April 26, 1996, to the Respondent's knowledge, investigations were still pending at the CJC, WSBA, FBI, IRS, and the Pierce County Prosecuting Attorney's Office. 7/17/00 Tr. at 156.

On April 26, 1996, Respondent 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 Respondent from the Barovic case. Although Judge Thompson had not reviewed the February 16, 1996 Declaration Under Penalty of Perjury in reaching his ruling, Respondent's February 16, 1996 Declaration was appended to his appellate motion. BF 109 at ¶29; EX A-10.

In filing the Motion for Discretionary Review, including his Declaration revealing Mr. Hamilton's confidential information, Respondent did not intend to benefit his client, Mr. Barovic (Mr. Anderson had already recused himself from the case). As Respondent testified, Respondent's motives in filing the Motion were (1) to personally vindicate himself and (2) to expose Mr. Anderson as a corrupt judge. BF 109 at 11 ¶39; 7/17/00 Tr. at 151-52.

In filing A-10, the Motion for Discretionary Review, Respondent took no steps -- such as requesting a protective order or redacting information directly obtained from Mr. Hamilton in 1992 – to avoid or to limit the revelation of his former client's communications to him. Indeed, Respondent wanted to place in the public record the information he had obtained about Judge Anderson, including Mr. Hamilton's confidential information. 7/17/00 Tr. at 152.

That same day, April 26, 1996, Respondent 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. BF 109 at 11 ¶40; EX A-12.

In providing Mr. Hamilton's confidential information to the news media, his purpose was solely to publicly expose Grant Anderson, whom he believed to be corrupt. Respondent

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intentionally disseminated the information about Judge Anderson, including Mr. 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. BF 109 at 11 ¶41.

In April 1998, the Commission on Judicial Conduct issued a decision regarding charges brought against Grant Anderson, finding that Mr. 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, the Supreme Court of Washington issued a decision in *Discipline of Anderson*, 138 Wn.2d 830 (1999), in which it found acts of misconduct by Grant Anderson. EX A-11. The facts set forth in the Supreme Court's opinion are uncontested for purposes of Respondent's disciplinary hearing. EX A-11.

ANALYSIS

I. STANDARD OF REVIEW

The Disciplinary Board applies a "de novo" standard of review to the hearing officer's conclusions of law and recommendation. Rule 6.7(b) of the Rules for Lawyer Discipline ("RLD").

The Disciplinary Board applies a "substantial evidence" standard of review to the hearing officer's findings of fact. RLD 6.7(b). "Substantial evidence exists when the record contains evidence of sufficient quantity to persuade a fair-minded, rational person that the declared premise is true." *State* v. *Foster*, 135 Wn.2d 441, 471 (1998).

The Board generally should not substitute its evaluation of the credibility of witnesses over that of the hearing officer. *See In re Dann*, 136 Wn.2d 67, 77 (1998). "The credibility and veracity of witnesses are best determined by the fact finder before whom the witnesses appear and testify." *In re Selden*, 107 Wn.2d 246, 251 (1986).

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II. THE HEARING OFFICER CORRECTLY DETERMINED THAT THE RESPONDENT 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 the Supreme Court's Rules of Professional Conduct ("RPC"). 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 for centuries has been viewed as one of the most important obligations of a lawyer since without the assurance that what clients tell their lawyers will be held in confidence by those lawyers, clients would hesitate to get legal advice and to tell their lawyers those confidences and secrets which those lawyers need to know to give the clients 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 v. Rogers, 102 Wn.2d 527, 535, 688 P.2d 506 (1984), quotation omitted; *accord Swidler & Berlin v. United States*, 524 U.S. 399, ___, 118 S.Ct. 2081, 2084, 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

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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 ABA Model Rule of Professional Conduct 1.6.

Respondent repeatedly violated RPC 1.6 in 1996, by detailing Mr. 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. Mr. Hamilton consented to none of these disclosures.

Respondent's key contention on appeal is that RPC 1.6 should be modified by the Disciplinary Board to condone his multiple disclosures of client confidences. He also argues that his conduct is permissible under the exception for preventing crimes contained in RPC 1.6(b)(1). These arguments lack merit.

B. <u>RPC 1.6 Should Not Be Rewritten, Post Hoc, To Justify Respondent's Misconduct</u>

Respondent argues RPC 1.6 should be modified in two ways: (1) by creating a new exception to the rule of non-disclosure to permit the reporting of the wrongdoing of a judge (Respondent's "common sense" argument); and (2) by creating a new "crime-fraud" exception to the rule of non-disclosure. Stating that, in essence, "the Rule is wrong" is not a viable defense to the pending charges against Respondent. RPC 1.6 is the carefully considered law in Washington, reflecting a delicate balance of competing interests. It can be modified only by the Supreme Court of Washington.

RPC 1.6 cannot, and should not, be modified during the course of this disciplinary proceeding. The rule of law entails established rules, available to all, and upon which all can rely.

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The Supreme 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 the Supreme 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 that included publication of the proposed rule in the Washington Reports for comment. *See* 103 Wn.2d, Advance Sheet No. 8, March 15, 1985. Respondent has focused on the debate that has been going for several years at the ABA, and that will probably continue to go on for several more years, as to whether the Model Rule 1.6 should be amended. Those ABA proposals have no effect on the validity or viability of the existing RPC 1.6, until and unless the Court under GR 9 determines to change the rule.

1. Respondent's Proposed "Common Sense" Modification Lacks Justification

Respondent's first proposed exception to RPC 1.6 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. Respondent cavalierly claims that "common sense" should condone his actions in revealing Mr. Hamilton's secrets and confidences because he was trying to expose wrongdoing committed by a judge, Grant Anderson.

In making this argument, Respondent asserts that his desire to expose a judge's wrongdoing was not foreseen when the RPCs were drafted, and therefore, it is appropriate to now judicially create another exception to RPC 1.6. Respondent's premise is faulty. Not only does RPC 1.6 carefully set forth the limited exceptions to the rule of confidentiality, but also 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

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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* American Bar Association, *Annotated Model Rules of Professional Conduct* at 78, 578 (4th ed. 1999). 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.

Respondent claims that exposing judicial wrongdoing should invariably trump client confidentiality. Such a rule would lead to incongruous results. For example, if a judge were to seek legal advice by informing a lawyer that the judge had accepted a bribe in exchange for a legal ruling, Respondent's rule would permit that lawyer to expose his client's wrongdoing publicly.

2. There Is No Crime-Fraud Exception to Attorney-Client Confidentiality

Respondent also urges the Disciplinary Board to adopt, outside of the rulemaking process, an 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. 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 absence from the language of RPC 1.6 and from case law interpreting RPC 1.6.

In the early 1980's, the American Bar Association ("ABA") Model Rules formed the starting point from which the Supreme Court of Washington adopted the RPCs in 1985 (104 Wn.2d 1101), including RPC 1.6. In both 1983 and 1991, the American Bar Association ("ABA") rejected

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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." ABA, *Annotated Model Rules of Professional Conduct* at 79 (4th ed. 1999). Thus, a much narrower version of Respondent's proposed crime-fraud exception has already been twice rejected.[1]

Respondent's argument regarding his proposed "crime-fraud" exception confuses the difference between the law of evidence and the law of professional ethics. The principle of confidentiality in attorney-client relationships arises from two sources: (1) the attorney-client privilege in the law of evidence and (2) the rule of confidentiality in professional ethics. Comment 5, 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* Omkar Suryadevara, *Attorney-Client Confidentiality*, 5 Geo. J. Legal Ethics 173, 175 (1991).

There is no question that there exists a crime-fraud exception to the attorney-client **privilege**

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[1] 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").

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– one which applies in the context of evidentiary rulings and permits disclosure of privileged information pursuant to court order.[2] That exception does not apply to the attorney-client **confidentiality** protections set forth in RPC 1.6, which prohibits both client confidences (which are privileged) and secrets (which are not) from being divulged by a lawyer in the absence of a court order compelling disclosure.[3] The cases upon which Respondent relies regarding the "crime-fraud exception" concern the more limited protection afforded by the evidentiary attorney-client privilege.[4]

The rewriting of RPC 1.6 to encompass the evidentiary crime-fraud exception would create an anomalous and inappropriate result. Under the 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. Respondent's proposed incorporation of the "crime-fraud" case law into RPC 1.6 provides clients

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[2] 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 at 720; *Whetstone v. Olson*, 46 Wn. App. 308, 310, 732 P.2d 159 (1986).

[3] *See,* American Bar Association, *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").

[4] Because Respondent's proposed crime-fraud exception lacks any legal merit, it is unnecessary for the Disciplinary Board to consider Respondent's request that it adopt additional Findings of Fact as set forth in Respondent's brief at 3-4.

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with no protection from unwarranted disclosures.

Given the considerable controversy and debate surrounding Respondent's proposed exception, and the fact that a much narrower version of his proposed amendment has already been twice rejected by the ABA, Respondent'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 pp. 11-12 above.

C. RPC 1.6 Expressly Prohibited Respondent's Disclosures of Mr. Hamilton's Confidences and Secrets

Respondent argues secondarily that his conduct was permitted by RPC 1.6, even in the absence of the adoption of his proposed modifications. He asserts (1) that his conduct is not even covered by RPC 1.6 because there was no "professional relationship" between himself and Mr. Hamilton in 1992, and (2) that his disclosures fell within the exception to RPC that would have permitted him to make disclosure to **prevent** Mr. Hamilton from committing a crime. These arguments lack merit.

1. The "Professional" Relationship

Respondent seeks to back door his proposed "crime-fraud" exception to the non-disclosure rule by urging that there can be no "professional relationship" between a lawyer and his client when the client used the lawyer's services to commit a crime or fraud. Respondent then argues that because there is no "professional relationship" within the meaning of RPC 1.6, RPC 1.6 does not apply at all. As discussed at some length in Section II.B.2. above, the history of RPC 1.6 makes clear that Respondent's strained interpretation of RPC 1.6 is baseless. Respondent cites no valid legal precedent for such an interpretation.

Under the Terminology section of the Rules of Professional Conduct, "confidence" is defined as information protected by the attorney-client privilege under applicable law. Thus, a

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"confidence" under RPC 1.6 is coextensive with the attorney-client privilege.[5] Dietz v. Doe, 131 Wn.2d 835, 842, n.3, 935 P.2d 611 (1997). "Secret" is defined 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" (emphasis added).[6]

Here, there is no question that Mr. Hamilton's statements were made to the Respondent "in the context of an client-attorney relationship," BF 109 at 15 ¶6, and that Mr. Hamilton specifically instructed Respondent not to disclose Mr. Hamilton's 1992 communications. BF 109 at 15 ¶7. Nonetheless, Respondent argues that Mr. Hamilton's communications do not fall within RPC 1.6 because there is no "professional relationship" between that client and the lawyer when the client has used a lawyer's services to further a crime or fraud.

Respondent's argument makes no sense. Clearly, the numerous legal scholars who have and are debating the proposed exception to the rule of confidentiality for the rectification or mitigation of a crime or fraud when the client has used the lawyer's services, do not recognize Respondent's novel interpretation. If they did recognize such an interpretation, there would be no reason to debate the proposed exception.

Moreover, Respondent has cited no valid legal precedent for his novel interpretation of the definition of "professional relationship." His citation to *Sloan v. State Bar of Nevada,* 102 Nev.

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

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

6 Thus, the duty of confidentiality as it applies to "secrets" encompasses a broad spectrum of information gleaned during the course of the attorney-client relationship, including public information. *See WSBA Formal Opinion 188* (lawyer may not disclose client's criminal history to the court); *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).

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436, 726 P.2d 330 (1986), is clearly misplaced. In *Sloan*, the Supreme Court of Nevada held that the respondent lawyer was justified in believing that he was prohibited from disclosing information about a client's past crime or fraud under ethical rule in effect when respondent lawyer received the information. Thus, Respondent's citation to a position taken by the Nevada State Bar, and rejected by the Nevada Supreme Court, is misleading. Respondent 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, confused the evidentiary crime-fraud exception to the attorney-client privilege with the ethical duty of attorney-client confidentiality.

In contrast, *ABA* Formal Opinion 92-366 interprets 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.

Accordingly, Respondent's novel interpretation of the scope of RPC 1.6 should be rejected.

2. The Crime-Prevention Exception of RPC 1.6(b)(1)

Respondent also argues that, even should the Disciplinary Board reject his proposed modifications of RPC 1.6, his disclosures of Mr. Hamilton's communications were permissible under RPC 1.6 under the exception to the rule of confidentiality to "prevent the client [Mr. Hamilton] from committing a crime." RPC 1.6(b)(1). This exception allows a lawyer to disclose a

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confidence or secret to prevent a **future** crime. It does not permit a lawyer to disclose past crimes. Respondent's reliance on this exception is unsupported by the evidence adduced during the four days of testimony in the hearing on this matter.

The Hearing Officer correctly determined that "the evidence does not support Schafer's assertion that his disclosures of confidences or secrets obtained from Hamilton in August of 1992 were made by Schafer in 1996 to prevent Hamilton from committing a future crime." By the time Respondent decided to disclose Mr. Hamilton's 1992 communications – three and a half years later -- the corporation had been formed, the transaction regarding the bowling alley was complete, and the events discussed by Mr. Hamilton in 1992 had already occurred. BF 109 at 16 ¶9.

The evidence plainly supports the Hearing Officer's finding. Clearly, Respondent's April 1996 disclosures to the three newspapers were not made to prevent Mr. Hamilton from committing a crime. Furthermore, Respondent's own testimony at hearing clarifies that his motive in disclosing client information was that past wrongdoing could be "not prevented but cured." 7/17/00 Tr. at 252. In Exhibit D-29, Respondent described his own state of mind as of early February 1996 as follows:

> [A]t that time all I thought I had discovered was flagrant self-dealing in breach of fiduciary duties—which I'd never thought of as a crime. I'd also been given the tip by Diane Anderson's divorce lawyer ("don't tell anyone you heard this from me," he said) to look into how the judge got his Cadillac, but still I never thought that what I was onto was a "crime."

During four days of testimony, Respondent never identified a single act of Mr. Hamilton that he sought to prevent by any of his 1996 disclosures. Thus, the evidence overwhelmingly supports the Hearing Officer's findings.[7]

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[7] Respondent's Statement in Opposition incorporates by reference "Respondent's Reply re: RPC 1.6(b)(1) (Preventing Commission of a Crime) dated July 28, 2000," which is BF 100. The Association's brief on this topic can be located at BF 97.

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D. Respondent 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

Another reason to reject Respondent's position is that his disclosures were not "reasonably necessary" to accomplish the stated purpose of any exception in RPC 1.6 or of proposed amendments to RPC 1.6. 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 when an exception to RPC 1.6 applies, that rule provides that 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, 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." Stuart Watt, *Confidentiality under the Washington Rules of Professional Conduct*, 61 Wash. L. Rev. 913, 917 (1986).

As the Hearing Officer found, Respondent's disclosures plainly went far beyond those reasonably necessary to prevent a crime, report wrongdoing by a judge, or to rectify or mitigate the effects of a past crime. BF 109 at 16-17 ¶¶10,12. Respondent 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. BF

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109 at 17 ¶12. The Hearing Officer's finding in this regard is amply supported.[8]

Regardless, as of April 1996, Respondent had already reported his allegations about Mr. Anderson to criminal investigators, to the CJC and WSBA disciplinary authorities, and to the hospital that allegedly was victimized by the sale of the bowling alley from the Hoffman Estate to Mr. Hamilton. Thus, by April 1996, Respondent had already taken all the steps he could have "reasonably believe[d] necessary." Nonetheless, in April 1996, Respondent disclosed Mr. 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 Mr. 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.

Under the facts of this case, Respondent's conduct fails to comply with RPC 1.6 and with the modified rules he proposes.

III. THE HEARING OFFICER'S FACTUAL FINDINGS REGARDING SANCTION ARE AMPLY SUPPORTED BY THE EVIDENCE AND HIS LEGAL CONCLUSION REGARDING SANCTION IS SOUND

The Hearing Officer's conclusion that suspension is the presumptive sanction applicable in this case is amply supported by the substantial evidence proving actual and potential injury to William Hamilton. His recommendation that a six-month suspension be imposed in this case is well supported by his findings regarding applicable aggravating and mitigating factors.

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[8] By reviewing in detail the information reported to the authorities by Respondent in February and March 1996, one can readily determine that the Hearing Officer was correct in concluding that Respondent could have met his primary objective of reporting wrongdoing by Grant Anderson without detailing his client's 1992 conversations. *See* Respondent's February 1996 summary 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.

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A. The Applicable Law

The *ABA Standards for Imposing Lawyer Sanctions* apply in all lawyer discipline case. *In re Johnson,* 114 Wn.2d 737, 745, 790 P.2d 1227 (1990). *In re Johnson* holds:

> [H]earing officers and the Disciplinary Board will be required by this court in every case to indicate clearly in their findings (1) the formal complaint; (2) findings of fact; (3) conclusions indicating violations of specific provisions of the Rules of Professional Conduct; (4) the sanction suggested by the ABA *Standards*; (5) weighing of any aggravating or mitigating factors, based upon the ABA *Standards*, considered in determining what sanction to recommend; and, (6) the sanction recommended by the Hearing Officer or the Board.

Id. The *ABA Standards* examine the ethical duty violated, the lawyer's mental state, the extent of actual or potential injury, and any aggravating or mitigating circumstances. *Id.; ABA Standards* at 5. In this context, "injury" means harm to a client, the public, the legal system, or the profession which results from a lawyer's misconduct. *ABA Standards* at 7. Such injury includes non-economic harm.

The nature of the duty violated determines the presumptive sanction to be applied. The Hearing Officer properly concluded – and the Respondent does not dispute – that *ABA Standard* 4.2 applies in this case. *ABA Standard* 4.2 provides:

> 4.2 ***Failure to Preserve the Client's Confidences***
>
> Absent aggravating or mitigating circumstances, upon application of the factors set out in 3.0, the following sanctions are generally appropriate in cases involving improper revelation of information relating to representation of a client:
>
> 4.21 Disbarment is generally appropriate when a lawyer, with the intent to benefit the lawyer or another, knowingly reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client.
>
> 4.22 Suspension is generally appropriate when a lawyer knowingly reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client.
>
> 4.23 Reprimand is generally appropriate when a lawyer negligently reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes injury or potential injury to a client.
>
> 4.24 Admonition is generally appropriate when a lawyer negligently

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reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed and this disclosure causes little or no actual or potential injury to a client.

B. Respondent's Disclosures Resulted in Substantial Injury to William Hamilton Resulting In the Application of a Presumptive Sanction of Suspension

The Hearing Officer properly determined that the presumptive sanction in this case is suspension under *Standard* 4.22. Respondent does not contest the Hearing Officer's finding that he "knowingly" revealed information relating to the representation of Mr. Hamilton. In addition, the Hearing Officer's conclusion that Respondent's disclosures caused injury to his client is supported by substantial evidence.

The actual and potential injury that Respondent caused William Hamilton was quite substantial. Respondent reported his client's activities to both federal and state criminal investigative authorities, thus subjecting his client to potential criminal investigation and prosecution. Respondent's disclosures, which eventually led to the public removal of Grant Anderson from the bench, resulted in substantial adverse publicity regarding William Hamilton, 1/17/00 Tr. at 153, 186; EX A-11, A-190, A-192, A-193, A-194, A-196, and caused Hamilton to incur costs and attorney's fees. 7/17/00 Tr. at 171. Respondent's disclosures "destroyed" William Hamilton.[9] 7/17/00 Tr. at 169.

Given the Respondent's knowing mental state and the substantial injury caused by his disclosures, suspension is the presumptive sanction under *Standard* 4.22.

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[9] In addition, this case has involved substantial injury to the legal profession and the system of justice, in that Respondent has openly and notoriously disregarded the rule of law as embodied in the Rules of Professional Conduct. A lawyer may not pick and choose which client confidences and secrets to respect based on the lawyer's own personal sense of justice. By allowing his own personal beliefs to usurp the rule of law, Respondent has challenged an essential bulwark of our system of justice and visited harm to everything that the rule of law stands for.

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C. The Hearing Officer's Findings Regarding Aggravating and Mitigating Factors Are Amply Supported By the Evidence

A downward departure from the presumptive sanction is not warranted here, in that a number of aggravating factors are applicable in this case. The Hearing Officer's findings of (1) dishonest or selfish motive, (2) a pattern of misconduct, (3) refusal to acknowledge wrongful nature of conduct and (4) substantial experience in the practice of law, are all supported by substantial evidence. Moreover, his refusal to find a mitigating factor based upon Respondent's motive to expose a "corrupt judge" is sound based upon the entirety of Respondent's conduct in this matter.

Contrary to Respondent's contentions, the Hearing Officer's finding (BF 109 at 19 ¶1(b)) that Respondent's motives were "partially selfish" is amply supported by the Respondent's own testimony. 1/17/00 Tr. at 141-52, 160. Respondent testified that his filing of the *Barovic* appeal was not intended to benefit his client in that case, Donald Barovic, but confirmed that his motives were twofold – "personal vindication" and "the public exposure of a corrupt judge." 7/17/00 Tr. at 151-52. He further 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."

Contrary to Respondent's assertions, the Hearing Officer's finding that Respondent engaged in a "pattern of misconduct" by engaging in multiple disclosures from February 1996 to April 1996, to "government and disciplinary agencies and newspapers" (BF 109 at 20 ¶1(c)) is also amply supported by the evidence. Respondent made separate and distinct decisions to disclose Mr. Hamilton's confidences and secrets over the course of several months, to numerous government and disciplinary agencies, and then the April public disclosure in the *Barovic* appeal and simultaneously to the press. Moreover, his pattern of misconduct is underscored by his later

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disclosures between 1997 and 1999 to the press. *See* EX A-190, A-192, A-193, A-194, A-196.

The evidence overwhelmingly supports the Hearing Officer's finding that Respondent has refused to acknowledge the wrongful nature of his conduct. During four days of testimony, Respondent repeatedly claimed that he had done the right thing in disclosing his client's communications, and never suggested that any of his disclosures should not have been made or could have been made in a less damaging fashion. *See, e.g.,* 1/17/00 Tr. at 277. Respondent's own Statement in Opposition further demonstrates that he will not accept any responsibility for his own wrongdoing, not even for disseminating his client's secrets and confidences to the newspapers.

Respondent's final issue as it relates to the Hearing Officer's recommended sanction challenges the Hearing Officer's failure to find a mitigating factor that Respondent "was determined to expose [a sitting superior court judge] to cause his removal and thereby restore integrity to the judicial system." While application of such a mitigating factor might have been appropriate had Respondent limited the extent of his disclosures to disciplinary authorities responsible for overseeing the integrity of the bench, it is clearly inappropriate where, as here, the Respondent on his own decided to publicly expose his client's confidences and secrets, and shared those confidences and secrets with the press.

Given the aggravating and mitigating factors applicable in this matter, which do not warrant a downward departure from the presumptive sanction of suspension, the Hearing Officer's recommendation of a six-month suspension is very reasonable.[10] The *ABA Standard 2.3* provides that "[g]enerally suspension should be for a period of time equal to or greater than six months ...."

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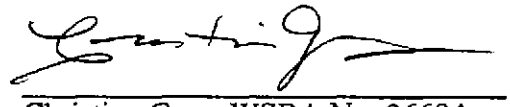
See In re Boelter, 139 Wn.2d at 101, 106 (1999) (applying the rule that suspensions generally should be for at least six months); *In re Halverson*, 140 Wn.2d 475, 495-99 (noting the general rule that six months is the minimum period of suspension, while increasing period of suspension to one year in light of fact that mitigating factors did not outweigh aggravating factors and "high profile" nature of the case).

CONCLUSION

Based upon the foregoing, the Association will ask the Disciplinary Board to adopt the Hearing Officer's conclusion that Respondent committed the acts charged in Count One of the Formal Complaint and the Hearing Officer's recommendation that Respondent be suspended for six months.

DATED this 27th day of November, 2000.



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[10] The recommended six-month suspension is also proportional to sanctions imposed in similar cases. *See Boelter*, 139 Wn.2d 81 (1999) (imposing six-month suspension for making misrepresentations in threatening to reveal client confidences if client did not pay disputed fees); *In re McMurray*, 99 Wn.2d 920 (1983) (imposing two-month suspension (to run concurrently with a suspension imposed for another ethical violation) for using information obtained from a client in attempt to impeach her as witness in trial of client's former husband).

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