BEFORE THE DISCIPLINARY BOARD OF THE
WASHINGTON STATE BAR ASSOCIATION

In Re	)	
	)	
DOUGLAS SCHAFER,	)	Public File No. 00#00031
	)	
Attorney at Law.	)	Argument held on 1/12/01
	)	
Bar No. 8652	)	
	)	

A hearing was held in the above-captioned matter beginning at the hour of 1:05 p.m. on Friday, January 12, 2001, at 2101 Fourth Avenue, Fourth Floor, before the Disciplinary Board chaired by Stephen C. Smith.

The committee members were present as follows:

Douglas Smith	Colleen Klein
F. J. Dullanty	Thomas Hayton
Stephen Brandon	Roger Johnson
Barry Bonnell	Terry Blink
Les Weatherhead	Dawn Sturwold
James Horne	David Cullen
Also Present:	Julie Shankland, Clerk/ Counsel to the Board

The parties were present and represented as follows:

For the Bar: CHRISTINE GRAY
Chief Disciplinary Counsel
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Fourth Floor
Seattle, WA 98121

For the Respondent: SHAWN NEWMAN
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Seattle, Washington; Friday, January 12, 2001
1:05 p.m.
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CHAIRMAN STEPHEN SMITH: We will now be in open public session. I'm Stephen C. Smith, chairman of the Washington State Bar Association Disciplinary Board.

We are here for an oral argument in the matter of In Re Douglas Schafer, which is WSBA File No. 9601244. This is an appeal from the recommendations of the Hearing Officer.

Prior to the beginning of the hearing and the oral argument, several members of the Disciplinary Board wish to make statements for the record.

Mr. Smith?

MR. DOUGLAS SMITH: For the record, I'm Douglas Smith, a Disciplinary Board member.

I need to advise Bar counsel and counsel for the respondent that quite sometime ago -- I don't even remember how long ago it was, let alone the date -- but it was quite sometime ago, when I was at my law office, Mr. Schafer called on the telephone to ask, as I recall, for a list of the Disciplinary Board members and their addresses and

phone numbers, or something of that sort.

My secretary wasn't sure whether that

information could be disclosed and asked me to take the call, which I did. I discussed with Mr. Schafer what he wanted and why he wanted it, and in the course of the discussion we started to talk in general terms about lawyer disciplinary matters and how they were processed and how long they took.

And in the course of that general conversation, Mr. Schafer, I recall, disclosed that he was the grievant in a complaint against Judge Grant Anderson of Pierce County, and I recall saying at that point that I didn't even know at that time that there was a grievance pending against Judge Anderson much less that a stipulation had been agreed upon and was to be presented to the Board, which obviously I would hear. And at that point I basically discontinued the conversation with Mr. Schafer, who indicated that he had only called to talk about matters in general.

Following that conversation, I contacted the counsel for the Disciplinary Board to report that this conversation had occurred because I thought it was important that someone other than myself be aware of it. And I believe that

prompted -- Ms. Shankland, the attorney to the board, I believe, wrote a letter to both disciplinary counsel and Mr. Schafer or Mr. Schafer's lawyer. I honestly don't remember for sure that it was written or what it said.

I don't believe this affects my ability to hear this case in any way. I did recuse myself in the Grant Anderson matter but not because of this conversation but for other reasons that do not apply to this particular case. But I thought that it was important that I advise counsel if they were not aware of it so they had a right to inquire of me, or whatever, if that's what they chose to do.

It's my understanding that you know about it anyway but I'm not sure of that.

CHAIRMAN STEPHEN SMITH: Thank you.

MS. GRAY: I'm Christine Gray, Bar counsel in this matter.

I just think I should state for the record that I was made aware of this by Ms. Shankland. I don't recall the details of whether it was an e-mail or a letter but I was made aware of it, and I certainly have no objection or concern about Mr. Smith participating in this matter.

MR. NEWMAN: I have no comment.

That's fine with me.

CHAIRMAN STEPHEN SMITH: You'd better tell the court reporter who you are.

MR. NEWMAN: My name is Shawn Newman. I'm counsel for the respondent, Mr. Schafer.

MR. BLINK: For the record, my name is Terry Blink and I am going to recuse on this case.

MR. JOHNSON: Also for the record, my name is Roger Johnson, citizen member, and I also am going to recuse on this case.

MS. KLEIN: I'm Colleen Klein and I respectfully recuse on this matter.

CHAIRMAN STEPHEN SMITH: Counsel, the ground rules are as follows: You each have 20 minutes per side. You may reserve, if you wish. I hope you will try to keep as closely as possible to the time limits. I will take into account that members of the Board usually do ask questions and sometimes very many of them, so I will try to keep that in mind.

We can proceed.

MR. NEWMAN: Thank you, Chairman Smith. My name is Sean Newman. I'm representing

Doug Schafer in this case in this matter. I'm an attorney from Olympia.

I would first like to reserve five minutes rebuttal time.

I want to begin with telling you how important this case is. This is a situation where you have an attorney, Doug Schafer, who is acknowledged as exercising what was morally right to do, which was to blow the whistle on a corrupt judge, that judge being former Pierce County Superior Court Judge Grant Anderson. And as you know from the materials I have in front of you here, in a landmark decision the state supreme court removed Judge Anderson from the bench based on information provided by my client.

My client is an attorney. He has been an attorney for 22 years. Like many of you, he's worked in large practices. He's solo right now. He has no disciplinary history.

I do want to briefly review the facts. I know that the information is voluminous. I see Mr. Horne's book there. You have quite a bit of material in front of you, so let me just try to, as they say in the sports world, hit the highlights.

The highlights involve a number of

players. The players include my client, Mr. Schafer, and at the time in 1992 Attorney Anderson, who eventually became a superior court judge. Mr. Anderson, as you know, was a trustee for an estate and he exploited assets from that estate for his own benefit with the help of a client of Mr. Schafer's named Bill Hamilton. The exploitation was to the detriment of the ultimate beneficiary, a public hospital district in Ilwaco, Washington. The exploitation exceeded $1.5 million.

Mr. Hamilton in 1992 came to Mr. Schafer to set up a corporation, to set up a shell for a particular arrangement to be funneled through. The arrangement was the sale of a bowling alley that was an asset of the estate. The sale was far under value of the estate. In the discussion with Mr.

Hamilton, Mr. Hamilton said to him that an attorney by the name of Anderson, who was just elected to the court, was milking the estate, that he was getting a great deal on this bowling alley, and at that point in time Mr. Schafer said he did not want to hear any more.

He set up the corporation. That's his only involvement. He did not negotiate the deal on the bowling alley or do any other work.

MR. WEATHERHEAD: Did Mr. Schafer advise his client at that time pursuant to the RPCs that he was limiting his representation to a specific task like that?

MR. NEWMAN: If you don't mind, I'm going to refer to Mr. Schafer. My understanding is that he did not tell Mr. Hamilton that the limitation of his representation was solely on forming the corporate body, but that's all he did.

MR. SCHAFER: If I could answer -- this is Doug Schafer -- Mr. Hamilton testified under oath on three occasions in Judge Anderson's case that he had already made his deal with Anderson and he was coming to me solely to form his corporation because he knew he could get a good deal. I don't charge a lot.

And he made it very clear to me that he had his deal, he just needed a corporation. He needed a corporate shell and the corporate papers, which is what I did. He was not seeking my involvement or advice at all concerning the acquisition of the bowling alley.

MR. WEATHERHEAD: Did you advise Mr. Hamilton, though, that you were so limiting your representation for purposes of his communications

to you? Did you warn him at the time that your representation was limited to the formation of the corporation and that there would be a privilege attaching only to statements directly related to the formation of the corporation?

MR. SCHAFER: Well, he specified To me that my engagement was limited to forming the corporation.

Okay. Now if you want me to recall what was said eight years ago, I can't. I can't say with certainty.

MR. WEATHERHEAD: All right.

MR. SCHAFER: But I can say most likely I didn't go through that formality. He's someone I'd known for years. He came to me to do a specific task, told me what he needed, and I did it.

MR. NEWMAN: If I just may add, I think it's important that it is undisputed that Mr. Schafer did tell Mr. Hamilton when he got into describing what eventually was the unlawful arrangement that he did not want to hear about that.

Let me just highlight again a couple of points on the chronology here. That was in 1992.

Anderson is elected judge. Mr. Schafer, who rarely appears in court -- he's not a trial attorney, Mr. Schafer's specialty is trusts and estates -- has a case before Judge Anderson, the Barovic case. He called Hamilton up remembering Judge Anderson's name. He calls Hamilton up and says to Hamilton, is Judge Anderson trustworthy? Hamilton says, as trustworthy as any other attorney.

Mr. Schafer moves to recuse Anderson citing this estate, this Hoffman estate. He does not cite any communications between Mr. Hamilton and Mr. Schafer. Mr. Schafer cites none of that. Judge Anderson recuses himself from the case.

Another judge takes over, a Judge Thompson. Judge Thompson unilaterally and immediately removes Doug Schafer from the case. Mr. Schafer goes to Judge Thompson. And the reason Judge Thompson did this very simply was because of Mr. Schafer's reporting that Judge Anderson was unethical, had a problem, et cetera. Judge Thompson -- this was an election year I should say -- Judge Thompson says, I don't want you in my courtroom. You're out of here.

In response, Mr. Schafer tries to communicate with Judge Thompson and says, there's a

lot to this, there's more to it. You should look at the details, what I suspect, and the communications. Judge Thompson does not want to look at that. He does not consider it.

Mr. Schafer appeals to the court of appeals, and as part of that appeal files this -- now this notorious Affidavit or Declaration under penalty of perjury where he does go into detail about the communications with Hamilton. The court of appeals reverses Thompson on that issue. Now that Declaration is a matter of public record. Anybody, the press, can pick that up.

As you well know, as a result of Mr. Schafer's actions -- I think even the Bar agrees here -- it was beneficial to society. Everybody -- in fact, there's one of my exhibits here -- you'll have to bear with me -- there's a -- I want to make sure this is it -- I'll hold that up -- it's clear even the supreme court and the Bar Association itself said, what Mr. Schafer did was beneficial to society but the means by which he did it was improper because he violated the attorney-client privilege.

The question before you today is, can the rules be interpreted in a way to justify morally

right conduct? Can the rules be interpreted in a way to justify morally right conduct?

And the answer to that question is, yes, and there's three ways you can arrive at that conclusion. The first is a simple common sense approach of balancing of public policy. And I would draw your attention to the recent California case dealing with Cindy Ossias. That's attached -- just bear with me -- it's attached to the response of the respondent to the Bar Association's counter statement. It's a letter from the attorney in California and an article on the Ossias case.

This woman, very briefly, worked for the insurance commissioner's office, found the insurance commissioner in California was engaged in kickbacks. She reported it. The Bar Association investigated and concluded that, we have determined that Ms. Ossias' conduct should not result in discipline because it was consistent with the spirit of the Whistle Blower Protection Act. It advanced important public policy considerations bearing on the office of the insurance commissioner.

CHAIRMAN STEPHEN SMITH: Counsel, Stephen C. Smith. Could I ask you a question?

Do we have in this state a similar Whistle Blower Act?

MR. NEWMAN: We do. We have a number of what are called Whistle Blower Anti-Slap statutes. Let me just point these out here.

Rules of Lawyer Discipline 12.11 talks about communications to the Association, for example, are absolutely privileged. Let me make a comment here. If you look at the Bar Association's complaint here, one thing that's somewhat interesting is they're claiming that every communication made by Mr. Schafer on this issue violated the attorney-client privilege. And I'm looking at page 11 of their counter statement.

If you look at the paragraph, they say, respondent repeatedly violated RPC 1.6 by detailing Mr. Hamilton's confidences and secrets to prosecutorial authority. That included the Bar Association.

Now, remember, Mr. Schafer went to everybody. I think he went to the FBI. He went to the Bar Association, the prosecutor's office. What he was concerned about, what he was motivated about was there was a corrupt judge sitting on the bench making life or death decisions and he felt as an

officer of the court that he needed to take action and have this guy removed. And he was removed.

But to answer your question, Mr. Smith, there are a number of mandated reporting requirements. RCW 4.24.510 is called the Anti-Slap statute whereby people are encouraged -- the public policy behind that statute is to encourage citizens, including attorneys, to report misconduct. If they believe there's misconduct

occurring, they have a duty, they have an obligation to report. And if you do, even if you're wrong about the misconduct, ultimately you're protected. You cannot be sued. There's a qualified immunity under the statute. I'll let that stand for what it stands for.

But let me just emphasize this point here about the Bar Association's allegations here. What they're saying is every communication that Mr. Schafer made, whether it was to the Attorney General's office, the prosecuting attorneys, the FBI, the IRS, even the Bar itself, reporting on this misconduct was a violation of the rule. And if you let that stand there is nothing an attorney can do. An attorney cannot seek guidance.

When you go to the Bar Association and

say, listen, I have a situation. I have a judge. I have a client. The client just told me that the judge is taking bribes. Do I have an obligation to report? But the Bar Association wants you to penalize Doug Schafer for coming to them with that information. That's in their pleadings.

So there's three ways to come to the yes conclusion on the question of can the rules be interpreted in a way to justify morally right conduct?

Again, first, the common sense approach. Look at the Ossias case. Read that letter. It's very important. That women in that case and Mr. Schafer ironically were paired up in national media attention on this issue of what does a conscientious lawyer do?

How can you fulfill your obligation under the RPCs, which is the second way you can reach a yes -- let's look at the RPCs here.

MR. WEATHERHEAD: Can you clarify for me? Was it necessary to reveal the client confidence to make the case against Judge Anderson? Would it have been possible to achieve what Mr. Schafer was trying to achieve in the matter of Judge Anderson without quoting Mr. Hamilton?

MR. NEWMAN: Let me first answer -- well, you know, one of our defenses is that there was no confidence or secret because the --

MR. WEATHERHEAD: I understand that.

MR. NEWMAN: You understand that argument, okay.

MR. WEATHERHEAD: But assuming there was, what I'm just asking you is really more factual than theoretical.

Couldn't Mr. Schafer have gone to the Judicial Conduct Commission with public records that he got and without repeating to the public or to the press or anybody else what Mr. Hamilton had told him, just used those records to support his claim that an investigation of then Judge Anderson's work as a trustee should have ensued?

MR. NEWMAN: I'll just give a preliminary answer and let him answer the rest.

The simple answer is no. Remember, when he went public with the Declaration under penalty of perjury, that motivated an attorney here in Seattle to contact him and say, oh, by the way, Anderson is taking kickbacks from Hamilton in the form of payments for a Cadillac. That would have never come out.

In fact, what's interesting is the Bar Association says that, well, Mr. Hamilton suffered because of disclosure by Mr. Schafer of these three things, that Hamilton said that Anderson is milking the estate, Hamilton said that he's getting a heck of a deal on this bowling alley, and I think the third thing is simply that Hamilton said that Anderson was running for judge.

Those are the only things. And the damage done to -- and this may be off the answer -- I mean, I'll let him answer the rest of this -- but the damage done to Hamilton -- and I think you've seen the McKenna case or you're considering the McKenna case -- Mr. Hamilton is a guy who works -- works. When I say that, manipulates attorneys. He's a guy that, as the supreme court said, worked with Anderson to rip off this estate.

But I'll let Mr. Schafer answer more directly whether or not he could have achieved the same objective without disclosing those two or three facts.

CHAIRMAN STEPHEN SMITH: Before you answer, since we're supposed to be having oral argument here, do you want him to answer the question?

MR. WEATHERHEAD: I want him to have the full opportunity if he wants to.

CHAIRMAN STEPHEN SMITH: It's just we are supposed to be having an oral argument on the record before us.

But go ahead, Mr. Schafer, but answer directly and I don't want to hear a lot of extraneous stuff.

Okay. Counsel is doing a fine job.

MR. SCHAFER: All right. I think the quick answer is, I felt the need to disclose all the material, relevant, substantive information that would be helpful to the authorities to do their job, basically.

On the question of in hindsight can we speculate that had I reported 75 percent of it the result would have been the same? I don't think so, and I think it's disproven by the fact that even though I disclosed everything to the Bar office, the Bar office exonerated him within about two months after they started looking into it.

It's also disproven by the decision by the first panel from the Commission on Judicial

Conduct. When they sat through the five-day hearing, they were not told anything about my

interaction with Hamilton in 1992. They concluded that it was not a very serious infraction and that it merited only a four-month suspension from office. It was the supreme court that reviewed the entire record, quite possibly read the newspapers, that ultimately concluded that he was too dishonest to be a judge.

It's hindsight and we'll never know.

MR. NEWMAN: I don't know how much time I have left.

CHAIRMAN STEPHEN SMITH: Why don't you wrap it up.

MR. NEWMAN: All right. As I indicated, the two other ways you can arrive to the yes conclusion on the question of whether or not the rules can be interpreted in a way to justify morally right conduct are by looking at the rules themselves, obviously.

You look at the spirit of the rules. The preamble, which I have on one of these boards here -- let me see here -- I think it's this next one here -- the preamble, I think you need to -- I would ask you to carefully read that. It has some interesting points, the first being that lawyers as guardians of the law.

You know, as lawyers -- and I know some of you here are not lawyers -- but we're often referred to as officers of the court. We're guardians of the law. We're not slaves to clients, whether they want to engage in illegal or potentially illegal conduct, which gets to the third way you can justify it by reading 1.6. It says, if a lawyer reasonably believes that the client is engaged in a crime, that lawyer can go beyond the attorney-client privilege. And reasonably believes -- and I know some of you are scholars on the RICO issue. Well, you have an issue here where potentially Mr. Schafer was involved as an instrument in accomplishing an illegal purpose, which was ripping off a poor hospital district in Ilwaco over a million dollars.

I'm going to close my first half here by just looking at the RPC preamble here which says that not every situation which a lawyer may encounter can be perceived. And certainly this is a situation -- I wonder if it has ever been perceived by this panel or the Bar Association before, perhaps -- not every situation which a lawyer may encounter can be foreseen, but fundamental ethical principles are always present

as guidelines. Within the framework of these principles a lawyer must with courage and foresight

be able and ready to shape the body of the law to the ever-changing relationships in society.

I, again, ask you to carefully consider what happened in California in a very similar situation, the Ossias case, where the Bar Association there found that even though she supposedly breached attorney-client privilege, that she fell within the spirit of the rules and was honoring the most important role an attorney has in society, which is not only as guardian of the law but to help preserve the integrity of our judicial system.

I'm assuming my 20 minutes are up.

MR. CULLEN: Mr. Newman, Dave Cullen. I have another question for you.

In the materials that were submitted there was some reference to the idea that preserving the integrity of the judicial system somehow trumps the duty to the client with respect to confidentiality. I mean, I think that's one of the legs of Mr. Schafer's defense here.

MR. SCHAFER: That's correct, yes.

MR. CULLEN: But you're also arguing

that there's another element or another leg to the defense, and that is that even if you don't argue for that point, he still can defend his conduct based on the existing rules?

MR. NEWMAN: Based on the existing rules as written. And let me make this point, Mr. Cullen.

The Bar Association wants to take a very strict reading of the attorney-client privilege, 1.6, that it's absolute, there's no exceptions. There are exceptions, obviously, within the rule itself. Beyond that, you go to the preamble, which I've just read, which said that these rules are guidelines. Attorneys are to have the courage and foresight to shape the body of law.

As you know, as lawyers, we all know you read a statute in the context of the title. Let's say, if you're looking at the RCW, you read it in context -- you have to read that 1.6 in context. And what the preamble does is set forth the spirit of the rules. And what Mr. Schafer did was act in good faith within the spirit of the rules and as an officer of the court.

I don't know. Mr. Cullen, did you have a followup question?

MR. CULLEN: I kind of did.

In the findings at the hearing, the distinction was made between the client giving you information about conduct that the client has already done, being right or wrong, or whatever, versus the client who comes to you and says, you know, I'm going to rob the Bank of America next week and here's how I plan to do it, which are two entirely different things with respect to the

confidentiality concept. The one is confidential and the other clearly is not.

And in this case the way the facts develop, isn't that part of Mr. Schafer's case, too, that some of what he was disclosing was future conduct?

MR. NEWMAN: Well, let's put it this way. Some of what he was disclosing was an ongoing crime or fraud, that's our position. Our position is that let's say you have a client that comes and says, yeah, I just robbed the bank and I gave the money to my brother. Well, isn't that an ongoing crime, concealing stolen property -- and I'm not a criminal law expert -- but the question here is that you had a situation where there wasn't a finite event. Somebody doesn't come in and tell

you, Mr. Cullen, as an attorney, that I murdered Joe two weeks ago. I need you to defend me. That's not the way it works.

The way this works is that Mr. Hamilton came in and said, you've got a guy, Attorney Anderson, who's going to become a judge, who's milking the estate. He's going to give me a great deal. And it ends up over time that deal, it wasn't ended, it was an ongoing fraud to the detriment of this hospital district in Ilwaco. And as I said it was, in essence, 1.5.

MR. CULLEN: So the Hearing Officer's distinction between past conduct versus future conduct you dispute?

MR. NEWMAN: No, we don't dispute his interpretation that a past wrong is protected, whereas -- our point is that if it's an ongoing crime or fraud -- that's the question I think that the Hearing Officer didn't directly get to -- if it's an ongoing crime or fraud does an attorney have an obligation to disclose?

MR. HAYTON: Could you give me, please, all of the reasons why you think it was an ongoing crime or fraud?

MR. NEWMAN: What were all the

reasons?

MR. HAYTON: All of the facts that support this record, the persistence of criminal behavior.

MR. NEWMAN: All right.

MR. SCHAFER: Can I?

MR. NEWMAN: I'll let him answer that question, if you don't mind.

MR. HAYTON: I don't care.

MR. NEWMAN: I mean, you have all types of things dealing with condominium sales to members of Mr. Anderson's own law firm, that kind thing.

But go ahead.

MR. SCHAFER: What I'd like to say is that I think -- and I've been a lawyer for 22

years -- I think most difficult decisions are decided based upon general broad policies. And we're dealing with the broad policy of when should a lawyer speak out in order to prevent a crime from happening? Now, that's how I read it.

I read it broadly. I don't read it by picking at the words. You know, as I read it with my background, not as a criminal lawyer but as a business lawyer, you prevent a crime. Well, you

prevent a crime when you keep the bad guys from getting away with it, when they're forced to give back the money.

You know, when somebody has defrauded an estate --

CHAIRMAN STEPHEN SMITH: Could you try to directly answer his question? I think his question was very specific as to the ongoing -- and I don't mean to interrupt you but I'm trying to keep this --

MR. SCHAFER: I'll try to be very specific.

I quickly could see just by adding up the real estate transactions and the bowling alley transaction that the estate had $2.4 million in proceeds. I could see that the inventory filed a month before it was closed declared the estate to be a sum total of 900 and some thousand dollars.

I could see there were big differences. I could see that the same day that the real estate transaction on the bowling alley was closed that both Anderson and Hamilton signed an excise tax Affidavit saying it was a $508,000 deal and the very next document recorded in the auditor's office was the $900,000 Deed of Trust from First

Interstate Bank.

And I had my client, who had told me the month before that -- gratuitously he just said that, I made a five figure contribution to Grant's campaign. I don't recall if it was the superior court or the supreme court campaign. But he volunteered to show how close he was to Anderson that he had made a five figure contribution.

It was not disclosed anywhere. I had a number of bits of information that there was a public hospital that appeared to be out well over a million dollars that it still couldn't recover. You know, there were appearances of significant crime. When I went to the Department of Licensing to look at the time share registration files I was told there were no files, even though there should have been a shelf full of files.

There were a number of things that warranted great suspicion. I went to the Attorney General's office first, one of my first calls. I thought it was a public charity. I later went to the prosecutor's office, went to the FBI. To me it was clear that there was tax evasion. I went to

the IRS criminal investigation division and I understood that they later did an audit. I don't

know the detail of all that. You know, to me there was obvious serious misconduct.

Now a lot evolved in February as I was meeting with various authorities. My initial thinking was rampant self-dealing in spades. The timeshares that were doled out to 20 people in his close circle of friends the month before he took the bench, all for a third of what members of the public were paying for those timeshares. I'm thinking rampant self-dealing.

I have a background in trusts and estates. I taught the subject at UPS law school in the mid-'80s and I'm thinking, this is just outrageous. But I don't have a background in criminal law and I don't think in terms of RICO and some of these criminal things on a regular basis.

So it wasn't until I started going to some of the law enforcement authorities and thinking more about it that I thought -- and, of course, the first thing everybody asks is, why are you doing this? So I felt the need to explain why I was doing it. It was because of a comment that was made to me three and a half years earlier.

So by mid-February I decided I needed to disclose this stuff. I needed to paint the full

picture for these folks so they can see what's going on here and why I'm involved in this. So by mid-February I decided, I've got to tell them, and I did.

CHAIRMAN STEPHEN SMITH: Are there any other questions?

MR. BONNELL: I have a question. Barry Bonnell, citizen member.

Can I ask Mr. Schafer --

MR. SCHAFER: Sure.

MR. BONNELL: You mentioned just now that this whole thing was precipitated by a comment that was maybe three years before. When I look at the Rules of Professional Conduct 8.3, it has the word "promptly" in there.

Obviously you smelled a rat because you told him you didn't want to hear anything about it. Why didn't you speak up at that point and advise your client that he should stay away from any dealings that might be suspect and get involved with Attorney Anderson at that point?

MR. SCHAFER: My answer is, he's a sophisticated business person. He's been executor of a large estate himself. He made the comment, I'm getting a good deal on a bowling alley. Well,

what's a good deal? Does that mean it's a fraudulent deal?

I had never heard of Grant Anderson. I mean, I didn't know him. I'd never spoken to him.

MR. BONNELL: You could have stopped him at that point --

MR. SCHAFER: Not because of the good deal. It's when he says, Grant Anderson is about to become a judge and I'm getting a good deal and I'm going to pay him back later, that I said, I don't want to hear about this.

Now at that point --

MR. BONNELL: You didn't feel any obligation to advise him to not go through with that kind of a transaction?

MR. SCHAFER: Quite frankly, I thought my comment, I don't want to hear about this, is a pretty clear message that I don't think this is right and I'm not going to be involved in it.

He's not a fool. I mean, how many lawyers are even going to step forward and say, I'm not going to be involved in it? I thought I was somewhat courageous in just coming out with that statement and saying, I don't want to hear about

it. I don't want to be involved in it.

But his comment was the statement of potential future action, you know, I intend to pay him back later in some way. So nothing had occurred. I mean, I couldn't investigate anything. But at that point my desire was just not to be involved, and nothing at that point -- had there been an investigation at that point, they wouldn't have found anything.

I just felt, I just don't want to be involved. I thought about it a few times in the next three years, but I was thinking three years statute of limitations on whatever the heck Bill may have done. And it wasn't until I had another client standing in front of that former lawyer, then judge, when at that point I put two and two together and said, he's the guy Bill was talking about, and I think he may be corrupt.

So that's when I decided -- actually, when I first made that connection, it wasn't a full three years yet and I thought I'd better let three years go by. So it was three years and five months later before I really started looking into the case, feeling that at least then whatever my former client, Bill Hamilton, may have done, would not

expose him to liability because the statute would have run.

But the other guy, the real bad actor, is wearing black robes every day. I found that intolerable.

MR. NEWMAN: Just one very short follow-up.

I would point out that Mr. Schafer's establishment of a corporation was a predicate to

the illegal Cadillac payments, the kickbacks, and obviously when he established the corporate entity, he was never told by Mr. Hamilton that he was going to use that as a vehicle to pay kickbacks to the judge.

Mr. Hayton, that may answer your question as well, what were the ongoing events? Certainly the Cadillac payments didn't happen until well afterwards. And I would say anyone that is still keeping illegally-gotten gains from an embezzlement or whatever you want to call it, that that's an ongoing crime.

CHAIRMAN STEPHEN SMITH: Thank you.

Counsel for the Bar Association, Ms. Gray?

MS. GRAY: Thank you.

Members of the Disciplinary Board, I'm Christine Gray.

The conduct in this case is quite clear. William Hamilton, Mr. Schafer's client, went to him in 1992 and made some comments to him about why he needed to get a corporation formed quickly. He didn't disclose those comments when Judge Anderson became a judge in 1993. He waited three years. He waited until Anderson was making rulings against his client, rulings that he didn't like.

He began investigating in December of 1995. He began investigating after the bowling alley sale was complete. He began investigating long after the last Cadillac payment was made in May of 1995. He was told unequivocally by his client not to disclose.

The most significant fact here is that when he disclosed, he chose to disclose way beyond what anyone could consider to be an appropriate authority. He disclosed based on his own personal opinion. He went public and he went to the press.

Hearing Officer Mills sat through four days of testimony. Practically all of that testimony was testimony by the respondent, and he reviewed thousands and thousands of pages of

exhibits. This is a voluminous record. And he produced a well-reasoned, careful, and thoughtful findings, conclusions, and recommendations.

Because of the proceedings that have gone forward during the course of this argument, I just want to make one point. You have asked certain questions directly of Mr. Schafer. It has not been subjected to cross-examination and has not been subjected to testing by all of the exhibits and all of the testimony in the hearing. That is the Hearing Officer's role and that is one of the many reasons why you should defer to the Hearing Officer's findings of facts in this matter. Hearing Officer Mills was very careful and very thoughtful.

In his argument, Mr. Newman has focused

on a new issue that was brought up in the reply brief about the California Bar's exercise of discretion in the Ossias matter. I just want to address it briefly.

The Ossias matter is a very different type of matter than this one. In that case, a government lawyer disclosed to a government entity, a different branch, a legislative committee, some wrongdoing by her boss, an insurance commissioner,

the concept covered by a Whistle Blower statute of California which encourages disclosure of government misconduct to government entities.

And indeed Washington does have a Whistle Blower statute which encourages that. And that statute -- we briefed the issue in our hearing brief that was filed in July of this year, it was not raised in the opening brief by respondent so it's not in my reply brief here -- it wasn't raised until the last one. So I encourage you to go to our hearing brief to read the Whistle Blower section.

But fundamentally, first of all, Doug Schafer didn't disclose it solely to the government. He disclosed it to the public and to the press. That is a concept that is not covered by the California Whistle Blower statute. It's not covered by ours.

In this case, the Office of Disciplinary Counsel and the Review Committee of the Disciplinary Board that approved this going to hearing properly exercised their discretion to authorize charges in this case.

MR. WEATHERHEAD: Les Weatherhead.

If Mr. Schafer had come to the Office of

Disciplinary Counsel and had said, here's what my client told me, it's not a prospective crime, it's a past crime, but it involves another member of the Bar, would he have been subject to discipline for that disclosure?

MS. GRAY: I think that if Mr. Schafer had just limited his disclosures to the Commission on Judicial Conduct and to the Bar Association disciplinary authorities, that there is a substantial chance that the Office of Disciplinary Counsel and/or the Review Committee would have exercised discretion not to pursue that matter.

But that --

MR. WEATHERHEAD: But I'm asking what the law required of him.

I mean, obviously any prosecutor can always choose not to bring charges and that's a matter for individual discretion.

But I guess I'm asking whether legally it's the Association's position that he would or would not have been subject to discipline had he come to ODC and said, I think a fellow member of

the Bar has committed an offense, I know about this through a communication from a client that would

otherwise be privileged, and I want to tell you about it?

MS. GRAY: It is our position that legally if he had disclosed the contents of what his client told him to the Bar it falls within the prohibitions under RPC 1.6. But we might well have exercised our discretion if it had been limited in the extent of the disclosure not to pursue the matter.

MR. CULLEN: Dave Cullen,

Doesn't the Bar have a service, a kind of a hot line if you have a tricky delicate, ethical question that's maybe something that's happening quickly and you don't quite know where to look or you looked but you can't quite -- doesn't the Bar provide a service where you can call, at least get some guidance on where to do more research or maybe other people to talk to where you can get some guidance on what to do?

MS. GRAY: Absolutely. The Bar does have an ethics hot line. Christopher Sutton mans it currently.

But an attorney --

MR. CULLEN: Wouldn't there have been an avenue that would have been available to

Mr. Schafer when this whole business arose and he started to feel qualms about what --

MS. GRAY: Absolutely, absolutely that avenue would have been available.

MR. CULLEN: To use that avenue, you don't have to disclose your client's name or anything?

MS. GRAY: You don't have to disclose your name. You don't have to disclose your client's name. You don't have to disclose actual words. You can ask it in any number of ways and it's done all the time.

My point about the Ossias case is California exercised its discretion under very different circumstances. They didn't have somebody going to the press and --

MR. HAYTON: Let me follow up on Les Weatherhead's point. This is Tom Hayton.

I think what he's actually getting at is Rule 8.3, and 8.3(c) -- 8.3 requires or allows, anyway, disclosure of information to authorities, both the Bar and to the judicial counsel. And then it closes by saying, this rule does not require disclosure of information otherwise protected by 1.6, and I read that to say that it allows it.

What's wrong with that interpretation?

MS. GRAY: I do not think that's an

unreasonable interpretation. It's not the one that I just gave the rule in answering Mr. Weatherhead's --

MR. HAYTON: I understand that.

MS. GRAY: -- question.

But I also think it's a question that we don't have to resolve in this case because there is no question that Mr. Schafer went beyond the appropriate authorities. There's no question that he disclosed far broader than to the Washington State Bar Association and to the Commission on Judicial Conduct.

My reading of 8.3(c) is that because 1.6 precludes unless there's a limited exception and 8.3 doesn't expressly permit it, that's the reason why I interpret it the way I do. But I certainly understand that argument.

But that is not the case we have here. Here we have a very broad dissemination of information.

MR. HAYTON: I think my point is that if this was an avenue for the dispensing of information, at least it's an opportunity to

express Mr. Schafer's legitimate concerns about a bad judge. Surely we need to have some place to disclose that information -- well, maybe not surely, maybe I'm overstating it -- but if there was a vehicle, that would kind of help the process, would it not?

MS. GRAY: I certainly understand that argument.

And part of the whole issue that's been briefed in this case, there are substantial questions in balancing the very valuable rule of confidentiality against other public interests. That's why there is debate about the proper parameters and the proper exceptions to RPC 1.6.

These are very difficult questions. They are very close calls and is one of the reasons that when there is an issue that arises, one should look to the rules for guidance.

But one of the points that I have tried to make in my brief and now in my argument is that the situation that we have in this case isn't a close call precisely because there is no question that Mr. Schafer is trying to achieve a laudable result. There was legitimate concern about Judge Anderson's conduct. But he went far beyond what

anyone could consider reasonable, necessary, or appropriate in making his disclosures.

MR. WEATHERHEAD: Les Weatherhead again.

Except that Mr. Schafer thought that it was reasonable and necessary, evidently.

Is that what this boils down to?

MS. GRAY: He must reasonably believe that, and it is our position that no lawyer

reviewing his ethical obligations and reviewing his client's rights and considerations can reasonably believe that it's appropriate for him to make disclosures to the press based upon his own personal opinion.

MR. CULLEN: Dave Cullen again.

I think following up on that same concept, I was impressed in the findings with the number of places that Mr. Schafer made his disclosure -- because I counted nine of them from the Pierce County prosecutor's office to the Tacoma News Tribune and everything in between, including the IRS -- which brings me to my question.

Is part of the Bar's motivation here the fact that none of the earlier bodies to whom

disclosures were made really got a chance to process the information before he was onto another one, before he was onto another one, so that it almost takes on more of a vendetta appearance than a reasonable attempt to root out some corruption?

MS. GRAY: It is certainly clear in the record and it's a very salient fact that I think you point out.

At the time that Mr. Schafer went public and to the press in April the matter was still pending at the Commission on Judicial Conduct. It was still pending at the Bar Association. It was sill pending at the Pierce County prosecutor's office. Mr. Schafer had no information that wasn't still pending at the IRS and the FBI. The only place that had informed him that they were not going to pursue the matter was the attorney general's office. But yet he felt that he wanted to take this matter public.

And, yes, indeed there is a finding by the Hearing Officer that his motives in April were partly personal and selfish. He wanted to vindicate himself after having been removed from the Barovic case by Judge Thompson. He was making an appeal not on behalf of his client -- he

testified that that appeal was not made for his client's benefit -- and in his brief he says that's why it was represented by somebody else by that time -- he made this appeal to vindicate himself, Judge Thompson having removed him from the case, and to put in the public record the information that he had gathered about both his client and Judge Anderson.

So I think you point to a very salient fact of what the situation was in April of 1996 when he went to the public and to the press.

MR. WEATHERHEAD: Ms. Gray, let me ask you what might be an unfair question -- if it is, I'll let you duck it -- but are you familiar with the Association's position in the matter of Phillip Egger on this protective order that was

heard this morning?
MS. GRAY: I am familiar with the matter in that I have read the briefs, and it may be inappropriate for me to make any argument relevant to that since those parties aren't here.
MR. WEATHERHEAD: No, I'm not asking you to argue their case. I'm not participating in that matter but I'm familiar with the arguments.
And what I thought I heard the

Association saying in that case was that there are certain instances in which courts, hearing officers, we should find that there are social interests that outweigh the attorney-client privilege.
I didn't think I was confused about this question about whether something trumps Rule 1.6, which is reasonably unambiguous on its face, until I heard the Association quote what I thought was that argument.
And I'm wondering if you're able to either differentiate that or correct me as to a misunderstanding I might have about the Association's position in Egger?
MS. GRAY: I did not attend the argument and obviously I didn't make the argument, but I think I can answer it to this extent.
I think the Association's position is entirely consistent in that there is a balance between the valuable rule of confidentiality between attorneys and their clients and public interest. In 1.6, that balance is spelled out in the rules by delineating certain exceptions: To prevent a future crime, to report to the tribunal misconduct by a fiduciary. The public interest

balance is in that rule. And the argument related to the Egger case is that that balance is also represented in a different rule, in that case, in a particular subsection of RLD 2.8.
But what I think the Association is saying is that the supreme court has exercised its authority to balance those interests and has come out with these rules in both cases.
MR. WEATHERHEAD: If that's within our purview, if we can hear all that and make those balancing determinations, why should we reject an argument that says that all of these statutes against corruption on the bench and encouraging disclosure of wrongdoing, and all these other things that Mr. Schafer was motivated by, why shouldn't we be free in this proceeding -- and I'm not eager to do it, I'll be plain about it -- but why aren't we free?
If the Association takes that position that Rule 2.8 conjures up reasons for this balancing, why don't these statutes create similar reasons for the balancing as Mr. Newman would have us do?

MS. GRAY: It is not our position that the rules permit the Disciplinary Board or any

lawyer to do their own balancing.

What I am saying is that the supreme court rules reflect its balancing, its balancing of the two competing interests, and it's reflected in those rules.

And going sort of one by one, for instance, the Whistle Blower rule, there is balancing in that legislative enactment that protects certain aspects of it. And, again, I would encourage you to read our brief on the Whistle Blower statute. But it clearly does not anticipate any protection beyond disclosure to governmental authorities.

CHAIRMAN STEPHEN SMITH: Can I follow up just for a second?

MR. WEATHERHEAD: Sure.

CHAIRMAN STEPHEN SMITH: So do I understand the Association's position that as far as the nine entities that Mr. Cullen talked about, assuming that eight of them appear to be governmental entities, that the real problem and the real violation here is when Mr. Schafer went to the press? Because would you concede or do you agree that his reporting of the alleged misconduct of Judge Anderson to the FBI and the IRS and the

Pierce County prosecutor and the attorney general and the Commission on Judicial Conduct and the Bar Association -- and I'm probably missing at least one -- was at least within the spirit of the rules of reporting misconduct to a governmental entity?

MS. GRAY: Actually, I disagree with that position.

I have obviously focused on the disclosures to the public and the press because it's by far the simplest aspect of this case. But let's talk about the FBI and the Pierce County prosecutor's office.

If you interpret the Whistle Blower statute to say, well, if you're reporting to a government entity -- and the prosecutor is clearly a government entity -- wrongdoing by your client, well then every criminal lawyer whose client comes in and confesses would be free to go to the prosecutor and say, my client just told me that he committed this crime in the past and I'm telling you that and I'm protected by the Whistle Blower statute.

That's an absurd result. We all know that that's not intended by either the Whistle Blower statute or by the Rules of Professional

Conduct. We don't want every criminal defense attorney to go report his client and his

confessions to the prosecutors.

And in this case, similarly, Mr. Schafer should not have reported to the prosecutors comments that his client made to him that might expose his client to any investigation or to any prosecution.

CHAIRMAN STEPHEN SMITH: So we're back to the only proper authorities that he could have reported to were the Bar and the CJC?

MS. GRAY: Well, we have not conceded that that was appropriate but we have certainly conceded that we might have exercised discretion not to pursue the matter if he had been so circumspect. But he was not circumspect in any way, shape, or form in this case.

MR. DOUGLAS SMITH: This is Doug Smith. I want to make sure I have the facts straight.

It's my understanding -- and I definitely want you to correct me if I'm wrong, that's why I'm asking you the question -- that there were no disclosures to the media until after the appellate Declaration was filed dealing with the appeal from

Judge Thompson's ruling.

Am I correct so far?

MS. GRAY: You are correct so far.

MR. DOUGLAS SMITH: And am I correct in what I read that either in Mr. Schafer's testimony or in some pleadings that he has filed, that he said he did that to vindicate himself, as you already mentioned, and also for the purpose of having it in the public forum so that the media would pick it up?

MS. GRAY: Yes, in essence that's correct.

MR. DOUGLAS SMITH: Words to that effect.

Before that Declaration was filed, to whom had he disclosed what Mr. Hamilton had told him? Not just suspicions of wrongdoing, to whom had he disclosed what Mr. Hamilton said?

MS. GRAY: What Mr. Hamilton had said to him in 1992?

MR. DOUGLAS SMITH: Right. As opposed to, I think Judge Anderson's a crook.

Other than that?

MS. GRAY: Right. He had disclosed it -- I may forget somebody -- but he had disclosed

it to the attorney general's office. He had disclosed it to the FBI, to the IRS criminal investigation division, the Pierce County prosecuting attorney's office, to the Washington State Bar Association discipline authorities, to the Commission on Judicial Conduct discipline authorities. He had disclosed -- I don't know for a fact -- but he had definitely contacted the hospital that was the beneficiary of the estate. I

do not know whether the record indicates that he disclosed the comment to them. But he had disseminated it broadly within governmental agencies prior to that time.

And I'd like to point out one fact about the April disclosures, which is his testimony about those April disclosures makes it clear that he disclosed to the newspapers later in the day on the same day that he had filed the public filling on the Barovic appeal, and in essence his testimony indicates that he filed it publicly in the Barovic appeal partly so he could boot strap it and then disclose it to the press. That was part of his purpose in putting it in the appeal papers without a protective order, without redaction, just put it out there completely before the public and the

press.

Because I've been taking up a fair bit of time in answering your questions, I'd like to just point out two quick things before I wrap up.

One is, I'd like to point out Mr. Schafer's attitude toward the Rule of Law, the Rules of Professional Conduct as evidenced by his testimony and his briefs. In his reply brief at pages 9 to 10 he tries to justify his disclosures to the press, and he says that in response to the assertion that 8.3(b) calls for reporting judicial unfitness to the appropriate authority, he submits that in the face of an upcoming judicial election, the electorate is an appropriate authority, and the means to report judicial unfitness to the electorate is through the news media. He then makes it clear that he would do it all again.

He had asked that a particular exhibit be distributed to you all so that you could refer to it during oral argument today. The exhibit that was distributed to you, I presume, is Defendant's Exhibit D4. In that, on the last page, on page 4, his attitude toward the Rule of Law and the Rules for Professional Conduct as guidelines for a lawyer's behavior is quite apparent.

He refers to a moral authority and moral rightness. And then he refers in the second paragraph on page 4 of Exhibit D4 to morally bankrupt lawyers who need the assistance of the written rule.

Respondent thinks that he is morally superior and that he, rather than the supreme court of Washington, should have the prerogative to set the rules. He has made it clear in his briefs. He's made it clear in his testimony. He would do it again. He would disclose his client's confidences and secrets if his client told him he had bribed a judge. He would disclose his client's confidences and secrets if his client told him he had molested a child. He would do it again, newspapers and all.

We urge this Board to adopt the thoughtful, balanced, and well-reasoned findings, conclusions, and recommendations of Hearing Officer Mills.

If there are any further questions, I'd be happy to entertain them. If not, I'll take my seat.

CHAIRMAN STEPHEN SMITH: Counsel, you have five minutes, and please keep it to that.

MR. NEWMAN: Thank you. Let me just follow up on a couple of points.

In order to rule against Mr. Schafer, you have to take a strict constructionist view of 1.6.

Mr. Weatherhead, you mentioned a case I have no familiarity with, but most jurisdictions look at the policy behind the rules. You read them all in the context. You read them in the context of the preamble, that an attorney has to have courage, which as we all know is the most important virtue in our society. Without courage, you may believe in honesty, but if you don't have the courage when the rubber hits the pavement to stand up and say, the judge is a crook, there's a problem here, someone needs to do something.

And Mr. Smith, your point is well taken as to where he went. I think both Messrs. Smith, you made that point. He first tried to go to Judge Thompson and say, you know, I was wrongfully excluded. You don't like me because I say one of your colleagues is a crook. Let me explain.

I don't want to hear it.

He appeals. He filed with every public agency, as Ms. Gray indicated, that he could think of, the FBI, AG's office. Nobody did anything.

He did that before he filed the appeal, before it was a matter of public record. I think that's important, because in their pleadings -- again, Ms. Gray is contradicting her own pleadings -- again, the Association's counter statement at page 11. They would have you believe -- and, Mr. Cullen, I think you made the point of, well, couldn't he call the hot line? I've called the hot line. I'm sure many of the attorneys here have called the hot line in questionable cases.

But if you read what they're charging here, they say, respondent repeatedly violated RPC 1.6, 1996, by detailing Hamilton's confidences and secrets to prosecutorial authority, including the attorney general's office, the Pierce County prosecuting attorney's office, the FBI, the IRS, to disciplinary authorities, the Commission on Judicial Conduct, the State Bar Association.

Including the State Bar Association. Is that what he's being penalized for, for reporting what a client told him, which may or may not be a secret or confidence, what he found out after the fact, what he found out based on his own research,

which resulted in the state supreme court for the

first time in history removing a sitting superior court judge for corruption? Is that what we're here today to do, to penalize this person, to penalize a whistle blower --

MR. HAYTON: Let me interject here. Do you think that Mr. Schafer is being penalized for revealing to any third parties the results of his own independent investigation?

MR. NEWMAN: I believe that without the results of his own independent investigation and the information which motivated it, which was the trigger, which was the off-hand comment made by Hamilton, indeed, yes. The answer to the question is yes. I think he is being penalized, obviously, for those --

MR. HAYTON: So had his report to these various bodies, and including the press, been limited to I, Mr. Schafer, have done some investigation and I find the following data, that we would be here today?

The hypothetical obviously is revelation of a body of information excluding the attorney/client privilege material. If it were just that, would we be here today?

MR. NEWMAN: Well, of course, I

think the answer is no. I mean, there had to be a violation or alleged violation of those rules for us to be here today.

But your question goes to, would the authorities or would the reports, could he have done this without referencing what Mr. Hamilton had told him? Could he have done --

MR. HAYTON: I gather you say no to that?

MR. NEWMAN: Yes, the answer to that question is no.

MR. DOUGLAS SMITH: Counsel, let me ask you this.

Let's assume that an attorney is consulted by an elderly woman about drafting her will, and in the course of routine questioning it comes up that she has a son. And she says to the lawyer, I don't want to leave anything to my son, however, because my son has confessed to me that he's the mass murderer who actually killed all those women that you've been reading about.

Can the lawyer start going around and telling everybody that he knows who the real criminal is because his client told him?

MR. NEWMAN: It's a past crime,

though. And I think the distinguishing factor here is that we are maintaining that this was an ongoing embezzlement, an ongoing crime.

Can an attorney? The answer to that question is no, I would think.

MR. DOUGLAS SMITH: But when Mr. Hamilton told Mr. Schafer what he did about the deal with the judge, wasn't that supposed to be a done deal by what your client just told us?

MR. NEWMAN: No. All that Mr. Hamilton told him, again, was that he's getting a good deal on the bowling alley, he'll get paid back somewhere down the line, I want you to set up this shell corporation to facilitate the deal. I don't want to hear anymore. See, that's all he knew at the time.

Based on the research and information provided by another attorney, he learned that that shell corporation that he had set up was being used to funnel kickbacks to Anderson in the form of Cadillac payments. That wasn't known at the time, it was known long afterwards.

MR. DOUGLAS SMITH: But by the time that Mr. Schafer -- and this is a factual issue and I'm trying to clarify, as I did with Bar counsel --

by the time that Mr. Schafer started making disclosures to people, wasn't everything that Hamilton had told him, whether or not it was a future crime when he told him, wasn't it by the time he disclosed it a past crime?

MR. NEWMAN: In 1996 --

MR. SCHAFER: I did not know at the time.

CHAIRMAN STEPHEN SMITH: Mr. Schafer, I'm going to be very -- unless you want him to answer --

MR. SCHAFER: Okay.

CHAIRMAN STEPHEN SMITH: -- I don't want --

MR. NEWMAN: I guess the answer to that question is, was Mr. Hamilton's involvement in the -- let's use the word conspiracy to rip of the hospital -- had that ended? And I think the answer to that question is no. The money still had not been returned to the hospital district, $1.5 million. It's like a bank robber. I gave it -- you know, still has the money.

MR. DOUGLAS SMITH: Well, you still have the money but the crime is done. It's not a crime to keep the money. The crime is stealing the

money. It's a different crime when you receive stolen property.

Okay, I think you've answered my question.

MR. NEWMAN: Maybe I did. I don't know.

MR. WEATHERHEAD: I have one brief question, if I may.

Counsel for the Bar points out that RPC

1.6 says that confidences in specified circumstances can be revealed to the extent the lawyer reasonably believes necessary. And counsel points out that by employing the word reasonably, the rules imply that that's an objective standard.

Do you have any basis on which to argue with that proposition?

MR. NEWMAN: Well, I think by the clear language in the black letters. I think whether the attorney reasonably believes that it's necessary to prevent a crime. That's what it says. It doesn't say whether the Bar Association or whether the CJC or anybody, it's you.

Go back to the preamble.

MR. WEATHERHEAD: What function does the word "reasonably" have if not to create an

objective standard? Why wouldn't it just say to the extent the lawyer believes?

MR. NEWMAN: Well, I think it provides some sort of -- you know, like reasonable attorney's fees. It has to be reasonable in the scheme of things.

You know, you raise the point, Mr. Weatherhead, about the balancing, and I think that language there does open the opportunity for a balancing. Again, you go back to the preamble.

The attorney has to make that courageous decision himself.

MR. WEATHERHEAD: But maybe also he takes the risk that other lawyers on a board like this will think he acted unreasonably.

MR. NEWMAN: True.

MR. WEATHERHEAD: If you have any authority or can find any within the next couple of days that indicates that that's a subjective and not an objective standard, I sure would like to have it.

CHAIRMAN STEPHEN SMITH: Your five minutes are up, counsel.

MR. NEWMAN: Thank you.

CHAIRMAN STEPHEN SMITH: the Board

will take this under advisement. We will issue a written opinion and report.

We are going to be in recess for probably 5 minutes, 10 minutes.

(Whereupon the hearing concluded at 2:25 p.m.)

C E R T I F I C A T E

STATE OF WASHINGTON)
) ss.
COUNTY OF KING)

I, the undersigned Notary Public in and for the State of Washington, do hereby certify:

That the foregoing proceedings held on the date indicated on the caption sheet were reported stenographically by me and thereafter reduced to typewriting under my direction;

I further certify that the transcription of the hearing is true and correct to the best of my ability.

Signed this 26th day of January, 2001.

_____

Notary Public in and for this State of Washington, residing at Seattle.
My Commission expires 10/10/03.
CSR No. BRODIK*534KB.

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March 1, 2001

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

Re: In re Douglas Schafer; Public No. 00#00031
Corrections to Transcript of Disciplinary Board Hearing

Dear Disciplinary Board Members:

Yesterday I received from Ms. Shankland a copy of the transcript of the hearing on this matter that was held before the Disciplinary Board on January 12, 2001. The copy shows that the transcript was filed on February 7, 2001. Having now read the transcript, I feel that the following corrections must be brought to your attention and placed in the record so that neither you nor others who read the record will be misled.

On pages 3–4 of the transcript Mr. Douglas Smith reports his recollection of my phone conversation with him that occurred a year earlier, on January 20, 2000. His recollection that I had sought names, addresses, and phone numbers of Disciplinary Board members was faulty and is therefore misleading, perhaps to my detriment. Enclosed for the record is a copy of Ms. Shankland's letter of January 21, 2000, describing that phone conversation, as had just then been reported to her by Mr. Smith, and also a copy of my e-mail to her of January 27, 2000, responding to her letter.

On page 17, lines 19–24, Mr. Newman was mistaken in stating, "Remember, when he [Schafer] went public with the Declaration under penalty of perjury, that motivated an attorney here in Seattle to contact him and say, oh, by the way, Anderson is taking kickbacks from Hamilton in the form of payments for a Cadillac." First, Seattle attorney Camden Hall of Foster Pepper and Shefelman (then representing Anderson's divorcing wife, Diane) had contacted me on February 1, 1996 (weeks before I even drafted my Declaration on February 16, 1996) and disclosed, requesting anonymity, that Anderson's Cadillac acquisition and his handling of the Hoffman Estate both should be investigated. I had left a note on Diane Anderson's door the previous evening seeking to speak with her.

Second, I never "went public" (whatever that means) with my Declaration in 1996 except for (1) including it in my Court of Appeals Petition for Discretionary Review that I filed on April 26, 1996, and (2) faxing selected pages from that filing, including the Declaration, to three newspapers, each of which ignored it.

On page 18, lines 13–14, the two references to "McKenna" should be corrected to "McKean," the Gig Harbor lawyer who was getting unlawful kickbacks from Hamilton and others.

On page 28, line 12,"couldn't" should be corrected to "could." Whether I mispoke or the court reporter misheard, I do not know. But the sentence beginning on line 9 should correctly read, "I had a number of bits of information that there was a public hospital that appeared to be out well over a million dollars that it still could recover."

Thank you for permitting me to correct the record and to call your attention to these corrections.

Very truly yours,

Douglas A. Schafer

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

Subject: Your Recent Letter to Doug Schafer
Date: Thu, 27 Jan 2000 15:17:56 -0800
From: Doug Schafer <d_schafer@bigfoot.com>
To: Bar DB Counsel Julie Shankland <julies@wsba.org>
CC: "Michels, M. Janice" <janm@wsba.org>, "Eymann, Dick" <rceymann@fgej.com>

Julie Shankland:

Your letter of 1/21/00 was forwarded to me from my old address (1019 Pacific Ave., Suite 1302). My preference has always been that you and others direct mail to my Post Office Box listed in the WSBA's lawyer database and that has been unchanged for many years: P.O. Box 1134, Tacoma, WA 98401-1134.

BTW, if there is any published rule that prohibits me from communicating with a Disciplinary Board or a BOG member about my concerns with the Bar's disciplinary system generally or in the context of a specific case, please cite me to the published rule. I thought the non-lawyers and lawyers who oversee the lawyer disciplinary systems were supposed to act like "reasonably prudent persons." Reasonably prudent persons usually wish to be informed of problems under their oversight. I'm not surprised that the individuals responsible for the lawyer disciplinary system's problems take the position that it's improper for a critic to report them to anyone who might be in a position to address them -- most reasonably prudent persons call that a "cover-up."

Thank you for your courtesy,

Doug Schafer, Idealistic Lawyer in Tacoma.
http://members.aa.net/~schafer/

[Ed: since mid-2001, http://www.dougschafer.com]

Washington State Bar Association
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Kurt Bulmer
Attorney at Law
201 Westlake Ave N
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Re: Ex-parte contact with Disciplinary Board member initiated by respondent Douglas Schafer

Dear Mr. Ende, Ms. Gray and Mr. Bulmer:

On Thursday, January 20, 2000, Disciplinary Board member Douglas Smith notified me that Douglas Schafer had telephoned his office and spoken with him. This telephone conversation concerned Mr. Smith and he contacted me to discuss what action, if any, should be taken because of Mr. Schafer's contact. He authorized me to send this letter to the parties in the two active discipline matters involved to make written disclosure of this contact.

On Thursday January 20, 2000, Mr. Schafer called Mr. Smith's law office and spoke with a staff member. Initially, Mr. Schafer only identified himself as a Tacoma lawyer and asked for the dates of up-coming Disciplinary Board meetings. The staff member connected Mr. Schafer with Mr. Smith, who provided this information to Mr. Schafer. Then, Mr. Schafer identified himself and told Mr. Smith that he (Mr. Schafer) was the grievant on the Grant Anderson grievance. Mr. Schafer stated that a stipulation in the Anderson matter would be sent to the Disciplinary Board soon. Until Mr. Schafer made this statement, Mr. Smith was completely unaware that an active grievance was pending, much less that a stipulation would be presented to the Board. At this time, Mr. Smith told Mr. Schafer that he could not, and would not, talk to him about any matter that was currently, or would potentially in the future, be considered by the Disciplinary Board. Mr. Smith explained that ex *pane* contact with the decision-making body

was inappropriate. Mr. Schafer stated that he did not intend to discuss the Anderson matter, but wished to speak about the handling of disciplinary matters in general.

Mr. Schafer continued the conversation by giving his opinion that the Bar Association was not following RLD 11.1, with regard to discipline matters generally. Mr. Schafer also asked for information on newly appointed Disciplinary Board members, including two new citizen members. He also mentioned that he had been the grievant in the Gerald Neil matter. Mr. Smith was not aware of the status of that case. He recused himself in that matter. Mr. Smith told Mr. Schafer again that he could not, and would not, make any comments that could be interpreted as acknowledgement of the existence of a grievance, information about which might not be public. Mr. Smith concluded by saying to Mr. Schafer that the conversation was arguably inappropriate *ex parte* contact, even though that may not have been Mr. Schafer's intent.

Although Mr. Schafer's communication was unfortunate and perhaps even inappropriate, Mr. Smith does not believe he needs to recuse himself from consideration of the Grant Anderson matter for the above reason. After he reviews the materials regarding the grievance, Mr. Smith must decide whether he will recuse himself for other possible reasons. Mr. Schafer did not convey any information or opinions about the substance of the Anderson matter to Mr. Smith. If either Mr. Ende or Mr. Bulmer object to Mr. Smith's participation in the Anderson matter, please contact me as soon as possible.

Very Truly Yours,

Julie Anne Shankland
Clerk/Counsel to the Disciplinary Board

cc: Douglas Schafer
Douglas Smith