BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

DOUGLAS SCHAFER,

Lawyer
Bar No. 11611

Public No. 00#00031

DISSENT

I join the majority in concluding that Mr. Schafer violated the Rules of Professional Conduct. I dissent from the majority's decision to increase the penalty, for three reasons. First, some years ago this Board adopted as a formal policy the "substantial evidence rule" as known to the appellate courts of this state. We did so largely out of respect for the principle that the trier of fact is better positioned than a reviewer to weigh conflicting evidence on matters of fact. We have endeavoured since to sustain rulings supported by substantial evidence, and indeed we do so in this case.

I believe that the "substantial evidence" rule should be honored as to sanctions, as well as to other matters of fact. Differences among levels of sanctions recognized under ABA guidelines almost always resolve into questions of fact, and decisions about what sanction to impose within a particular range are particularly affected by the trier of fact's sense of the equities on the facts he or she has found. If the facts found by the hearing officer are supported by substantial evidence and also support (as a legal matter) the imposition of a given sanction, I think we are bound to sustain.

Where, as here, the length of a sanction within a given range is a matter of discretion and judgment, I believe the logic of the substantial evidence rule also suggest affirmance of the hearing officer, absent some articulable grounds to believe that the hearing officer has abused his or her discretion. While I share the majority's concern that safeguarding privileged communications is near the heartland of a lawyer's duty, and that the seriousness of a violation

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of that duty should not be understated, I am not satisfied that any clear grounds exist to upset the result reached by the hearing officer in this case, which were supported by substantial evidence throughout.

Second, I believe that we should be especially hesitant to increase the sanctions recommended by hearing officers where there has been no cross-appeal by the bar, and where there are no grounds to consider the hearing officer's recommendation wrong and/or aberrant, because of the implications for future respondent lawyers. Respondent lawyers have the right to appeal adverse disciplinary determinations; that right should be unburdened by any fear that the Disciplinary Board will not only affirm following review, but will *sua sponte* up the ante. If we make a habit of increasing penalties on review, future respondents may be inhibited from seeking review, even where their objections to recommended discipline are meritorious, for fear of increased sanction. Further, we risk creating at least an appearance that respondents may be punished for seeking review.

I do not mean to suggest that the majority in this case acted in any way to punish Mr. Schafer for having appealed. I am quite satisfied that the majority increased the sanction here because it honestly felt that the sanction under-appreciated the seriousness of the violation. But I am concerned that lawyers for future Mr. Schafers may well be chilled in their zeal to seek review for fear of such a result. That would not advance legitimate goals of the disciplinary system at all.

Third, I am not sure that there were no mitigating factors. While we affirm the hearing officer's finding that Mr. Schafer's purposes were at least partly self-interested, they were also partly in the public interest, as the hearing officer also found. I am convinced that Mr. Schafer's ideas about the law of privilege are utterly wrong, and that Mr. Schafer knew (or strongly suspected) that his intended disclosures would violate the rules as they are (not as he believes they should be) and harm his client in the process, but decided to forge ahead anyway. But I am also convinced that Mr. Schafer's opinion that the law of privilege should change, however wrong-headed, is earnestly held. I would not make the change to the law that Mr. Schafer proposes had I the power to do so. But I do consider the earnestness of Mr. Schafer's views, and

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the likelihood that Mr. Schafer was blinded to his duty to Mr. Hamilton by his near-obsessive quest to defrock Judge Anderson to be matters in mitigation. I suspect the hearing officer did too, and I would sustain the hearing officer's recommendation in full.

DATED this 1st day of May, 2001

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Leslie R. Weatherhead

I concur in the result of this dissent and with the first and third reasons stated for its result.

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Thomas Hayton

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