

FILED

BEFORE THE DISCIPLINARY BOARD  
OF THE  
WASHINGTON STATE BAR ASSOCIATION

DEC 22 1999

In re ) Bar No. 8652  
DOUGLAS A. SCHAFER, )  
Lawyer ) ORDER REGARDING SCOPE OF  
 ) DISCOVERY, RESPONDENT'S  
 ) MOTION FOR CONTINUANCE,  
 ) AND OTHER MATTERS  
 )

THIS MATTER came before the undersigned Hearing Officer for prehearing rulings regarding the following:

1. Motion for a Protective Order on behalf of David R. Tuell, Jr., arising out of questioning by Douglas A. Schafer during Mr. Tuell's deposition on December 1, 1999;
2. Motion to Quash a Subpoena directed to Julie Ann Shankland, Clerk/Counsel to the Disciplinary Board of the Washington State Bar Association, that Douglas A. Schafer caused to be served on December 10, 1999;
3. Motion by Douglas A. Schafer to engage in discovery to develop evidence of criminal, fraudulent, or other serious misconduct by Mr. Schafer's former client, William L. Hamilton, and others, including former Pierce County Superior Court Judge Grant Anderson;
4. Motion by Douglas A. Schafer for a continuance of the hearing date; and
5. Motion by Douglas A. Schafer for an order directing all parties to provide Mr. Schafer with an electronic version (by disk or E-mail) of all documents filed in this proceeding so that Mr. Schafer can post all documents on an Internet website to enable interested persons to monitor these proceedings.

December 1, 1999 Telephone Conference. On December 1, 1999, during the deposition of David Tuell, the Hearing Officer heard brief oral arguments by telephone on the scope of examination of Mr. Tuell and ruled that objections interposed by Larry J. Couture, attorney for Mr. Tuell, to certain questions propounded by Mr. Schafer were sustained. Mr. Tuell was not required to answer the questions at that time. During the telephone conference, the Hearing Officer requested briefing from Mr. Schafer, the Washington State Bar Association, and Mr. Tuell's counsel regarding the proper scope of discovery in these proceedings. The Hearing Officer agreed to issue a ruling on the scope of discovery on December 14, 1999. The continuation of Mr. Tuell's deposition was scheduled for December 15, 1999.

Materials Received and Considered. The Hearing Officer received and considered the following:

1. Mr. Schafer's letter dated December 7, 1999, and attachments.
2. Motion and Memorandum for Protective Orders filed by Larry J. Couture on behalf of David R. Tuell, Jr.
3. Washington State Bar Association's Brief in Opposition to Respondent's Request for Broad Discovery regarding alleged misconduct of others.
4. Mr. Schafer's letter dated December 9, 1999, to Julie Shankland, with Subpoena and Notice of Examination;
5. Robert D. Welden's letter dated December 10, 1999, to the Hearing Officer objecting to the Subpoena served on Julie Ann Shankland; and
6. Mr. Schafer's letter dated December 10, 1999, to the Hearing Officer in support of the Subpoena served on Julie Ann Shankland.

The Hearing Officer also considered the files and records in these proceedings and reviewed the legal authority cited by the parties.

December 14, 1999 Telephone Conference. The Hearing Officer also initiated and conducted on short notice a prehearing telephone conference on December 14, 1999, primarily to address Mr. Schafer's motion for a continuance of the disciplinary hearing. Douglas A. Schafer appeared pro se, and the Washington State Bar Association appeared through Disciplinary Counsel Christine E. Gray.

Procedural Background. In May of 1999, the Bar Association filed a formal disciplinary complaint against respondent Douglas A. Schafer alleging as follows:

Count I: Violation of RPC 1.6(a) by revealing confidences or secrets in February of 1996, relating to his prior representation of William Hamilton.

Count II: Violation of RPC 4.1(a) and/or RPC 8.4(c) by making a false statement of fact on December 15, 1995, to Court Commissioner James Orlando.

Count III: Violation of RPC 4.1(a) and/or RPC 8.4(c) by making a false statement of material fact concerning matters revealed to Mr. Schafer during a meeting with William Hamilton on December 18, 1995.

In July of 1999, Mr. Schafer filed a detailed Answer alleging, among other things, that he had a paramount duty to reveal communications to him as an attorney by his client, William Hamilton, under the so-called "crime-fraud exception" to the confidentiality of attorney-client communications. The Bar Association contends that the "crime-fraud exception" is not provided for in the existing RPC 1.6 as adopted by the Washington Supreme Court. Mr. Schafer contends that, in his defense, he should be permitted to present evidence relating to the "crime-fraud exception" and to argue

for the interpretation and extension of existing law to recognize the "crime-fraud exception" in the State of Washington.

Mr. Schafer now seeks to conduct extensive discovery in this proceeding to prove that William Hamilton and Grant Anderson were engaged in criminal or fraudulent conduct in 1992. To that end, Mr. Schafer has identified 56 witnesses in his preliminary witness list, most of whom would be called as witnesses to prove misconduct by Mr. Hamilton and Mr. Anderson. The Washington State Bar Association has entered into a written stipulation with Mr. Schafer to the effect that the Bar Association will not contest Mr. Schafer's actual belief in 1996, when he allegedly revealed an attorney-client communication, that Grant Anderson had engaged in misconduct.

Scope of Discovery. The Hearing Officer starts from the premise that an attorney disciplinary proceeding is a serious matter and the respondent should be afforded an opportunity to assert his or her defenses and make an appropriate factual record. At this time, the Hearing Officer is not ruling on the availability of the "crime-fraud exception" to RPC 1.6 as enacted in Washington and in effect in February 1996, when Mr. Schafer allegedly improperly disclosed a confidential communication from his client over the client's objection. Nonetheless, the Hearing Officer recognizes Mr. Schafer's right to assert the "crime-fraud exception" as a defense in these proceedings.

The gravamen of the "crime-fraud exception" is that a lawyer may ethically disclose client confidences to rectify or mitigate a client's criminal or fraudulent activity. The factual basis for the "crime-fraud exception" appears to be that (1) the lawyer reasonably believes the client was engaged in or planning criminal or fraudulent activity when the attorney-client communication took place, and (2) the communication was intended by the client to facilitate or conceal the criminal or

fraudulent activity. In defending these disciplinary proceedings, it is not necessary or appropriate for Mr. Schafer to engage in extensive discovery to prove William Hamilton and Grant Anderson were actually engaged in criminal or fraudulent activity. It is enough for Mr. Schafer to establish that the information and documents available to him in 1996 caused him to have a reasonable belief that William Hamilton was engaged in criminal or fraudulent activity. The defense of the allegations of the Bar Association in these disciplinary proceedings does not require Mr. Schafer, or give him the license, to invade the confidential communications of others or to attempt to prove a pattern of criminal activity in 1992.

Accordingly, the Hearing Officer takes the following actions and makes the following orders:

1. Protective Order for David R. Tuell, Jr. The Hearing Officer affirms the prior rulings sustaining the objections interposed by Larry J. Couture to the questions propounded by Mr. Schafer at Mr. Tuell's deposition on December 1, 1999. Mr. Schafer may continue with Mr. Tuell's deposition if he wishes, but Mr. Schafer may inquire only regarding Mr. Tuell's transmittal of information and documents, if any, to Mr. Schafer regarding the activities of William Hamilton and Grant Anderson before February 29, 1996.

2. Subpoena to Julie Ann Shankland. The Hearing Officer observes that the documents sought by the Subpoena to Julie Ann Shankland are generally not subject to discovery pursuant to RLD 11.1. However, at the request of Mr. Schafer, and because Mr. Schafer has not yet had an opportunity to discuss with Robert D. Welden, General Counsel for the Bar Association, the information sought from Ms. Shankland, the Hearing Officer defers ruling on the Subpoena to Ms. Shankland at this

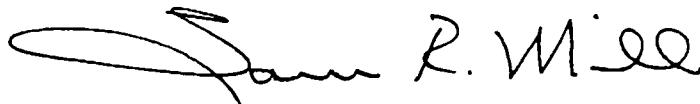
time. If necessary, counsel may request a telephone hearing regarding the Subpoena and the proposed deposition of Ms. Shankland.

3. Motion by Douglas A. Schafer to Engage in Discovery to Develop Evidence of Criminal, Fraudulent, or Other Serious Misconduct. Mr. Schafer's general motion to permit him to engage in extensive discovery to develop evidence of criminal, fraudulent, or other serious misconduct by William Hamilton, Grant Anderson, and others is denied. The discovery in this proceedings shall be limited to development of evidence regarding the information and documents communicated to Mr. Schafer before February 29, 1996, relating to the activities of William Hamilton, Grant Anderson, and others, and other evidence bearing upon Mr. Schafer's state of mind and reasonable beliefs at the time he allegedly disclosed confidential communications in February of 1996. Mr. Schafer may also engage in reasonable discovery regarding the factual allegations in Counts II and III of the Formal Complaint.

4. Continuance of Hearing Date. At the request of Mr. Schafer, and with the agreement of the Bar Association, it is hereby ordered that the disciplinary hearing be postponed and shall be held before the undersigned Hearing Officer beginning on Monday, February 14, 2000, at 9:00 a.m. at the office of the Washington State Bar Association located at 2101 4th Avenue, 4th Floor, in Seattle, Washington. The hearing shall continue each business day through Friday, February 18, 2000, if necessary. Counsel shall confer and prepare an agreed Order re-establishing the prehearing deadlines. The new agreed Order, when entered, shall supersede the Order Setting Hearing Date and Establishing Prehearing Deadlines dated August 19, 1999.

5. **Motion to Provide Electronic Version of all filed Documents.** Mr. Schafer's motion for an Order directing all parties to provide Mr. Schafer with an electronic version of all documents filed in these proceedings is denied. Nothing in this Order, at this time, shall be construed as restricting Mr. Schafer's ability to post all documents filed in these proceedings on an Internet website to enable interested persons to monitor these proceedings.

DATED this 15th day of December, 1999.



Lawrence R. Mills  
Hearing Officer

1000 Second Avenue, 30th Floor  
Seattle, WA 98104-1064  
(206) 382-1000

#### CERTIFICATE OF TRANSMITTAL

I hereby certify that a true copy of the foregoing Order Regarding Scope of Discovery, Respondent's Motion for Continuance, and Other Matters was sent via facsimile to the following persons and deposited in the United States Mail on the date last above written, postage prepaid, and the original of this Order has been mailed to Julie A. Shankland, Clerk/Counsel to the Washington State Bar Association Disciplinary Board for filing.

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Mr. Larry J. Couture  
Tuell, Couture, Powell & Tuell, P.S.  
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Mr. Robert D. Welden, General Counsel  
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Lawrence R. Mills  
Hearing Officer