[Note: The page-breaks of this 33-page edition (converted using Adobe's Distiller) vary slightly from the 32-page original as filed on May 7, 2003.]

Bar No. 8652

SUPREME COURT

OF THE STATE OF WASHINGTON

In the Matter of the Disciplinary Proceeding Against

DOUGLAS A. SCHAFER,

a Suspended Attorney at Law.

RESPONDENT LAWYER'S MOTION FOR RECONSIDERATION AND FOR STAY

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A. IDENTITY OF MOVANT

This motion is filed by the Respondent, Douglas A. Schafer, a 24-year business and planning sole practitioner. In February 1996 he revealed information about corrupt Pierce County Superior Court Judge Grant L. Anderson that finally led to his removal by this court in September 1999 for what it described as his "clear pattern of dishonest behavior." This court in May 2000 apparently felt that Anderson was *not* too dishonest and lawless to be a lawyer—as he now still is—but in April 2003 ruled that Schafer is *too* honest and lawful to be an *ethical* lawyer, by this court's standards.

B. STATEMENT OF RELIEF SOUGHT

Schafer seeks the court's immediate stay of, and eventual vacation of, its ruling filed April 17, 2003, suspending his law license for six months for having revealed *too much* information about corrupt Judge Anderson, and its dismissal of this proceeding without discipline. The majority opinion (**Bridge Opinion**) was authored by Justice Bobbe Bridge and joined by Justices Faith Ireland, Tom Chambers, and Susan Owens, and by Justice *Pro Tempore* Charles Z. Smith (retired justice of this court). An opinion concurring in the majority's conclusions was authored by Justice *Pro Tempore* G. Karen Seinfield (Judge of the Court of Appeals, Div. II) (**Seinfeld Opinion**). And an opinion concurring in part and dissenting in part was authored by Justice *Pro Tempore* Robert Winsor (retired judge of

the Court of Appeals, Div. I), joined by Justice Barbara Madsen and Justice *Pro Tempore* Faye Kennedy (judge of the Court of Appeals, Div. I) (**Winsor Opinion**).

C. MISTAKES OF JUDICIAL CONDUCT

1. Justice *Pro Tempore* Karen Seinfeld should have disqualified herself due to her and her lawyer husband's personal relationships with former corrupt Judge Anderson and/or their mutual friends, and perhaps other jurists should have also.

On February 1, 2002, Schafer filed a Motion for a Ruling on Issues of Disqualification (**Disqualification Motion**). He there briefed the law of judicial ethics under which *the burden rests on each jurist* to recuse himself or herself whenever facts known to them *might* cause a reasonable person to question their impartiality. Schafer specifically sought rulings based upon public facts known to him about personal relationships by Justices Gerry Alexander and Richard Sanders with Anderson and his lawyer, Kurt Bulmer, but he *also* solicited other jurists to reflect upon whether nonpublic facts known to them might reasonably call into question their impartiality, saying "There may be other *nonpublic* facts that jurists also should consider (such as other close relationships with Kurt Bulmer or with Grant Anderson)." This court's clerk later informed Schafer that he had provided the Disqualification Motion *only* to Justices Alexander and Sanders, both of whom promptly disqualified themselves. The court never ruled on the Disqualification Motion.

Click in box for DQ Motion

Two court of appeals judges, Karen Seinfeld and Faye Kennedy, were then selected by the court clerk to serve as justices *pro tempore* on the panel that heard oral arguments in this case on May 7, 2002, and ruled on it nearly a year later, April 17, 2003.

Judge Karen Seinfeld was a member of the Pierce County superior court (to which corrupt Judge Anderson was elected in September 1992 and served until September 1999) for five years prior to her appointment in 1992 to the court of appeals in Tacoma. It is common knowledge that judges and their spouses in the Tacoma-Pierce County community socialize together. Schafer heard Judge Seinfeld comment at a local bar luncheon in 2000 that she and her husband had enjoyed their recent cruise with Pierce County superior court judge Art Verharen and his wife, Karen Conoley, a superior court judge from adjacent Kitsap County. Judge Conoley's brother is Kurt Bulmer, who defended Anderson for four years principally by maliciously vilifying Schafer with false allegations of a retaliatory and vindictive motive arising from an alleged but non-existent ruling denying Schafer some fees from a September 1995 irrelevant hearing that Schafer did not even attend.[1] Bulmer began his strategic propaganda campaign of mis-information in early 1996 [2] and continued it

[1] Bulmer's oft-repeated lies, included in Ex. D-24 and D-25, are disproved by the actual court-filed documents and hearing transcript filed as Ex. D-25, D-26, and D-27.

[2] *See, e.g,*, Bulmer's letter to the state bar Office of Disciplinary Counsel (**ODC**) of May 22, 1996 ("Mr. Shafer [sic] directed his wrath toward Judge Anderson when the judge denied Mr. Shafer [sic] attorney fees. Mr. Shafer's actions since that time have become obsessive and either are or are on the verge of becoming irrational.") ODC lawlessly

through his submissions to the disciplinary board and to this court in February through May of 2000 seeking approval of his negotiated two-year suspension of Anderson's law license.[3]

In 1997-98, Judge Verharen was defended by his brother-in-law Kurt Bulmer from charges of falsely claiming Pierce County residency while actually residing in Kitsap County with his wife (since 1992) when filing for his re-election in 1996. Those charges were brought by a lawyer, Steven Quick-Ruben, with whom Schafer's then shared office space, so Verharen and Bulmer defended the charges partly by falsely accusing Schafer of inciting them as part of a falsely alleged pattern of personally attacking Pierce County superior court judges.[4]

Judge Seinfeld participates as a member and former president in the local Puget Sound Chapter of the American Inns of Court, the current apparent president[5] of which is Sandra Bobrick, putative spouse and law partner of Philip Sloan, who has represented William Hamilton for many years in matters relating Hamilton's dealings with corrupt Judge Anderson and to Schafer's disciplinary case.[6] As a former law partner of Sloan, Schafer knows that he was a regular crew member on Judge Verharen's

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refused to share that letter with Schafer for nearly three years. Ex. D-32, pg. 27-31, 34-40.

[3] Ex. D-24 and D-32.

[4] *State ex rel Steven Quick-Ruben v. Verharen*, 136 Wn.2d 888, 969 P.2d 64 (1998). Schafer will supplement this motion with a copy of Judge Verharen's declaration making unfounded accusations against Schafer upon his retrieving it from archived court files.

[5] See the directory of chapters at http://www.innsofcourt.org (visited May 5, 2003).

[6] Ex. D-23 and its internal exhibits, evidencing fraud joined in by Sloan and Bulmer.

sailboat in local yacht club races.

Given the tight-knit culture of the local social and professional network in which Judge Seinfeld and her husband, Dennis Seinfeld, second-generation lawyer in Tacoma,[7] participate and their relationships with colleagues who had reasons to echo Bulmer's false propaganda vilifying Schafer, reasonable persons certainly *might* question her impartiality in this case.

In Judge Seinfeld's venomous concurring opinion, her lack of impartiality is quite apparent. She echoes Bulmer's false propaganda portraying Schafer's exposure of corrupt Judge Anderson as "reprehensible" saying:[8]

> And at least part of Schafer's motivation to disclose Hamilton's confidences was a desire for *personal vindication against a judge whom Schafer believed has wronged him*. DP at 41-42, 555. The fact that Schafer waited nearly three years to act supports this evaluation of his conduct.[9] [Emphasis and footnote added.]

But the record is devoid of evidence that Schafer harbored any personal retaliatory motive toward corrupt Judge Anderson or of any credible basis for such a motive. Judge Seinfeld mistakenly cited findings of the hearing officer and disciplinary board that were based on Schafer's honest admis-

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[7] See Judge Seinfeld's official bio-page at http://www.courts.gov/div2/bios/seinfeld.cfm

[8] Seinfeld Opinion at 2.

[9] Schafer consistently has asserted, supported by documentary evidence, (e.g., Exhibit D-26) that he held off probing into Hamilton's hints of Anderson's misconduct until the three-year statute of limitations likely would have expired on whatever complicity Hamilton might have incurred for aiding and abetting in Anderson's breach of his fiduciary duties. That subjective motive certainly is more plausible, given the fact that Judge Anderson never ever made any ruling whatsoever that caused Schafer the slightest financial harm or embarrassment, contrary to the false propaganda that was broadcast for years by corrupt judge Anderson, Bulmer and their colleagues and friends.

sion that he was motivated partly to vindicate his professional honor when he appealed a rogue order by Pierce County Superior Court *Judge Donald Thompson* in March 1996.[10] Judge Thompson's rogue order publicly humiliated and disciplined Schafer by summarily disqualifying him from the cases of his client, Don Barovic,[11] due to Judge Thompson's circle-the-wagons assumption that Schafer had violated lawyer ethics rules by questioning his bench-mate Judge Anderson's integrity, without justification (or so Judge Thompson thought), in the court papers[12] Schafer filed the prior month that caused the corrupt judge to recuse from Barovic's cases. That rogue order was promptly vacated and later reversed by the court of appeals,[13] vindicating Schafer's professional honor and affirming that *Judge Thompson* had unjustly wronged him. The papers that Schafer

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[10] Schafer honestly testified, "I guess I was seeking some degree of vindication at having been, you know, banished from the courthouse by Judge Thompson when he ordered me to turn over all my files and get the hell out of here." Disciplinary Hearing Transcript (**TR**) at 151.

[11] Barovic was not measurably harmed, however, for he had hired Schafer simply to advise on trust and estate law his two trial lawyers, Sean Hicks and Richard Jensen (who was succeeded in about March 1996 by Neil Hoff). The court of appeals almost immediately stayed Judge Thompson's order to the extent of permitting Schafer to continue working on Barovic's cases with co-counsel, though not participating in hearings. Thus, Schafer testified at his disciplinary hearing that his two purposes in petitioning the court of appeals, at his own expense, were (1) to expose a corrupt judge and (2) to vindicate himself. TR 151-52.

[12] Ex. A-5, Motion of Prejudice and Supporting Statement filed Feb. 2, 1996, in which Schafer declared, "Based upon the public documents that I have reviewed and individuals with whom I have spoken, I believe that a full investigation into [Judge Anderson's] and his firm's handling of [the Hoffman] estate is necessary. ... If a full investigation by appropriate authorities or counsel for affected parties confirms my suspicions, then Judge Anderson may be removed from the bench." He was removed three and a half years later, even though it does not appear that a "full investigation" ever occurred. No other lawyers in his former law firm, one of which became his judicial assistant, were ever disciplined.

[13] *Estate of Barovic*, 88 Wn. App. 823, 946 P.2d 1202 (1997).

had appended to his emergency petition to the appellate court were necessary to show that Schafer had *not* act unethically in publicly predicting, accurately, that Judge Anderson would be removed from the bench once his conduct in the Hoffman estate became exposed.[14]

Sadly, the impact of Judge Seinfeld's many years of being subjected to the propaganda broadcast by Bulmer and corrupt Judge Anderson's friends and supporters in her social and professional networks was to destroy her ability to impartially and faithfully consider the record and arguments in Schafer's disciplinary case.

The extent to which Judge Seinfeld may have poisoned the full nine-judge panel in their deliberations in this case, and the extent to which other jurists on this panel may independently have been poisoned by the false and malicious propaganda spewed by Anderson, Bulmer, and their many judge and lawyer friends and supporters may never become known—unless they step forward and self-report it. It is an irrefutable fact that Bulmer's 14-page propaganda hit-piece vilifying Schafer as having retaliatory motives against Judge Anderson was sent to *every judge* in the state by this court's administrative office in the June 7, 1999, issue of its bi-weekly *Judicial News*, the editor of which refused Schafer request to print his corrective response.[15] And official records indicate that Bulmer's same hit-piece was considered in March 2000 by the disciplinary

[14] Ex. A-5.
[15] Exhibits D-24 and D-25.

board and in May 2000 by this court in approving corrupt former judge Anderson's retention of his law license with merely a two-year suspension.[16] The taint is undeniable, and permeates the viciously denigrating tone of the Bridge Opinion.[17].

D. MISTAKES OF FACT

1. The Bridge Opinion was laced with falsehoods and spin intentionally designed to malign Schafer and to deceive and mislead readers.

Justice Bridge wrote,[18] "Judge Anderson ruled that *Schafer's petition* was frivolous and without legal merit, and assessed $1,000 in attorney fees against Schafer's client." That was a false statement designed to deceive.[19] Exhibit A-1 from Schafer's disciplinary hearing is a copy of Judge Anderson's ruling, and it nowhere names *Schafer* nor any petition of his, for *none existed*. Schafer testified about that the circumstances of that order at his disciplinary hearing, saying (TR 77 and 79):

> A. There were three of us representing Don Barovic in that matter and Shawn Hicks, I believe, filed a motion for either

[16] Ex. D-24 and Ex. 1 to the Disqualification Motion.

[17] As but one example, Justice Bridge wrote that after Anderson recused from Barovic's cases, "Over the next several months, Schafer became *obsessed* with Judge Anderson." She supported her gratuitous insult simply by writing that during that period Schafer met with professional disciplinary and law enforcement officials and revealed evidence about the corrupt judge. Furthermore, she imaginatively wrote that Schafer *met with the press*, though the record indicates that he only *faxed* to three newsrooms papers from a public file at the court of appeals. Bridge Opinion at 3; *but see* Ex. A-12.

[18] Bridge Opinion at 3.

[19] As intended, readers the Bridge Opinion were misled to believe that Judge Anderson had sanctioned Schafer. A national newspaper's story reported that Schafer reported Anderson "when the judge sanctioned him for bringing a frivolous suit in 1995." Adam Liptak, *Lawyer Whose Disclosure of Confidence Brought a Judge Is Punished*, The New York Times (April 20, 2003, Late National Edition, page 11).

> reconsideration or to challenge a will that had been admitted, and Judge Anderson denied that petition to challenge the will. And then the opposing counsel requested attorney's fees and Judge Anderson awarded a thousand dollars attorney's fees.
> . . . .
> Q. How did you learn of the ruling?
> A. I was physically present, you know, in the hearing.
> Q. Were you unhappy with his ruling?
> A. Yes, I would say that.
> Q. Were you angry at his ruling?
> A. No.

Included in an appendix to this motion is what Justice Bridge falsely labeled as the *Schafer petition* and related papers that all were prepared and filed by co-counsel Sean Hicks and Richard Jensen, two trial lawyers who had been representing Barovic since mid-1994 in his legal disputes with his sisters over their parents' muli-million dollar estate. The $1,000 fee award did not significantly impact Barovic, and did not *at all* impact Schafer.

On page 2 of the Bridge Opinion, she describes Philip Sloan as Hamilton's "new attorney" (suggesting that Hamilton needed Sloan to replace Schafer), though Sloan testified that he had been Hamilton's friend and lawyer since 1981, and exhibits confirmed their long-established relationship.[20]

On page 3, Justice Bridge states as a *fact* that "Schafer became obsessed with Judge Anderson" yet no evidence supports her finding. The evidence only shows the Schafer recognized his duty as a responsible

[20] TR 163; Ex. D-22 and D-23.

"officer of the court" to report fully the evidence of Judge Anderson's corruption to those who society entrusts to act on such evidence.

In the same page and paragraph Justice Bridge asserts that Schafer then met with the press, but nothing in the record supports her assertion.

On page 5, Justice Bridge reports that Hamilton filed a state bar grievance against Schafer in July 1996, then states:

> Despite the pending grievance, Schafer went on to author two articles in local newspapers, touting his role in Anderson's disciplinary proceedings and exposing Hamilton's confidences in detail.

Justice Bridge fails to report that in his state bar grievance in July 1996, Hamilton signed a conspicuous statement *consenting* to the disclosure by Schafer of any information relating to the grievance.[21] And in ODC disciplinary counsel Julie Shankland's letter to Schafer of August 15, 1996, (closing her investigation of Judge Anderson after finding "no evidence" of misconduct) she *quoted* Hamilton's statements made to Schafer in 1992 and she wrote, "Hamilton agrees that he made the statements you attribute to him."[22] After Hamilton's written consent, and Ms. Shankland's publication (without any protective order) of Hamilton's 1992 statements and of Hamilton's acknowledgment of having made them, those statements ceased to be confidences[23] (even ignoring the

[21] Ex. D-36.
[22] Ms. Shankland's eight-page letter begins on page 52 of Ex. D-32.
[23] Rules for Lawyer Discipline rule 11.1(i) then read, "Except as provided in rule 11.1(g) [protective orders, none having been entered in Schafer's grievance on Anderson], nothing in these rules shall prohibit the grievant, respondent, or any witness ... from

crime-fraud exception).

The two newspaper articles, barely readable as Ex. A-192 and A-193, are included in the appendix to this motion. The first one, published by the *Tacoma Voice* on Jan. 15, 1998,[24] during Judge Anderson's five-day disciplinary hearing by the Commission on Judicial Conduct (**CJC**) that began Jan. 12, 1998, disclosed no confidences of Hamilton. It simply stated that Schafer began looking into Judge Anderson's handling of the Hoffman estate "due to an indiscreet comment" made by Hamilton. In the second article, published in the *University Place Journal* on April 30, 1998, Schafer objected to the CJC's mere censure and recommendation of a *four-month suspension*[25] of corrupt Judge Anderson from his judicial post, and Schafer did reveal Hamilton's 1992 comment, writing:

> In 1992, Hamilton had told me (I was then one of his attorneys) that he was getting a great deal from Anderson on the Hoffman Estate's bowling business, and that he would pay back Anderson later for it. Consistent with that remark, the [Judicial Conduct] Commission found that in 1993 Anderson had told his wife that his new Cadillac was a "commission" from Hamilton for the bowling alley deal. In contrast, both Anderson and Hamilton testified at the Commission's recent fact-finding hearing that the payments were merely a "social gift," and that gifts in the range of $30,000 were not uncommon within their well-heeled class. Anderson claimed it would have been socially awkward for him to decline Hamilton's generous gift.

The CJC's hearing panel had failed to recognize the full and complete

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disclosing any documents or correspondence served on or provided to those persons."

[24] Fn.3 of the Bridge Opinion mistakenly dates the Tacoma Voice article as *June* 15.

[25] Ex. D-18 (CJC Decision in the matter of Hon. Grant L. Anderson, filed April 3, 1998.)

depth of Judge Anderson's corruption because their contracted disciplinary counsel had withheld from them Schafer's declaration and oral testimony on Hamilton's 1992 clearly stated intention to *payback* Anderson for the *great deal* on the Hoffman estate's bowling center. The cover-up of the full and complete extent of Judge Anderson's outrageous corruption by many powerful friends was succeeding!

On page 12, Justice Bridge wrote,

> Schafer himself admitted at oral argument that perhaps there was no need to reveal his client's confidences in order to make the allegations against Anderson.

That was a false and misleading statement. Misleading, for certainly no evidence is *needed* "in order to make *allegations* against" a corrupt judge. It is only if one hopes to *fully and completely expose* the judge's rampant corruption that one would need to reveal all the probative evidence of it in her or his possession. The only portion of Schafer's oral argument that is even close to the above-quoted false statement was this colloquy:

> **Justice Madsen:** If the record in and of itself without your client's confidences was enough, then there's validity to the state's argument that you didn't need to disclose that, so obviously (interrupted by Schafer).
> **Schafer:** In an objective standard, perhaps yes. Sally Carter-DuBois told me, "Don't report it to the bar association. They will try to cover up. They will not investigate." She told me that. She had experienced that before. We have a bad system. We have a failed system. I gave you a voluminous record in the hope that I wouldn't be the only one that cared, that one of you, some of you would care about the integrity of the disciplinary system. You have all the record that you need. You just need to look at it.

Sally was then, and had been for years, the sole investigator for the WA Commission on Judicial Conduct. She had experienced the corruption within the state bar on many prior occasions.

> Somebody needs to look at it. Sally Carter-DuBois told me, emphatically, there needs to be something like a grand jury convened to investigate, because the system is not working.
>
> Also on page 12, Justice Bridge wrote:
>
> Schafer insisted at oral argument that the additional reporting to parties other than the appropriate tribunal was necessary because he was not seeing results. However, Schafer, who waited three years from the time of first hearing of an alleged transgression on Anderson's part, apparently became frustrated only two and a half months after making the initial allegations and revealed his client's statements to the press.

More seriously false and misleading statements. The colloquy was this:

> **Justice pro tempore Seinfeld:** Why could you not wait and let the process work its way out and see whether the Judicial Conduct Commission was going to operate before you released your material?
> **Schafer:** Well, one answer was knowing that this man was corrupt. He was judging people every day. There was an election coming up that year. I had some prior experience with the Commission on Judicial Conduct and it was not particularly satisfying. Even though Sally was enthusiastic, that's no assurance that the members of the Commission are going to support her. [dialogue omitted] I am not that confident that every agency is going to do their job. You only need to look at what the bar did. They said, when I gave them everything, "There is no evidence of misconduct." That was their letter that closed the file in August of 1996.

On page 13, Justice Bridge creatively continued:

> Schafer also repeated his disclosure of Hamilton's confidences in the two newspaper articles he wrote in 1998, well after the investigation of Anderson had begun, making Schafer's assertions that his actions were to prompt a response from investigators totally unavailing.

But the truth is that Schafer *never* asserted that his actions were to prompt

a response from investigators. By 1998, all investigations of Hamilton had concluded[26] (except possibly by federal law enforcement agencies). Schafer's first newspaper article disclosed no confidences of Hamilton.[27] Schafer wrote the second article after the CJC had seemingly covered-up more of Judge Anderson's corruption than it had exposed, and had recommended merely his four-month suspension from his judicial office.

On pages 13-14, Justice Bridge addresses Rules of Professional Conduct (**RPC**) rule 8.3, first correctly quoting it, including its subsection (b) which reads:

> (b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office *should promptly inform the appropriate authority*. (Emphasis added.)

But after concluding that reporting pursuant to Rule 8.3 is "permissive, not mandatory" "when confidences and secrets are concerned," she writes:

> But consistent with RPC 1.6, under RPC 8.3, disclosure of the alleged misconduct is limited to an "appropriate *professional* authority" only. (Emphasis added.)

After that injudicious deception of deftly sneaking the word "professional" into the phrase "appropriate authority," Justice Bridge proceeded to condemn Schafer for reporting Judge Anderson's obvious corruption

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[26] The Pierce County prosecutor declared his investigation closed on May 1, 1996. Ex. D-32, p.30. The ODC declared its so-called investigation closed on August 15, 1996. Ex. D-32, p.52-61. The Washington Office of the Attorney General reported to Schafer by letter of February 12, 1996, that it would not be investigating. Ex. D-34, p.12. The CJC closed its investigation with public charges against Judge Anderson on August 4, 1997. Ex. A-11.

[27] See page 11, above.

beyond the appropriate *professional* authority and going to—God forbid—"the prosecutor's office, the FBI, the IRS, and the press," the former of which she had belittled, on page 12, as "a sundry assortment of 'appropriate public officials.'"[28] In the Bridge Opinion's discussion of RPC rule1.6, rule 8.3, and rule 3.3,[29] there are many references to reports of judicial corruption being properly directed only to *the tribunal* or to the *appropriate authority*, but the reader is left guessing just what that body is. The closing paragraph of the opinion seems to imply that the body—though never naming it—is the CJC because the court holds Schafer acted unethically by revealing his client's information implicating corrupt Judge Anderson beyond "the appropriate tribunal designated by the people of the State of Washington for receipt of such complaints."[30] While one might think that the people of the state have designated law enforcement officials as proper recipients of information about corrupt judges, the court appears to disagree. It must be comforting to corrupt judges that the CJC refuses to disclose evidence of crime to law enforcement officials unless it eventu-

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[28] Justice Bridge appears to view law enforcement officials responsible for investigating judicial corruption much like Hamilton views regulatory agency officials who enforce the gambling and liquor laws. He dismissed questions about his having assumed effective ownership of Pacific Lanes months before receiving his required gambling and liquor licenses by saying, "There was nothing significant in my mind about the official closing date. That was strictly to do with little people with little problems at some regulatory agency. It had nothing to do with the operation of this business ... these were clerical problems." Ex. D-15 (CJC Finding of Probable Cause, Ex. 2, Dep. of Hamilton on 1/21/97, p. 44)

[29] Bridge Opinion pages 11-14.

[30] Though the court there employed the word *such* without any antecedent—so just exactly what complaints is the court referring to?

ally becomes part of a public proceeding, which judges can avoid by negotiating a stipulation to discipline.[31]

On page 19, Justice Bridge hurls a gratuitous insult at Schafer, saying:

> ... in his motion for discretionary review to the Court of Appeals in the *Barovic* case (a wholly unrelated matter in which he was the *losing* attorney) ... (Emphasis added.)

The record is devoid of support for her malicious barb of Schafer as "the losing attorney" in the *Barovic* case. His motion to the court of appeals was simply to vacate the rogue order by Judge Donald Thompson that summarily and unlawfully disciplined and banished Schafer, which order the appellate court vacated.[32] When judges abuse their awesome power and authority—as we observe them do all too often—the public is as much the loser as is the specific individual victimized by the judicial abuse.

On page 21, Justice Bridge misleads readers again, suggesting that Schafer knew in 1992 that Anderson was corrupt but failed to act on that knowledge, and she made substantially the same implication on page 12. But hearing someone like Hamilton remark that a lawyer is "milking" an

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[31] Ex. D-12 p.4. There the CJC "Commission counsel" Paul Taylor wrote on December 18, 1997, "[S]hortly after the Statement of Charges [against corrupt Judge Anderson] was filed, the United States Attorneys' Office asked Commission counsel for copies of the investigative files underlying the Statement of Charges. Due to confidentiality requirements, Commission counsel declined the request." See CJCRP rule 11. In *Gardner v. Cherberg*, 111 Wn.2d 811, 765 P.2d 1284 (1988), this court held the CJC was beyond the subpoena power of the state legislative branch and, by implicition, of its executive branch. Apparently, if a lawyer learns from a client that a judge has committed a murder, the lawyer now may report it to the CJC but not to law enforcement officials. And the CJC can be relied on to keep it confidential!

[32] See n.13 and associated text, above.

estate or client is so common as to be meaningless.[33] Beyond that, Hamilton in 1992 said he was getting a "good deal" and *intended at some indefinite time in the future* to pay back Anderson for it. But what was there then to investigate? What was there then to report? What is Justice Bridge suggesting is the duty of a lawyer hearing such remarks?—"rat" on her or his client and lose her or his client and law license? Should the lawyer initiate covert surveillance of her or his client to catch them once they actually pay the hinted kickback? Woops—it then would be a *past* crime, protected from revelation under our state's lawyer *ethics* rules. Catch-22!

Schafer's deliberate decision after actually hearing Hamilton's 1992 remarks was do nothing until it seemed that the three-year statute of limitations would have shielded Hamilton from possible liability for participating in Anderson's breach of fiduciary duty, then begin investigating to ascertain whether suspicions of Judge Anderson aroused by Hamilton 1992 comments were well founded. Schafer's decision was patently reasonable, and quite arguably required, under the circumstances.

E. MISTAKES OF LAW

1. The public records that Schafer sought out because of Hamilton's

[33] If Justice Bridge suggests Schafer had a duty to investigate or report Anderson in 1992, then Schafer apparently had a duty in 1995 to investigate *most every* lawyer, for Schafer recorded Hamilton's remarks on Dec. 18, 1995, as follows: "He responded to my specific query about whether Anderson has 'stellar' integrity by saying that Anderson was as honest as most any lawyer (conveying by his tone his belief that most lawyers are not honest)." Ex. A-7 (Schafer's Declaration Under Penalty of Perjury, p. 2)

1992 inculpatory comments were "secrets" as defined in the RPC.

Schafer's Opening Brief [34] presented extensive case law from this and other high courts, and other authorities (including the leading "hornbook" on legal ethics), all of which indicate that it is *settled law* that even public records are "secrets," as that term is defined in the RPCs, when a lawyer seeks them out based upon communications with or about a client. In disregard of that *settled law*, this court (as did the hearing officer and the disciplinary board) seeks to justify its ruling by stating:

> There is very little doubt that sufficient additional alternative evidence existed in the *public records* to make revealing Hamilton's confidences unnecessary. (Emphasis added.)

Of course, if the court were to admit that under *settled law*, the public records that Schafer sought out based on Hamilton's comments were *secrets*, then its convenient way out of prioritizing public policies evaporates—it must choose between giving top priority either to ensuring judicial integrity or to preserving clients' confidences and secrets.

2. The judicially created crime-fraud exception to attorney-client confidentiality has always applied when a client uses a lawyer to further the client's crime or fraud.

Schafer's Opening Brief devotes 20 pages to extensive analysis of the development over the last 120 years of case law of this and other states and other common law countries on the crime-fraud exception to attorney-

[34] Schafer's Opening Brief pages 17 - 22.

client confidentiality.[35] The Bridge Opinion devotes but two paragraphs to that exception.[36] Both writings quote the same passage from *United States v. Zolin*, 491 U.S. 554, 562-63, 109 S.Ct. 2619, 105 L.Ed.2d 469 (1989), to the effect that the public policies underlying the protection that is afforded a wrongdoer's communications with a lawyer cease "where the desired advice refers *not to prior wrongdoing*, but *to future wrongdoing*." Though that passage (and everything else written about the crime-fraud exception) makes application of the crime-fraud exception turn upon whether the client's wrongdoing is past or future *at the time of the client's communications with the lawyer*, the Bridge Opinion mistakenly applies it based upon whether the wrongdoing is past or future *at the time the client's information is reported*. That is a mistake, unsupported by the oft-repeated policies underlying the crime-fraud exception.

The Bridge Opinion states, "Washington has never applied the crime-fraud exception to client confidences such as the ones at issue here." That is not accurate. The judicially created crime-fraud exception was plainly reflected, until September 1985, in the published lawyer ethics rules of this state. The ABA Canons of Professional Ethics, made applicable to Washington lawyers by RCW 2.48.230 (1921) included the following:

Canon 41. Discovery of Imposition and Deception. ***When a***

[35] Schafer's Opening Brief pages 29-49.
[36] Bridge Opinion pages 15-16.

> ***lawyer discovers that some fraud or deception has been practiced***, which has unjustly imposed upon the court or a party, he should endeavor to rectify it at first by advising his client, and if his client refuses to forego the advantage thus unjustly gained, ***he should promptly inform the injured person*** or his counsel, so that they may take appropriate steps. (Emphasis added.)

And the ABA Code of Professional Responsibility, in the form adopted by this court effective 1972 and remaining in force until September 1985 included the following:

> **Disciplinary Rule 7-102(B).** ***A lawyer who receives information clearly establishing that***: (1) ***His client has, in the course of representation, perpetrated a fraud upon a person*** or tribunal shall promptly call upon the client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected tribunal and ***may reveal the fraud to the affected person***.

The abandonment of the crime-fraud exception to confidentiality in the 1983 ABA Model Rules of Professional Conduct is now widely recognized as having been driven by self-serving motivations of lawyer groups who were instrumental in shaping those rules. The national winds have plainly shifted into the direction of restoring the crime-fraud exception to the confidentiality provisions of the ABA Model Rules. For only the latest of many examples, the ABA Presidential Task Force on Corporate Responsibility released on April 29, 2003, its final report with recommendations, for action next August by the ABA House of Delegates, that Model Rule 1.6 be amended to permit lawyers voluntarily to reveal confidential client information about any fraud or crime that the client had furthered

my means of the lawyer's services. That final report[37] states, at 54:

> The Ethics 2000 Commission believed, and the Task Force agrees, that the use of the lawyer's services for such improper ends [namely, to further the client's crime or fraud] constitutes an ***abuse by the client of the client-lawyer relationship, forfeiting the client's absolute entitlement to the protection*** of Model Rule 1.6. In such circumstances, the Task Force believes that the lawyer must be permitted, where the crime or fraud has resulted or is reasonably certain to result in substantial injury to the financial interests or property of third parties, to reveal information relating to the representation as reasonably believed necessary to prevent the commission of, or to prevent or rectify the consequences of, the crime or fraud. (Emphasis added.)

If this court shares the wisdom of the balancing of public policies that has been made by the latest ABA Task Force and by so many other scholarly national groups that have preceded it, this court may readily achieve that result simply by interpretation. The crime-fraud exception is indisputably inherent in this state's RPC definition of "confidences" because this court has interpreted (as have many others with similar statutes) "professional employment"as used in RCW 5.60.060(2)(attorney-client evidentiary privilege) as inapplicable to the employment of a lawyer in furtherance of a crime or fraud. This court could responsibly take the same approach of interpreting "professional relationship" as used in the RPC definition of *secrets* as also inapplicable to the employment of a lawyer in furtherance of a crime or fraud.

Hamilton employed Schafer in 1992 to form a corporation in further-

[37] Available at http://www.abanet.org/buslaw/corporateresponsibility/final_report.pdf

ance of Hamilton's conspiracy with corrupt then-lawyer Anderson to defraud the Hoffman estate through a below-market sale of its bowling center. Hamilton's communications made to Schafer at that time were not, accordingly, deserving of the protection of Schafer's duty of confidentiality.

3. The court's strong push toward "sealing" important information in public court files is contrary to law.

The Bridge Opinion strongly and repeatedly emphasizes that Schafer should have sought, and all lawyers and tribunals facing similar situations in the future should seek, to "protect"—meaning to *seal* from public access—any information rightfully filed in a court file about a client such as Hamilton who may have conspired with a corrupt judge. At page 4, Justice Bridge condemns Schafer's filing of papers[38] that included his Declaration reporting Hamilton's 1992 comments because Schafer "did not seek court assistance to protect the confidentiality of the documents." Linked to that passage is a link to Civil Rule (**CR**) 26(c) which permits a party or deponent, on matters relating to a deposition, to request that a court, for good cause, enter a protective order that restricts disclosure of the contents of a deposition. But deposition transcripts are not automatically or as a matter of course normally filed in public court files. So it would be rare that CR 26(c) would be applicable to information about a

[38] Ex. A-10 (Motion for Discretionary Review)

client who has conspired with a corrupt judge. The more plainly applicable rule is General Rule (**GR**) 15, which courts seem more often to ignore than to follow. For the sealing of documents or entire files in civil cases, GR 15(c)(2)(B) requires the court to conduct a hearing preceded by notice to all interested parties and normally that the court determine the existence of compelling circumstances where justice requires that the records or entire court file be sealed. It would be strange, indeed, if a court were to find that *justice* requires the sealing and hiding from public access of information indicating that a judge is corrupt! But in actual fact, when Schafer filed his petition for review in the court of appeals on April 26, 1996, Commissioner Don Meath a few days later summarily sealed all 59 pages of its Appendix "D," for it documented Judge Anderson's rampant corruption. The Commissioner did not bother with the niceties of GR 15 (advance notice of a hearing, and finding of compelling circumstances and the needs of justice). He was simply, it appears, doing a favor for a corrupt judicial colleague. The strength of those collegial bonds are shown by the Commissioner's unwillingness to remove his seal even three years later,[39] after Judge Anderson had undergone his public CJC disciplinary hearing—for not all the damning evidence had come out at that hearing.

It is common knowledge, based upon repeated incidents, that courts routinely abuse their authority by sealing court file information whenever

[39] Ex. D-30 (Motion to Unseal Court Record)

the person who would be embarrassed by its public revelation is one who the court regards as worthy of special treatment. It seems lately that pedophile clergymen have routinely enjoyed that special treatment when they settle claims of abuse. Judges routinely enjoy that special treatment when undergoing marital dissolutions or other distasteful litigation. The problem is out-of-control, and calls for responsible leadership by this court to direct that incidents of noncompliant sealing of records must cease. The several suggestions in the Bridge Opinion that court-filed information should have been *protected* are inconsistent with the leadership that is called for at a time when the public is demanding more *transparency* in its governmental institutions.

F. MISTAKES OF JUDGMENT

1. The court should declare that judicial system integrity is a higher priority than client secrecy.

For seven years, Schafer has been asking the hypothetical question: If a client confidentially tells a lawyer that the client had bribed a judge to achieve a win in court, may the lawyer reveal that confidence to expose the corrupt judge? He has found most nonlawyers answering "yes" and most lawyers unwilling to answer. By its Bridge Opinion, this court has answered "no," it appears. The court repeatedly condemns as *unnecessary* Schafer's revelations of Hamilton's comments that offered persuasive evidence of Judge Anderson's corruption. The court never suggests when,

if ever, such revelations ever would be *necessary*.

Of course, the exposure of corrupt judges in never *necessary* if society is comfortable with a *justice* system populated with corrupt judges. Corrupt Judge Anderson continued to preside over his Pierce County superior court domain for three and a half years after Schafer exposed obvious proof of his corruption. Nobody was in a hurry to remove him. The only ones who may have complained about Judge Anderson were the *losers*—who perhaps lost their children, their financial security, or other components of a quality life—but *winners* are never interested in the whines of the *losers*.

This court found Anderson in September 1999 to be *too dishonest* to be a judge, but seven months later felt that he was *not too dishonest* to continue to hold his law license, which was restored to active status after his two-year suspension. Does the court suppose that Anderson became *honest* during that two-year break? Ah heck, who cares?

At page 10, the Bridge Opinion states with apparent concern, "Erosion of [attorney-client] privilege through willful breaches of a client's trust by an attorney is undoubtedly harmful to society." Shouldn't the court weigh that harm against the much greater harm caused to society when officers of the court—lawyers and judges—shield a corrupt lawyer or judge from exposure and removal, not merely the harm to persons whose lives the corrupt one impacted directly, but the loss of trust and

confidence in the judicial system when the greater society realizes that the leaders of the system are indifferent to the virtue of integrity. What might happen when the public realizes that the leaders of its justice system do not regard integrity of that system as their greatest priority?

2. The court should insist that every discoverable act of dishonesty or other misconduct by a corrupt judge be fully and completely exposed.

The approach that seems to have been taken by the hearing officer, the disciplinary board, and by this court, is repeatedly to reject the proposition that *every discoverable act* of misconduct by corrupt Judge Anderson should be exposed.

The hearing officer concluded[40]

> "The information and documents obtained by Schafer from the public records would have been more than sufficient to allow Schafer to carry his primary objective of seeing that a corrupt judge was removed from the bench...."

But if the probative evidence possessed by a responsible citizen or lawyer would reveal a dark character obviously unfit to continue as a licensed lawyer, should it be sufficient to offer only enough evidence to cause him to be removed the bench? I submit the answer should be "no," for a lawyer who is too dishonest to be a judge can still be forced into citizens' lives by judicial or random selection appointment as an indigent defense counsel, a guardian ad litem, a receiver, other appointive capacities, or can

[40] Decision Papers (**DP**) 39.

be hired by persons without local knowledge and believing that possession of a law license indicates a high degree if integrity.

The disciplinary board stated:[41]

> The Board unanimously supports Mr. Schafer's reporting of suspected judicial or lawyer misconduct. The hearing officer found that Mr. Schafer could have made these reports based on his investigations, without disclosing his client's statements. The record supports this finding. The Board does not support Mr. Schafer's disclosures of his client's secrets and confidences during his personal investigation, especially to the prosecutor's office, the FBI, the IRS, and the press. ***It is not reasonable to believe that any of these disclosures were necessary to report suspected judicial or lawyer misconduct.***"

The disciplinary board's approach seems to be that the full and complete exposure of a corrupt judge's dark character is not their goal, rather it is enough simply that the corrupt judge is reported for *something*, even though not necessarily everything, or not necessarily enough to cause his removal from the bench, or not necessarily enough to cause his removal from the rolls of lawyers, and certainly not anything that would cause him to be investigated by law enforcement officials.

In the Bridge Opinion, sadly, the hedged approach is most apparent. At page 11, Justice Bridge wrote:

> While Schafer may very well have been justified in reporting Anderson's alleged misconduct regarding the estate, he need not have reported his own client's confidences and secrets to accomplish this goal.

But the goal was to reveal to appropriate officials, or possibly to the voters

[41] DP page 10.

through the press, the truth about *each and every fraudulent and lawless act* that the corrupt judge had committed in the recent and relevant time period, trusting that those officials learning of such acts would respond appropriately with speed and decisive authority.

At page 12, the Bridge Opinion appears to view the goal as nothing more than to "to make allegations against Anderson." Wrong.

At page 18, the Bridge Opinion asserts:

> Schafer violated a central tenet of the attorney-client relationship — protecting a client's confidential information, *without good reason*. While *there are valid justifications* for revealing a client's confidences, these instances are rare and *Schafer's unnecessary revelation* of Hamilton's confidential information *does not qualify* for an exception. (Emphasis added.)

But just what is a sufficient "good reason"? The quoted passage points to the listed "good reasons" in this state's version of RPC 1.6, including to prevail in a dispute with a client over the lawyer's fees. It would seem to most folks that a lawyer's revealing a client's secret to expose a corrupt judge is at least as *good* a reason as doing so to collect the lawyer's fees.

In 1993, this court stressed in *State v. Hansen*, 122 Wn.2d 712, 862 P.2d 117 (1993) that there was not merely a *good reason* but a *compelling reason* for lawyers to reveal—without regard to client confidences and secrets[42]—information about any true threat of harm to a judge. It seems

[42] RPC 1.6(b)(1) (exception to prevent a *client* from committing a crime) would be inapplicable if a client confided that a third party (*e.g.*, a client's relative or friend) intended to harm a judge.

that the harm upon society caused by a corrupt judge is in the same league as the harm that might be caused by a person's threats upon a judge, so revelations to expose a corrupt judge ought to pass muster as "good reasons."

3. The court should take notice of the strong national tide toward restoring the "rectify fraud and crime" exception to lawyer confidentiality and not be a conspicuous hold-out clinging to nationally discredited and abandoned policy arguments.

No person can deny that there are good reasons for the attorney-client privilege, as the Bridge Opinion summarizes on pages 8 - 10. But no responsible person can deny that (1) there also are good reasons for public-interest exemptions to a lawyer's duty of confidentiality, and (2) there is presently a very strong national momentum favoring those academics, lawyers, and governmental officials who have for years been urging the restoration of exceptions in the lawyer confidentiality rules to *permit* (some wish to *require*) lawyers to reveal confidential client information to prevent a fraud or crime, or to rectify a past fraud or crime that a client has furthered by a lawyer's services.

As noted above, the ABA Task Force on Corporate Responsibility, chaired by Jim Cheek (sometimes referred to as the Cheek Task Force), on April 29, 2003, released its final report supporting the same public interest exceptions to Model Rule 1.6 that the Ethics 2000 Commission had proposed in 2001, and the Conference of Chief Justices formally endorsed

in August 2002.[43] Those changes would permit lawyers to reveal confidential client information to prevent a fraud or crime, or to rectify a past fraud or crime that a client has furthered by a lawyer's services. The appendix includes a copy of pages 47 - 55 of the Cheek Task Force report that addresses the topic of "Confidentiality and its Limitations."

In addition, the U.S. Securities and Exchange Commission (SEC) in January 2003 adopted a regulation that expressly permits lawyers serving public companies concerning securities law matters to reveal client information to prevent or rectify material violations of certain federal and other laws. Furthermore, the SEC is considering and soon will announce a regulation setting forth the duties of securities lawyers when faced with a client who is unwilling to comply with federal securities laws, possibly including making a "noisy withdrawal" to the SEC. The SEC regulations are, in general, due to directives by Congress that resulted from the widespread belief that lawyers should have done more to prevent or minimize the societal cost from Enron and assorted other highly publicized corporate frauds.[44]

What's more, the Administrative Review Board of the U.S. Department of Labor will very soon be releasing a ruling indicating its position

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[43] The support of the ABA Ethics 2000 Commission's recommended changes to Model Rule 1.6 was noted in the Winsor Opinion at its n.1.

[44] *See, e.g.,* SEC Release 33-8150, 67 Fed. Reg. 71669 (December 2, 2002); Release No. 33-8185, 68 Fed. Reg. 6296 (February 6, 2003); and Release No. 33-8186, 68 Fed. Reg. 6324 (February 6, 2003). *See also* <http://www.EvergreenEthics.com/SEC/>.

on whether certain federal whistleblower protection laws effectively preempt state lawyer ethics rules' confidentiality provisions that otherwise may limit the remedies of lawyer-whistleblowers.[45]

The latest published news story about the ABA Cheek Task Force recommendations supporting implementing the ABA Ethics 2000 Commission's proposed changes to Model Rule 1.6 indicates that the ABA leadership is strongly pushing for their adoption at the ABA House of Delegates meeting in August 2003.[46] One ABA leader is quoted as saying,

> "I've changed my mind after Ethics 2000," says Leslie W. Jacobs, the ABA Board of Governors liaison to the task force, speaking at the news conference. He had opposed amending Rule 1.6 in 2001. "I hope that I'm going to be typical of people who had an instinctive reaction that laws in 41 states are in the books but are not actively called into play on many occasions. I have come 180 degrees on this issue."

Extensive national and regional news coverage of the ABA action is assured.

Perhaps it is the perceived threat that Congress and federal agencies may take-over the regulation of lawyers (as the accounting profession was recently taken-over by Congress), or perhaps it is a genuine re-assessment of what is best for society and the legal profession that is now driving widespread support for the public-interest changes to Rule 1.6. But for

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[45] Willy v. The Coastal Corporation, ARB No. 98-060, ALJ No. 1985-CAA-1. Avail. from <http://www.dol.gov/arb/>.

[46] Terry Carter, *Doubling Back on Disclosure: New ABA Battle Brewing Over Reporting Client Misconduct*, ABA Journal e-Report for May 2, 2003. <http://www.abanet.org/journal/ereport/m2corp.html>

whatever reasons, people recognized as leaders in the legal profession are now supporting such changes. Mr. Barrie Althoff, until recently the State Bar Professionalism Counsel,[47] who had long been a strong proponent of very limited exceptions of the duty of confidentiality, recently recommended that our state adopt the Ethics 2000 recommended permissive exceptions to confidentiality, and even consider adopting a variation under which lawyers would be *required* to reveal client information if necessary to prevent events like serious crime or fraud.[48]

Given the strong national movement, being pushed by legal ethics professors, national bar leaders, and government officials, toward the recognition that there are *good reasons* for lawyers to breach client confidentiality when societal interests are more worthy than a client's interests, this court should consider reversing its decision in this case so as not to be a national case study of how lawyer confidentiality rules ought *not* be applied and enforced. No responsible leader should seek to be portrayed as the close-minded officer in Franz Kafka's *The Penal Colony.*

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G. CONCLUSION

Schafer requests that the court stay and reconsider and reverse its

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[47] Althoff was the State Bar's Chief of Lawyer Discipline from about 1994 to 2002.

[48] Althoff recommendations are at pages 24-33 of Comparison of Washington Rules of Professional Conduct to ABA Model Rules of Professional Conduct, and Reporter's Recommendations for Revisions to Washington RPCs, prepared Jan. 26, 2003, by Barrie Althoff, Reporter, WSBA Committee to Evaluate Washington Rules of Professisonal Conduct ("Ethics 2003 Committee"). Avail as of May 6, 2003 at http://www.wsba.org/lawyers/groups/ethics2003/default.htm.

ruling in this disciplinary proceeding after giving due consideration to the arguments and authorities presented above.

Respectfully submitted this 7th day of May, 2003.

Douglas A. Schafer, Suspended Attorney at Law; Bar No. 8652, Pro Se

Click in box for the item to its left.

APPENDIX

A. Donald Barovic's Petition Objecting to Probate of Revoked and Destroyed Will, and related papers. (9 pages)

B. "Money Trials," in the *Tacoma Voice*, Jan. 15-29, 1998. (5 pages)

C. "Judiciary's Integrity Called Into Question by Anderson Case," in the *University Place Journal,* April 30, 1998. (2 pages)

D. Excerpt (pages 47-55) from Report of the American Bar Association Task Force on Corporate Responsibility, March 31, 2003, released April 29, 2003. (7 pages)