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Bar No. 8652

SUPREME COURT
OF THE STATE OF WASHINGTON

In the Matter of the Disciplinary Proceeding Against
DOUGLAS A. SCHAFER,
an Attorney at Law.

RESPONDENT LAWYER'S OPENING BRIEF

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Issue #1: What amount of information implicating a corrupt lawyer-judge is sufficient to cause appropriate disciplinary officials to recognize his corruption and remove him as a judge and lawyer?

Issue #2: What information obtained by Schafer relating to Judge Anderson might be characterized as a confidence or secret of Hamilton?

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STATEMENT OF THE CASE [1]

Relevant Facts. Douglas A. Schafer received his law license in 1978 and since 1989 has maintained a solo practice in Tacoma, Washington. Prior to 1992, he had provided legal services from time to time to William L. Hamilton. In August 1992, the following transpired, as Schafer later wrote in a Perjury Declaration (EX A-7) that he gave to various officials and eventually filed in a public court file:

> On August 12, 1992, I was called by my client, William L. Hamilton, who I previously had advised in several matters including the formation in 1990 of Sound Banking Company (of which he then was President/CEO, as he had been at Western Community Bank for about 25 years before its sale), and he requested that I form a new corporation for him immediately. He said that an attorney he knew, Grant Anderson, had been "milking" an estate for four years and was about to become a judge, so he needed to quickly sell the estate's business, Pacific Lanes, in order to close the estate before he took the bench. Hamilton said that he had agreed to buy the business. It was either in that phone conversation or when we met on

[1] In this brief, per RLD 7.6(f), bar file documents, including the hearing officer's and disciplinary board's rulings, are abbreviated "BF." Some such documents also were hearing exhibits (abbrev. "EX"), but the BF-copies are usually cited, for their pages are sequentially numbered permitting more precise references. The disciplinary board clerk transmitted to this Court three transcripts, the first (TR1) being of a telephonic hearing on July 14, 2000 (unlikely to be referenced), the second (TR2) being of the disciplinary hearing on July 17–24, 2000, and the third (TR3) being of oral argument to the disciplinary board on January 12, 2001.

> August 17, 1992, that Hamilton commented that there was no time for an appraisal of the business, that Anderson was giving him a good deal, and that Hamilton would repay him "down the road" by paying him as corporate secretary or something like that. When I heard that comment, I told Hamilton, "I don't even want to hear about it!" I formed his corporation, Pacific Recreation Enterprises, Inc., and had no further involvement with him concerning the purchase of Pacific Lanes. My notes from those conversations and papers Hamilton gave me when me met reflect that the estate was that of Chuck Hoffman.

BF 24-25, 31. In 1992, Schafer did not give Hamilton any advice about the purchase of the bowling alley or make any further inquiries about the transaction. BF 25. Hamilton later testified:[2]

> I had inquired in the middle of August of Mr. Schafer to form the corporation that was going to be necessary since I wanted to deal from a corporate limited liability, and he began his engagement. He formed that corporation. … I approached him after I had what I considered to be the deal made with Grant Anderson. … I went to Mr. Schafer strictly for the purpose of forming the corporation.

EX D-16 p. 221–22.

In July 1995, Schafer appeared for a client, Don Barovic, at a hearing before Pierce County Superior Court Judge Grant L. Anderson and there privately recalled Hamilton's 1992 comments about Anderson. Schafer then reviewed his office file for Hamilton and the court file for the Hoffman estate. After another hearing before Anderson on December 15, 1995, Schafer checked out the Hoffman estate court file, copied it, and began making inquiries into the administration of that estate by Anderson and lawyers of his former law firm, Tuell, Anderson, Fisher & Koppe. BF 26. Schafer set up a meeting with Hamilton at a restaurant on December 18, 1995, to inquire about Anderson's integrity, and the following transpired, as later memorialized by Schafer in a Perjury Declaration (EX A-7):

> We met for almost three hours, during most of which time Hamilton was telling me about major structural problems he had encountered with the Pacific Lanes building, for which he recently recovered his costs from the insurer. 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). He told me that Anderson has been a good friend of his for 20 to 25 years; that they socialized with their wives; that he had attended the wedding of one of Anderson's children; etc.
>
> Hamilton told me that Anderson had campaigned not only for the superior court position he now holds, but had also campaigned for a supreme court position. Hamilton said that he had made "a five-figure contribution" to one of Anderson's election campaigns, but he could

[2] Hamilton also testified: "I didn't retain Mr. Schafer in any capacity to negotiate anything for me. ... The deal was made; it was done. All I asked Mr. Schafer to do was form my corporation." EX D-15 Hamilton Deposition (Jan. 1, 1997) p. 28.

not recall which of those campaigns it had been.

....

During the meeting, I told Hamilton that I had reviewed the Hoffman Estate court file, and was quite bothered that Anderson's $112,000 personal representative's fee had been summarily approved without any apparent scrutiny by a commissioner who was about to become Anderson's subordinate. We discussed somewhat the Hoffman Estate. He indicated he thought Anderson had done admirable work in shifting some of the Surfside resort timeshare owners around so he could to sell whole units and liquidate that property. I informed him that I learned that Chuck Hoffman's ex-wife, Millie (the sole life beneficiary of his estate and testamentary trust), had died in late January, 1992. Hamilton told me that a few months after her death, the hospital (Pacific County Hosp. District was the remainder beneficiary of 90% of Hoffman's estate/trust) requested a payoff on the Pacific Lanes financing. Hamilton said he shopped for bank financing (I think he mentioned he rejected Key Bank's lending terms because he got better terms at First Interstate Bank), and negotiated with Steve Fisher (Anderson's former law partner who he nominated, and Commissioner Johnson appointed, as the successor trustee of the Hoffman Trust) for a significantly discounted payoff of the Pacific Lanes purchase. Hamilton said he was quite surprised when, after that payoff had closed, Steve Fisher billed him about $15,000 for legal services related to that negotiated payoff.

My meeting with Hamilton ended with him strongly urging me to stop "looking for dirt" on Anderson, and urging me to simply run against him in his next election if felt he was a poor judge. I responded that I would consider what he had told me, and that I was undecided whether to pursue the Hoffman Estate matter further.

BF 27; TR2 142.

From mid-December 1995 through January 1996, Schafer investigated Anderson's handling of the Hoffman estate and obtained from numerous persons and public records information that would have been more than sufficient to cause Judge Anderson to be removed from the bench for his dishonest and corrupt conduct. BF 27 ¶19; BF 39 ¶12.

On February 1, 1996, Schafer had a phone conversation with Camden Hall, the divorce lawyer for Anderson's wife in their then pending divorce, as later memorialized by Schafer in a Perjury Declaration (EX A-7):

I informed him that I was investigating Anderson's handling of the Hoffman Estate and had found apparent misconduct involving the sale of Pacific Lanes to Hamilton and involving the Surfside resort. He responded with, "I was wondering when that shoe was going to drop." He told me not to disclose him as the source of the tip, but suggested that I check into Anderson's acquisition of his Cadillac, since Anderson had been evasive about his acquisition of it when information was requested in the divorce proceedings.

BF 27 ¶20. Later that day, Schafer was instructed by Hamilton, in a letter (EX A-3) and orally in their

meeting at the office of another of Hamilton's lawyers, Philip Sloan (who reiterated the instruction with a faxed message to Schafer the next day (EX A-4)), not to disclose any privileged or confidential communication by Hamilton regarding Anderson. Sloan threatened Schafer with a Bar complaint and, Schafer believes, with a civil lawsuit by Hamilton if Schafer did so. BF 27-28 ¶21-24.

On February 2, 1996, Schafer filed and presented to Anderson papers in the Barovic cases requesting Anderson's recusal, stating:

> I personally have been making inquiries into the handling by Judge Grant L. Anderson, during the almost four years, and particularly the last few months, before he became a judge, of the *Estate of Charles C. Hoffman* (Cause No. 89-4-00326-3). Based upon the public documents that I have reviewed and the individuals with whom I have spoken, I believe that a full investigation into his and his firm's handling of that estate is necessary. ... If a full investigation by appropriate authorities or private counsel for affected parties confirms my suspicions, then Judge Anderson may be removed from the bench.

EX A-10, App. B. Anderson recused from the Barovic cases, which then were assigned to Judge Donald H. Thompson, who on March 8, 1996, summarily ordered Schafer disqualified from further participation in any Barovic matters for allegedly having violated the Rules of Professional Conduct ("RPC"), specifically RPC 8.2(a) (making a false or reckless statement concerning a judge's integrity), among other rules. EX A-10, App. A. On April 26, 1996, Schafer petitioned the Court of Appeals to stay and reverse Judge Thompson's order, attaching to the petition as an appendix various documents that exposed Anderson's corruption (EX A-10, App. D.); and the appellate court did stay and later reversed Judge Thompson's order. *In re Estate of Barovic*, 88 Wn. App. 823, 966 P.2d 902 (1997).

On February 5, 1996, Schafer met with Seattle University Law School ethics professor John Strait, who advised Schafer that he would not have civil liability if he disclosed the information regarding Anderson to the Bar's disciplinary officials. Strait told Schafer that it was a "gray area" whether doing so without Hamilton's consent would come within the prevent-crime exception to RPC 1.6. BF 29 ¶27. Schafer believes that Strait indicated that reporting Anderson was the morally right course of action. TR2 764.

During the next eight days, Schafer met separately with agents of the Federal Bureau of Investigation, the Pierce County Prosecutor's Office, and the Washington Commission on Judicial Conduct ("CJC"). BF 29-30. Schafer's met on February 13 with the CJC investigator, Sally Carter-DuBois, for about seven hours to share his documents and information about Anderson, after which she rated the matter a "13" on a 1-to-10 scale. BF 30-31 ¶32. Carter-DuBois arranged for the reproduction of all of

Schafer's documents concerning Anderson to permit Schafer to provide complete sets to various officials, and he later provided them to the county prosecutor, the FBI, the Internal Revenue Service, and the State Bar Office of Disciplinary Counsel ("ODC"). He had earlier provided copies of many of the documents to the Office of the Attorney General ("OAG") (TR2 89), but received a letter dated February 12, 1996, expressing no concerns or interest in the matter. EX D-34 p. 000012-13.

On February 16, 1996, Schafer prepared and signed under penalty of perjury a declaration (the "Perjury Declaration") memorializing his direct conversations with various individuals—including his 1992 conversations with Hamilton—and his actions relevant to the Anderson matter. EX A-7. On February 29, 1996, Schafer prepared a memorandum (the "Explanatory Memo") explaining the Anderson matter and supporting documentation. BF 31-32. Schafer then provided those documents to the county prosecutor, the FBI, the IRS, the CJC, the OAG, and the ODC. BF 32 ¶35-38.

On April 26, 1996, Schafer faxed to offices of the *Tacoma News Tribune*, the *Seattle Times*, and the *Seattle Post-Intelligencer* selected pages from his petition filed in the Court of Appeals seeking review of Judge Thompson's order in the Barovic cases, including the *Filed*-stamped petition's cover and pages from it and its appendix that included the Perjury Declaration and the Explanatory Memo. EX A-12; BF 33. Schafer did so because 1996 was a superior court judicial election year, and Schafer was hoping to prevent Anderson from being re-elected as a superior court judge in an uncontested election. BF 33 ¶41.

Three and one-half years after Schafer's initial reports to appropriate authorities, this Court on July 29, 1999, unanimously found Anderson's conduct relating to the Hoffman estate to "clearly exhibit a pattern of dishonest behavior unbecoming a judge" and removed him from judicial office. *In re Discipline of Anderson*, 138 Wn.2d 830, 857, 981 P.2d 426 (1999). EX A-11. Subsequently, the State Bar and Anderson stipulated to the suspension of his law license for two years for having violated the Code of Judicial Conduct (but *not* the RPC's), which suspension was approved by this Court, and commenced, on May 4, 2000. BF 34 ¶44; EX D-32.

Relevant Procedure. On July 26, 1996, Hamilton, assisted by his lawyer Sloan, filed a grievance against Schafer with the ODC and in doing so expressly consented to the disclosure of any information relevant to it. EX D-36; BF 34 ¶42. On February 4, 1999, ODC completed its investigation of Hamilton's grievance and recommended that Schafer be charged with two counts of lying and one for disclosing Hamilton's confidences or secrets, which recommendation was approved by a review committee of the disciplinary board on April 13, 1999. BF 45-58; EX A-139. On May 26,

1999, ODC filed a Formal Complaint (BF 59) against Schafer on those three counts, to which Schafer filed an Answer (BF 66) on July 6, 1999. On January 25, 2000, the assigned hearing officer, lawyer Lawrence Mills, dismissed the two counts of lying after ODC invited him to do so, admitting that it had insufficient evidence to support them. BF 224-27. A five-day hearing (TR2) was held on the remaining count, from July 17 to 24, 2000. On August 21, 2000, the hearing officer entered his findings of fact, conclusions of law, and recommended sanction, that being a six-month suspension of Schafer's law license. BF 431. On January 12, 2001, the disciplinary board heard argument from ODC and Schafer (TR3), and on May 1, 2001, entered an order (BF 553) by the board's seven-member majority recommending to the Court a one-year suspension of Schafer's license. Two disciplinary board dissenters supported the hearing officer's recommended six-month suspension (BF 557), and one dissenter recommended a reprimand. BF 560.

ARGUMENT

1. What amount of information implicating a corrupt lawyer-judge is sufficient to cause appropriate disciplinary officials to recognize his corruption and remove him as a judge and lawyer?

The hearing officer concluded, as Conclusion of Law ¶12:

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

The disciplinary board approved that and all other findings of fact and conclusions of law by the hearing officer. BF 9. After initially declaring that "Reporting alleged ethical misconduct by a judge is absolutely necessary to maintain the integrity of the judicial system," the board added (BF 10):

> 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. ... It is not reasonable to believe that any of these disclosures were necessary to report suspected judicial or lawyer misconduct.

Though Anderson was removed by this Court from his judicial office three and one-half years after Schafer reported the clear evidence of his corruption, his case gives no comforting sign as to just what quantum of such evidence must be presented to disciplinary officials to lead them to act responsibly.

Notwithstanding all the evidence that Schafer presented to the ODC and the CJC, the lawyer disciplinary body never even charged Anderson (EX D-32) with violating the RPC's (which purport to require *honesty* of lawyers), and the judicial disciplinary body merely recommended, in April 1998, his censure and four-month suspension from judicial office. EX D-18. In contrast, Schafer's information, with evidence readily derived from it, showed that—

- Anderson and his law partner sold his good friend Hamilton[3] the Hoffman Estate's bowling business and property in 1993 for a total of $657,000 though it was formally appraised for $1,334,000 as of March 1989 and for $1,775,000 as of June 1993.[4] Anderson and Hamilton signed under penalty of perjury in October 1993 a tax affidavit certifying the bowling property's sale price was $508,096, and the same day First Interstate Bank closed Hamilton's $900,000 commercial property loan based on the second appraisal of the bowling center.[5]
- While Hamilton in 1993 was secretly paying for Anderson's new Cadillac, Anderson agreed to downwardly adjust his unpaid purchase price on the bowling business by about $93,000.[6]
- Hamilton in October 1992 placed all-risk casualty insurance on the bowling center building and claimed in July 1993 to first discover the structural failure of its roof trusses, though Anderson had informed Hamilton of that problem before September 1992. Hamilton recovered $525,000 from the insurance carrier.[7]
- Anderson and his law partners from 1989 through 1992 secretly took $125,000 in "management fees" from the Hoffman estate without disclosing it to any estate beneficiary or to the court commissioner from whom Anderson sought and obtained approval of an additional $112,000 as his personal representative's fee.[8]
- Anderson secretly collected about $81,000 in improper fees and commissions from selling assets of the Hoffman estate and related parties, in breach of his fiduciary duties to the estate.[9]
- Anderson with his law partners and friends engaged in blatant self-dealing with the assets of the Hoffman estate, selling to themselves for less than one-third of the market value over 20 timeshare units (weeks) in a two-bedroom condominium at the estate's Surfside Inn resort.[10]

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[3] Hamilton testified of Anderson, "He's as good a male friend as I have." EX D-16 p 260.
[4] EX D-23, p 6 and its exhibits; BF 247-61.
[5] EX D-11.
[6] EX D-18; EX A-11, *In re Discipline of Anderson*, 138 Wn.2d 830, 836-37, 981 P.2d 426 (1999).
[7] EX D-22; TR2 p. 602-26; EX D-15 Anderson Dep. p. 58, Fisher Dep. p. 41-41; EX A-139 p. 4; EX D-16 p. 256-57, 320.
[8] BF 263; EX D-16 pgs 47-48.
[9] BF 263; EX D-34 p. 000034-79, esp. 000057-61; EX D-16 p. 671-73.
[10] EX D-6; EX D-15 Anderson Dep. p. 80-84; EX D-16 p. 694.

- Anderson signed and filed a knowingly false tax affidavit concerning Surfside Inn timeshare units returned to the estate by a man who had been a "straw man" on the owners' association board for Hoffman.[11]
- Anderson with his law partners and staff knowingly prepared, dated, and signed materially false papers concerning the Hoffman estate, including a court-filed inventory and lease documents.[12]
- Anderson and Hamilton knowingly violated state gambling and liquor licensing laws in their management of the bowling center, which derives most of its revenue from gambling and liquor sales.[13]

Ten months after the CJC recommended a grossly inadequate sanction of Anderson, its better-informed outside disciplinary counsel prosecuting him emphatically stressed to this Court in February 1999 that "Grant Anderson was for sale."[14] And the chief executive of the rural public hospital that was the 90-percent beneficiary of the Hoffman estate testified to the state legislature in March 1999 that Anderson and his cronies "robbed" her community of $1.5 million that its benefactor, Charles Hoffman, had bequeathed to the hospital for greatly needed health care equipment.[15] And within days after this Court released its ruling removing Anderson, the CJC closed its ongoing investigation of him with *even more* charges of his moral turpitude and a public announcement that he had been "engaging in a pattern of dishonesty and deception over the past decade."[16]

In removing Anderson from judicial office (three and a half years after Schafer's reports to the authorities), this Court[17] found Hamilton's sworn testimony to be *unconvincing* and Anderson's "*simply not credible*" and "*to clearly exhibit a pattern of dishonest behavior unbecoming a judge*."[18]

Considering the pathetically or corruptly ineffective responses of our state's judge and lawyer disciplinary authorities to the collection of evidence that Schafer disclosed to them, it is silly and

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[11] EX D-15, Anderson Deposition of December 17, 1996, p. 33-43.
[12] EX D-14 p 1-5; EX A-8 p. 5 (Integrity Issue).
[13] EX D-16, p. 15, 51-54, 167-67, 329-30; EX D-15 Hamilton Deposition of January 21, 1997 p. 44; EX D-16 p. 88, 167, and 230.
[14] Oral argument on Feb. 9, 1999, by Paul Taylor, at 33 minutes into the RealPlayer audio file accessible at <http://198.239.32.162/ramgen/199902/1999020002A.ra> (at www.tvw.com; accessed Aug. 23, 2001).
[15] Testimony of Pamela Ott to the Wash. House of Representatives Judiciary Committee on March 18, 1999, on SSCR 8406, at 27 min. into the RealPlayer audio file accessible at <http://198.239.32.162/ramgen/199903/1999030096.ra> (accessed Aug. 23, 2001).
[16] EX D-14. The Statement of Charges included 16 exhibits comprising hundreds of pages. (available at http://www.cjc.state.wa.us/CJC_Activity/public_actions_1999.htm)
[17] By a panel that included only three of its current members, namely Justices Madsen, Smith, and Ireland.
[18] *Discipline of Anderson*, 138 Wn.2d 830, 848-49, 857, 981 P.2d 426 (1999).

disingenuous for the disciplinary board to suggest now that Schafer's disclosure of even less evidence would have caused them to respond appropriately.

2. What information obtained by Schafer relating to Judge Anderson might be characterized as a confidence or secret of Hamilton?

The disciplinary board objected to Schafer's disclosure of *statements* by his former client Hamilton, as illustrated by the emphasis added to that term in the following excerpt from the board's order:

> In 1996, Mr. Schafer disclosed his client's ***statements***, along with the voluminous documentation he had discovered in his investigation to the Commission on Judicial Conduct, the Pierce County Prosecutor's Office, the FBI, the IRS, the WSBA, and others. Before any of these offices had a chance to complete an investigation, Mr. Schafer filed a pleading in court containing his client's ***statements***. He did not request a protective order and testified that he filed the pleading, in part, to make the ***statements*** public. That same day he disclosed his client's ***statements*** to three newspapers. He testified that he hoped for press coverage and an investigation. ...
>
> 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. Mr. Schafer took no steps to protect this information. For example, he could have submitted his investigation results, without the client's ***statements***, and indicated that he had additional ***attorney-client privileged information*** that could be provided, with appropriate protections, upon court order.

We also emphasize in that excerpt the phrase "attorney-client privileged information" as it further illustrates the board's misconception that the phrase "confidences and secrets" is exactly synonymous with the phrase "attorney-client privileged information." The board's clear message is that Schafer should have disclosed only the investigative information and documents that were *not* covered by Hamilton's attorney-client privilege— as a client's private *statements* to an attorney normally are. But RPC 1.6(a) prohibits revelation of a client's "confidences" and "secrets," the two distinct terms being defined in the *Terminology* section of Washington's RPC's:

"Confidence" refers to information protected by the attorney-client privilege under applicable

> law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."[19]

Hamilton's *statements* initially appear to be confidences[20] for absent an exception under applicable evidence law (such as the common law "crime-fraud exception," discussed later), they would be protected by the attorney-client privilege. But the important question is this: what portion, if any, of the other information gained by Schafer from public records and private parties when he followed up on Hamilton's statements about Anderson would clearly *not* be secrets of Hamilton? All of Schafer's investigative information was directly traceable to Hamilton's statements.

From the 1969 ABA Code of Professional Responsibility ("CPR"),[21] one of the guiding Ethical Considerations, EC 4-4, under Canon 4 ("A Lawyer Should Preserve the Confidences and Secrets of a Client"), read in part:

> The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge.

This Court quoted that language in *In re McMurray*, 99 Wn.2d 920, 928, 665 P.2d 1352 (1983), in rejecting a disciplined attorney's defense that the client information he disclosed was readily available from another source.

> Charles W. Wolfram, *Modern Legal Ethics* (1986), states at §6.7.2:
>
> By definition, the fact that the attorney-client privilege does not extend to information does not mean that it should not be a secret. The secret protection applies, for example, to information *even if it is also contained in public records* .... (Emphasis added.)

In an Indiana disciplinary case, *In re Matter of Anonymous*, 654 N.E.2d 1128 (Ind. 1995), a lawyer had received information from a prospective client seeking to collect support arrearages from her minor child's father, who, she disclosed, was going to receive a substantial inheritance. The lawyer

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[19] This Court in 1985 adopted as our RPC's the 1983 ABA Model Rules of Professional Conduct ("MRPC"), but with many changes. One change was the rejection of the MRPC §1.6(a) phrasing of the confidentiality rule to cover "information relating to representation of a client." This Court continued the rule's scope as specifically covering "confidences" and "secrets," drafting into the new conduct rules the same definitions of those terms that had been in DR 4-101(A) of the CPR, the conduct rules then in force.

[20] In this brief, the terms *confidences* and *secrets* are used as defined in the RPC.

[21] In effect (with some variances) in this state from January 1972 until September 1985. The ABA's version is printed in ABA Center for Professional Responsibility, *Compendium of Professional Responsibility Rules and Standards* 155 (1999).

declined to represent her, but used the information to bring a collection action for another client against the father, who then impleaded the mother. The lawyer was disciplined even though the information he gained from the mother was readily available from public sources and not confidential in nature.

The Ohio Supreme Court recently held that a letter, that a lawyer's investigator had obtained from his client's mother, was a "secret" under DR 4-101(A) (identical to our RPC definition of "secret"), saying:

> Unlike "confidence," which is limited to information an attorney obtains directly from his or her client, the term "secret" is defined in broad terms. Therefore, a client secret includes information obtained from third-party sources, including information obtained by a lawyer from witnesses, by personal investigation, or by an investigation of an agent of the lawyer, disclosure of which would be embarrassing or harmful to the client.

In re Original Grand Jury Investigation, 89 Ohio St. 3rd 544, 733 N.E.2d 1135 (2000).

There is no policy reason why the concepts of tracing and causal connection that apply to the "fruits" of barred evidence ought not apply to the bar on disclosure of a client's secrets. Justice Guy, dissenting in *State v. Fjermestad*, 114 Wn.2d 828, 791 P.2d 897 (1990), described the "fruit of the poisonous tree" doctrine:

> Exclusion of evidence obtained by reason of the use of an unauthorized body wire extends not only to the contents of the transmission but to all evidence that may be causally connected to the contents of the transmission.

Justice Guy quoted from *State v. Aranguren*, 42 Wn. App. 452, 457, 711 P.2d 1096 (1985):

> [E]vidence will not be excluded as "fruit" unless the illegality is at least the "but for" cause of the discovery of the evidence. Suppression is not justified unless "the challenged evidence is in some sense the product of illegal government activity."

Prosecutors can overcome a reluctant witness's self-incrimination defense only by conferring on the witness not just immunity from use of the compelled testimony in subsequent criminal proceedings but also immunity from use of *evidence derived from* the testimony. *Kastigar v. United States*, 406 U.S. 441, 32 L. Ed. 2d 212, 92 S. Ct. 1653 (1972).

Many cases like *People v. Meredith*, 29 Cal.3d 682, 631 P.2d 46, 52 (1981), hold that "the attorney-client privilege is not strictly limited to communications, but extend to protect observations *made as a consequence of* protected communications." (Emphasis added.)

Many opinions use language like the following in *Watson v. Watson*, 171 Misc. 175, 11 N.Y.S.2d 537 (N.Y. Sup. Ct. 1939), to disqualify lawyers from any advocacy position "where, even

unconsciously, they might take, in the interests of a new client, an advantage *derived or traceable to,* confidences reposed under the cloak of a prior, privileged, relationship." (Emphasis added.) *E.g.*, *Darby v. Methodist Hospital*, 447 So. 2d 106 (La. Ct. App. 1984); *Cochran v. Cochran*, 333 S.W.2d 635 (Tex. Civ. App. Houston 1st Dist. 1960).

Vermont Bar Association Advisory Ethics Opinion[22] 88-1 disapproved a public defender law firm representing a murder suspect, for from the firm's prior representation of the victim it possessed copies of third-party affidavits about his violent nature that would be used to defend the murder suspect. The committee considered the affidavits to be secrets of the victim even though they were available in public court records. In contrast, the same committee soon followed with Ethics Opinion 88-6 expressing no disapproval on similar facts but where the firm declared—

> there is nothing that the public defender's office presently knows concerning the former client's reputation for violence that can be traced to confidences of secrets of the former client: all such evidence was independently derived and developed.

In conclusion, there is no law or policy support for the disciplinary board's (and hearing officer's) assertion that Schafer could have reported Anderson's corruption simply by disclosing the information that he gained from the public records and third-parties that he sought out when he followed up on Hamilton's statements. All that information was directly derived from, and traceable to, Hamilton's statements, so it all is properly characterized as *secrets* of his (but for the analysis hereafter presented).

3. Is information showing the events that precipitated a whistleblower's disclosures often determinative of whether or not disciplinary and law enforcement officials will objectively investigate the alleged misconduct disclosed by the whistleblower?

In *In re Discipline of Dann*, 136 Wn.2d 67, 960 P.2d 416 (1998), Justice Alexander criticized the respondent lawyer's strategy of impugning the whistleblower's motives (presumably pursued by his lawyers, David D. Swartling and Kurt M. Bulmer), saying, at page 81:

> [F]ar from showing repentance, his briefs to this court are full of animus toward the former DGR associate who initiated the WSBA investigation. He repeatedly characterizes the former associate as "disgruntled," as if the motives - even assuming the characterization to be true - of the employee in whistle-blowing have any bearing upon the wrongs that he brought to light."

While Justice Alexander's dismissal of the relevance of the whistleblower's motive is idealistic, that is

[22] http://www.vtbar.org/AdvisoryEthicsOpinions/index.htm (accessed August 30, 2001)

not what happens in the "real world." In real life, the *motive* is among the first things that investigators or other officials want to learn from a whistleblower, and it often determines whether or not they will zealously investigate the allegations he or she presents. Experienced defense counsel like Bulmer, who represented Anderson, are quite aware of that, and know that the strategy of impugning the reporting person's motives in fact *does work quite effectively* most of the time.

Schafer likewise knew that the law enforcement and disciplinary officials to whom he presented the information about Anderson would inquire as to why he had embarked upon his investigation. He believed that they need *all* of the information he possessed to most effectively do their jobs. And he suspected that evidence showing that righteous motives precipitated his investigation would quite possibly be needed to keep them from discounting his report as merely "sour grapes," for Anderson undeniably had ruled against Schafer's client Barovic in pending cases.

The dismissive, disinterested responses of the ODC, the county prosecutor's office, and the Office of the Attorney General all substantiate Schafer's suspicions. And confirming the importance of motive, Bulmer for four years employed a strategy on behalf of Anderson of fabricating and spreading, usually secretly, malicious lies to impugn Schafer's motives—widely reporting that Schafer's "attack" on Anderson resulted from his ruling denying Schafer attorney fees—so as to evoke sympathy for poor judge Anderson.[23] Bulmer's malicious lies were fed to ODC, the state legislature, the judiciary for the entire state, journalists, the disciplinary board, and to this Court.

Schafer voiced his concerns about Bulmer having "poisoned the well" by directing (with accommodating cooperation from ODC[24]) his malicious lies about Schafer's motives and character to the disciplinary board[25] and to this Court.[26] Those concerns continue to this day, for Bulmer still is what Sally Carter-DuBois described as a "power player"[27] in our state's legal fraternity.

4. Were Schafer's disclosures justified based upon a lawyer's moral duty to report judicial corruption?

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[23] EX D-24, D-25, D-26, D-27, D-34 p.000080–000104.

[24] Memo to Disciplinary Board from Douglas Ende (Feb. 4, 2000), EX D-32 p. 3-4 and listed Document No. 25 with attachments. The ODC collusively refused for nearly three years to provide to Schafer, Anderson's grievant, his initial response by Bulmer's letter to ODC of May 22, 1996. EX D-32 p.27-40.

[25] See the two preceding footnotes.

[26] The record supporting Anderson's stipulation, including Bulmer's malicious lies in Document No. 25, was submitted to this Court. Additionally, this Court's *Judicial News* clipping service for statewide judicial branch personnel on June 7, 1999, printed Bulmer's malicously lying 15-page "Media Release" but its editor refuse Schafer's request that it print his response. EX D-25.

[27] EX D-3; EX D-33 (Documenting Bulmer's "insider" status); EX D-23 and D-31.

There is no shortage of lofty prose espousing idealism concerning judges, lawyers, and our judicial system. *E.g*., "[A]n honorable judiciary is indispensable to justice in our society." Code of Judicial Conduct, Canon 1. "Lawyers, as guardians of the law, play a vital role in the preservation of society." RPC Preamble, Second paragraph.

Lawyers are said to be "officers of the court"[28] with duties, among other things, "to defend judges and courts from unjust criticism." RPC 8.2(c). But in this state (unlike most others),[29] lawyers are *not required* to report even clear evidence of a judge's corruption to authorities. RPC 8.3(b).

After the FBI's Operation Greylord in Chicago-area courts ended in 1984 by exposing a score of corrupt judges and scores of corrupt court employees and lawyers, a "blue ribbon" commission blamed the rampant corruption on the "conspiracy of silence" among lawyers and judges, saying:[30]

> [At page 7] One of the principal attributes of a profession is its ability and willingness to regulate itself. The failure of the legal profession to police its members—to report misconduct of others within the legal community—casts doubt on whether the profession's long-standing tradition of self-regulation will endure.
> [At page 74] If professional ethics are to have meaning, attorneys and judges must have a clear understanding of their moral obligations, and those moral duties must be enforced. Consequently, the attorney and judicial disciplinary systems must be strengthened.

Schafer recognized his moral obligation to report his clear evidence of judge Anderson's corruption and to take all actions permitted under the law to bring about his removal from judicial office at the earliest moment.

Judge Anderson posed a "true threat" not just to Schafer's client Barovic and other litigants who appeared before him expecting justice, but to the greater society that confidently relies on there being an honest judiciary.

In *State v. Hansen*, 122 Wn.2d 712, 862 P.2d 117 (1993), this Court emphatically held at page 721 (repeating itself apparently for emphasis):

> To decide this case, we must determine whether an attorney has an affirmative duty to

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[28] In *Fite v. Lee*, 11 Wn. App. 21, 521 P.2d 964, 97 A.L.R.3d 678 (1974), the court said of lawyers: "As an officer of the court, his duties are both private and public. When the duties to his client to afford zealous representation conflict with his duties as an officer of the court to further the administration of justice, the private duty must yield to the public duty. He therefore occupies what might be termed a 'quasi-judicial office.'"

[29] Noteworthy failure-to-report cases are *In re Himmel*, 533 N.E.2d 790 (Ill. 1988) (one-year suspension for failure to report a lawyer's theft) and *In re Matter of Dowd*, 160 A.D.2d 78, 559 N.Y.S.2d 365 (N.Y. App. Div. 2d Dep't 1990) (five-year suspension for failing to report, and paying, kickbacks demanded by a lawyer who was an elected public official).

[30] Final Report of the Special Commission on the Administration of Justice in Cook County (September 1988) [obtained by Schafer from Jerold S. Solovy, its Chairman.]

> warn judges of true threats made by his or her client or by third parties. Whether a threat is a true or real threat is based on whether the attorney has a reasonable belief that the threat is real. We hold that attorneys, as officers of the court, have a duty to warn of true threats to harm members of the judiciary communicated to them by clients or by third parties.
>
> ... We conclude that attorneys, as officers of the court, have a duty to warn of true threats to harm a judge made by a client or a third party when the attorney has a reasonable belief that such threats are real.

The Court offered no analysis to explain its broadly worded, twice stated, directive to the legal community. No such *duty* in to be found in the RPC's, and RPC 1.6(a) even prohibits a lawyer from disclosing a client's secret that another party (*e.g.*, a relative or friend) intends to harm a judge. But the Court simply applied its common sense (and self-preservation sense). There is nothing unethical in applying common sense and morality. A New York judge wrestling with a knotty case in which lawyer disclosed client secrets to thwart his friend's threatened suicide, stated:

> The ethical oath of secrecy must be measured by common sense. ... To exalt the oath of silence, in the face of imminent death, would, under these circumstances, be not only morally reprehensible, but ethically unsound.

People v. Fentress, 103 Misc. 2d 179, 425 N.Y.S.2d 485 (1980). In another prevent-suicide scenario, the Utah State Bar's Ethics Advisory Opinion Committee issued its Opinion 95 (1989)[31] approving preventative disclosures of a client's secrets notwithstanding the absence of an applicable exception in its lawyer conduct rules,[32] saying:

> In view of the compelling interest in disclosing a suicide threat to authorities, it is believed that the better course of action is to free the attorney from the strict requirements of the Rule 1.6(b)(1).

Such a recognition that a higher public interest might trump client secrecy is not new. In the leading lawyer ethics treatise of the last mid-century, Henry S. Drinker, *Legal Ethics* (1953), under the topic of confidentiality at page 137, the author says:

> Although Canon 37 contains no specific exception covering communications where disclosure to the authorities is essential to the public safety, such is necessarily implied.

The Supreme Court of Canada recently approved, based upon public safety, a psychiatrist's voluntary disclosures to a sentencing judge of attorney-client privileged information on the homicidal intentions of

[31] http://www.utahbar.org/opinions/

[32] Other similar ethics opinions recognizing that moral duty sometimes trumps the written lawyer conduct rules are Delaware Bar Assoc. Prof. Ethics Comm. Op. 1988-2; Georgia State Bar Disciplinary Board Advisory Op. 42 (1984), and ABA Standing Comm. on Ethics and Prof. Resp. Informal Op 83-1500.

a client whose lawyer had arranged the psychiatric evaluation for his defense. *Smith v. Jones*, [1999] 1 S.C.R. 455.[33] It certainly can be said that public safety requires the exposure and removal of corrupt judges just as much as common criminals and corrupt lawyers. In that regard, RPC 8.3 provides:

> (a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, *should* promptly inform the appropriate professional authority.
>
> (b) A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office *should* promptly inform the appropriate authority.
>
> (c) This rule does not *require* disclosure of information otherwise protected by rule 1.6. (Emphasis added.)

Subsections (a) and (b) can easily be read as expressing a lawyer's moral duty, but with subsection (c) making its fulfillment *permissive* rather than *mandatory* if the information is otherwise protected by rule 1.6. And there is authority,[34] and common sense, supporting an interpretation of subsection (c) that denies its applicability if the client whose secret would be disclosed is actively conspiring in the legal professional's misconduct.

Considering the clear information that Schafer possessed of Anderson's corruption, his disclosure of it in 1996 was morally justified.

5. Were Schafer's disclosures justified based upon a judicially created crime-fraud exception to attorney-client confidentiality?

In the ABA Annotated Model Rules of Professional Conduct (4th Ed. 1999), the authors discuss exceptions to the duty of confidentiality, at 72:

> The rule of confidentiality is not absolute. ...[I]ts purpose is to encourage unfettered communication between lawyer and client and to facilitate legal consultation and advice. ... A number of situations present occasions when total adherence to the confidentiality principle would defeat other important societal values or legal duties. In these situations, exceptions to the general rule will either require or permit disclosure. Some are set forth in Rule 1.6(b), and *others are institutionalized through case law*. (Emphasis added.)

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[33] Avail. at http://www.lexum.umontreal.ca/csc-scc/en/index.html.

[34] Connecticut Bar Association's Ethics Committee Informal Opinion 95-17 declares rule 8.3(c) inapplicable if the client is involved in the lawyer's fraudulent activity. The opinion is at BF 529-32, and is discussed at BF 506-07. In *Meyerhofer v. Empire Fire and Marine Ins. Co.*, 497 F.2d 1190 (2nd Cir. 1974), a lawyer had disclosed to S.E.C. enforcement officials and to private parties the recent securities fraud committed by his supervising lawyers and a client, and the appellate court found no CPR violation in his conduct.

This Court's opinion in *State v. Hansen*, previously discussed, is a clear example of judicial case law setting forth an exception to the general confidentiality principle. The judicially created crime-fraud exception (hereafter the "CFE") to the confidentiality principle is another institutionalized case law exception, for it rejects the existence of any legitimate *professional relationship*[35] when a client seeks to use a lawyer to further or to conceal a crime or fraud.

Some recent[36] judicial expressions of the CFE, which *usually* arises in the context of allegedly privileged testimony, are as follows:

> The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reason for that protection—the centrality of open client and attorney communication to the proper functioning of our adversary system of justice—ceases to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing. It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the "seal of secrecy," between lawyer and client does not extend to communications made for the purpose of getting advice for the commission of a fraud or crime. (Citations and quotations omitted.) *United States v. Zolin*, 491 U.S. 554, 562, 105 L. Ed. 2d 469, 109 S. Ct. 2619 (1989).
>
> Although there is a societal interest in enabling clients to get sound legal advice, there is no such interest when the communications or advice are intended to further the commission of a crime or fraud. The crime-fraud exception thus insures that the secrecy protecting the attorney-client relationship does not extend to communications or work product made for the purpose of getting advice for the commission of a fraud or crime. (Citations and quotations omitted.) *In re Richard Roe, Inc.*, 68 F.3d 38, 40 (2nd Cir. 1995)
>
> The essential building block in the justification of the exception, then, is the judgment that statements made in furtherance of a crime or fraud have relatively little (if any) positive impact on the goal of promoting the administration of justice. ... [T]he attorney-client privilege exists as matter of policy, not as a matter of logic. The benefits of full and frank communication between clients and attorneys generally have been deemed to outweigh the costs of probative evidence foregone. The balance shifts, however, when a client communicates for the purpose of advancing a criminal or fraudulent enterprise. Because such communications do not create a net benefit to the system, the rationale that underpins the privilege vanishes (or, at least, diminishes markedly in force). *In re Grand Jury Proceedings (Violette)*, 183 F.3d 71, 76 (1st Cir. 1999).
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> The case law dealing with the crime-fraud exception in the attorney-client context makes it transparently clear that the client's intentions control. *See, e.g., Clark*, 289 U.S. at 15 ("The attorney may be innocent, and still the guilty client must let the truth come out."); *United*

[35] By definition, a *secret* can only arise within a *professional relationship*. RPC Terminology.
[36] *Recent* is a relative term, for the CFE originated 117 years ago.

> *States v. Ballard*, 779 F.2d 287, 292 (5th Cir. 1986) (stating that the exception attaches "when the lawyer becomes either the accomplice or the unwitting tool in a continuing or planned wrongful act"); *United States v. Calvert*, 523 F.2d 895, 909 (8th Cir. 1975) (explaining that "[i]t is the client's purpose which is controlling, and it matters not that the attorney was ignorant of the client's purpose"). *Id. at 79.*
>
> The [crime-fraud] exception does not apply if the assistance is sought only to disclose past wrongdoing, *see Zolin*, 491 U.S. at 562, but it does apply if the assistance was used to cover up and perpetuate the crime or fraud. *See In re Grand Jury Proceedings (Company X)*, 857 F.2d at 712; *see also In re Grand Jury Proceedings (Doe)*, 102 F.3d 748, 749-51 (4th Cir. 1996) (applying exception where client used lawyers, without their knowledge, to misrepresent or to conceal what the client had already done); *In re Richard Roe, Inc.*, 68 F.3d 38, 40 (2d Cir. 1995) (noting that exception applies where "communication with counsel or attorney work product was intended in some way to facilitate or to conceal the criminal activity"); *In re Sealed Case*, 754 F.2d 395, 402 (D.C. Cir. 1985) ("To the limited extent that past acts of misconduct were the subject of the cover-up that occurred during the period of representation, however, then past violations properly may be a subject of grand jury inquiry."). *In re Grand Jury Subpoenas (Roe)*, 144 F.3d 653, 660 (10th Cir. 1998).

Additional briefing of recent cases[37] articulating the present breadth of the judicially created CFE may be found in Schafer's submissions to the hearing officer. BF 125-36, BF 243-46. But a full understanding of the CFE requires looking at its origins and policy-based foundations as consistently applied by courts for over a century. The CFE was announced in the landmark case of *Queen v. Cox*, 14 Q.B. 153 (1884),[38] in which the full ten-judge panel of the English Queen's Bench was convened to resolve recognized problems attributed to an absolutist view of attorney-client confidentiality that was announced in 1833 by Lord Broughman in *Greenough v. Gaskell*, 39 Eng. Rep. 618 (1833), where he stated (remarkably like the confidentiality mantra of absolutists today):

> If, touching matters that come within the *ordinary scope of professional employment*, they [attorneys] receive a communication *in their professional capacity*, either from a client or on his account, and for his benefit in the transaction of his business, or, which amounts to the same thing, if they commit to paper, in the *course of their employment* on his behalf, matters which they know only through their *professional relation* to the client, they are not only justified in withholding such matters, but bound to withhold them, and will not be compelled to disclose the information or produce the papers in any court of law or equity, either as a party

[37] One is noteworthy here for the lawyer's response, like Schafer's, to his client's request for complicity: *United States v. Reeder*, 170 F.3d 93, 106 (1999) ("I don't want anything to do with it. Don't ever discuss it with me again.")

[38] Discussed recently in David J. Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. Rev. 443, 456-66 (1986) and discussed extensively in the New Jersey and Missouri cases, cited in the text, that shortly followed the 1884 case. *See also* Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 Cal. L. Rev. 1061, 1063 n.6, 1086-87 (1978).

or as a witness. (Emphasis added for reasons later discussed.)

Note that Lord Broughman's rule addresses *both* the attorney's duty of confidentiality and the testimonial privilege, so references in *Queen v. Cox* to "the rule" refer that two-pronged confidentiality rule. The *Queen v. Cox* panel felt that the confidentiality rule ought *not* apply to shield a client's wrongdoing facilitated by an attorney, so it focused on the concept of the legitimacy of the wrongdoer's employment of an attorney and held that no *professional employment* or *professional relationship* arises when a client uses an attorney while intending to commit crime or fraud. The passage from *Queen v. Cox* that has been repeatedly quoted (hereafter referred to as the "*Queen v. Cox* passage") for over a century is this:[39]

> In order that the rule may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his advisor professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object, he reposes no confidence, for the state of facts, which is the foundation of the supposed confidence, does not exist. The solicitor's advice is obtained by a fraud.

Illuminating extensive discussions of *Queen v. Cox* are found in *Hamil & Co. v. England*, 50 Mo. App. 338, 1892 Mo. App. LEXIS 328 (1892), and in Part VII of *State v. Faulkner*, 175 Mo. 546, 75 S.W. 116, 1903 Mo. LEXIS 78 (1903). Both report that Justice Stephen, the author of *Queen v. Cox*, quoted approvingly from an earlier case, reported in *Hamil* as:

> In that case Lord Hatherly makes use of this terse language: "There is no confidence as to the disclosure of iniquity. You cannot make me the confidant of a crime or a fraud, and be entitled to close up my lips upon any secret which you have the audacity to disclose to me relating to any fraudulent intention on your part; such a confidence cannot exist." Referring to the privilege of communication between attorney and client, he adopts as his own this language: "If he is employed as an attorney in any unlawful or wicked act, his duty to the public obliges him to disclose it; no private obligations can dispense with that universal one which lies on every member of society to discover every design which may be formed contrary to the laws of society to destroy the public welfare."

The New Jersey Court of Chancery promptly adopted *Queen v. Cox*, stating in *Matthews v. Hoagland*, 48 N.J. Eq. 455, 21 A. 1054, 1891 N.J. Super. LEXIS 127 (N.J. Ch. 1891):

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[39] *E.g.*, *State v. Phelps*, 24 Or. App. 329, 334, 545 P.2d 901 (1976); also quoted in *In re Marriage of Decker*, 153 Ill. 2d 298, 606 N.E.2d 1094, 1101 (Ill. 1992).

> In the course of his opinion, Mr. Justice Stephen quotes with approval the following remarks by Lord Cranworth in *Follet v. Jefferyes*, 1 Sim. (N.S.) 1 (at p. 17): "It is not accurate to speak of cases of fraud contrived by the client and solicitor in concert together, as cases of exception to the general rule. They are cases not coming within the rule itself: for the rule does not apply to all which passes between a client and his solicitor, but only to what passes between them in professional confidence; and *no court can permit it to be said that the contriving of a fraud can form part of the professional occupation of an attorney or solicitor*."
>
> ... [T]he rule as laid down by the court of queen's bench should be adopted, not only on account of the great weight of such an authority, but because it puts the question of privileged communications on high ground of honesty and integrity, worthy of the dignity and honor of the profession of the law. (Emphasis added.)

The doctrine of *Queen v. Cox* was quickly adopted by jurisdictions throughout the United States,[40] partly explainable by it being reported in 5 Am. Crim. Rep. 140, according to the opinion in *Orman v. State*, 22 Tex. Ct. App. 604, 3 S.W. 468, 1886 Tex. Crim. App. LEXIS 296, 58 Am. Rep. 662 (Tex. Crim. App. 1886), which summarized it as requiring as a condition of confidentiality that the communication arise "in the legitimate course of professional employment of the attorney." The *Queen v. Cox* case was discussed and implicitly adopted, but distinguished as not applicable to the facts of the case, in *Alexander v. U.S.*, 138 U.S. 353, 34 L. Ed. 954, 11 S. Ct. 350 (1891).

This Court, in 1899, recognized the doctrine of *Queen v. Cox*, but without directly citing it, in *Hartness v. Brown*, 21 Wash. 655, 668, 59 P. 491 (1899), saying, "The rule, however, is well settled that communications made to counsel in contemplation of fraud or a criminal act are not privileged." It should be noted that at least until the writing, in the late 1960's, of the ABA's Code of Professional Responsibility—which distinguished client information that is privileged under the law of evidence from information subject only to a duty of confidentiality—the term "privileged" was widely used to refer to *both* categories of information,[41] so "not privileged" would then have meant neither subject to a duty of

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[40] Researching citations to *Queen v. Cox*, 14 Q.B. 153 (1984), is challenging due to its many permutations: The prosecution is sometimes *The Queen*, *Regina*, *Reg.*, and *R*; the defendants sometimes are *Cox and Railton* or *Cox & Railton*; the reporter is sometimes *Q.B.D.*, *L.R.Q.B.D.*, and *Q.B.L.R.*; and the year reported is sometimes 1885.

[41] To illustrate, in *Dike v. Dike*, 75 Wn.2d 1, 11, 448 P.2d 490 (1968), this Court said, "The attorney-client privilege, as defined in Canon 37, is not absolute; but rather is subject to recognized exceptions." But Canon 37 (of the ABA's 1908 Canons of Professional Ethics) defines no evidentiary privilege, but sets out *only* the lawyer's duty of confidentiality.

The leading ethics treatise of the mid-century, Henry S. Drinker, *Legal Ethics* (1953), in its discussion of the Canon 37 duty of confidentiality, makes frequent references to protected information as "privileged." *E.g.*, at page 135: "The privilege is not nullified by the fact that the circumstances to be disclosed are part of a public record."

The clearest example of the common two-pronged meaning of "privileged" is ABA Formal Ethics Opinion 341 (1975) interpreting the phrase "privileged communication" to meaning *both* confidences and secrets where it was used in the 1974 "except clause" amendment to DR 7-102(B)(1) [that few states ever adopted].

confidentiality nor excludible under the law of evidence.

This Court again applied the doctrine of *Queen v. Cox* in *State v. Richards*, 97 Wash. 587, 591, 167 P. 47 (1917), quoting from a treatise:

> [T]here is no privilege as to communications made in contemplation of the future commission of a crime, or perpetuation of a fraud, in which, or in avoiding the consequences of which, the client asks the advice or assistance of the attorney.

The *Queen v. Cox*-created CFE received great visibility when Justice Cardozo used it to support an analogous crime-fraud exception to a juror's deliberations privilege in *Clark v. United States*, 289 U.S. 1, 77 L. Ed. 993, 53 S. Ct. 465 (1933). He said, at 15:

> There is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told. ... To drive the privilege away, there must be "something to give colour to the charge;" there must be "prima facie evidence that it has some foundation in fact." (Citation omitted.) When that evidence is supplied, the seal of secrecy is broken. *See also*: *Regina v. Cox*, [1884] 14 Q.B.D. 153, 157, 161, 175. ... Nor does the loss of the privilege depend upon the showing of a conspiracy, upon proof that client and attorney are involved in equal guilt. The attorney may be innocent, and still the guilty client must let the truth come out. *Regina v. Cox*, supra . ...
>
> With the aid of this analogy, we recur to the social policies competing for supremacy. A privilege surviving until the relation is abused and vanishing when abuse is shown to the satisfaction of the judge has been found to be a workable technique for the protection of the confidences of client and attorney.

But by the 1930's, there was no doubt that the CFE, born of *Queen v. Cox*, was firmly established. In 1936, *Nadler v. Warner Company*, 321 Pa. 139, 184 A. 3, 1936 Pa. LEXIS 666 (1936), collected cases then recognizing the doctrine in the following passage (which was quoted as still good law in *In re Investigating Grand Jury*, 527 Pa. 432, 593 A.2d 402 (1991)):

> Cases in other jurisdictions hold that the privilege does not protect communications made for the purpose or in the course of the commission of proposed crime or fraud. The reason for the nonapplication of the rule has been variously stated: "... no Court can permit it to be said that the contriving of a fraud can form part of the professional occupation of an attorney or solicitor": *Follett v. Jefferyes*, 1 Sim. (N.S.) 1, 61 Eng. Repr. 1. [The full *Queen v. Cox* passage was quoted here.]: *Queen v. Cox*, 14 Q.B.D. 153, 168. "Such communications were not made to the attorney, in his professional capacity, as they were such, as he could not receive in such capacity, and therefore, were not privileged": *Standard Fire Ins. Co. v. Smithhart*, 183 Ky. 679, 685, 211 S.W. 441. *See, too*, *Matthews v. Hoagland*, 48 N.J. Eq. 455, 469, 21 A. 1054. When the advice of counsel is sought in aid of the commission of

> crime or fraud, the communications are not "confidential" within the meaning of the statute and may be elicited from the client or the attorney on the witness stand. "There is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told": *Clark v. U.S.*, 289 U.S. 1, 15.

Against this backdrop of the well-settled CFE originating in *Queen v. Cox*, the ABA in 1928 added Canons 33 to 45 to its 1908 Canons of Professional Ethics,[42] Canon 41 of which read:

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

As adopted, Canon 41 plainly reflected the *Queen v. Cox* doctrine: that a client's use of a lawyer to further a crime or fraud is not recognize under the law as legitimate professional employment necessary to establish a confidential professional relationship. The Alabama Supreme Court in *Sawyer v. Stanley*, 241 Ala. 39, 1 So. 2d 21 (1941), in addition to quoting the *Queen v. Cox* passage, said:

> [S]ince the perpetration of a fraud is outside the scope of the professional duty of an attorney, no privilege attaches to a communication between attorney and client with respect to the establishment of a false claim. ... In 125 A.L.R. 512 et seq., state and federal authorities, as well as those from England, Ireland and Canada are collected to the effect that the great majority of the cases hold that the privilege "protecting communications between attorney and client is lost if the relation is abused, as where the client seeks advice that will serve him in the commission of a fraud." ...
>
> It may be said further that the reason most frequently advanced for this exception to the rule of privileged communications is that there is no professional employment, properly speaking, in such cases. ...
>
> The Michigan court in *People v. Van Alstine*, 57 Mich. 69, 23 N.W. 594, 598, [1885 Mich. LEXIS 747] in holding not privileged communications to an attorney having for their object the commission of a crime, said: "They then partake of the nature of a conspiracy, or attempted conspiracy, and *it is not only lawful to divulge such communications, but under certain circumstances it might become the duty of the attorney to do so*. The interests of public justice require that no such shield from merited exposure shall be interposed to protect a person who takes counsel how he can safely commit a crime. The relation of attorney and client cannot exist for the purpose of counsel in concocting crimes." (Emphasis added)

[42] Printed in ABA Center for Professional Responsibility, *Compendium of Professional Responsibility Rules and Standards* 311 (1999).

Thirty years later, the Virginia Supreme Court in a disbarment proceeding, *Seventh District Committee v. Gunter*, 212 Va. 278, 183 S.E.2d 713 (1971), again recognized the absense of a legitimate professional relationship when a client pursues crime or fraud, saying:

> The protection which the law affords to communications between attorney and client has reference to those which are legitimately and properly within the scope of a lawful employment and does not extend to communications made in contemplation of a crime, or perpetration of a fraud. If the client does not frankly and freely reveal his object and intention as well as facts, there is not professional confidence and therefore no privilege. ...
>
> If the communication between attorney and client relates to unlawful or fraudulent accomplishment, higher public policy, and the duty of an attorney to society as a whole, abrogates the privilege. If the client does not disclose his fraudulent purpose there is no confidential relationship established, and no attaching privilege. ...
>
> [T]he perpetration of a fraud is outside the scope of the professional duty of an attorney ....
>
> [T]he privilege cannot avail to protect the client in concerting with the attorney in a crime or other evil enterprise. This is for the logically sufficient reason that no such enterprise falls within the just scope of the relation between legal adviser and client. (Citations omitted.)

Commentators discussing the CFE recognized the essence of the *Queen v. Cox* doctrine, as when an unknown Harvard Law School student author in 1964 cited that case for the correct statement, "The rationale for the exception in these cases is ... [that] the type of professional relationship that the privilege was designed to foster is absent."[43]

It is within this consistent body of law giving meaning to the phrase "professional relationship," that the ABA promulgated in 1969, and this Court adopted for this state in 1972, the Code of Professional Responsibility ("CPR") which, at DR 4-101(A), defined "secrets" as limited to certain "information gained in the *professional relationship*" with a client. That term and definition were carried over by this Court in 1985 into our current Rules of Professional Conduct,[44] so the term "secrets" should

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[43] Note, *The Future Crime or Tort Exception to Communication Privileges*, 77 Harv. L. Rev. 730, 731 n.12 (1964). Such statements continue throughout the professional literature. *See, e.g.*, Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 Iowa L. Rev. 1091, 1118 (1985) ("When the attorney is used to pursue goals that the client knows are illegal, invocation of the crime or fraud exception is simply another way of saying that no attorney-client relationship has been formed".); Ronald L. Motley and Tucker S. Player, *Issues in "Crime-Fraud" Practice and Procedure: The Tobacco Litigation Experience*, 49 S.C. L. Rev. 187, 195 (1998) ("The proper attorney-client relationship cannot exist when communications are intended to aid unlawful activity."); Fred C. Zacharias, *Harmonizing Privilege and Confidentiality*, 41 S. Tex. L. Rev. 69, 78 (1999) ("The theory of the crime-fraud principle is that a client who uses a lawyer to further an ongoing or future crime is not, in fact, using the lawyer as a lawyer.")

[44] Robert H. Aronson, *An Overview of the Law of Professional Responsibility: The Rules of Professional Conduct Annotated and Analyzed*, 61 Wash. L. Rev. 823 (1986). *See* n. 31 and its associated text. And notice particularly p. 843 and n. 101 where Professor Aronson quoted the *Queen v. Cox* passage and observes that "the client has not

continue to have the same meaning that it had when the CPR was written and adopted.

In addition to the meaning inherent in the use of the phrase "professional relationship" in the CPR's definition of "secret," the drafters of the 1969 CPR explicitly implemented the *Queen v. Cox* doctrine in DR 7-102(B)(1) which read:[45]

> (B) A lawyer who receives information clearly establishing that:
>
> (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal.[46]

The legal profession in this country suffered something of a *coup d'état* in 1983 when trial lawyers (reportedly significantly driven by fears of liability and other self-interests[47]) organized in shrill opposition[48] to the continued recognition of the *Queen v. Cox* doctrine (which had always been the

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sought advice from a lawyer *acting in his professional capacity*" (emphasis his) if the client did so intending to commit a future crime.

[45] This Court's version of DR 7-102(B)(1), as adopted with the full CPR effective January 1, 1972, and continued in force until September 1, 1985, ended with "...shall reveal the fraud to the affected tribunal and may reveal the fraud to the affected person."

[46] The ABA in 1974 amended DR 7-102(B)(1) by appending to it the phrase "except when the information is protected as privileged communications," but reportedly only 13 state courts ever adopted that amendment. In Washington, the ABA's "except clause" amendment was never even proposed for adoption by this Court, for our state bar's board of governors rejected it by a 9-to-1vote for the stated reason that "client confidence should not override justice." Washington State Bar News, April 1977, page 23.

According to commentators, the ABA's "except clause" amendment was a defensive measure because the S.E.C. in 1972 had taken enforcement actions against leading Wall Street law firms that, through their silence, knowingly ***enabled*** their clients to commit massive securities fraud. See, e.g., Ted Schneyer, *Professionalism as Bar Politics: The Making of the Rules of Professional Conduct*, 14 Law & Social Inquiry 677, 689 (1989) (an outstanding historical account); Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C.L. Rev. 1389, 1423 n.144 (1992) (an extraordinary insightful and interesting analysis of normative differences between lawyers and lawmakers/enforcers).

The ABA's confused and misguided tinkering with DR 7-102(B)(1) has been soundly criticized: *E.g.*, Charles W. Wolfram, *Client Perjury*, 50 So. Cal. L. Rev. 809, 836-38, n.105-06 (1977); Ronald R. Rotunda, *The Notice of Withdrawal and the New Model of Professional Conduct: Blowing the Whistle and Waving the Red Flag*, 63 Ore. L. Rev. 455, 467-70 (1984); Geoffrey C. Hazard, Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 Emory L.J. 271, 294-96 and n.38 (1984).

[47] *See, e.g.*, Koniak, *supra* n. 46, p. 1444 n. 234 (quoting a House of Delegates debate statement, "If you begin to open the door in a way that really seriously undermines the lawyer privilege then the lawyer who does not make disclosures is exposed to very serious sanctions and liability because of the charge ... that he could have made disclosure."); Schneyer, *supra* at n. 46, at p. 725, (section entitled "Defensive Ethics."); Stephen Gillers, *What We Talked About When We Talked About Ethics: A Critical View of the Model Rules*, 46 Ohio St. L.J. 243, 245, 256 (1985) ("The confidentiality rules, to the extent they impose duties on lawyers that substantive law does not, benefit the profession. ... Though the confidentiality duty does not yield in the face of injustice to others, it dissolves if there is peril to the professional or financial interests of the lawyer."); Limor Zer-Gutman, *Revising the Ethical Rules of Attorney-Client Confidentiality: Towards a New Discretionary Rule*, 45 Loyola L. Rev. 669, 681 (1999) ([T]he profession's self-interests are what really dictate the confidentiality rules." See note 56.

[48] *E.g.*, Schneyer, *supra* at n. 25, p. 701-23; Koniak, *supra* at 25, p. 1441-46.

substantive law, but many lawyers were "in denial"[49]) by the Kutak Commission's inclusion of that doctrine in its proposed rule 1.6 to the then proposed Model Rules of Professional Conduct. The profession has endured a divisive civil war[50] over that issue ever since, that continues to rage today.[51] That civil war has been described as the trial bar fighting with the counseling bar[52] and academia.[53] The latter group has declared the *Queen v. Cox* doctrine as still a part of American common law though their publication (with the judiciary) of that doctrine as §67 of the acclaimed American Law Institute, *Restatement of the Law Governing Lawyers* (2000);[54] and the former group has defeated, at the ABA Convention in early August 2001, the restatement of that doctrine in an amendment to MRPC 1.6 proposed by the ABA's Ethics 2000 Commission[55] (Chaired since August 1997 by Delaware's Chief Justice Norman Veasey).[56]

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49 *E.g.*, Koniak *supra* note 46, at 1443 n.231; Hazard, *supra* note 46 at 298 ("The Kutak proposal was essentially consistent with the law as it stood, soberly considered.")

50 Harris Weinstein, *Client Confidence and the Rules of Professional Responsibility: Too Little Consensus and Too Much Confusion*, 35 S. Texas L .Rev. 727, 732 (1994) ("Intense warfare broke out within the organized bar. The trial bar vigorously opposed, while the counselling bar generally supported, the Kutak proposal.")

51 *E.g.*, Geoffrey C. Hazard, Jr., *Lawyers and Client Fraud: They Still Don't Get It*, 6 Geo. J. Legal Ethics 701 (1993); Margaret C. Love and Lawrence J. Fox, *Letter to Professor Hazard: Maybe Now He'll Get It*, 7 Geo. J. Legal Ethics 145 (1993); Mark Hansen, *The New Model Rules*, 87 A.B.A.J. 50-52 (Jan. 2001) (discussing proposals of the ABA's Ethics 2000 Commission).

52 Kenneth F. Krach, *The Client-Fraud Dilemma: A Need for Consensus*, 46 Md. L. Rev. 436, 464 (1987) (proposing separate sets of ethical rules for lawyer-advisors and for lawyer-advocates); David Rosenthal, *The Criminal Defense Attorney, Ethics and Maintaining Client Confidentiality: A Proposal to Amend Rule 1.6 of the Model Rules of Professional Conduct*, 6 St. Thomas L. Rev. 153 (1993) (discussing conflicts between moralists and role-differentiationists [mercenaries]).

53 The scholarly works calling for a correction of the ABA's misguided 1983 turn that made lawyers passive "**enablers**" of client crime and fraud are overwhelming: In addition to *every other article cited in this brief,* see Roger C. Cramton and Lori P. Knowles, *Professional Secrecy and its Exceptions: Spaulding v. Zimmerman Revisited*, 83 Minn. L. Rev. 63 (1998): Fred C. Zacharias, *Rethinking Confidentiality*, 74 Iowa L. Rev. 350 (1989); Gilda M. Tuoni, *Society Versus the Lawyers: The Strange Hierarchy of Protections of the "New" Client Confidentiality*, 8 St. John's J. of Legal Commentary 439 (1993); Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 Hofstra L. Rev. 311 (1990) ("It is ludicrous to allow the client to abuse the system by using a lawyer's talent, while simultaneously taking refuge in the confidentiality principle." p.327); Irma S. Russell, *Cries and Whispers: Environmental Hazards, Model Rule 1.6, and the Attorney's Conflicting Duties to Clients and Others*, 72 Wash. L. Rev. 409 (1997); Irma S. Russell, *Unreasonable Risk: Model Rule 1.6, Environmental Hazards, and Positive Law*, 55 Wash. & Lee L. Rev. 117 (1998); Lonnie Kocontes, *Client Confidentiality and the Crooked Client: Why Silence Is Not Golden*, 6 Geo. J. of Legal Ethics 283 (1992); Kenneth J. Drexler, *Honest Attorneys, Crooked Clients and Innocent Third Parties: A Case for More Disclosure*, 6 Geo. J. of Legal Ethics 393 (1992).

54 The academics and judiciary recognize that most United States jurisdictions have adopted lawyer confidentiality rules that more closely resemble the *Queen v. Cox* doctrine than resemble the ABA's 1983 MRPC 1.6; see the Proposed Final Draft No.2 of the Restatement's §117B (which became §67 upon publication), particularly the chart of variations among the 51 jurisdictions, at BF 173-86;

55 See its Proposed Rule 1.6 Discussion Draft and explanatory materials at BF 190-202; the Ethics 2000's Final Report is at http://www.abanet.org/cpr/e2k-report_home.html.

56 The rhetoric has become somewhat unprofessional (and telling). Vocal dissenter on the Ethics 2000 Commission, Lawrence J. Fox, (and others) frequently shrieked that under the proposed rule "lawyers could be liable for something they learned about a client but didn't disclose." Hansen, *supra* note 51 at 51. Fox himself published, "The

It is worth noting that other countries that derive their common law from 19th century England continue to recognize that the *Queen v. Cox* doctrine applies *both* to a lawyer's duty of confidentiality as well as to the client's evidentiary privilege. The Law Society of England and Wales, governing 89,000 solicitors in those countries, states in *The Guide to the Professional Conduct of Solicitors* (Eighth Ed. 1999),[57] at §16.02:

> **16.02 Circumstances which override confidentiality**
> The duty to keep a client's confidences can be overridden in certain exceptional circumstances.
> 1. The duty of confidentiality does not apply to information acquired by a solicitor where he or she is being used by the client to facilitate the commission of a crime or fraud, because that is not within the scope of a professional retainer. If the solicitor becomes suspicious about a client's activities the solicitor should normally assess the situation in the light of the client's explanations and the solicitor's professional judgement. [14 more listed circumstances are omitted.]

The Canadian Bar Association's 1974 and 1987 editions of its *Code of Professional Conduct*[58] state in Note 9 of its Chapter IV on Confidentiality that, "There is no duty or privilege where a client conspires with or deceives his lawyer: *The Queen v. Cox* (1885), L.R. 14 Q.B.D. 153 (C.C.R)." That identical note citing *Queen v. Cox* is incorporated into the lawyer conduct codes of the Canadian provinces. *E.g.*, The Law Society of Saskatchewan, *Code of Professional Conduct* (1991);[59] The Law Society of New Foundland, *Code of Professional Conduct* (1998).[60]

One need not look to other countries to see the continued vitality of the *Queen v. Cox* doctrine.[61] In *In re Marriage of Decker*, 204 Ill. App. 3d 566, 562 N.E.2d 1000 (Ill. App. Ct. 4th Dist. 1990), a snatch-the-child case, the intermediate appellate court stated at 572:

> [A] client's intent to commit a crime, unlike a client's identity in "unique and unusual" circumstances, is not a "confidence" or "secret" as those terms are defined under the Code of Professional Responsibility. To qualify as such, a communication must be made within the

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liability creating effect will occur when lawyers, who no longer will have the shield of Rule 1.6's prohibition on disclosure of confidential information to explain a failure to disclose where client fraud was involved ..." Lawrence J. Fox, *Ethics 2000: Is it Good for the Clients?*, The Professional Lawyer, Vol 12, Spring 2001 p.19; "Academics have this lofty notion that lawyers should do good for society. But I'm not buying it. I don't think we should but the lawyers in a position where they have duties to the public, except in the case of death or bodily harm." Fox quoted in Sarah Boxer, *Lawyers Are Asking, How Secret Is a Secret?*, The New York Times, Aug. 11, 2001, Arts Section (avail. on Internet).

[57] http://www.guide-on-line.lawsociety.org.uk/ (accessed Aug. 23, 2001).

[58] The 1974 edition is posted, over CBA's objections, by an Indiana institute at http://csep.iit.edu/codes/coe%5CCanada_bar_ass.html (accessed August 13, 2001). The 1987 edition is in the collection of the Gallagher Law Library, at U.W. in Seattle.

[59] http://www.lawsociety.sk.ca/newlook/Publications/Code2001/CodeCh4.htm

[60] http://www.lawsociety.nf.ca/complaints/code_chap4.htm

[61] In 1996, 16 U.S. jurisdictions by their conduct codes required or permitted lawyer disclosures when a client had used their services to commit a crime or fraud. BF 183-84.

> ambit of a legitimate professional relationship. Announcing plans to engage in future criminal conduct or seeking legal advice in furtherance of illegal ends are always outside the scope of any valid attorney-client relationship.

That ruling and its reasoning were upheld on appeal by the Illinois Supreme Court in *In re Marriage of Decker*, 153 Ill. 2d 298, 606 N.E.2d 1094 (1992), in which the court quoted the *Queen v. Cox* passage (at N.E.2d at 1101), then held:

> [A]ny intention to commit the crime of child abduction would not be a confidence protected by the duty of confidentiality, as the crime-fraud exception would apply. Moreover, *if this information could be considered a secret* under the Code and Rules, it must also be disclosed in this situation. (Emphasis added.)

One justice who dissented from the opinion on unrelated grounds nonetheless joined in the majority's ruling on the crime-fraud exception, saying at page 1109:

> As the majority opinion correctly notes, disclosures to a lawyer in furtherance of criminal or fraudulent activity are outside the protection of the attorney-client privilege. That is to say, such communications are not privileged. *Neither are such communications protected by the rule of confidentiality.* (Emphasis added.)

The next year, the Illinois State Bar Association issued Advisory Opinion 93-16[62] which analyzed a question in light of the then existing Illinois law governing lawyer confidentiality, that it described as follows:

> **Exceptions to the Rule of Confidentiality**
> An exception to the attorney-client privilege and the attorney's fiduciary duty of confidentiality under Rule 1.6 is the "Crime Fraud" exception. If the client "seeks or obtains the services of an attorney in furtherance of criminal or fraudulent activity", *Decker*, at 1101, the communications to the attorney with respect to such activity would not be privileged nor could the attorney be bound by a fiduciary duty of confidentiality toward them. *Decker*, at 1104.

In California, in recent cases involving lawsuits by former in-house lawyers against their former employers, its courts have held that *all* of the exceptions to California's statutory attorney-client privilege (including its crime-fraud exception[63]) are also exceptions to the lawyer's duty of confidentiality.[64] In *General Dynamics v. Superior Court*, 7 Cal. 4th 1164, 876 P.2d 487 (1994), the Supreme Court said, at 1189, that when deciding a lawyer's claim of wrongful discharge for opposing or

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[62] http://www.illinoisbar.org/CourtsBull/EthicsOpinions/93-16.asp (acc'd Aug. 28, 2001)

[63] California Evidence Code § 956. Avail. at http://www.leginfo.ca.gov/calaw.html.

[64] The author concurs with that reading of *General Dynamics* as stated in Cramton and Knowles, *supra* note 53, n. 196 on p. 125. BF 170.

reporting (*i.e.*, whistleblowing) their client-employer's wrongdoing—

> the court must determine whether some statute or ethical rule, such as the statutory exceptions to the attorney-client privilege codified in the Evidence Code ((case cite omitted); §§ 956-958) specifically permits the attorney to depart from the usual requirement of confidentiality with respect to the client-employer and engage in the "nonfiduciary" conduct for which he was terminated.

More recently, in *Fox Searchlight Pictures v. Paladino*, 89 Cal. App. 4th 294, 2001 Cal. App. LEXIS 377, ___ P.3d ___ (Cal. App. 2d Dist. 2001), the court recognized, at 314, that the State Bar Court (the California lawyer disciplinary body) had—

> "held the duty of confidentiality expressed in Business and Professions Code section 6068 Bus. & Prof., subdivision (e) [stating the duty as absolute and without exception] is modified by the exceptions to the attorney-client privilege contained in the Evidence Code."

In addition, the California Bar's lawyer conduct investigatory and prosecutorial body recently demonstrated sound judgment in declining to prosecute a government lawyer, Cindy Ossias, who in 2000 "blew the whistle" on her client-employer, the state's corrupt insurance commissioner (who resigned in disgrace upon his exposure), disclosing his *dirty* secrets notwithstanding unclarity under the applicable lawyer conduct rules as to whether doing so was "ethical." BF 511, 521-25.

The judgment demonstrated by the California state bar officials perhaps explains the complete absense of any reported case in the country disciplining a lawyer for reporting a corrupt judge or other public official, or even for disclosing a client secret under circumstances in which the information would be unprivileged by reason of the crime-fraud exception.

Washington state courts on many occasions over the last century have applied the CFE,[65] but have had no opportunity to apply it to a lawyer's voluntary disclosure, though this Court indicated a readiness to do so in *Seventh Elect Church v. Rogers*, 102 Wn.2d 527, 688 P.2d 506 (1984):

> [W]e disapprove of any attempt by a client to use the rule of confidentiality in such a way as to involve his attorney in the concealment of his assets so as to defraud judgment creditors.

This case presents that once-in-a-century opportunity: Hamilton's 1992 use of Schafer to prepare corporate documents furthering his fraudulent[66] bargain-

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[65] *Hartness v. Brown*, 21 Wash. 655, 668, 59 P. 491 (1899); *State v. Richards*, 97 Wash. 587, 591, 167 P. 47 (1917); *Dike v. Dike*, 75 Wn.2d 1, 14, 448 P.2d 490 (1968); *State v. Metcalf*, 14 Wn. App. 232, 239-40, 540 P.2d 459 (1975); *Whetstone v. Olson*, 46 Wn. App. 308, 310, 732 P.2d 159 (1986); *State v. Hansen*, 122 Wn. 2d 712, 720-21, 862 P.2d 117 (1993).

[66] While the record provides not just *prima facie*, but clear and convincing evidence of Hamilton's fraudulent

price purchase of the bowling business and property from a probate estate being administered by one of his closest friends,[67] lawyer Anderson (*then becoming a judge*), to whom he was then intending a to pay a *kickback*, was *not* within the ambit of a legitimate professional relationship, so the information he then imparted to Schafer was *not* a "secret" as defined in the RPCs.

6. Were Schafer's disclosures justified based upon a lawyer's moral duty to rectify or mitigate a client's fraud in which the lawyer had been used?

As previously noted, Canon 41 of the ABA's 1908 Canons of Professional Ethics,[68] which remained in force in this state until 1972, expressed the lawyer's moral duty to "promptly inform the injured person" upon dicovery that his client had practiced a "fraud or deception" using his services. That moral duty to rectify a client's fraud was expressly recognized in this state's CPR DR 7-102(B)(1) ("may report the fraud to the affected person") that remained in force until September 1985. Whether this Court's replacement of our CPR with the RPC was consciously intended to, or did, reject that century-old moral duty is a debatable question.

A great deal of "lip service" and "shelf space" is devoted to admonitions to the legal profession fulfill its moral duty to the society that it serves. But since about 1983, the bugle of those with a self-serving and mercenary view of lawyering, and who disclaim any duty to society,[69] has marshalled the greater army of lawyers to shed their profession's tradition of morality. Those mercenaries' claims—that near absolute attorney-client confidentiality is necessary in order to serve their clients—simply cannot be squared with the facts that, in addition to the always extant evidentiary crime-fraud exception, the rectify-fraud exception to confidentiality has been one of our profession's core norms for over a century and 16 U.S. jurisdictions have never abandoned it, nor have England, Wales, Canada, or Australia. Clients in those jurisdictions are still well-served by lawyers!

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intentions when he used Schafer's services in 1992, Schafer is confident that he could have exposed considerably more such evidence had the hearing officer not wrongfully barred him from discovery of such. *See, e.g.*, BF 567-69, 121-38, 212-19, and Deposition Transcript of Jerry Williams, M.D., esp. pgs. 5-8. (Filed under this Court's Docket No. 68957-1.)

[67] Hamilton testified of Anderson, "He's as good a male friend as I have." EX D-16 p. 260.

[68] Declared by RCW 2.48.230 to be "the standard of ethics for the members of the bar of this state."

[69] Philadelphia lawyer Lawrence J. Fox (former head of the ABA's Section of Litigation and of the ABA's Standing Committee on Ethics and Professional Responsibility) recently was quoted as saying, "Academics have this lofty notion that lawyers should do good for society. But I'm not buying it. I don't think we should put the lawyers in a position where they have duties to the public, except in cases of death or bodily harm." Sarah Boxer, *Lawyers Are Asking, How Secret is a Secret?* The New York Times, August 11, 2001 (Arts Section) (Avail. on Internet.). The preface to the American Trial Lawyers Association's Code of Conduct similarly disclaims any "general duty to do good for society." See Koniak, *supra* note 46, at 1442.

The pillars of our profession continue to seek the express restoration of our moral traditions, but the masses at our ABA conventions continue to reject them. The moral leadership of our profession will need to come from the respective state supreme courts, including this one. As was said in 1987 by Jerrold Solovy,[70] the post-Operation Greylord's "chief pathologist" examining the cancer that had spread within the Chicago-area courts, "What we need from the Illinois Supreme Court ... is leadership, moral leadership."[71]

From the evidence that Schafer possessed in early 1996, it was clear that a rural public hospital had been "robbed" by lawyers (the ringleader of whom was then a judge) and other "professionals" of about a million and a half dollars that could have been employed to serve the health care needs of its community. No *moral* person can deny that Schafer had a moral duty to act to rectify that fraud, particularly when his services had been used by Hamilton to further it.

7. Were Schafer's disclosures justified based upon a lawyer's duty to report misconduct by a court-appointed fiduciary?

This Court adopted, effective September 1, 1990, RPC 1.6(c) stating:

> (c) A lawyer may reveal to the tribunal confidences or secrets which disclose any breach of fiduciary responsibility by a client who is a guardian, personal representative, receiver, or other court appointed fiduciary.

This provision, unique to our state, resulted from a recommendation to this Court by our State Bar's Board of Governors ("BOG").[72] A lawyer in 1987 or early 1988 had inquired to the State Bar's Rules of Professional Conduct Committee ("RPC Committee") as to his duties upon learning of serious misconduct, such as the theft of estate funds, by a client serving as personal representative or guardian. The RPC Committee proposed responding with a Formal Opinion stating that the lawyer could *not* disclose the serious misconduct by his fiduciary client, and must simply withdraw if the client refused to rectify his misconduct. At its November 1988 meeting, the BOG "did not disagree that the proposed opinion was a correct reading of the Washington Rules," but nonetheless "was unwilling to approve a

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[70] Chairman of the Special Commission on the Administration of Justice in Cook County (1984–88); Chairman of Chicago's Jenner & Block law firm.

[71] Martha Middleton, *Chicago Courts Reel From Corruption Probe*, National Law Journal (March 2, 1987).

[72] Due to their limited availability, a separate Appendix includes the archived State Bar materials concerning the adoption of RPC 1.6(c), including the RPC Committee Subcommittee's Report, the Proposed Amendment's GR 9 Cover Sheet, and memoranda by State Bar General Counsel Robert B. Welden.

formal Opinion which would candidly recognize[73] that the Washington RPC's gave the Rule on confidentiality (RPC 1.6) such an overriding priority."[74] At the direction of the BOG, the RPC Committee, through a Subcommittee of its own, then drafted and proposed subsection (c) to RPC 1.6, the stated purpose of which was "to permit a lawyer to disclose to the tribunal misconduct by a court-appointed fiduciary so as *to avoid permitting such a client from committing fraud upon the tribunal*."[75] (Emphasis added.) The BOG approved the proposed subsection (c) in November 1989, and this Court also did shortly thereafter.[76] Due to their limited availablility, the Appendix includes the archived State Bar materials concerning the adoption of RPC 1.6(c), including the Subcommittee's Report, the Proposed Amendment's GR 9 Cover Sheet, and memoranda by State Bar General Counsel Robert B. Welden.

Of some significance, the Subcommittee Report observed:[77]

> The RPC's cannot provide a simple bright-line answer to every ethical problem a lawyer confronts, but they ought not put a lawyer in the position of not being able to be candid with the tribunal as respects breaches of trust by court-appointed fiduciaries in cases where the lawyer perceives that the proper administration of the trust estate dictates that disclosure be made.

The Subcommittee Report opined at page 2:

> [I]t is clear the attorney cannot assist the client in concealing past material breaches of fiduciary responsibility from discovery by the trust beneficiaries or the court. (RPC 1.15[a][1] and RPC 8.4[c]. [Footnote 2 followed, the text of which read:]
>
> To do so would assist a fiduciary in deceiving his or her beneficiaries. That is conduct involving deceit of person entitled to a full and faithful accounting of the client's stewardship. As such, the attorney's assistance in concealing the misconduct is itself professional miscon-

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[73] Professor Robert H. Aronson sternly had admonished the State Bar and this Court for not having adopted RPC, in 1985, as the Kutak Commission had proposed it—rejecting the rectify fraud provision, saying:

> At a time when public respect for lawyers is at an all-time low, and lawyers have been increasingly found in complicity with their client's criminal or fraudulent conduct, it is unfortunate that the Washington Supreme Court has gone on record as *lessening* the duty of lawyers to protect the public from their clients' criminal conduct. ... [A] client is entitled to complete confidentiality with respect to proper legal representation, but has no justified expectation of confidentiality when he uses the attorney to perpetrate a fraud on another person. It is a mistake for Washington to prohibit revelation under those circumstances when it required revelation under the CPR. (Emphasis his.)

Aronson, *supra* note 44, p.832.

[74] Quoted passages are from the *Report of Subcommittee on Rule Change Re: Misappropriation by Guardian or Personal Representative*, August 30, 1989 ("Subcommittee Report").

[75] GR 9 Cover Sheet to Proposed Amendment, under the heading, "Purpose."

[76] This event at least raises questions about the foresight of the State Bar bodies that in 1985 had proposed our customized version of the RPC's that this Court then adopted. Nobody apparently anticipated that a court-appointed fiduciary (or a judge) might be flagrantly dishonest, presenting an informed lawyer with a knotty ethical question.

[77] At Subcommittee Report Exhibit B, *Notes Concerning Interpretation of the Rule*, p.3.

duct under RPC 8.4(c).

The Subcommittee Report continued, on page 2, opining that a lawyer's continued representation in court proceedings of a fiduciary client who the lawyer knew to have materially breached his or her duties would constitute "assisting a criminal or fraudulent act" violative of RPC 3.3(a)(2), dismissing contrary arguments in footnote 3, that read:

> While *a technical argument might be made that* if the issue is "past" missapropriation *the fraud is an acomplished fact* and, hence, the lawyer's failure to disclose it to the court is not "assisting" a fraudulent act by the client prohibited by RPC 33 [*sic*., 3.3] (a)(2), *such a reading perverts the ethical sense of the Rule itself*. (Emphasis added.)

Of significance, the Subcommittee Report, adopted (or at least forwarded) by the full RPC Committee, then the BOG, then this Court, recognizes that the RPCs must be applied without applying technical arguments that defeat the policies sought to be achieved by the rules.

The policy of RPC 1.6(c) is that the duty of confidentiality does not trump the obligation of lawyers to guard against *fraud on the court* by exposing the misdeeds of court-appointed fiduciaries who might defraud the beneficiaries of estates that are under the court's supervision. This Court recognizes both personal representatives[78] and guardians[79] are officers of the court, and regularly holds that transferees of property from disloyal fiduciaries are constructive trustees holding it for the rightful beneficiaries.[80] In light of that, it was consistent with the policy underlying RPC 1.6(c) for Schafer reasonably to determine that the policy of RPC 1.6(c) justified exposing the fraud that Anderson, as court-appointed personal representative of a probate estate, and Hamilton, as constructive trustee of assets from that estate, had perpetrated upon a rural public hospital that was the primary beneficiary of that estate.

8. Were Schafer's disclosures justified based upon whistleblower protection policies?

We recognize that effective enforcement of our laws and rules depends upon the willingness of persons to report observed violations to appropriate officials. Because the fear of adverse personal consequences deters many persons from reporting lawlessness, we have enacted various whistleblower provisions both to overcome those fears and to protect those who do report.

Rule 12.11(b) of Washington's Rules for Lawyer Discipline grants full protection to persons who report lawyer misconduct, stating that such communications "are absolutely privileged, and no lawsuit

[78] *Hesthagen v. Harby*, 78 Wn.2d 934, 942, 481 P.2d 438 (1971).
[79] *Seattle-First Nat. Bank v. Bommers*, 89 Wash. 2d 190, 200, 570 P.2d 1035 (1977).
[80] *E.g., Viewcrest Cooperative Assoc. v. Deer*, 70 Wn.2d 290, 422 P.2d 832 (1967).

predicated thereon may be instituted against any grievant, witness or other person providing information." RCW 2.64.080 provides a similar shield to persons reporting misconduct by judges to the CJC, making their statements "absolutely privileged in actions for defamation." The Washington Legislature adopted a comprehensive whistleblower protection bill in 1989, codified at RCW 4.24.500 through –.520. The central provision of that bill, RCW 4.24.510, provides:

> A person who in good faith communicates a complaint or information to any agency of federal, state, or local government regarding any matter reasonably of concern to that agency shall be immune from civil liability on claims based upon the communication to the agency. A person prevailing upon the defense provided for in this section shall be entitled to recover costs and reasonable attorneys' fees incurred in establishing the defense.

Schafer communicated in good faith to appropriate federal, state, and local officials and appropriate disciplinary authorities information that clearly established the existence of fraudulent misconduct by Anderson, Hamilton, and several lawyers and accountants. The policies underlying our state's various whistleblower protection provisions have already been thwarted by this case even having proceeded to this level of appeal. How many Washington lawyers (and even those in other states) who learn of Schafer's ordeal will likely report misconduct by any well-connected lawyer or judge, regardless of the outcome of this appeal?

In considering those whistleblower protection policies, recognize that they normally are balanced against claimed infringements of civil rights that otherwise could be vindicated through normal litigation (*e.g.*, defamation, invasion of privacy). But here Hamilton had no cognizable cause of action for Schafer's disclosure of his alleged secrets under RPC 1.6(a), for this Court has declared the RPCs do not create substantive rights upon which clients may sue their lawyers. *Hizey v. Carpenter*, 119 Wn.2d 251, 830 P.2d 646 (1992). Hamilton's information certainly would not have been *privileged* under the law of evidence due to the crime-fraud exception. And *truth* would have been a complete defense to any defamation action by Hamilton. His "rights" simply were not violated.

So the *balancing* is simply of the whistleblower protection policies and the policy supporting the preservation (actually: restoration) of integrity to a department of the Pierce County Superior Court, on the one hand, against, on the other hand, the harm (if any) to the profession and to public confidence in our legal institutions from a lawyer disclosing an alleged secret of a client who had used the lawyer to further his conspiracy with the corrupt judge that defrauded a rural public hospital of $1.5 million and yielded for the judge a Cadillac kickback.

In *Dike v. Dike,* 75 Wn.2d 1, 14, 448 P.2d 490 (1968), this Court balanced "society's interest in the administration of justice" against an attorney-client "shield of silence" that would "aid the client in continuing his wrongdoing at the expense of other members of society." The Court there recognized the first outweighed the second.[81]

In *Hawkins v. King County*, 24 Wn. App. 338, 343, 602 P.2d 361 (1979), the Court of Appeals cited *Dike* and also *Sowers v. Olwell*, 64 Wn.2d 828, 394 P.2d 681 (1968), and observed:

> *Olwell* and *Dike* make clear our Supreme Court's willingness to limit the attorney's duty of confidentiality when the values protected by that duty are outweighed by other interests necessary to the administration of justice.

This is just such a case.

9. Were Schafer's disclosures justified because Hamilton did not intend in 1992 that his statements to Schafer concerning Anderson be considered as confidential attorney-client communications?

Hamilton's 1992 statements to Schafer were memorialized by the latter in his Perjury Declaration (EX A-7) prepared in February 1996. The statements by Hamilton were described by Schafer as this:

> He said that an attorney he knew, Grant Anderson, had been "milking" an estate for four years and was about to become a judge, so he needed to quickly sell the estate's business, Pacific Lanes, in order to close the estate before he took the bench. Hamilton said that he had agreed to buy the business. It was either in that phone conversation or when we met on August 17, 1992, that Hamilton commented that there was no time for an appraisal of the business, that Anderson was giving him a good deal, and that Hamilton would repay him "down the road" by paying him as corporate secretary or something like that.

ODC Disciplinary Counsel Julie Ann Shankland's letter of August 15, 1996, to Schafer (EX D-32, p. 52-61 of 65) closing her "investigation" of Anderson stated, at page 5:

> Mr. Hamilton agrees that he made the statements you attribute to him. He states, however, that you have misinterpreted those statements. Mr. Hamilton states that by "milking" the estate, he meant that lawyer Anderson was working hard to turn the estate assets into more profits than losses, and generate cash for the beneficiaries. Mr. Hamilton emphatically states that lawyer Anderson, to his knowledge, was not gaining any personal advantage from

[81] Courts traditionally refuse to aid wrongdoers who seek damages from agents who have exposed their lawlessness. *See, e.g., Willig v. Gould*, 75 Cal. App. 2d 809, 171 P.2d 754 (1946) (agent reported his principal's fraud to the damaged party); *Lachman v. Sperry-Sun Well Surveying Company*, 457 F.2d 850 (10th Cir. 1972) (surveyor reported principal's knowing theft of neighbor's underground oil and gas notwithstanding confidentiality clause in their contract).

the estate. ...

Mr. Hamilton agrees that he told you that Pacific Lanes was a good deal -- but that he was only referring to the terms of the option. Originally, lawyer Anderson wanted Hamilton to purchase Pacific Lanes outright. Mr. Hamilton was only willing to lease the bowling alley, with an option to purchase. Lawyer Anderson agreed, and the deal was signed.

Ms. Shankland's report of Hamilton remarks is consistent with his deposition testimony during the CJC investigation (EX D-15, Hamilton Deposition of January 21, 1997, p. 26):

Q [by Mr. Taylor]: Did you tell Mr. Schafer that you wanted to reward Grant Anderson for giving you a good deal on the bowling alley?

A [by Mr. Hamilton]: No, I did not.

Q: Did you make the statement to Mr. Schafer that Judge Anderson had been milking the Hoffman estate?

A: I have read that statement, but I don't recall the statement specifically, but if asked that question, milking the estate, since I know nothing about the fee arrangements or anything of that nature, would have had nothing to do with that end of it. I did know of the assets of the estate. I knew of what they call the beach arrangement. I had been involved, to a minor extent, with Hoffman, and, therefore, I know that Judge Anderson – now, at that point, Grant Anderson – had created cash out of chaos, therefore milked the assets, the non-liquid assets, the unsalable assets and converted them into money. .... If I had used that phrase, it would have been something along the line of that I have stated.

Consistent with Hamilton's other deposition testimony, quoted earlier on page 3, he later testified at Anderson's disciplinary hearing, in response to the question, "You went to Mr. Schafer for what purpose?" Hamilton replied, "I went to Mr. Schafer strictly for the purpose of forming the corporation." EX D-16 p. 222.

Substantial case law recognizes the common law principle that not all statements made by a person to their lawyer are made within the penumba of attorney-client confidentiality. It is only those statements that are made for the purpose of seeking advice from the attorney in his "professional capacity." *See, e.g., United States v. Evans*, 113 F.3d 1457 (7th Cir. 1997); *United States v. Chen*, 99 F.3d 1495, 1501 (9th Cir. 1996); and *United States v. Tedder*, 801 F.2d 1437, 1441-43 (4th Cir. 1986).

In *People v. Gionis*, 9 Cal. 4th 1196, 892 P.2d 1199 (1995), an angry husband served with divorce papers beckoned a lawyer-friend to his home. Though the lawyer clearly declined to represent the husband in the action, during the visit he did review the divorce papers and advised the husband to seek a change in venue and to quickly retain a good attorney. During their meeting, the husband made angry comments that he easily could hire thugs to assault his wife at some future time. The majority opinion recognized (p. 1209) that the two men discussed "legal matters," and a concurring-dissenting

justice asserted (p. 1224) that an attorney-client relationship sprang from that, but both the majority and the dissenting-concurring judge found that the husband's inculpatory comments were not privileged because they were not made to seek advice from the lawyer in a professional relationship. They cited an earlier case, *Solon v. Lichtenstein*, 39 Cal.2d 75, 244 P.2d 907 (1952), in which a client had met with his lawyer to discuss the transfers of cemetery lots, but the balance of the conversation between him and the lawyer concerning the division of his property upon his death was later held not privileged because it was not related to the lawyer's professional employment. While both *Gionis* and *Solon* were cases dealing with evidentiary privilege, both courts denied privilege as to statements not given to seek *advice in the professional relationship*; and on the same analysis Hamilton's comments to Schafer in 1992 about Anderson were not secrets relating any advice that Hamilton was seeking in a professional relationship with Schafer–who he engaged solely to form his corporation.

In addition, if one is to believe Hamilton's explanation (as the ODC did), even made under oath, that he meant "milking an estate" as a compliment of Anderson's astute businesslike administration of the Hoffman estate, then Hamilton's statement could *not* have been intended—at the time that he uttered it in 1992—as a secret.

10. Were Schafer's disclosures of Judge Anderson's corruption to disciplinary and law enforcement officials protected by the right-to-petition and the due process clauses of our federal and state constitutions?

In addition to the weakly-prescribed admonition, in RPC 8.3, that lawyers "should" report serious professional misconduct to appropriate authorities, stronger statements of duty are often made when the wrongdoing rises to a serious level[82]. In *Roberts v. United States*, 445 U.S. 552, 63 L. Ed. 2d 622, 100 S. Ct. 1358 (1980), the Court approved the weight given at sentencing to a convict's non-cooperation with law enforcement authorities, saying:

> Concealment of crime has been condemned throughout our history. The citizen's duty to "raise the 'hue and cry' and report felonies to the authorities (citation omitted) was an established tenet of Anglo-Saxon law at least as early as the 13th century. ... Although the term "misprison of felony" now has an archaic ring, gross indifference to the duty to report known criminal behavior remains a badge of irresponsible citizenship.

The reporting of lawlessness within the executive branch of our national government has been held a duty of government lawyers that even trumps a President's claim of attorney-client privilege. *In re*

[82] Compare other states' mandatory reporting requirement. See note 29.

Lindsey, 332 U.S. App. D.C. 357, 158 F.3d 1263, 1273 (D.C. Cir. 1998) ("If there is wrongdoing in government, it must be exposed.")

No citation of case law should be necessary to cause this Court to recognize that Due Process, under both state and federal constitutions, is probably lacking in the courtroom of a superior court judge whose conduct is found by this Court to "clearly exhibit a pattern of dishonest behavior" and who is further charged by the CJC, after lengthy investigation, to have been "engaging in a pattern of dishonesty and deception over the past decade." *See, Bracy v. Gramley*, 520 U.S. 899, 138 L. Ed. 2d 97, 117 S. Ct. 1793 (1997).

Each citizen has a protected Constitutional right to petition government officials to carry out their duties. In *Kottle v. Northwest Kidney Centers*, 146 F.3d 1056 (9th Cir. 1998), the court said:

> The First Amendment to the United States Constitution guarantees the right "to petition the Government for a redress of grievances." U.S. Const. amend. I, cl. 6. The Supreme Court has long recognized that for the Petition Clause to be a meaningful protection of the democratic process, citizens must be immune from some forms of liability for their efforts to persuade government officials to adopt policy or perform their functions in a certain way. In *Eastern RR Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 81 S. Ct. 523, 5 L. Ed.2d 464 (1961), the Court rejected antitrust liability stemming from an aggressive lobbying campaign by railroads to persuade states to adopt legislation that would severely limit competition from truckers. The Court explained that "[i]n a representative democracy such as this . . . the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Id*. at 137, 81 S.Ct. 523. ...
>
> The Court subsequently expanded the holding of Noerr to include activities aimed at the executive and judicial branches of government. ...
>
> This circuit has clarified that the Noerr-Pennington doctrine is not merely a narrow interpretation of the Sherman Act in order to avoid a statutory clash with First Amendment "values." Rather, the doctrine is a direct application of the Petition Clause, and we have used it to set aside antitrust actions premised on state law, as well as those based on federal law. ...
>
> Noerr-Pennington protects advocacy before all branches of government ....

Other cases have applied the Noerr-Pennington doctrine as granting First Amendment protection to persons and groups that have petitioned government officials to discipline or terminate subordinate government officials. *E.g.*, *Eaton v. Newport Bd. Of Educ.*, 975 F.2d 292 (6th Cir. 1992) (Lobbying a school board to fire a school principal.) Such cases uphold the complainants' First Amendment shield even against claims of invasion or deprivation of recognized lawful rights asserted by the claiming third persons.[83] But, as noted above, in this case, Hamilton has no deprived property right or other

[83] This Court has applied the Petition Clause in our state constitution, Constit. art. I, § 4, consistent with the First Amendment. *Richmond v Thompson*, 130 Wn.2d 368, 922 P.2d 1343 (1996).

cognizable cause of action that he could assert against Schafer for the alleged breach of a duty of confidentiality. Instead, the Schafer's alleged violation of a professional rule of conduct must be weighed against his recognized First Amendment rights. In other cases, this Court has held that a lawyer's or judge's exercise of First Amendment rights cannot be considered a violation of their professional conduct rules. *In re Discipline of Sanders*,135 Wn.2d 175, 955 P.2d 369 (1998); *In re Kaiser*, 111 Wn.2d 275, 759 P.2d 392 (1988). *See, also, Bates v. State Bar of Arizona*, 433 U.S. 350, 53 L. Ed. 2d 810, 97 S. Ct. 2691 (1977) (Bar's code of conduct found unconstitutional); *Butler v. State Judicial Inquiry Comm.*, ___ So.2d ___ , 2001 Ala. LEXIS 285 (Ala. May 15, 2001) (Judicial code of conduct found unconstitutional.).

11. Were Schafer's disclosures to the press of copies of a pleading that had been filed in a public court file protected by the right of free speech under our federal and state constitutions, particularly when information in those papers indicated the corruption of a superior court judge who was about to seek re-election?

After Schafer had filed a Petition (EX A-10) in the Barovic cases with the clerk of the state Court of Appeals, Division II, he provided copies of its cover page and selected other pages from that then ***public*** document to journalists. EX A-12. Neither the ODC, the hearing officer, nor the disciplinary board have ever raised any objection to Schafer's action in filing at that appellate court the Petition with its appendix of relevant papers. Their objection is that he then provided copies to "the press."

Before continuing, keep in mind the hearing officer's Conclusion of Law No. 12, that the disciplinary board fully adopted:

> 12. The information and documents obtained by Schafer from the public records would have been *more than sufficient* to allow Schafer to carry out his primary objective of seeing that a *corrupt* judge was removed from the bench .... (Emphasis added.)

At oral argument before the disciplinary board, Disciplinary Counsel Gray protested repeatedly (ten times) that Schafer had the audacity to provide his ***clear evidence of Anderson's corruption*** to the public [84] and to the press. Key portions of that transcript (TR3) are:

> [Gray at p.34] 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***.

[84] Gray's usage implies that "the public" to her means something more than "the press." But only after Hamilton had waived any claim of confidentiality (EX D-36) did Schafer provide information to member of "the public" other than "the press."

[Gray at p.36] Schafer didn't disclose it solely to the government. He disclosed it to the **public** and to the ***press***.

[Gray at p.39] 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 –

[Gray at p.42] [I]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.

[Gray at p.43] 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***.

[Gray at p.44] 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***.

[Gray at p.48] I have obviously focused on the disclosures to the ***public*** and the ***press*** because it's by far the simplest aspect of this case.

[Gray at p.51] [H]e disclosed to the ***newspapers*** later in the day on the same day that he had filed the public filling on the Barovic appeal, ... 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***.

[Gray at p.52] 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***.

Disciplinary members probed three separate times about Schafer having "gone to the press." (Pages 17, 47, and 56.) And at page 35, Ms. Gray said:

> [I]f 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.

This Court has sufficient background in Free Speech jurisprudence to recognize the obviously unconstitutional position that the ODC, the hearing officer, and the disciplinary board have taken. *See, e.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S. Ct. 710, 11 L. Ed. 2d 686, 95 A.L.R.2d 1412 (1964); *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 56 L. Ed. 2d 1, 98 S. Ct. 1535 (1978) (First Amendment protects speech on judicial disciplinary matters.); *Bartnicki v.*

Vopper, 532 U.S. ___, 121 S.Ct. 1753; 149 L. Ed. 2d 787; 2001 U.S. LEXIS 3815; 69 U.S.L.W. 4323 (May 21, 2001) (Statutory privacy rights yield to First Amendment's core purpose of permitting publication of matters of public importance.); and to the cases and argument discussed in the preceding issue of this brief.[85]

12. Was there substantial evidence in the record to support the disciplinary board's finding that Professors Strait and Boerner told Schafer that he should not disclose his client's statements?

The hearing officer found as a fact (No. 27) (and the disciplinary board adopted each of his findings) that:

> Professor Strait advised Schafer that RPC 1.6 prohibited disclosure of a client's confidences or secrets without the client's consent, except to prevent the client from committing a crime. Professor Strait informed Schafer that the description of Judge Anderson's and Hamilton's conduct sounded like a past event; however, Professor Strait told Schafer that the question of whether fraud is a "continuing crime" is a gray area in the law. Schafer told Professor Strait that Schafer intended to reveal Hamilton's confidential communications to the authorities in order to expose a corrupt judge. Professor Strait also advised Schafer that he believed Schafer would not have civil liability if he disclosed information to the Bar Association.

Nonetheless, the Board's Ruling, without support in the record, states:

> Mr. Schafer asked law professors John Strait and David Boerner whether he could ethically disclose his client's communications. Both professors told him that he should not disclose his client's statements.

Testimony by both Schafer and by Strait was to the effect that (1) Strait told Schafer it was unclear under Washington law— a "gray area"—as to whether fraud on an estate by its executor was a continuing crime that could be reported under the bar's "ethics" rules, (2) Strait told Schafer he would not likely incur liability from reporting the corrupt judge, and (3) Strait indicated that reporting a corrupt judge was the morally right thing to do. TR2 313-17, 715-17, 726, 735-36, 750-51, 764-66. There was no evidence whatsoever in the record that either Strait or Boerner "told [Schafer] that he should not disclose his client's statements."

CONCLUSION

This case presents an opportunity for the Court to make highly visible case law that will have a

[85] I could discuss a couple of cases in which the Seattle press fulfilled its "watchdog" role of reporting the misconduct of former King County judges, now deceased, but that might be considered crass.

great positive impact on the legal profession and on the justice system—and on the public's confidence in both—not in just this state but nationally. Exposing a clearly corrupt judge is plainly the right thing for any lawyer to do, and the case law should strongly assert that. And if public confidence is truly sought, this Court ought to inquire further into the inner workings of the ODC of this state's bar.

Wrongdoers who use lawyers as tools to commit crimes and frauds are not using them in a legitimate *professional capacity*, so the law ought not let them bar their lawyers from making compelled or voluntary disclosures to rectify their crimes or frauds upon discovering them. The revitalization of that traditional doctrine requires no tumultous re-write of any lawyer conduct code, merely this Court's recognition of the century-old meaning of the phrase "professional relationship" as applied between a lawyer and a client.

We have not argued the measure of any sanction, for we strongly believe that Schafer committed no misconduct. If you find that his actions in seeking promptly to expose the clear corruption of a sitting judge were improper for a lawyer, then he intends to abandon the practice of law as it then would be inconsistent with his traditional moral values, as expressed in 1817 by David Hoffman, the father of legal ethics.[86]

> What is wrong, is not the less so by being common. And though few *dare to be singular*, even in a right cause, I am resolved to make my own, and not the conscience of others, my sole guide. *What is morally wrong, cannot be professionally right*, however it may be sanctioned by time or custom. It is better to be right with a few, or even none, than to be wrong with a multitude. (First emphasis is the author's, the second is added.)

Respectfully submitted this 6th day of September, 2001.

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[86] Reprinted in Allen K. Harris, *The Professionalism Crisis—The 'z' Words and Other Rambo Tactics: The Conference of Chief Justices' Solution*, The Professional Lawyer, Vol. 12, Issue 2 (Winter 2001) p.7, quoting Hoffman's Resolution, No. XXIII from David Hoffman, *Resolutions in Regard to Professional Deportment*, A Course of Legal Study Addressed to Students and the Profession Generally, 752–75 (American Law: The Formative Years, Arno Press 1972).