BEFORE THE DISCIPLINARY BOARD OF THE
WASHINGTON STATE BAR ASSOCIATION

In re DOUGLAS SCHAFER, Lawyer (Bar No. 8652).	Public No. 00#00031 REPLY TO MOTION TO QUASH AND TO DEPONENT'S OBJECTIONS TO SUBPOENA FOR DEPOSITION AND DOCUMENTS

I, Douglas Schafer, reply to Disciplinary Counsel Gray's Motion to Quash and to Deponent Philip R. Sloan's Objections to Subpoena for Deposition and Documents as follows:

1. Procedural Setting. On June 7, 2000, I served upon lawyer Philip R. Sloan a Subpoena for Deposition and Production of Documents (a copy of which is Exhibit A to Disciplinary Counsel Gray's Motion to Quash it) seeking to examine lawyer Sloan under oath, and inspect and copy records, relating to his and his firm assisting William L. Hamilton to attempt to conceal his fraudulent and unlawful transactions with Grant L. Anderson relating to the Charles Hoffman Estate, Pacific Lanes, Inc., or Pacific Recreation Enterprises, Inc. (including all attorney-client communications that are unprotected by the attorney-client privilege by application of the crime-fraud exception). Lawyer Sloan objected to that Subpoena as invasive of the attorney-client and work-product privileges of his client, Mr. Hamilton, and Disciplinary Counsel Gray moved to quash it.

2. No Applicable Discovery Cut-off. Disciplinary Counsel Gray falsely declares under penalty of perjury that I am beyond an applicable discovery cut-off date. No discovery cut-off date for the July 17, 2000 hearing has been ordered by the Hearing Officer. My understanding from the telephonic scheduling hearing on April 20, 2000, was that I was permitted to continue engaging in appropriate discovery, including deposing witnesses and subpoening relevant documents, subject to Disciplinary Counsel Gray's

Schafer Law Firm
950 Pacific Ave., Suite 1050
P.O. Box 1134, Tacoma, WA 98401
(253) 383-2167 Fax: 572-7220

concern that nothing be scheduled during her forthcoming trip from July 3 to July 7, 2000.

3. My Right to, and Reasons For, Requesting the Deposition and Documents. In my Declaration Under Penalty of Perjury dated February 16, 1996 ("Perjury Declaration"), I testified as to various events and communications that involved me and Hamilton, my former client. Among the statements I reported him making to me in our meeting in December 1995 was that he had given Anderson a "five figure contribution" for his election campaign for either his county superior court campaign (in 1992) or his state supreme court campaign (in 1994). Hamilton later denied making that statement to me, and Anderson never reported any such contribution on his Public Disclosure Commission reports . The credibility of my testimony in the Perjury Declaration, and of testimony that I will give in the hearing, is naturally in issue in this proceeding. To support my credibility, I believe that I have a right to compel the testimony and records of any witness to whom Hamilton may have directed communications that may confirm or otherwise relate to his communications with me, provided his communications to the witness and such records are not shielded by an applicable privilege. Lawyer Sloan contends that Hamilton's communications to him and his records relating to them are shielded by the attorney-client privilege and the work product privilege; I contend that they are excluded from those privileges by the well-established crime-fraud exception to those privileges.

4. Crime-Fraud Exception to Attorney-Client and Work Product Privileges. I will not here explain the attorney-client nor work product privileges, as I am confident that the Hearing Officer is familiar with them. I lack such confidence concerning the crime-fraud exception, however.

I filed a letter-brief in this proceeding dated December 7, 1999, that included extensive analysis of the crime-fraud exception that has been recognized for over 100 years in Washington state. I quoted on page 7 of that letter-brief excerpts from *State v. Metcalf*, 14 Wn. App. 232, 239-40 (1975):

"[T]he attorney-client privilege is not applicable when the advice sought is in

Schafer Law Firm
950 Pacific Ave., Suite 1050
P.O. Box 1134, Tacoma, WA 98401
(253) 383-2167 Fax: 572-7220

furtherance of a crime or fraud. ***It does not matter that the attorney was unaware of his client's purpose for seeking the advice.*** [Emphasis added.]

On the same page, I quoted from *Whetstone v. Olson*, 46 Wn. App. 308, 310 (1986):

> "It is well established that the attorney/client privilege does not extend to communications in which the client seeks advice to aid him in carrying out an illegal or fraudulent scheme.
>
> "Although the exception was at one time limited to criminal activity, it also is now well settled that this exception is applicable to advice or aid secured in the perpetration of a civil fraud. The rationale for excluding such communications from the attorney/client privilege is that the policies supporting the existence of the privilege are inapplicable where the advice and aid sought refers to future wrongdoing rather than prior misconduct.
>
> "***It does not matter that the attorney was unaware of his client's purpose for seeking the advice. His knowledge or participation is not necessary to application of the exception.*** However, the exception applies only when the client knows, or reasonably should know, that the advice is sought for a wrongful purpose." [Emphasis added.]

On pages 14 and 15, I quoted from the then brand-new case, *In re Grand Jury Proceedings (Gregory P. Violette)*, 183 F.3d 71; 1999 U.S. App. LEXIS 19716 (1st Cir. 1999):

> "To bring the crime-fraud exception to bear, the party invoking it must make a prima facie showing: (1) that the client was engaged in (or was planning) criminal or fraudulent activity when the attorney-client communications took place; and (2) that the communications were intended by the client to facilitate or conceal the criminal or fraudulent activity.
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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 States v. Ballard*, 779 F.2d 895, 909 (5th 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***")." [Emphasis added.]

Notwithstanding the quoted case law in my letter-brief of December 7, 1999, the Hearing Officer entered his Order on December 15, 1999, stating at page 4:

> "The factual basis for the "crime-fraud exception" appears to be that (1) ***the lawyer reasonably believes the client was engaged in or planning criminal or fraudulent activity*** when the attorney-client communication took place, and (2) the communication was intended by the client to facilitate or conceal the criminal or fraudulent activity."

He got part (2) right, at least. As to part (1), I respectfully request that the Hearing Officer re-read, perhaps more carefully, my letter-brief of December 7, 1999 and the case law quoted in it, for cases consistently report that the lawyer's knowledge or belief concerning

Schafer Law Firm
950 Pacific Ave., Suite 1050
P.O. Box 1134, Tacoma, WA 98401
(253) 383-2167 Fax: 572-7220

whether the client's activities are unlawful is irrelevant to the crime-fraud exception.

Part (2) of the Hearing Officer's Order correctly observes that the crime-fraud exception applies when a client uses a lawyer to help ***to conceal*** the client's past criminal or fraudulent activities. In *State v. Richards*, 97 Wash. 587, 591 (1917), the court said:

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

An abundance of state and federal court case law confirms that the crime-fraud exception applies to a client's use of a lawyer to further the concealment of the client's past fraud or misconduct. See, *e.g.*, *Volcanic Gardens Management Co. v. Paxson*, 847 S.W.2d 343, 347 (Tex. App. 1993) (for purposes of the exception, "fraud" is "much broader" than common law and criminal fraud, and can include "false suggestions" and "suppression of truth"); *In re A.H. Robins*, 107 F.R.D. 2 (USDC Kan. 1985) (crime-fraud exception applied for Robins attempted, with the assistance of counsel, to devise strategies to cover up Robin's responsibilities and lessen its liabilities with respect to the Dalkon Shield); *Craig v. A.H. Robins*, 790 F.2d 1, 4 (1st Cir. 1986) (a pervasive picture of covering up a defective product, the Dalkon Shield, vitiates not only any attorney-client privilege but also any work product immunity).

In *In re Grand Jury Subpoenas (Roe and Doe)*, 144 F.3d 653 (10th Cir. 1998), in support of a federal investigation into health care fraud, the court enforced grand jury subpoenas upon two respected attorneys who had represented a hospital and its chief executive officer. At page 660, the court said:

> "To invoke the crime-fraud exception, the party opposing the privilege must present prima facie evidence that the allegation of attorney participation in the crime or fraud has some foundation in fact. *Motley*, 71 F.3d at 1551; *In re Grand Jury Proceedings (Vargas)*, 723 F.2d at 1467. The evidence must show that the client was engaged in or was planning the criminal or fraudulent conduct when it sought the assistance of counsel and that the assistance was obtained in furtherance of the conduct or was closely related to it. *See In re Grand Jury Investigation (Schroeder)*, 842 F.2d 1223, 1226 (11th Cir. 1987). The exception does not apply if the assistance is sought only to disclose past wrongdoing, *see Zolin*, 491 U.S. at 562, 109 S.Ct. 2619, ***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*

Schafer Law Firm
950 Pacific Ave., Suite 1050
P.O. Box 1134, Tacoma, WA 98401
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> *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 Cases*, 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 the representation, however, then the past violations properly may be a subject of grand jury inquiry.") [Emphasis added.]

A simple, straightforward case, *In re Grand Jury Proceedings*, 102 F. 3d 748 (4th Cir. 1996), illustrates how a client loses any claim of attorney-client or work-product privilege claim when it uses it's attorneys to perpetuate a fraud, even if without their knowledge of the fraud. In that case, a bank had back-dated loan documents in the name of a borrower's spouse seeking to conceal its unlawful over-its-lending-limit loans to the borrower, then used its lawyers to file pleadings, documents, and to write letters referencing the back-dated loan documents by the fraudulently assigned date. The Fourth Circuit Court of Appeals rejected the bank's argument that the lawyers' asserted lack of knowledge of the fraud permitted application of the attorney-client and work-product privileges, stating at 751:

> "[T]he ***concealment or cover-up of its criminal or fraudulent activities*** by the client, the holder of the privilege [citation omitted] rather than the attorney's lack of knowledge of the criminal or fraudulent activity or activities of the client, controls the court's analysis of whether the attorney-client privilege may be successfully invoked. Similarly, the crime-fraud exception applies in the work-product context." [Emphasis added.]

Based upon these and other authorities, the first step in applying the crime-fraud exception is determining that a client had engaged in criminal, fraudulent, or otherwise unlawful activity. The second step is determining that the client used his attorney to further the commission—***or the concealment from discovery***—of that unlawful activity. The next section of this brief addresses the first step; the two subsequent sections address the second step.

5. William Hamilton and Grant Anderson Engaged in Fraudulent Activities. Grant L. Anderson, while a lawyer and court-appointed executor of the Charles Hoffman Estate,

Schafer Law Firm
950 Pacific Ave., Suite 1050
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sold that estate's Pacific Lanes bowling center to his good friend William L. Hamilton for less than its fair value, then further reduced its price after Hamilton began paying for Anderson's new Cadillac. The Washington State Supreme Court held that Anderson's continued participation, after he'd become a judge, with Hamilton in the sale of the bowling alley business, his deliberate failure to disclose Hamilton's payments on his public disclosure filings, and his attempt to misrepresent Hamilton's car loan payments as a gift "clearly exhibit a pattern of dishonest behavior." *In the Matter of the Disciplinary Proceeding Against Grant L. Anderson, Pierce County Superior Court Judge*, 138 Wn.2d 831, 857 (1999). The Supreme Court, at page 848, found Anderson's testimony that Hamilton's car loan payments were a gift unrelated to the sale of Pacific Lanes as "simply not credible." At page 849, the Court stated it was "unconvinced" of the truth of Hamilton's testimony that he was unaware that his incorporated bowling business was making, and deducting as business expenses, Anderson's car loan payments. Also on that page, the Court agreed with the Commission on Judicial Conduct's conclusion that clear, cogent, and convincing evidence showed that Anderson's acceptance of the car loan payments from Hamilton was, in fact, consideration for negotiating the sale of the Hoffman estate's bowling alley business to Hamilton. It is improper for a court-appointed executor of an estate to receive consideration (commonly referred to as a "kickback") from a person to whom he sells an asset of the estate.

The kickbacks from Hamilton to Anderson would have been fraudulent even if Anderson had required Hamilton to pay the fair market price for Pacific Lanes, but he sold it at well below that. Pacific Lanes (real estate, equipment, and business) was appraised at $1,334,000 as of March 1989 and at $1,775,000 as of June 1993. (See Exhibits A and B.) Anderson and Hamilton initially documented their Pacific Lanes transaction as being $1,000,000 (see Exhibits C and D), but after price adjustments in which Anderson participated, Hamilton ended up paying only $657,000 for it. For the operating business (with equipment), Hamilton paid about $207,000 (See Exhibit E); and for the real estate,

Schafer Law Firm
950 Pacific Ave., Suite 1050
P.O. Box 1134, Tacoma, WA 98401
(253) 383-2167 Fax: 572-7220

Hamilton initialy paid $50,000 for an option (Exhibit F) and then paid $400,000 when he exercised that option in October 1993. (See Exhibits G through I.)

The public hospital that was the 90% beneficiary of the Hoffman Estate eventually learned of the fraud perpetuated by Anderons, Hamilton, and their colleagues. It's attorneys threatened a fraud lawsuit against them, served them with a complaint alleging fraud, and settled the dispute for $500,000 without having to file the lawsuit. (See Exhibits J through L).

No reasonable person reading these exhibits can fail to recognize that Hamilton and Anderson engaged in fraudulent activities relating to the Pacific Lanes transaction.

7. Hamilton, Sloan, Anderson, & Bulmer Conspired to Conceal Their Fraud. Upon their recognition that Hamilton's compensatory car loan payments for Anderson might be discovered, Hamilton, his lawyer Sloan, Anderson, and his lawyer Kurt M. Bulmer, conspired to collectively claim that the car payments had been merely a gift from Hamilton to Anderson. On March 20, 1996, Bulmer's itemized invoice shows that he prepared several versions of an affidavit for Hamilton to sign, and he sent them to Anderson and Sloan to review; and Hamilton signed such an affidavit on April 2, 1996. The deduced redactions are corroborated by Sloan's testimony. (See Exhibits M through O.) Throughout the disciplinary proceeding that resulted in Anderson's removal as a judge, the co-conspirators testified to the version of the "facts" documented in that affidavit, but the factfinders found it to be not credible because of the overwhelming inconsistence evidence. Among the credible inconsistent evidence was written and oral testimony by Anderson's wife, Diane Anderson, that he had told her that the new Cadillac was a commission from Hamilton for the Pacific Lanes transaction. See Exhibit P.

8. Sloan and Hamilton Sought to Intimidate Me to Not Report the Unlawful Activities. As described in my Perjury Declaration, when I met in the afternoon on February 1, 1996, at Sloan's office with him and Hamilton, they were uncooperative and intimidating. I had been told that morning my Diane Anderson's lawyer, Camden Hall (of

Schafer Law Firm
950 Pacific Ave., Suite 1050
P.O. Box 1134, Tacoma, WA 98401
(253) 383-2167 Fax: 572-7220

Foster, Pepper & Sheffelman) that somebody should investigate how Anderson had acquired his new Cadillac for he had refused to disclose that in the marital dissolution property settlement negotiations. When I repeatedly asked Hamilton at Sloan's office if he had made any substantial gifts to Anderson, Sloan repeatedly instructed Hamilton not to answer me. As noted in the Perjury Declaration, Sloan and Hamilton expressly threatened to sue me if I reported the evidence I possessed of Judge Anderson's fraudulent and corrupt activities, as I was telling them that I intended to do. The next day, Sloan faxed to me his handwritten, sobering message (Exhibit Q): "Please protect your family if not yourself and stop your threats, etc." That message could reasonably have been read, and may have been intended, as a threat of harm to my family and me if I reported the evidence of wrongdoing that I possessed.

9. Conclusion. It cannot be disputed that Hamilton used lawyer Philip R. Sloan to attempt to conceal from discovery the fraudulent and otherwise wrongful activities that Hamilton, Anderson, and others had committed relating to Pacific Lanes and the Hoffman Estate. As a consequence, the crime-fraud exception prevents Hamilton and Sloan from asserting that the attorney-client or work-product privilege prevents Sloan from complying with the Subpoena for Examination and Documents that I served upon him on June 7, 2000. The Hearing Officer should order him to fully comply with the Subpoena and disallow any claim of attorney-client or work-product privilege.

June 16, 2000

Douglas A. Schafer, WSBA 8652

Schafer Law Firm
950 Pacific Ave., Suite 1050
P.O. Box 1134, Tacoma, WA 98401
(253) 383-2167 Fax: 572-7220