Bar No. 8652 [Filed on Nov. 8, 2001]

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 REPLY BRIEF

Attorneys for Respondent:

Douglas A. Schafer, Attorney
Schafer Law Firm
P.O. Box 1134
950 Pacific Ave., Suite 1050
Tacoma, WA 98401-1134
(253) 383-2167

Donald H. Mullins, Attorney
Badgley~Mullins Law Group
Washington Mutual Tower
1201 Third Avenue, 51st Floor
Seattle, WA 98101
(206) 621-6566

Shawn T. Newman, Attorney
2507 Crestline Dr. NW
Olympia, WA 98502
(360) 866-2322

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REPLY TO COUNTERSTATEMENT OF THE CASE [1]

Though material facts are not in dispute, two factual assertions by the Office of Disciplinary Counsel ("ODC") in its Answering Brief ("ODC Br.") warrant reply. On page 6, ODC paraphrases lawyer Phil Sloan's testimony as to Schafer's state of mind in February 1996. Schafer gave hearing testimony (TR2 258) disputing Sloan's testimony and the Hearing Officer made *no finding* as to Sloan's testimony. But concerning Schafer's state of mind, the record does include a copy of his letter of March 29, 1996 to this Court's then Chief Justice Barbara Durham[2] expressing his extreme frustration and anger at the legal fraternity's unwillingness to address fundamental, well-documented, systemic mistreatment of elderly and disabled persons in guardianship proceedings for more than a year after Schafer began soliciting them to do so. (*E.g.*, Schafer's letter of February 16, 1995 to members of the Pierce County Superior Court Bench, as Ex. A to the Motion of Prejudice that is App. B to this proceeding's EX A-10).

The ODC Brief asserts at page 10 (last paragraph) that Judge Thomp-

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[1] In Schafer's briefs, 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 (nowhere 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.

[2] On about October 10, 2001, the clerk of the Disciplinary Board transmitted to the clerk of this Court, pursuant to RLD 7.5(d), a copy of the file from this Court's Docket No. 68957-1. Schafer's letter to Chief Justice Durham is the 82nd page of that file, being the 34th page of the filed print-out of his Internet website (http://www.dougschafer.com).

son had not reviewed Schafer's February 16, 1996 Declaration under Penalty of Perjury in reaching his ruling. But, Schafer had offered, by a Declaration filed and provided to Judge Thompson two days before his ruling, to show him "in open court or privately" the documents that Schafer had provided to the Commission on Judicial Conduct and other appropriate authorities. Those documents included Schafer's February 16, 1996 Declaration. EX D-30 p.2, lines 10-19.

RESPONSIVE ARGUMENTS

1. Judicial System Integrity Should Trump Client Confidentiality.

The Bribed Judge Problem. The ODC, at page 20 of its brief, says it would be "problematic" if exposing judicial corruption were of a higher priority than keeping client secrets. It illustrates that "problem" with an example of a client who seeks legal advice by informing a lawyer that the client had bribed a judge to give a particular legal ruling, but the client seeks to avoid exposure and possible prosecution. (Presumably the advice sought is how best to avoid exposure and prosecution.) The ODC asserts that if the lawyer discloses the judge's bribe, the client is denied effective legal assistance.[3]

In Schafer's very first letter, dated August 19, 1996, to Disciplinary

[3] The Sixth Amendment right to effective legal assistance was the chief argument by the proponents of lawyer-enabled perjury until the U.S. Supreme Court soundly rejected that claim in *Nix v. Whiteside*, 475 U.S. 157, 106 S. Ct. 988, 89 L. Ed. 2d 123 (1986).

Counsel Julie Shankland[4] (EX D-4) concerning this disciplinary matter he expressed his views on the judicial bribe hypothetical:

> The strongest justification for my disclosures concerning Judge Anderson's apparent misconduct is that judicial integrity concerns inherently should trump client confidentiality concerns. Canon 1 of the Code of Judicial Conduct begins, "An independent and honorable judiciary is indispensable to justice in our society." If an acquitted client boasts to his lawyer while leaving the courthouse that he bribed the judge the previous day, the lawyer should not need to study any ethical codes or rules to decide if he may report that information – his moral duty to report it should be obvious to him.

Schafer simply could not imagine any responsible citizen, much less any "officer of the court," failing to report the corruption of a sitting judge. After all, since an *honorable* judiciary is indispensable to justice, enabling a corrupt judge to escape exposure dooms society to be ruled by an unjust judicial system.

But even though Schafer could not have imagined it, in 1980 some radical lawyers *actually had* claimed the legitimacy of a lawyer "ethics" code that barred lawyers from disclosing that a client had bribed a judge or juror in the client's case.[5] The leader of that radical view was Professor Monroe H. Freedman, and he preached the gospel of absolute client

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[4] Ms. Shankland is now Assistant General Counsel of the Washington St. Bar Assoc.

[5] The American Lawyer's Code of Conduct (Public Discussion Draft, June 1980) by the Commission on Professional Responsibility of The Roscoe Pound-American Trial Lawyers Foundation ("ATLA Code"). Prof. Freedman was the drafter-reporter. That code's Rule 1 "The Client's Trust and Confidences" was proposed in two versions: Alternative A let lawyers disclose client confidences to prevent imminent danger to life and to avoid proceeding before a corrupted judge or juror (bribed by the client); *but* Alternative B barred lawyers from disclosing client confidences in such circumstances.

confidentiality.[6] Fourteen years earlier, he wrote a controversial essay[7] in which he answered "yes" to his three questions of whether a lawyer could properly (1) cross-examine to discredit a truthful witness, (2) present witness testimony knowing it will be perjurous, and (3) give a client advice the lawyer knows will tempt the client to commit perjury. His essay, earlier presented at a Washington D.C. bar meeting, so angered then Federal Circuit Judge Warren Burger and other judges that they sought to have Prof. Freedman disbarred or suspended.[8] They failed. But Judge Burger promptly authored an opinion[9] to voice his and other judges' strong opposition to Freedman's lawyer-as-mercenary philosophy, saying:

> The popular misconceptions about the function of lawyers in criminal cases flow from many sources including misconduct of some lawyers themselves, distortion of real life in popular media such as television and movies, and a misplaced sentimentality which has put some lawyers in doubt as to their function.
>
> One result of these fallacious and blurred conceptions of the advocate's function is the public image of the "criminal lawyer" as the servile "mouthpiece" or the alter ego of the accused or one

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[6] As concisely summarized in Shaffer, Thomas L., *The Legal Ethics of the Two Kingdoms*, 17 Valpariso L. Rev. 1, 16 (1983):

> Professor Monroe Freedman of Hofstra University says, "Once a lawyer has assumed responsibility to represent a client, the zealousness of that representation cannot be tempered by the lawyer's moral judgments of the client or of the client's cause." He argues that ***if the client wants to lie in court, the lawyer-as-advocate should help the client lie***; if the client appears to be the sort who will use legal advice to do evil, the lawyer-as-advisors [*sic*] should nonetheless give the advice. He argues that the lawyer's fealty, in either case, is to the law, the adversary system, the Constitution, and that this duty requires that professional life have its own morality. [Footnotes omitted; emphasis added.]

[7] Freedman, Monroe H., *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966).

[8] *Id.*, at n.1.

[9] *Johnson v. United States*, 360 F.2d 844, 846 (D.C. Cir. 1966) (J. Burger Concurring).

> who does for the accused what the accused would do for himself if he had the legal skills. This is more than a fallacy; it is totally incompatible with the basic duty of a lawyer as an officer of the court and contrary to the traditions and ethics of the legal profession.
>
> A lawyer complying with the canons and traditions of the bar advocates but does not identify with his client. The alter ego or "mouthpiece" school of thought, which is happily a minute fraction of the legal profession, would carry this perverted notion to the point of complete identification of lawyer with client, *i.e.*, the lawyer as an extension of the accused himself with a community of interest, motivation and goals, bound to engage in falsehood and chicane at the command of the client. These concepts have long been rejected by the legal profession and find no acceptance among honorable members of the bar. [Footnote 2] [Footnote 2 read:] Few courts have stated this basic ethical duty more cogently than the Supreme Court of Nebraska:
>
> > An attorney owes his first duty to the court. He assumed his obligations toward it before he ever had a client. His oath requires him to be absolutely honest even though his client's interests may seem to require a contrary course.
>
> *In re Integration of Neb. State Bar Ass'n*, 133 Neb. 283, 289, 275 N.W. 265, 268, 114 A.L.R. 151 (1937).

The Threatening 1970s Prompted Defensive Ethics. Though the ethical norms of the legal profession through the 1960s had always recognized that lawyers owed *no* duty of confidentiality to clients who used them to further a crime or fraud,[10] several highly visible threats emerged in the 1970s that prompted the practicing bar defensively to embrace a more protective ethical norm of absolute duty of confidentiality to clients. That norm became the practicing bar's shield against liability for failing to

[10] American Bar Association, *Code of Professional Responsibility* (1969) ("ABA/CPR"), DR 4-101(C)(2) and 7-102(B)(1); American Bar Association, *Canons of Professional Ethics* (1908, as amended in 1928) ("ABA Canons") Canons 37 and 41; See the discussion of cases and opinions predating the 1969 ABA/CPR beginning at page 20.

disclose client fraud, crime, or dangerousness.

One threat to the practicing bar was the national public outrage, prompting a criminal prosecution, of two Syracuse, New York, criminal defense lawyers who failed in 1973 to voluntarily report bodies, that they had photographed, of two missing girls that their client, charged with another murder, had viciously murdered. Though fellow lawyers could understand those lawyers' silence for six months, even in the face of desperate public pleas from the father of one of the missing girls, the public simply could not understand their lack of concern for the public interest and simple decency. The so-called "Buried Bodies Case" about the lawyers' conduct was widely covered in the press, including the New York Times, and resulted in books and a television documentary.[11]

A similar threat to the practicing bar was recognized when the California Supreme Court in 1976 found a psychotherapist liable for failing to warn the target of a patient's dangerous threats (that the patient carried out, murdering his target)–the notorious *Tarasoff* case.[12] The widely-held fear within the practicing bar was that lawyers would face the same type of liability for failing to disclose their clients' dangerousness that had been

[11] Subin, Harry I., *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 Iowa L. Rev. 1091, 1101 (1985); Merton, Vanessa, *Confidentiality and the Dangerous Patient: Implications of Tarasoff for Psychiatrists and Lawyers*, 31 Emory L. Rev. 263, 280 n.30-33 (1982); Zitrin, Richard, and Langford, Carol M., *The Moral Compass of the American Lawyer* (Ballantine Books, 1999), Chapter 1.

[12] *Tarasoff v. Regents of the University of California*, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976); See generally Merton, *supra* n. 11. Prof. Merton observed at 288 n. 56 that by 1978 there had been more than a score of academic legal articles written about the *Tarasoff* case.

found in *Tarasoff*. That threat quickly materialized in a 1977 lawsuit against a Seattle lawyer whose decision not to disclose his in-custody client's dangerousness while securing his release from custody allegedly led soon to the client's assault of his mother and his attempted suicide (losing his legs, but not his life). The resulting appellate opinion – the 1979 *Hawkins* case[13] – further alarmed the practicing bar for, while exonerating the Seattle lawyer because the client's mother knew of his dangerousness, the Court suggested that an unknowing victim would have prevailed. As Professor Merton observed:[14]

> [T]he court did suggest that a common law duty to volunteer information ... might exist if the attorney were convinced beyond a reasonable doubt that "the client has formed a firm intention to inflict serious personal injuries on an unknowing third person." ... The disquieting implication of this suggestion is that a successful defense attorney might in some circumstances be held responsible for a client's future crimes. [Footnote omitted.]

The *Hawkins* case was cited by the Kutak Commission in 1981 as compelling its proposed version of Model Rule 1.6, because "An absolute rule [of confidentiality, as Prof. Freedman proposed] would prohibit disclosure in circumstances where the lawyer's individual legal obligations may require disclosure."[15]

The third notorious threat – one that was near and dear to many quite

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[13] *Hawkins v. King County Dep't of Rehabilitation Servs.*, 24 Wash. App. 338, 602 P.2d 361 (1979).
[14] Merton, supra n. 11, at 335.
[15] ABA Commission on Evaluation of Professional Standards, *Proposed Final Draft, Model Rules of Professional Conduct*, (May 30, 1981), p. 47-48.

influential lawyers – was the position taken by the U.S. Securities Exchange Commission ("SEC") that lawyers had a *duty* to disclose when they discovered client fraud in a securities transaction. On February 2, 1972, the SEC filed a complaint in the *National Student Marketing Corporation* ("*NSMC*") case[16] alleging breach of that duty by prominent New York law firm White & Case and one of its partners, and by prominent Chicago law firm Lord, Bissel & Brock and two of its partners. Within three weeks the full text of that complaint was delivered to every securities law lawyer in the country.[17] The corporate bar was utterly shocked, and it mobilized quickly.[18] Since the SEC had bolstered its enforcement position by citing the bar's ethical reporting duty in ABA/CPR DR 7-102(B)(1), the bar quickly prepared an amendment to that ethics rule making the reporting duty applicable "except when the information is protected as privileged information." The amendment was first presented at the ABA's August 1973 annual meeting, and was approved without discussion at its February 1974 mid-year meeting.[19] Commentators report

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[16] *SEC v. National Student Mktg. Corp.*, 457 F. Supp. 682 (D.D.C. 1978); the Feb. 3, 1972 Complaint was reprinted in [1971-72 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 93,360, at p. 91,913 (D.D.C. Feb. 3, 1972) [sent to subscribers of that essential looseleaf service in its Feb. 24, 1972, weekly update].

[17] *Id.*

[18] Hoffman, Junius, *On Learning of a Corporate Client's Crime or Fraud*, 33 Bus. Law. 1389, 1392, 1402-08 (1978). Prof. Hoffman cites, at n. 38 "a flood of symposia and articles" on the liability issue and in the text describes efforts by the ABA and state bars in the 1970s to restrict the obligations of securities lawyers under the securities laws by passing ethics rules and issuing interpretations of ethics rules. Karmel, Roberta S., *Attorneys' Securities Laws Liabilities*, 27 Bus. Law. 1153 (July 1972) (summarizing and criticizing the SEC's complaint against the law firms and lawyers).

[19] Hoffman, *supra* n. 18, at 1406 n. 40; Schneyer, Ted, *Professionalism as Bar Politics:*

that only 12[20] to 17[21] states ever adopted that defensive "except clause" amendment. (But New York and Illinois did.)

The SEC's *NSMC* case was resolved with the New York firm settling in 1977 and the court in 1978 finding securities law violations by the Chicago law firm.[22] Reportedly, they settled lawsuits by shareholders for about $2 million and $1.3 million, respectively.[23]

During the mid-1970s, SEC Commissioners were presenting public speeches asserting that a corporate lawyer's function in securities matters is "more akin to that of the auditor than that of the advocate" and that their duty to public shareholders and investors trumps conflicting interests of individuals comprising corporate management.[24] And the influential Second Circuit in 1974 tacitly approved actions of a securities lawyer who voluntarily delivered an affidavit to the SEC in which he alleged fraud in a former client's registered securities offering.[25]

The Making of the Rules of Professional Conduct, 14 Law & Social Inquiry 677, 689-90 (1989); Koniak, Susan P., *The Law Between the Bar and the State*, 70 N.C.L. Rev. 1389, 1423 n.144 (1992). Both Professors Schneyer and Koniak document the effective manner in which the organized bar's ethics rules and opinions are shaped to serve the private interests and agendas of its members.

[20] Subin, *supra* n. 11, at 1149 n. 297. Even though by mid-1973, 46 states and the District of Columbia had adopted, mostly without alterations, the ABA/CPR. *In re Griffiths*, 413 U.S. 717, 727 n.19, 37 L.Ed.2d 910, 93 S.Ct. 2851 (1973).

[21] Nahstoll, R.W., *The Lawyer's Allegiance: Priorities Regarding Confidentiality*, 41 Wash. & Lee L. Rev. 421, 433 n.31 (1984). The late Dick Nahstoll had been a Portland, Oregon corporate/business lawyer since 1946, and prepared this article during a 1983 Lawyer-in-Residence program at the school that published it. His very enlightening article presents representative views of the counseling/planning/business lawyer bar.

[22] *SEC v. National Student Mktg. Corp.*, 457 F. Supp. 682, 687 n.2 (D.D.C. 1978)

[23] Nahstoll, *supra* n. 21, at 449 n. 75.

[24] Hoffman, *supra* n. 18, at 1400-01.

[25] *Id.* at 1401; *Meyerhofer v. Empire Fire and Marine Ins. Co.*, 497 F.2d 1190 (2nd Cir. 1974).

Fabricating the ABA Model Rules (the Ethics War of 1983). It was against the backdrop of the threats of the 1970s that the ABA in 1977 formed the Commission on Evaluation of Professional Standards (commonly called the Kutak Commission after its chairman, Robert J. Kutak) to re-write the national bar's model ethics code. When its preliminary non-public draft was privately shared in 1979 with Prof. Freedman, he published it along with his scathing criticism of its client confidentiality exceptions (that reflected then existing case law[26]), and soon he was the Champion of all lawyers seeking greater liability protection. Freedman and his followers (principally the American Trial Lawyers Association ("ATLA") and the American College of Trial Lawyers ("ACTL")) won that *ethics* war in 1983 with the ABA's House of Delegates voting to adopt Model Rules of Professional Conduct ("MRPC") that had been *amended* to reflect a nearly absolute duty of confidentiality. The sorry saga is documented in many articles, the most comprehensive being Professor Schneyer's in the American Bar Foundation's journal.[27]

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[26] The Kutak Commission's first public Discussion Draft (Jan. 30, 1980), p. 25 simply explained its qualifications to the principle of confidentiality:

> Qualification of the rule of confidentiality recognizes that a client's right to assistance of counsel is itself qualified. A client is entitled to counsel for lawful purposes, including defense against an accusation of a past criminal act, but is not entitled to advice in carrying out deliberately wrongful purposes.

In its Proposed Final Draft (May 30, 1981), the *Legal Background* section supporting its proposed Rule 1.6 included six pages (p. 42-48) of citations to cases and other authorities; but the greater ABA was not interested in following the law, but in making defensive ethics law to shield its members from liability.

[27] Schneyer, *supra* n. 19; among the many others are: Koniak, *supra* n. 19 at 1441-47; Nahstoll, *supra* n. 21 at 438; Wolfram, Charles W., *Client Perjury: The Kutak Commission and the Association of Trial Lawyers on Lawyers, Lying Clients, and the*

The adopted confidentiality provisions (principally Rule 1.6) of the MRPC have been overwhelmingly criticized by the legal academic community. NYU Law Professor Harry Subin observed, "With the adoption of the *Model Rules* the ABA has come perilously close to asserting that confidentiality is not just an important interest of the justice system, but the only one."[28] The New York Times editorialized on Feb. 11, 1983, immediately after the ABA Delegates approved Rule 1.6:[29]

> Forced to choose starkly between models of the lawyer as client's mouthpiece and as caretaker of the law, the American Bar Association has opted for mouthpiece. Indeed, it held so faithfully to the role of hired gun that it left the impression it condones a lawyer's silent acquiescence in fraud. Writing a new code of ethics, the A.B.A.'s House of Delegates approved a rule that requires lawyers to keep their client's secrets – no matter what the cost of a client's dishonesty to innocent victims. Unless clarified, that cramped view is a disservice to both the public and the profession.

But that rejection of any *duty to society* would not have surprised anyone who had read Prof. Freedman's prior writings, paraphrased by Professor Shaffer in footnote 6 on page 4, above. And the Preface to the 1982 ATLA

Adversary System, 1980 Am. B. Found. Research J. 964 (comparing the Kutak Commission draft with the Freedman-ATLA draft provisions on perjury); Hazard, Geoffrey C., Jr., *Rectification of Client Fraud: Death and Revival of a Professional Norm*, 33 Emory L.J. 271, 296-308 (1984); Rotunda, Ronald R., *The Notice of Withdrawal and the New Model of Professional Conduct: Blowing the Whistle and Waving the Red Flag*, 63 Ore. L. Rev. 455 (1984); Lawry, Robert P., *The Central Moral Tradition of Lawyering*, 19 Hofstra L. Rev. 311 (1990).

[28] Subin, *supra* n. 11, at 1150.

[29] Nahstoll, supra n. 21, at 423 n. 6. All of this happened in the wake of another monumental New York commercial fraud that lawyers **enabled** by their silent acquiescence upon learning of it – the *O.P.M. Leasing Services* case. *See* Nahstoll at 421-23; Subin, *supra* n. 11 at 1109-11; Zitrin and Langford, *supra* n. 11 at 172-75.

Code (the ethics code drafted by Prof. Freedman) reportedly[30] stated:

> Our first principle remains that a client must be able to confide *absolutely* in a lawyer, or there may be little point in anyone's having a lawyer. *We have rejected* one concept that the Kutak Commission apparently espouses, that lawyers have a general *duty to* do good for *society* that often overrides their specific duty to serve their clients. (Emphasis added.)

Schafer's retort is *if* client confidentiality trumps judicial integrity, there is little point in anyone's having a lawyer – bribe brokers will suffice.

Washington State's Adoption of the RPCs. In late 1983, the Washington State Bar Association's Board of Governors ("BOG") formed a five-lawyer Task Force to study the MRPC. After doing so and soliciting member input, the Task Force recommended to the BOG, which agreed, their adoption in Washington with various amendments. One amendment rejected the MRPC's Preamble, Scope statement, and Comments, retaining instead the brief Preamble and Preliminary Statement from the WA/CPR. Rule 1.6 was amended by retaining from prior DR 4-101 the terms "confidences" and "secrets," with their prior DR definitions added to the new *Terminology* section; and changing the language of Rule 1.6 to permit disclosures to prevent the client from committing *any* crime (not solely to prevent imminent death or substantial bodily harm, as the MRPC provided) or to comply with a court order, both exceptions having been in the prior DR 4-101. An amendment deleted Rule 1.13, that had dealt with

[30] Koniak, supra n. 19, at 1442.

organizations as clients,[31] leaving issues for case-by-case determination. Another amendment adopted the ACTL version of Rule 3.3 instead of the Kutak Commission's version that the ABA Delegates had adopted.[32] The last noteworthy amendment was changing, in Rule 8.3 (a) and (b), the language *shall report* to *should report* serious judicial and lawyer misconduct.

This Court published the proposed RPCs for comment, then adopted them as proposed without significant changes.[33] They took effect September 1, 1985, and were very soon recognized as deficient.[34]

Judicial Rejection of Freedman's Duty to Enable Perjury. The basis underlying Prof. Freedman's view that lawyers must enable their clients' perjury is the same as that raised by ODC in its judge-bribing example, above, namely, that permitting the lawyer to expose the crime

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[31] Interestingly, Rule 1.13 was a *liability shield* inserted by the ABA's Corporation, Banking, and Business Law Section. Schneyer, *supra* n.19, at 698, 705-07, and 720-21.

[32] Interestingly, ACTL's version implemented Prof. Freedman's view that an absolute duty of confidentiality compelled a lawyer to **enable** client perjury or other fraud on a court, his only exception to that duty being to prevent imminent death or serious injury. But with Washington's Rule 1.6 being amended to except from that duty the prevention of *any* client crime, most perjury could be reported even with ACTL's version of Rule 3.3. That ACTL fraud-on-the-court version had been rejected by the ABA Delegates after opposing floor debate "raised with particular force by William Erickson of the Colorado Supreme Court." Schneyer, supra n.19, at 722.

[33] This Court received three comment letters from lawyers. It rejected Professor Rob Aronson's suggestion to adopt the Kutak Commission's version of Rule 1.6, consistent with its prior DR 7-102(B)(1). It rejected Spokane Prosecuting Attorney Don Brockett's suggestions, including adopting the Kutak Commission's version of Rule 4.1(b) that would permit lawyer disclosures to avoid assisting a client in crime or fraud. And it rejected Seattle lawyer Robert Gould's suggestions, including adopting the MRPC Rule 1.13 and the Rule 8.3's requirement that lawyers *shall* report professional misconduct. (Records provided to Schafer by this Court's Clerk in July 2000.)

[34] Schafer's Opening Brief, Issue 7 on p. 51-55; Appendix to Respondent's Opening Brief: Legislative History of RPC 1.6(c).

would deny the client "effective legal assistance" assured under the Sixth and Fourteenth Amendments. Prof. Subin in 1985 dispelled that claim,[35] reasoning from this Court's decision in *Sowers v. Olwell*, 63 Wn.2d 828, 394 P.2d 681 (1964) (mandating turn-over of tangible evidence of crime). The next year, Chief Justice Warren Burger soundly buried the claim (and strongly denounced Prof. Freedman's views) in *Nix v. Whiteside*, *supra* n. 3, announcing to the practicing bar with his full authority, at 173-74:

> Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying falsely. ...
>
> The paucity of authority on the subject of any such "right" may be explained by the fact that such a notion has never been responsibly advanced; *the right to counsel includes no right to have a lawyer who will cooperate with planned perjury*. A lawyer who would so cooperate would be at risk of prosecution for suborning perjury, and disciplinary proceedings, including suspension or disbarment. ...
>
> The crime of perjury in this setting is indistinguishable in substance from the crime of threatening or tampering with a witness or a juror. *A defendant who informed his counsel that he was arranging to bribe or threaten witnesses or members of the jury would have no "right" to insist on counsel's assistance or silence.* Counsel would not be limited to advising against that conduct. ***An attorney's duty of confidentiality****, which totally covers the client's admission of guilt,* ***does not extend to a client's announced plans to engage in future criminal conduct****.* See *Clark v. United States*, 289 U.S. 1, 15 (1933). In short, the responsibility of an ethical lawyer, as an officer of the court and a key component of a system of justice, dedicated to a search for truth, is essentially the same whether the client announces an intention to bribe or threaten witnesses or jurors or to commit or

[35] Subin, supra n. 11, at 1123-34; *Cf. Purcell v. District Attorney*, 676 N.E.2d 436 (Mass. 1997) (Privilege may still apply to defendant's comments though his tenant-rights lawyer disclosed them to prevent the client's intended apartment house arson.)

> procure perjury. No system of justice worthy of the name can tolerate a lesser standard. (Emphasis added.)

The next year, our Court of Appeals held[36] that neither the federal, citing *Nix*, nor state constitutions guarantee defendants a lawyer who will enable their perjury, and that "RPC 3.3, in conjunction with RPC 1.6, requires an attorney to disclose his client's plan of perjury to the court if necessary to avoid assisting such a criminal act." A very similar case was decided just last July by New York's highest court.[37] There the lawyer was confronted with his client's perjury during trial, so he then informed the judge in chambers that his client had made contrary statements previously to the lawyer. As quoted by the Court, New York's Code of Professional Responsibility DR 7-102(B)(1) mandates that—

> [a] lawyer who receives information clearly establishing that ... [t]he client has, in the course of the representation, perpetrated a fraud upon a ... tribunal shall promptly call upon the client to rectify the same, and if the client refuses or is unable to do so, the lawyer shall reveal the fraud to the affected ... tribunal, *except when the information is protected as a confidence or secret*. (emphasis added)

The Court then declared:

> ***The intent to commit a crime is not a protected confidence or secret*** (see, *Nix, supra*, 475 US, at 174 [attorney's duty of confidentiality does not extend to a client's announced plans to engage in criminal conduct]; *see also*, DR 4-101(C)(3) ... [a lawyer may

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[36] *State v. Fleck*, 49 Wn. App. 584, 586, 744 P.2d 628 (1987), *review denied*, 110 Wn.2d 1004 (1988); *see also*, *State v. Berrysmith*, 87 Wn. App. 268, 277, 944 P.2d 397 (1997) ("[A] defendant has no legitimate interest that conflicts with his or her attorney's obligation not to tolerate perjury and to adhere to the Rules of Professional Conduct.").

[37] *People v. DePallo*, 96 N.Y.2d 437, 729 N.Y.S.2d 649, 754 N.E. 2d 751 (2001).

> reveal the intention of his client to commit a crime]). (emphasis added)

Recently in a different context, U.S. Supreme Court Justice Breyer, joined by Justice O'Connor, asserted that participants in a cell phone conversation discussing intended crime had no *legitimate* privacy interest that barred public exposure of their unlawfully intercepted conversation even *after* the threat of their crime had passed.[38] Justice Breyer wrote:

> For another thing, the speakers [the president of a teacher's union and the union's chief negotiator] had little or no *legitimate* interest in maintaining the privacy of the particular conversation. That conversation involved a suggestion about "blow[ing] off ... front porches" and "do[ing] some work on some of these guys," App. 46, thereby raising a significant concern for the safety of others. Where publication of private information constitutes a wrongful act, the law recognizes a privilege allowing the reporting of threats to public safety. *See* Restatement (Second) of Torts § 595, Comment g (1977) (general privilege to report that "another intends to kill or rob or commit some other serious crime against a third person"); *id.*, § 652G (privilege applies to invasion of privacy tort). *Cf.* Restatement (Third) of Unfair Competition § 40, Comment c (1995) (trade secret law permits disclosures relevant to public health or safety, commission of crime or tort, or other matters of substantial public concern); *Lachman v. Sperry-Sun Well Surveying Co.*, 457 F.2d 850, 853 (CA10 1972) (nondisclosure agreement not binding in respect to criminal activity); *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal.3d 425, 436, 551 P.2d 334, 343-344 (1976) (psychiatric privilege not binding in presence of danger to self or others). Even where the danger may have passed by the time of publication, that fact cannot legitimize the speaker's earlier privacy expectation. Nor should editors, who must make a publication decision quickly,

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[38] *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) (Justice Breyer Concurring). Counsel of record Lee Levine informed Schafer that no party had raised the public safety or illegitimate privacy interest doctrine that Justice Breyer raised in his concurring opinion.

> have to determine present or continued danger before publishing this kind of threat.

Public Confidence in the Judicial System Depends on Its Appearance of Integrity. If a lawyer holding clear evidence of a judge's corruption must withhold it from authorities because of a duty owed to a client who conspired with the judge in the corruption, then public confidence in the judicial system inevitably will become impaired – for the truth will *eventually* come out. In the New York *Buried Bodies Case*, the bodies of the murdered girls were eventually found, and the public then became outraged that the lawyers had withheld their information for six months. In this state, after evidence *eventually* came out in 1988 that the late King County Superior Court Judge Gary Little had a widely known history of sexually molesting boys, the public became outraged that responsible professionals had not acted years earlier to remove him from judicial office.[39] Public confidence in the judicial system suffered profoundly as a result. We should not forget what a wise court observed decades ago:[40]

> Confidence in our law, our courts and in the administration of justice is our supreme interest. No practice must be permitted to prevail which invites toward the administration of justice a doubt or distrust of its integrity.

The need for judicial integrity *must* trump client confidentiality interests.

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[39] *See, e.g.*, Gering, David, *The Judges' Dark Secret; Judicial Conduct*, 75 A.B.A. Journal 78 (May, 1989); Mathews, Jay, *Social Watchdogs Shielded a Judge's Troubling Secret; Suicide Spurs Debate Over System's Failure*, The Washington Post (October 30, 1988) (reporting that legal professionals knew of, but did not expose, the Judge's misconduct for over seven years).

[40] *Erwin M. Jennings Company v. DiGenova*, 141 A. 866 (Conn. 1928).

2. Policy-Based *Interpretation* of the Rules of Professional Conduct is Appropriate

The ODC repeatedly asserts (ODC Br. at 1, 18, and 22) that Schafer is asking this Court to re-write the RPCs. Not so.[41] This Court *interprets* the lawyer conduct rules so as to further the purposes for which they are enacted, and the stated purpose of the rules governing lawyer conduct is "to protect the public and preserve confidence in the legal profession and justice system."[42]

Interpretation of Rule 8.3. Consistent with that purpose, this Court easily could interpret RPC 8.3 subsections (a) and (b) as expressing a lawyer's moral duty to report serious professional misconduct, but with subsection (c) making its fulfillment *permissive* rather than mandatory if the information is otherwise protected by Rule 1.6. Schafer's Opening Br. 28-29.

Past Interpretation of Attorney-Client Privilege Statute. ODC asserts "courts apply statutes, not policies" (ODC Br. 34), but finally

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[41] But in *Nielsen v. Bar Association*, 90 Wn.2d 818, 827, 585 P.2d 1191 (1978), this Court *did* amend its Admission to Practice Rule in the opinion. And in *State v. Hansen*, 122 Wn.2d 712, 721, 862 P.2d 117 (1993), this Court declared lawyers to have a duty to warn threatened judges that was not previously stated in any published rule. That duty has still *not* been proposed for incorporated into the Rules of Professional Conduct. The Bar leaders must regard a duty of lawyers to warn judges as a *slippery slope* that might lead to a duty of lawyers to warn ordinary persons who are in danger. See Koniak, *supra* n. 19.

[42] *In re Felice*, 112 Wn.2d 520, 526, 772 P.2d 505 (1989) ("The primary purpose ... is to protect the public and preserve confidence in the legal profession and judicial system."); *In re McGlothlen*, 99 Wn.2d 515, 522, 663 P.2d 1330 (1983) ("court rules are subject to the same principles of construction as are statutes"). In *McGlothlen*, the Court found a violation, but felt discipline would be unfair. *See also Lowry v. Industrial Ins. Appeals*, 102 Wn.2d 58, 64-65, 684 P.2d 678 (1984) (approving a courageous lawyer's insubordinate actions based upon his *reasonable belief* as to his ethical duties).

acknowledges (ODC Br. 25) this Court's well-established crime-fraud exception to the statutory attorney-client privilege. That exception reflects a policy-based interpretation of the phrase "professional employment" in the Washington statute establishing attorney-client privilege that has not changed since 1881[43] and is presently codified at RCW 5.60.060(2):

> An attorney or counselor shall not, without the consent of his or her client, be examined as to any communications made by the client to him or her, or his or her advice given thereon in the course of *professional employment*. [Emphasis added.]

For at least the 117 years since *Queen v. Cox*,[44] this Court and those of other states and countries have recognized that using a lawyer to further a crime or fraud cannot be interpreted as *professional employment* or as establishing a *professional relationship*. Schafer's Opening Br. 29-49.

Interpretation of "Professional Relationship" in the RPC Definition of "Secret". Normal statutory construction looks to the intent of the drafter who chose a particular phrase for use in a statute or rule. The RPC definition of "secret" remains unchanged from its form in the first 1969 public draft[45] of the ABA/CPR:

> "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship which the client has requested be held inviolate or the publication of which

[43] 1881 Code of Washington Territory, section 392, paragraph 2. The only change in 120 years has been the addition of feminine pronouns.
[44] 14 Q.B. 153, 5 Am. Crim. Rep. 140 (1884)
[45] ABA Special Committee on Evaluation of Professional Ethics, *Code of Professional Responsibility* (Preliminary Draft, January 15, 1969). What later became DR 4-101 was 5-101 in that draft.

would be embarrassing or is likely to be detrimental to the client.

That draft and the ABA/CPR were the work-product of a committee,[46] the reporter and principal drafter of which was Professor John F. Sutton, Jr. of the University of Texas School of Law.[47] He delivered his first draft of his completely original lawyer ethics code to the Wright Committee members in October, 1965. Most likely, Prof. Sutton chose the phrase "professional relationship" for use in the definition of "secret," but even if not, he certainly knew its contemporary meaning as applying *only* to one using a lawyer for a *legitimate* purpose. A 1964 article in the Harvard Law Review had described the absence of a *professional relationship* as the rationale used in the case law denying a communications privilege to persons who use lawyers to further crimes or torts:[48]

> [At page 731:] The exception comprehends a number of different situations – actual conspiracy between attorney and client, overt solicitation of illegal assistance which the attorney refuses, and performance of legal services for a client who conceals a tortious or criminal purpose. The rationale for the exception in these cases is ... the type of *professional relationship* that the privilege was designed to foster is absent. [Emphasis added; footnotes omitted.]
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> [At page 733:] If the attorney is consulted solely for an illegal

[46] Commonly called the "Wright Committee" after its chairman, Edward L.Wright.

[47] Considerable information about Prof. Sutton and his work drafting the ABA/CPR is in the transcript of an interview of him by Olavi Maru on December 20, 1976, posted on the Internet as part of the American Bar Foundation Oral History Program at <http://www.abf-sociolegal.org/oralhistory/sutto.html> (hereafter, "Sutton Interview"). That interview reports Prof. Sutton had been teaching a Legal Profession (a/k/a Professional Responsibility) course since he became a law professor in 1957, having been a practicing Texas trial lawyer for 16 years before that.

[48] Note, *The Future Crime or Tort Exception to Communication Privileges*, 77 Harv. L. Rev. 730 (1964).

> purpose, the absence of a *professional relationship* leads to a denial of privilege for all communications by the client – including those not germane to the unlawful activity. On the other hand, where an underlying *professional relationship* exists in which the attorney performs normal legal services for his client, an illegal request or hidden illicit purpose opens up only communications related to that purpose. [Emphasis added; footnotes omitted.]

Similar language ("legitimate professional employment") had been used in 1953 by a Texas appellate court denying privilege to comments between a defendant and his divorce lawyer that concerned his disposal of a murder weapon:[49]

> We are unwilling to subscribe to the theory that such counsel and advice should be privileged because of the attorney-client relationship which existed between the parties in the divorce suit. We think, on the other hand, that the conversation was admissible as not within the realm of legitimate professional counsel and employment.
>
> The rule of public policy which calls for the privileged character of the communication between attorney and client, we think, demands that the rule be confined to the legitimate course of professional employment.

Prof. Sutton and the other members of the Wright Committee provided many footnotes to the ABA/CPR to support and explain its provisions. The Canon 7 chapter's footnote 44, attached to EC 7-26, quoted portions of a 1951 Kentucky decision[50] suspending a lawyer who violated ABA Canons of Professional Ethics (1908) Canon 41's duty to report his client's fraud upon a tribunal notwithstanding the lawyer's defense that

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[49] *Clark v. State*, 261 S.W.2d 338 (Tex. Cr. App. 1953). Prof. Sutton certainly would have been familiar with this case, not only for its novelty and significance, but because it upheld a ruling that his own father had made as the trial judge.

[50] *In re Carroll*, 244 S.W.2d 474 (Kentucky 1951).

doing so would violate his duty of confidentiality to his client.

In footnote 73 to DR 7-102(B)(2), they cited a 1945 U.S. Supreme Court decision[51] that declined to enforce a patent dispute settlement agreement because the parties and their lawyers had knowledge of, but failed in their ethical duty to report, fraud and perjury concerning a patent proceeding.

Another significant case during that period was a 1949 New Jersey decision[52] sanctioning two lawyers. A husband and his lawyer perjurously fabricated lawful grounds for divorce. The wife's lawyer knew of the fraud, but misperceiving his duty of confidentiality to her, he did not report the fraud. The husband's lawyer was disbarred; the wife's lawyer was reprimanded.

The Wright Committee, in their footnote 15 to DR 4-101(C)(2) (permitting disclosures required by law), quoted the relevant text of ABA Ethics Opinions 155 and 156 (1936). The first opinion declared:

> [T]he attorney's knowledge of his [bail-jumping fugitive] client's whereabouts is not privileged, and [the attorney] may be disciplined for failing [voluntarily] to disclose that information to the proper authorities.

The second ABA opinion noted that though a lawyer might have a professional relationship with a client with respect to *some* matters, information

[51] *Precision Inst. Mfg. Co. v. Automotive M.M. Co.*, 324 U.S. 806, 89 L. Ed. 1382, 65 S.Ct. 993 (1945). A modern similar case is *Florida Breckenridge v. Solvay Pharm*, 174 F.3d 1227 (11th Cir.) (Recommending discipline of opposing lawyers from nationally prominent law firms that each hid their client's lawlessness from the court.)

[52] *In re Stein*, 62 A.2d 801 (N.J., 1949).

gained by the lawyer about the client's ongoing lawlessness is not protected:

> If his client [after the lawyer's warnings] thereafter persists in violating the terms and conditions of his probation, it is the duty of the attorney as an officer of the court to advise the proper authorities concerning his client's conduct. Such information, even though coming to the attorney from the client in the course of his professional relations with respect to other matters in which he represents the defendant, is not privileged from disclosure.

Prof. Sutton served for nine years, beginning in 1958, on the State Bar of Texas Professional Ethics Committee, as its vice-chairman by 1961 and later its chairman.[53] He certainly would have been quite aware of, and may even have authored, SBT Ethics Opinion 204 (June 1960) (by a 5 to 1 Committee member vote).[54] That opinion concerned a lawyer who had been consulted by a widow planning to forge her late husband's signature on a will and to get two witnesses who would swear that he had signed it. The lawyer counseled against that, and she did not hire him. The lawyer later learned that she had fulfilled her plan, and the forged will had been admitted to probate. The lawyer then was convinced the widow was perpetrating a fraud on the husband's children, including a daughter from a previous marriage. The lawyer asked the Ethics Committee (1) if he was

[53] See Sutton Interview, *supra* n. 47; Sutton, John F., Jr., *Professional Ethics*, 24 Tex. B. J. 99 (1961).

[54] Printed in a 1960 supplement (to a 1958 compilation) published as part of 24 Tex. B. J. #2 (Feb. 1961). [Available at the Wash. St. Law Library.] Nevada State Bar Formal Ethics Opinion No. 25 [printed in Nevada Lawyer (Feb. 2001)] is amazingly similar, and likewise permits disclosure of the prospective client's fraud. It is Internet-retrievable from <http://www.nvbar.org/publicServices/indexPublicationsArticles.php>.

permitted to testify as to the facts of his meeting with the widow, and (2) if he should *volunteer* that information to the court or the attorneys involved. The Committee answered affirmatively to the first question because "the announced intention to commit a crime is not included within the confidence the attorney is bound to respect," and then said:

> As to question two, the Committee is of the opinion that while nothing prevents an attorney from testifying in this matter, there is, at the same time, nothing in the Canons compelling the attorney to do so. The question is one of personal rather than legal ethics, though the duties of good citizenship would seem to call for disclosure.

This Court should, as courts have been doing for over a century, interpret *professional relationship* as excluding the use of a lawyer to further a crime or a fraud – as Hamilton used Schafer in 1992.

CONCLUSION

This case presents this Court an opportunity to demonstrate national leadership in re-defining the role of lawyers in our society. There is clear evidence that the national leadership of the well-organized practicing bar fabricated the ABA Model Rules of Professional Conduct primarily to serve the self-interests of practicing lawyers seeking to shield themselves from adverse rulings by the judiciary. It is up to this Court to interpret the lawyer conduct rules and to define the role lawyers,[55] and the legitimate

[55] Prof. Lawry, *supra* n.27, quoting from the "Lawyer as a Guardian of Due Process" section of the Report of the 1958 ABA-AALS Joint Conference on Professional

boundaries of any attorney-relationship, in a manner that serves greater society and the public interests.

Schafer hopes to be able to say that he is "Proud to be a lawyer."

Respectfully submitted this 8th day of November, 2001.

Douglas A. Schafer, Attorney No. 8652

Responsibility, 44 A.B.A.J. 1159 (1958), says about the role of a lawyer, at 319:

> The lawyer's highest loyalty is at the same time the most intangible. It is a loyalty that runs, not to persons, but to procedures and institutions. This means that the lawyer's duty (or "loyalty") to the client is bounded and contextualized by the legal system itself; moreover, the role of the lawyer within that system imposes on him a trusteeship for the integrity of those fundamental processes of government and self-government upon which the successful functioning of our society depends. ... [T]here is no such thing as a "client" without a legal system within which the words "lawyer" and "client" have meaning.