BEFORE THE DISCIPLINARY BOARD OF THE
WASHINGTON STATE BAR ASSOCIATION

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| In re<br>DOUGLAS SCHAFER,<br>Lawyer (Bar No. 8652). | Public No. 00#00031<br>RESPONSE BY RESPONDENT TO BAR ASSOCIATION'S COUNTERSTATEMENT |

I, the respondent lawyer, Douglas A. Schafer, respond to the Bar Association's Counterstatement in Support of Hearing Officer's Recommendation (RLD 6.3(b)) (hereafter "Bar's Counterstatement") (BF 125) as follows:

**THE CORRUPT JUDGE FACTOR**

The immediately obvious difference between the Bar's Counterstatement and my Respondent's Statement in Opposition to Hearing Officer's Decision ("Respondent's Statement") (BF 123) is in the significance we place on the ***corruption*** of Pierce County Superior Court Judge Grant L. Anderson, finally removed by the supreme court in 1999 for his "pattern of dishonest behavior." (EX A-11) Within the 11 pages of Respondent's Statement, I use the words "corrupt" or "corruption" 16 times, including ten times within the first two pages. In contrast, in the 26 pages of the Bar's Counterstatement those words appear only three times, once on page 8 and twice on page 24, referring only to *my* belief or motive. Our differences in our recognition of Judge Anderson's corruption and in our weighing of its significance result in our quite different attitudes toward the propriety of my conduct in exposing him. My primary objective behind my conduct in question in these



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proceedings was to remove from judicial office a very clearly corrupt judge.

The Hearing Officer concluded:

> "12. The information and documents obtained by Schafer from 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, without the disclosure of confidences and secrets communicated by Hamilton to Schafer in a client-attorney relationship. In his zeal to expose corruption by Anderson, Schafer disregarded his duty to maintain the confidences and secrets of his client Hamilton." (Emphasis added.)

Disciplinary Counsel, whose office has never charged Anderson or his colleagues for any corrupt conduct (EX D-32), downplayed that conclusion of the Hearing Officer by re-phrasing it in footnote 8 (page 21) of the Bar's Counterstatement as follows:

> "8. By reviewing in detail the information reported to the authorities by Respondent in February and March 1996, one can readily determine that the Hearing Officer was correct in concluding that Respondent could have met his **primary objective of reporting wrongdoing** by Grant Anderson without detailing his client's 1992 conversation. *See* Respondent's February 1996 summary of his investigation into Grant Anderson's activities, Ex. A-7 and A-8, and the box of documents that he had gathered by that time, Ex. A-14." (Emphasis added.)

Since the Office of Disciplinary Counsel has never acknowledged that Anderson was a corrupt judge (and a corrupt lawyer for years before becoming a judge) that Office understandably refuses to give significance to my having clear evidence of his corruption in assessing the propriety of my conduct in exposing him.

By early February 1996, it was clear to me that Anderson was a corrupt individual, based upon my gathering of the information and documents referred to by the Hearing Officer in his conclusion quoted above. Given that Anderson was a superior court judge—with the power to destroy people's lives (including that of my client Don Barovic)—I regarded his continuation on the bench as absolutely intolerable. I had a sense



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of great urgency, feeling that every litigant in his courtroom was at risk and that each had a due process right to have their case heard by an honest judge. I sought to take every step that I felt I could responsibly take to expedite his removal from his judicial post, without exposing myself to liability. I was well aware of the various whistleblower protection shields detailed on page 9 of my Answer (BF 12), including RCW 4.24.510 that shields from liability any person who communicates in good faith information to any agency of federal, state, or local government regarding any matter reasonably of concern to that agency. I relied on those shields in providing documentation to several agencies plus judicial and lawyer disciplinary officials.

Various events caused me soon to recognize that "the system" is not very responsive to accusations of a judge's corruption, and it tends to react in a manner suspicious of the accuser and protective of the judge. When I sought Judge Anderson's Cadillac license plate number from the office of then Presiding Judge Strombom, she directly reported my request to Anderson, then declined it. (EX D-19) When I sought to initiate the process for Judge Anderson's immediate suspension, a process reported in a news article about another judge, Supreme Court Justice Johnson informed me that no such process existed. (EX D-2). When I sought to involve the Attorney General's Office in helping Ocean Beach Hospital to recover its full charitable bequest from the estate that Anderson had exploited, that office showed very little interest. (EX A-9) After I contacted the Pierce County Prosecutor, I soon felt that he and his investigator were improperly trying to muzzle me. (TR 252-55) My contacts with the investigator for the Commission on Judicial Conduct led me to have serious doubts about the efficacy of "the system," most particularly the lawyer disciplinary system. (EX D-3).

On February 2, 1996, I prepared and filed a Motion of Prejudice and Supporting



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Statement requesting Judge Anderson's recusal from the Barovic cases, indicating that an investigation into his handling of the Hoffman Estate might result in his removal from office. (EX A-5, p. 3). I did not disclose in it anything relating to my former client, Bill Hamilton. (BF 109 pg. 6-7, ¶25) Judge Anderson immediately recused.

By February 16, 1996, I had determined to share with the law enforcement and disciplinary officials all of the relevant information that I possessed about Anderson's misdeeds, so I prepared the Declaration Under Penalty of Perjury (EX A-7) that reported the 1992 communications by my then client, Hamilton, among other things.

On March 8, 1996, Judge Donald Thompson, to whom the Barovic cases were assigned after Judge Anderson's recusal, spontaneously ordered me disqualified from participating in those cases, declaring that I had violated ethics rules, including RPC 8.2(a) (making false or reckless statement about the integrity of a judge). I believed that the true reason for his action was my having filed the recusal request (EX A-5) implying that Judge Anderson had committed serious misconduct in handling the Hoffman Estate. Before Judge Thompson entered a written order, 21 days later, reflecting his ruling, I offered to show him, in chambers if he desired, the documents concerning Anderson's apparent misconduct that I had shared with appropriate authorities. (EX D-30 p.2)

On April 26, 1996, I filed in the Court of Appeals a Motion for Discretionary Review (EX A-10) of Judge Thompson's order removing me from the Barovic cases, though my client, Don Barovic, was by then being represented in court by veteran lawyer Neil Hoff. Consistent with my belief, later shared by the Commissioner of the Court of Appeals (EX D-30 p. 2-3), that Judge Thompson's action sanctioning me was related to my recusal motion questioning Judge Anderson's judicial fitness, I included (pursuant to RAP 17.3(b), permitting relevant appendix material) as Appendix D to the Motion for



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Discretionary Review a 59-page collection of documents illustrating why I questioned Judge Anderson's judicial fitness. (EX A-10 pgs 5-6, 27-85). As I later testified (TR 152), I was pleased at having been able to place those documents in the public domain through that court filing, for my primary objective remained to expose and hasten the departure from the bench of a clearly corrupt judge. I was concerned for the litigants in Judge Anderson's courtroom.

Consistent with my primary objective, immediately after filing in the Court of Appeals the Motion for Discretionary Review, I faxed selected pages from it (EX A-12) to offices of the Tacoma News Tribune, the Seattle Times, and the Seattle Post-Intelligencer. I assumed that responsible journalists would promptly investigate and would publicly expose Judge Anderson's corruption. It being late April in a judicial election year, 1996, I hoped that news coverage would lead to Judge Anderson declining to seek re-election that year, or else facing and losing a contested election. I consider it vital to our democracy that responsible journalists scrutinize elected officials and report to the voting public whenever an official is discovered to be deficient in character. First Amendment jurisprudence has long recognized the governmental watchdog role of the press. Sadly, the local journalists were dissuaded, I believe, by the Pierce County Prosecutor's office from scrutinizing Judge Anderson, who was re-elected in 1996 without opposition and served for three more years before his removal in 1999 by the supreme court.

## BALANCING THE POLICIES: WHAT TRUMPS WHAT?

The most concise expression of my thinking in 1996 concerning the ethics of disclosing a possible client secret to expose a clearly corrupt judge is found in pages 3 and 4 of my letter to Disciplinary Counsel Julie Shankland of August 19, 1996. (EX D-4). On



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page 4, I raised the simple hypothetical: If an acquitted client boasts to his lawyer while leaving the courthouse that he bribed the judge the previous day, may the lawyer report that information? I asserted that the lawyer has a moral duty to do so.

I further asserted that RPC 8.3 could be read as supporting that moral duty. Subsection (b) of that rule admonishes lawyers to promptly report any judge's ethical violation that raises a substantial question as to the judge's fitness for office. That rule's Subsection (c), stating that "the rule does not require disclosure of information otherwise protected by rule 1.6," could be read as making such a disclosure *discretionary* rather than *mandatory*. Indeed, every express exception to the duty of confidentiality in rule 1.6 is discretionary rather than mandatory, intended to leave disclosures within the judgment of the lawyer.

I have been unable to locate any case or ethics opinion in the country that balances a lawyer's duty to report a corrupt *judge* against the lawyer's a duty of confidentiality to a client, particularly a client who is participating in the judge's corruption. I suspect that is because that particular collision of duties has never been addressed by an ethics body or court. Several ethics opinions address the conflict between reporting a miscreant *lawyer* under rule 8.3(a) and protecting the confidence of a non-consenting client. The opinions indicate that the duty of confidentiality takes precedence when the client is a victim of the miscreant lawyer's actions. ABA, *Annotated Model Rules of Professional Conduct* (4th ed. 1999), page 578. But one opinion does indicate that if a client is a knowing participant benefitting from a lawyer's dishonest conduct, then rule 8.3(c) does not bar another lawyer in the client's law firm from reporting the dishonest lawyer's conduct under rule 8.3(a). Connecticut Bar Ass'n Comm. on Legal Ethics and Professional Responsibility, Informal Op. 95-17 (1995). The opinion addressed a situation where a lawyer employed by another



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lawyer discovered that his employer lawyer had fraudulently backdated the filing of a complaint to evade a lapsed statute of limitations on a client's claim. It was unclear whether the law firm's client was involved in the fraud, but the ethics committee opined that it made no difference, that the associate lawyer must report the employing lawyer without needing the client's consent, saying:

> "Rule 8.3(c) is not applicable in this situation, as Rule 1.6 concerning the confidentiality of client information does not operate to bar the disclosure of this type of information. Pursuant to Rule 1.2(d), a lawyer is proscribed from assisting a client in conduct that the lawyer knows is criminal or fraudulent. The involvement of a lawyer with a client in a fraudulent activity violative of Rule 1.2(d) and Rule 8.4(c) cannot serve as a shield against disclosure of that information pursuant to Rule 1.6(a)."

I believe that the Connecticut committee recognized an important factor in the application of Rule 8.3, namely, was the client whose confidence would be breached by reporting a law professional's misconduct wrongfully participating with the professional in that misconduct. If the client was, then rule 8.3(c) should *not* be interpreted to shield the exposure of the professional's misconduct based on confidentiality due that client. Under the Connecticut committee's approach, rule 8.3(c) would not let Hamilton's claim of confidentiality bar my reporting of Anderson's corruption for Hamilton had been an active participant in Anderson's corruption.

It is well recognized that a lawyer's duty of confidentiality to clients is not absolute, but yields when balanced against weightier public interests. In this state until 1972, the duty of confidentiality, though often referred to as the "attorney-client privilege," was expressed in the Canons of Professional Ethics at Canon 37 ("It is the duty of a lawyer to preserve his client's confidences."). In *Dike v. Dike*, 75 Wn.2d 1 (1968) , the Washington State Supreme Court recognized that "balancing process," stating at 14:



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> "The attorney-client privilege, as defined in Canon 37, is not absolute; but rather is subject to recognized exceptions. (Citation omitted.)
>
> The exceptions which have arisen are the result of a balancing process in which the courts have had to weigh the benefits of the privilege against the public interest . . . ."

In *Hawkins v. King County*, 24 Wash. App. 338 (1979), the court cited *Dike* and a similar case, *Sowers v. Olwell*, 64 Wn.2d 828 (1968), stating at pages 343-44:

> *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."

A later case, *Seventh Elect Church v. Rogers*, 102 Wn.2d 527 (1984), similarly employed a balancing process when considering confidentiality. In 1986, a local law review contributor surveyed exceptions to the rule of confidentiality and stated:

> "All of these exceptions to the rule of confidentiality give discretion to the lawyer to determine if and to what extent disclosure should be made. In using this discretion, the lawyer simulates the balancing of the court in *Seventh Elect Church*. The lawyer must balance the need for disclosure against the harms disclosure will cause to the lawyer-client relationship in general and in the particular case. In performing this balancing, *lawyers must avoid isolating themselves from the needs and interests of society or forgetting the duty they owe to society* as well as to the client. Lawyers must shun the temptation to use the right of discretion as an excuse to avoid making difficult and sometimes costly decisions. A system of ethical rules that gives discretion to lawyers is the most desirable and effective system only if lawyers make conscientious decisions considering both their duty to the client and their duty to society." (Emphasis added.)

Stuart Watt, *Confidentiality Under the Washington Rules of Professional Conduct*, 61 Wash. L. Rev. 913, 917 (1986).

It seems to me that lawyers owe a duty to society to ensure that our system of justice operates with integrity. As expressed by a federal judge in *Malatea v. Suzuki Motor Co.*, 987 F.2d 1536 (11th Cir. 1993) [Paragraph 38], "An attorney's duty to a client can never outweigh his or her responsibility to see that our system of justice functions smoothly." The



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Preamble to the RPC in Washington states, "Lawyers, as guardians of the law, play a vital role in the preservation of society." Lawyers and judges are the guardians of the *integrity* of the justice system, which is essential to the preservation of our free and democratic society.

In 1996, I was aware of the "intense warfare" that since 1983 had been raging within the legal profession between trial lawyers and the counseling bar concerning whether a lawyer discovering a client's fraud could expose it. *See* H. Weinstein, *Client Confidences and the Rules of Professional Responsibility: Too Little Consensus and Too Much Confusion*, 35 S. Tex. L. Rev. 727, 732 (1994) (BF 93 Attachment, hereafter "Weinstein Article"). *See also* G. Hazard, *Lawyers and Client Fraud: They Still Don't Get It,* 6 Geo. J. Legal Ethics 701 (1993). I had in my "Ethics" folder at my desk copies of three different articles on Opinion 92-366 of the ABA Standing Committee on Ethics and Professional Responsibility authorizing the "noisy withdrawal" upon discovering client fraud. Each article emphasized that opinion's declaration that the ***client confidentiality provisions of Rule 1.6 "should not necessarily and in every case 'trump' other rules with which it collides."*** *The National Law Journal*, January 18, 1993 ("'Noisy Withdrawal' Held a Duty") (EX D-1); ABA Section of Business Law, *Business Law Today*, March 1993, pg. 49 ("Get out — and be 'noisy'") (EX D-1); and ABA Section of Business Law, *Business Law Today*, July/August 1993, pg. 40 (G. Bermant & S. Lorne,"Balancing Act: The noisy withdrawal. ABA opinion weighs subtleties of client fraud, lawyer confidentiality") (BF 107 Attachment).

Considering in 1996 the factors discussed above, I determined it was appropriate to do my utmost to expose the corruption of Judge Grant Anderson, including disclosing the 1992 comments of my former client, Bill Hamilton, that illustrated Anderson's corruption. In response to the assertion that RPC 8.3(b) calls for reporting judicial unfitness to "the appropriate authority," I submit that in the face of an upcoming judicial election, the



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electorate is an "appropriate authority," and the means to report judicial unfitness to the electorate is through the news media. The material that I provided in 1996 to the news media was in the public domain, a public court file, when I provided it to the media. I had filed that material, which included my declaration of Hamilton's 1992 comments, in my appeal of Judge Thompson's order removing me from the Barovic cases as consistent with a recognized exception to client confidentiality permitting a lawyer to make disclosures "to defend himself against accusations of wrongful conduct." (Former DR 4-101(C)(4), rephrased at RPC 1.6(b)(2)) .

**TO APPLY RULES OR TO APPLY JUDGMENT?**

The Bar's Counterstatement, at pages 11 and 12, asserts essentially that unless RPC 1.6 is changed, which only the Supreme Court can do, I must be harshly punished for violating "the rule of law" in my zeal to expose the corrupt judge. The Bar's Counterstatement claims its position is necessary to preserve "the proper functioning of the legal system" (page 10) and that my conduct "has challenged an essential bulwark of our system of justice and visited harm to everything that the rule of law stands for." (page 23, fn. 9) I submit that the presence of a corrupt superior court judge is much more harmful to our system of justice and the rule of law than the zealousness of a lawyer seeking to purge that corruption from our judicial system.

The Bar's Chief of Lawyer Discipline, Barrie Althoff, was quoted in an Associated Press article about this case that appeared in newspapers nationally on May 26, 2000, as saying "We recognize that Mr. Schafer's move to bring this forward was beneficial to society," but he continued, "We also believe it violated the Rules of Professional Conduct." (TR 36).



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The Hearing Officer concluded (BF 109 p. 16-17 ¶ 11) that "Schafer should be commended for his extraordinary efforts ... that resulted in Anderson's removal from judicial office." Still, he recommended a very harsh sanction.

The result could be otherwise if a disciplinary decision were based upon public policy considerations rather than upon the mechanical application of rules. Another lawyer whistleblower case that recently has received national attention involved a staff lawyer, Cindy Ossias, employed by the California Department of Insurance. Last spring, she leaked confidential information implicating the integrity of her boss and client, Insurance Commissioner Chuck Quackenbush, to a state legislative committee. Before he was forced to resigned his elected office, he had suspended Ms. Ossias and the California Bar had commenced a disciplinary investigation into her whistleblowing conduct. Many observers thought the Bar would sanction her for violating California's very strict rule of confidentiality. But on October 11, 2000, the California Bar disciplinary staff closed its investigation relating to Ms. Ossias stating that her conduct should not result in discipline because it was "consistent with the spirit" of the state's whistleblower protection act and because it "advanced important public policy considerations" bearing on the Office of Insurance Commissioner. Attached as Appendix A is a copy of the California Bar's dismissal letter as posted on the Internet by Ms. Ossias's attorney, Richard Zitrin, followed by the Los Angeles Times' story about her case published, and posted on its Internet website, on November 30, 2000.

I suggest that the same or a similar result could be reached in my case, if it were decided based upon a judgmental application of the public interest and policies underlying the rules rather than upon a mechanical parsing of the words in the rules. For example, as I initially argued in August of 1996 to Ms. Shankland (BF D-4 pg. 3), I believe that RPC



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1.6(c) (a Washington exception to confidentiality to allow reporting of breaches by court-appointed fiduciaries) could be interpreted on policy grounds as permitting me to expose the breaches of fiduciary duty to the Hoffman Estate that its court-appointed executor, Anderson, and his friend and accomplice Hamilton had engaged in. I reiterated this argument in my Answer (BF 12, pg. 8). In Respondent's Reply re: RCP 1.6(b)(1) (BF 100, pgs. 3-4), I asserted that the law concerning constructive trusts could apply to treat Hamilton as constructive trustee of the court-supervised Hoffman Estate, making RPC 1.6(c) applicable.

**IS A STRICT CONSTRUCTION OF THE RULES WARRANTED?**

At page 11, the Bar's Counterstatement asserts that exceptions to the Rule 1.6 duty of confidentiality "must be strictly construed." The only authority cited for that suggested strict constructionist approach was Comments 14 and 19 to ABA Model Rule 1.6. It should be noted that the Washington Supreme Court followed our bar's recommendation when adopting the RPCs in 1985 and specifically declined to adopt the comments to the ABA Model Rules. Those comments reflect the very strict approach to client confidentiality taken in Model Rule 1.6 that all but six states later rejected, as did Washington. Weinstein Article (BF 93 Appendix p. 733-34). Because of its widespread rejection by the states, Model Rule 1.6 with its very strict approach to client confidentiality has been characterized as "a substantive and political failure." (*Id.* at 736). The ABA's Ethics 2000 Commission has now published its report recommending substantial changes to Model Rule 1.6, including an exception to permit disclosures to rectify a client's fraud, which report is available on the Internet at www.abanet.org/cpr/e2k-rule16.html. In that report, the Reporter's Explanation of Changes states:



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> "[T]he Commission agrees with the substantial criticism that has been directed at current Rule 1.6 and regards the Rule as out of step with public policy and the values of the legal profession."

It is apparent that the values that the legal profession is returning to are substantially those expressed in the confidentiality provisions of the Code of Professional Responsibility ("the Code") that preceded the Rules of Professional Conduct. As discussed in Respondent's Statement (BF 123 p. 9), the Code's Disciplinary Rule 7-102(B)(1), and Canon 41 that preceded it, expressly provided in Washington through 1985 that a lawyer upon discovering that a client had perpetrated a fraud in the course of representation was permitted to reveal the fraud to the affected person. Considering that, I suggest that the claim in the Bar's Counterstatement (BF 125 p. 13) that "there is no crime-fraud exception to attorney-client confidentiality" is mistaken. It has existed for most of the twentieth century through the express wording of Canon 41 and the Code's DR 7-102(B)(1). It also has been implicit in the definitions of "confidences" and "secrets" that were expressed in DR 4-101(A). "Confidences" was there defined as information protected under the evidentiary privilege, which incorporated the crime-fraud exception. "Secrets" was there defined as "information gained in the **professional relationship** with the client" subject to additional conditions not relevant here.

**SECRETS ARISE ONLY IN A PROPER PROFESSIONAL RELATIONSHIP**

In K. Rolandelli, *Confidentiality and the Crime-Fraud Exception*, 3 Geo. J. of Legal Ethics 139, 141 (1989), the origin and rationale of the crime-fraud exception are attributed to an early English case, *Queen v. Cox*, 14 Q.B.D. 153 (1884), as follows:

> "An English case, *Queen v. Cox*, was the earliest case which fully promulgated the crime-fraud exception. The rationale for implementing the



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crime-fraud exception in that case has often been cited:

> 'In order that the rule [of privilege] may apply there must be both professional confidence and professional employment, but if the client has a criminal objective in view in his communications with his [lawyer] one of these elements must necessarily be absent. The client must either conspire with his [lawyer] or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the [lawyer'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 importance of *Cox* lies in the manner in which the court construed the word confidence. Since the client in this case was not honest and frank with his attorney, **no professional relationship developed**. This was the first time that the court recognized that the client had a role to play in forming the attorney-client bond." (Footnotes omitted; emphasis added.)

The article reports, at 141, that "The *Queen v. Cox* rule was adopted rapidly in the United States." There is no reason to assume that the scholars drafting the Code of Professional Responsibility in the 1960's and defining "secrets" to require a "professional relationship" were unaware of the significance of those words from the well known rationale of the *Queen v. Cox* case. Their drafting of a definition of "secrets" to require a "professional relationship" was fully consistent with then existing Canon 41 and with their contemporaneous drafting of DR 7-102(B)(1) that permitted disclosures to rectify a client's fraud perpetrated in the course of representation. Thus, both the definition of "secrets" at DR 4-101(A), in light of the *Queen v. Cox* rule, and the plain provisions of DR 7-102(B)(1) separately implemented the crime-fraud exception to attorney-client confidentiality in the Code.

The Bar's Counterstatement (BF 125 p. 16-17) rejects this analysis as "novel" by simply asserting that numerous legal scholars nationally would not be debating the proposed rectify-fraud exception to the confidentiality rules if my assertion that the crime-



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fraud exception is implicit in the definition of "secrets" made any sense. But the reason this analysis is distinct from that national debate is that this analysis only applies in those few states that retained the Code definition of "secrets" as setting the scope of the duty of confidentiality when they adopted their version of the Model Rules. Washington did that in 1985. In contrast, ABA Model Rule 1.6 greatly expanded the scope of the duty of confidentiality to cover all "information relating to representation of a client," rejecting the more limited scope of "information gained in the professional relationship with a client."

The Bar's Counterstatement, at page 16, recognizes that the asserted "professional relationship" requisite in the definition of "secrets" effectively obviates a lawyer's duty of confidentiality toward a client who uses the lawyer to further a crime or fraud, as Hamilton used me in 1992. But Disciplinary Counsel scorns this analysis as "baseless" and "strained" by pointing to the rejection in 1983 and 1991 by the American Bar Association's House of Delegates of proposed crime-fraud exceptions to attorney-client confidentiality. Again, that scorn fails to recognize that unlike the ABA Model Rules, Washington's RPC 1.6 retained the definition of "secrets" from the prior Code of Professional Responsibility which has always required the existence of a "professional relationship." The *Queen v. Cox* rationale continues to be relevant in Washington—a client deceptively using a lawyer to further a crime or fraud is not in a professional relationship but is using the lawyer as an *instrument.*

**IN WHAT STATE IS THE CRIME-FRAUD EXCEPTION?**

The Bar's Counterstatement, at pages 17 and 18, alleges that my discussion of *Sloan v. State Bar*, 102 Nev. 436, 442 (1986), in my Respondent's Trial Brief (BF 93 p. 6) was misleading. I disagree. As the case's passage that I quoted indicates, the Nevada State Bar sought to suspend the license of a lawyer who discovered that a client had used him as an



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*instrument* in the client's fraud for having failed affirmatively to report the client's fraudulent transaction after learning of it. The Nevada State Bar contended the lawyer "had an independent duty to disclose the fraud, because [the lawyer] had been used as 'instrument' in the fraudulent transaction." The Nevada State Supreme Court held that the lawyer had no affirmative duty to report, and could have justifiably concluded he was prohibited from doing so. The significance of the case lies in the position taken, presumably after some study and thought, by the Nevada State Bar disciplinary officials.

The Bar's Counterstatement, at page 18, scoffs at Illinois State Bar Association Advisory Opinion on Professional Conduct No. 93-16, claiming its authors were confused in making the statement that I quoted in my Respondent's Trial Brief (BF 93 p. 6), as follows:

> "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, the communications to the attorney with respect to such activity would not be privileged nor would the attorney be bound by a fiduciary duty of confidentiality toward them."

Those statements were made based directly upon, and cited to specific pages of, a then recent Illinois State Supreme Court opinion, *In re Marriage of Decker*, 606 N.E.2d 1094 (Ill. 1992), a case in which both the Illinois State Bar Association and the Chicago Bar Association filed *amicus curiae* briefs. In that opinion, the Court separately considered both the attorney-client privilege and the rule of confidentiality. Concerning the crime-fraud exception, the Court quoted the classic passage from *Queen v. Cox* and at page 1101 stated, "The rationale for this exception is that in seeking legal counsel to further a crime or fraud, the client does not seek advice from an attorney in his professional capacity." At page 1104, the Court quoted approvingly from 1 G. Hazard & W. Hodes, The Law of Lawyering §



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1.6:109 (Supp. 1991) the following passage:

> "Where the client's present activities are unlawful, neither the confidentiality principle nor the attorney-client privilege accords protection to information concerning those activities."

At pages 1104-05, the Court 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 crime-fraud holding, 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."

Considering the *Decker* opinion, I do not think that Disciplinary Counsel's scoffing at the scholarship of the authors of the Illinois State Bar's ethics opinion is warranted. If they are "confused," then the Illinois Supreme Court is confused, but it *is* the highest ethics authority in that state. I don't think it is confused. From the Nevada *Sloan* case discussed above, it appears that the Nevada Bar may be confused. Confusion in this highly contentious and debatable area of legal ethics is hardly surprising. There is a dearth of case law authoritatively dealing with the ethics of lawyer conduct upon discovery of client fraud or crime, probably because few disciplinary cases are brought in such circumstances. There is voluminous secondary literature, mostly written by scholars with suggestions as to what the rules of legal ethics *should be* because they find the discredited Model Rules of confidentiality in such crime-fraud circumstances to be morally unacceptable. The Bar's



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Counterstatement (BF 125 p.14 fn. 1) quotes from ABA, *Annotated Model Rules of Professional Conduct* (4th ed. 1999), page 79:

> "The issues of the lawyer's proper course of action upon discovery of client fraud or crime is the most controversial in the subject of confidentiality, if not the whole of legal ethics."

In the 1994 Wienstein Article (BF 93 Attachment p. 736), he reported that:

> "One can now find among the 50 states at least 10 different versions of rules governing whether a lawyer may, must, or may not disclose that a client has committed or is intending to commit a fraud or financial crime having a serious financial impact on a third party."

In G. Bermant & S. Lorne, *"Balancing Act: The noisy withdrawal. ABA opinion weighs subtleties of client fraud, lawyer confidentiality,"* ABA Section of Business Law, *Business Law Today,* July/August 1993, pg. 40 (BF 107 Attachment), it is reported at page 57 that:

> "Of the 37 jurisdictions that have used the Model Rules as the source of their rules, only six have accepted Rule 1.6 as the ABA House of Delegates would have it. Twenty-one have adopted the Kutak/Ethics Committee formulation or a variant on permissive disclosure, and 10 have gone so far as to mandate disclosure of client information if needed to prevent or rectify a serious financial fraud."

Considering the state of chaos nationally about the extent to which the crime-fraud exception obviates the duty of confidentiality once a used lawyer fully discovers his client's fraud, it seems to me appropriate to not judge too harshly a lawyer to charted a course that all admit resulted in benefits to society–the removal of a corrupt superior court judge.

## HAMILTON'S INJURIES

The Hearing Officer concluded that the information and documents I obtained from public records would have been more than sufficient to cause Judge Anderson's removal from the bench, without the disclosure of confidences and secrets communicated



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to me by Hamilton in an attorney-client relationship. The only such alleged "confidences and secrets" that have been identified were his August 1992 comments to me that I reported in the first paragraph of my Declaration Under Penalty of Perjury. (EX A-7) If the Hearing Officer's assumption about Anderson's removal is correct, I assert strongly that whatever injury Hamilton may have suffered from my disclosure of his 1992 comments, he would have suffered it to the same degree if I had distributed only the other information and documents. I was given the tip to investigate Anderson's acquisition of his Cadillac from his divorcing wife's lawyer, Camden Hall (of Foster Pepper Sheffelman). The Commission on Judicial Conduct spent 17 months investigating thoroughly before bringing its charges against Anderson. There is no evidence that any other official ever contacted Hamilton as a result of any papers that I distributed, except for phone contact by WSBA Disciplinary Counsel Julie Shankland in July 1996. By July 26, 1996, Hamilton had filed his grievance against me and signed the waiver of confidentiality (EX D-36) as to any information relating to his grievance against me, which encompassed his 1992 comments to me.

I do not doubt that Hamilton has incurred humiliation and expense, but he brought on his problems himself. The federal agents and grand jury that were investigating him by at least 1996 for illegal dealings with lawyer Michael McKean and who-knows-what-else did not result from anything I had done. (EX D-12, D-13, TR 182).

Lawyer Philip Sloan's conclusory testimony (TR 169) that "disclosures" by me have "destroyed" Hamilton is false and misleading. Among other things, it fails to distinguish between my allegedly improper disclosures of Hamilton's 1992 comments in early 1996 to selected parties and my permissible disclosures of any other information at any time to any parties. My disclosure of his 1992 comments could not have "destroyed" him, for he readily



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admitted to Disciplinary Counsel Julie Shankland in July 1996 that he had made those 1992 comments just as I had reported them. (EX D-32, p. 5 of Shankland's ltr to Schafer of August 15, 1996).

## CONCLUSION

Please dismiss this case without discipline. It is not warranted.

December 7, 2000

Douglas A. Schafer, WSBA 8652



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**text of State Bar letter to Ms. Ossias**

- **To: Multiple recipients of list <legalethics-l@lawlib.wuacc.edu>**
- **Subject: text of State Bar letter to Ms. Ossias**
- **From: Richard Zitrin <zitrinr@usfca.edu>**
- **Date: Wed, 18 Oct 2000 08:10:14 -0500**

**To avoid further ambiguity, and to give Ed (and others who have e-mailed me off list) the full text of the letter, I typed it in this morning. Here it is:**

**Richard**

**The State Bar of California**
**Office of the Chief Trial Counsel--Enforcement**
**140 Howard Street**
**San Francisco, CA 94105**

**October 11, 2000**

**Richard Alan Zitrin**
**Attorney at Law**
**Zitrin & Mastromonaco LLP**
**445 Bush St. #600**
**San Francisco, CA 94108**

**Re: Your Client: Cindy Alayne Ossias**
**State Bar Case no. 00-O-12989**

**Dear Mr. Zitrin:**

**We are sending this letter to you based on our understanding that you represent Ms. Ossias in this matter. Please let us know immediately if this understanding is incorrect.**

**We are writing to advise you that we have decided to close our investigation relating to whether Ms. Ossias violated the Rules of Professional Conduct or the State Bar Act when she disclosed materials from the Department of Insurance to legislative staff members. We have concluded that Ms. Ossias did not engage in conduct which warrants disciplinary prosecution.**

**In reviewing this matter, we found that the facts were not in serious dispute. Ms. Ossias, while employed as an attorney with the Department of Insurance, provided legislative committees with materials pertaining to the department's settlement of claims against insurance companies arising out of the Northridge Earthquake. We have carefully reviewed the question of whether Ms. Ossias violated client confidences (Bus. & Prof. Code sec. 6068(e) and related case law), whether Ms. Ossias complied with the obligations of**

**attorneys representing an organization (Rule of Prof. Cond. 3-600 and related case law), and whether Ms. Ossias' conduct was permissible under the California Whistleblower Protection Act (Gov. Code sec. 9149.20 et seq.).**

**We have not found it necessary to decide whether the Department of Insurance could have asserted that the documents in question were confidential as to legislative committees. Rather, we have determined that Ms. Ossias' conduct should not result in discipline because: (1) it was consistent with the spirit of the Whistleblower Protection Act; (2) it advanced important public policy considerations bearing on the office of Insurance commission; and (3) it is not otherwise subject to prosecution under the guidelines set forth in this office's Statement of Disciplinary Priorities.**

**We note that the Acting Insurance Commissioner, based on reports from the California Highway Patrol and the California Attorney General's Office, commended Ms. Ossias for her actions and reinstated her to active employment with the department.**

**We appreciate the cooperation that we have received from you and your client in this matter. Please feel free to contact us if you have any questions or concerns.**

**Sincerely,**

**/s/**

**Donald R. Steedman**
**Deputy Trial Counsel**

**Richard Zitrin**
**Director, Center for Applied Legal Ethics**
**Univ. of San Francisco School of Law**
**c/o Zitrin & Mastromonaco, LLP**
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Los Angeles Times, November 30, 2000

## Ruling Clears Quackenbush Whistle-Blower

By VIRGINIA ELLIS, Times Staff Writer

SACRAMENTO--In a decision that could give attorneys new freedom to expose wrongdoing, the State Bar of California has exonerated whistle-blower Cindy Ossias of violating lawyers' ethics when she leaked documents that contributed to the downfall of former Insurance Commissioner Chuck Quackenbush.

The bar found that the actions of Ossias, a Department of Insurance lawyer, were not only protected by the California Whistleblower Act but, more important, "advanced . . . public policy considerations bearing on the responsibilities of the office of insurance commissioner."

"We have concluded that Ms. Ossias did not engage in conduct which warrants disciplinary prosecution," wrote Donald R. Steedman, the bar's deputy trial counsel. The bar licenses and disciplines lawyers.

Legal experts said the carefully worded decision--believed to be the first of its kind in the nation--could be an important breakthrough, especially for government lawyers who witness wrongdoing that could affect the public.

In those instances, they said, the decision seemed to mean that the obligation to protect the public overrides other considerations, including a lawyer's ethical obligation not to divulge confidential information provided by clients.

"I read this as a statement acknowledging that lawyers can 'whistle blow' in appropriate circumstances, [but] it's not a license for everybody to go ratting on their clients," said Richard Zitrin, who is director of the Center for Applied Legal Ethics at the University of San Francisco Law School and who represented Ossias without pay.

Clark Kelso, the McGeorge Law School professor who briefly served as acting insurance commissioner after Quackenbush was forced to resign, agreed that the decision would provide new protection for government lawyers but questioned whether it extended to all attorneys.

"It seems to me it applies only to the public sector," he said. "I think if a disclosure by an attorney is protected by the Whistleblower Act and the disclosure advances important public

policy, then you may not have a problem with the state bar."

Zitrin, the author of several books, including "The Moral Compass of the American Lawyer," acknowledged that the decision was less clear on that point. But he said it appeared applicable to any attorney whose disclosures could protect the public.

"I don't know if Cindy was working for Firestone and blew the whistle to the Legislature on faulty tires . . . what would have happened," he said, "but I would have hoped the state bar would have come to the same conclusion."

Ossias provided information to the Assembly Insurance Committee about secret settlements Quackenbush had reached with six insurance companies after the Northridge earthquake. The settlements allowed the companies to donate money to private foundations that Quackenbush created rather than face possible fines for mishandling Northridge claims.

Funds from one of the foundations were used for political polling and television advertising designed to help the commissioner prepare to run for higher office, say court documents filed by state Atty. Gen. Bill Locyker. A series of legislative hearings prompted Quackenbush to resign, effective July 10.

Before he left office, Quackenbush placed Ossias on administrative leave and took steps to fire her.

His successor, Kelso, reinstated her, deciding after a thorough investigation that her actions were protected by the Whistleblower Act, which provides that state employees be free "to report waste, fraud, abuse of authority, violation of law, or threat to public health without fear of retribution."

In an interview, Kelso said he was pleased by the bar's position because "it would be odd if lawyers were to get the protection of the Whistleblower Act only to have the state bar take their license."

Kelso said the bar's decision could be far-reaching, because lawyers are "often going to be the ones who have the greatest insight" into wrongdoing.

Assemblyman Darrell Steinberg (D-Sacramento), who conducted much of the questioning during the Quackenbush hearings, said the decision sends the right message that, for the government lawyer, the real client is the "public, first and foremost."

He said Ossias had been put in the difficult position of having to weigh her conscience and her public responsibility against the effect her actions to expose wrongdoing might have on her livelihood.

"The bottom line is this," he said: "But for Cindy's willingness to risk her job and her license, we probably would not have gotten to the bottom of this scandal."

Steinberg, who is himself a lawyer, said he will introduce legislation to make it clear in law that the protections of the Whistleblower Act apply to attorneys.

"Cindy's situation raised a very important issue: how we strike the right balance between maintaining the sanctity of attorney-client privilege and at the same time make sure lawyers have the ability to expose fraud and corruption," he said.

Ossias, who for months had been under the threat of losing her ability to practice law, said she was "terribly relieved" by the decision.

"It's validation for what I've done," she said. "That's the best thing."

Insurance company officials, who have criticized Ossias for releasing confidential documents, declined to comment.

State bar lawyers would not discuss the origin of their investigation of Ossias. Zitrin said he understood that it had been initiated by the bar because the organization considered the facts surrounding her case to be of substantial public interest.

Zitrin, a frequent critic of what he considers the bar's lax disciplinary policies, said he volunteered to represent Ossias without pay because "I was absolutely convinced she did the right thing."