BEFORE THE DISCIPLINARY BOARD OF THE
WASHINGTON STATE BAR ASSOCIATION

In re DOUGLAS SCHAFER, Lawyer (Bar No. 8652).	Public No. 00#00031 RESPONDENT'S STATEMENT IN OPPOSITION TO HEARING OFFICER'S DECISION

I, the respondent lawyer, Douglas A. Schafer, oppose the Hearing Officer's Findings of Fact, Conclusions of Law, and Hearing Officer's Recommendations, as follows:

1. Introduction.

Comments that a client, Mr. Hamilton, made to me in 1992 concerning his purchase of a bowling center prompted me, three years later, to investigate into the integrity of Pierce County Superior Court Judge Grant L. Anderson. Upon concluding from the evidence I gathered that Judge Anderson was corrupt, in 1996 I provided the evidence including Mr. Hamilton's comments to disciplinary and law enforcement authorities and certain other parties. In 1999, the state supreme court removed Judge Anderson from office for a "pattern of dishonest behavior," including accepting payments on his Cadillac from Mr. Hamilton as payback for his 1992 sale of a bowling center from a deceased client's estate to Mr. Hamilton shortly before becoming a judge.

The Hearing Officer asserted that under our state's Rules of Professional Conduct ("RPC") "a lawyer should seek to remove a corrupt judge without violating the lawyer's duty to preserve his client's confidences" and that my objective of removing corrupt Judge Anderson "most likely could have been achieved without violating [my] duties to

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

Hamilton." [Hearing Officer's Aggravating Factor (g).] I asserted that exposing the corruption of a sitting judge is a higher priority than maintaining confidences of a client who had joined in the judge's corruption. I asserted that Mr. Hamilton's 1992 comments were not "confidences" or "secrets" as defined in the RPC. I also raised other defenses, all of which the Hearing Officer rejected.

The Hearing Officer recommended a six-month suspension of my law license for disclosing Mr. Hamilton's 1992 comments.

2. The Hearing Officer's Findings of Fact.

I do not object to the Hearing Officer's 44 Findings of Fact, but I assert that additional facts should be found from the evidence and testimony. These additional facts are relevant to certain proposed and existing legal conclusions.

a. Facts Showing Corruption. Without stating a relevant supporting finding of fact, the Hearing Officer stated as Conclusion of Law No. 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 ... ." While I question the Hearing Officer's hindsight assertion that the corrupt judge would have been removed even without my disclosing all the evidence that I possessed of his corruption, a finding of fact on the corruption that was evident from the public records seems necessary. I suggest my proposed Finding of Fact No. 18, as follows:

> 18. From December 15, 1995 through January 31, 1996, Doug Schafer obtained considerable information from both public and private sources about transactions by Grant L. Anderson concerning the Hoffman Estate that caused Doug Schafer to believe that Judge Anderson in conspiracy with lawyer Stephen Fisher, Bill Hamilton, and others were defrauding Ocean Beach Hospital of at least $1 million

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

that it still was entitled to receive. Among the papers that Doug Schafer had then obtained were public records showing that Bill Hamilton, through his corporation, PRE, had acquired Pacific Lanes for $508,096 simultaneously with borrowing $900,000 from First Interstate Bank, which borrowing would have required that the appraised value of Pacific Lanes be at least $1.2 million. Other public records showed that Grant Anderson had transferred from the Hoffman Estate's Surfside Inn timeshare interests to most individuals in his law firm for less than one-third their market value in the month before he closed that estate and became a judge. [EX D-6 through D-11; TR 374-469; TR 367; TR 414-15]

b. Facts Supporting Crime-Fraud Exception. Two of the defenses discussed below, the crime-fraud exception and the absence of a professional relationship, arise when a person uses the services of a lawyer intending to facilitate the commission of a crime, fraud, or other unlawful activity. The Hearing Officer's Finding of Fact No. 7 (Mr. Hamilton's statement of intent to repay Mr. Anderson for the good deal on the bowling alley.) does show his fraudulent or unlawful intent. But, the evidence supports far more explicit findings of fact of that intent, which more convincingly support those defenses. I suggest my proposed Findings of Fact Nos. 6, 10, and 11, as follows:

6. In August 1992, Bill Hamilton engaged Doug Schafer to prepare and file papers to form PRE. Concerning that task, Bill Hamilton later testified under oath:

(a) "I engaged Douglas Schafer to prepare and file corporate papers for me relative to this acquisition" referring to his acquisition of Pacific Lanes. [EX D-15 (CJC Investigation Documents) Hamilton's Deposition on 1/21/97, page 21];

(b) "I didn't retain Mr. Schafer in any capacity to negotiate anything for me. I have my own opinions of his abilities in that regard, as well as my own. The

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

deal was made; it was done. All I asked Mr. Schafer to do was form my corporation." [EX D-15 (CJC Investigation Documents) Hamilton's Deposition on 1/21/97, page 28]; and

(c) "I had inquired in the middle of August of Mr. Schafer to form the corporation that was going to be necessary since I wanted to deal from a corporate limited liability, and he began his engagement. He formed that corporation. … I approached him after I had what I considered to be the deal made with Grant Anderson. … I went to Mr. Schafer strictly for the purpose of forming the corporation." [EX D-16 (CJC Hearing Transcript) at pages 221–22].

10. Bill Hamilton later testified under oath that he and Grant L. Anderson had been close friends for at least 15 years prior to 1993 and specifically described his close relationship with Grant Anderson by testifying, "He's as good a male friend as I have." [EX D-16 (CJC Hearing Transcript) at page 259].

11. Bill Hamilton's engagement of Doug Schafer in August 1992 to form PRE was intended by Bill Hamilton to further his commission of fraudulent, criminal, or otherwise unlawful activities in conspiracy with the Hoffman Estate's court-appointed executor, Grant L. Anderson, including the intentional breach of duty by a court-appointed fiduciary and violation of liquor and gambling licensing laws. [EX D-17 (CJC Hearing Exhibits) Ex. 1 –16 and 19 ¶13(a); EX D-16 (CJC Hearing Transcript) pages 129–57; EX D-15 (CJC Investigation Documents) Hamilton's Deposition of 1/21/97, pages 40–44.]

3. Conclusions of Law and Defenses

A fundamental principle that I believe should be borne in mind while considering the propriety of my conduct as a lawyer, as an "officer of the court," is expressed in Canon

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

1 of the Code of Judicial Conduct:

> "An ... honorable judiciary is indispensable to justice in our society."

Another guide is expressed in the Preamble to our state's Code of Professional Responsibility, as follows:

> "Lawyers, as guardians of the law, play a vital role in the preservation of society. ... In fulfilling professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation which a lawyer may encounter can be foreseen, but fundamental ethical principles are always present as guidelines. Within the framework of these principles, a lawyer must with courage and foresight be able and ready to shape the body of the law to the ever-changing relationships of society."

a. Common Sense Duties of Lawyers as Officers of the Court. The Hearing Officer's Conclusion of Law No. 2 asserts that a lawyer may not reveal client information "absent an express exception" in the RPC. I disagree, and our case law indicates otherwise. As noted in the RPC's Preamble's extract quoted above, not every situation which a lawyer may encounter can be foreseen, even by the drafters of the RPC. As I argued in my Respondent's Trial Brief (a/k/a Respondent's Hearing Brief) dated July 16, 2000, to the Hearing Officer at the commencement of the hearing, there is room in the law to apply common sense and recognize that lawyers have a duty to see that our system of justice functions properly. I incorporate by this reference the arguments under the heading "Common Sense" in Respondent's Trial Brief.

b. The Crime-fraud Exception and the Absence of a Professional Relationship. The Hearing Officer's Conclusion of Law No. 6 asserts that Mr. Hamilton's 1992 communications to me were "confidences" or "secrets." I disagree. Both of those terms are expressly defined in the Terminology section of the RPCs:

> "'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to other information gained in the professional relationship ... ."

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

Washington case law for over 100 years has recognized the crime-fraud exception as denying privilege to information communicated to an attorney by a client who is using the attorney's services to further a crime, fraud, or other unlawful act. Information communicated under such circumstances would not be a "confidence" as defined in the RPC. The rationale generally given for denying privilege when a client uses a lawyer as a tool to further the client's lawlessness is that no "professional relationship" has been formed between them. Without there being a "professional relationship," information gained by the lawyer from the client intending to further lawlessness would not be a "secret" as defined in the RPC.

I extensively briefed the crime-fraud exception in, and incorporate by this reference, (1) my letter/brief dated December 7, 1999, to the Hearing Officer on a discovery dispute with Mr. Tuell, Judge Anderson's former law partner, and (2) my Reply to Motion to Quash dated June 16, 2000, on a discovery dispute with Mr. Sloan, Mr. Hamilton's counsel.

I briefed the defense that the absence of a "professional relationship" in a situation under which the crime-fraud exception applies precludes information gained from being a "secret" in, and incorporate by this reference, (1) Respondent's Trial Brief, pages 5 - 7, and (2) Exhibits A and B to Respondent's Reply re: RPC 1.6(b)(1)(Preventing Commission of a Crime) dated July 28, 2000, which are copies of relevant portions of the 1984 and 1992 editions of the *ABA Model Code of Professional Conduct Annotated* that I had cited in Respondent's Trial Brief. 

c. The Prevent Crime Exception. The Hearing Officer's Conclusions of Law Nos. 9 and 10 assert the inapplicability of the exception in RPC 1.6(b)(1) permitting lawyers to reveal client confidences or secrets to prevent the client from committing a crime. I assert that the exemption could be found to be applicable, and I incorporate by this reference the arguments for its applicability that I made in Respondent's Reply re: RPC 1.6(b)(1)

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

(Preventing Commission of a Crime) dated July 28, 2000.

4. Application of ABA Standards.

The Hearing Officer asserts, under Application of ABA Standards No. 3 (page 19), that my disclosures of Mr. Hamilton's 1992 comments caused injury to him. I submit that there was no significant evidence presented to support a conclusion that his injuries resulted directly from my disclosures of his 1992 comments rather than from the overwhelming evidence of his misconduct from public documents and other sources (*e.g.*, the Cadillac tip by Diane Anderson's divorce lawyer, Camden Hall). The evidence shows that when Mr. Hamilton was interview by Disciplinary Counsel Julie Shankland in July 1996, he acknowledged to her that he had made the 1992 comments that I had revealed. EX D-32 (Dismissal Letter by Ms. Shankland to Mr. Schafer dated August 15, 1996, page 5.) That same month, Mr. Hamilton waived confidentiality with respect to his 1992 comments when he signed his consent to public disclosure of all information relating to his grievance against me that has resulted in this proceeding. EX D-36.

The evidence presented would lead a reasonable person to believe that Mr. Hamilton's injuries may more likely be related to his questionable activities that became the subject of a federal criminal investigation and the felony prosecution and conviction of a lawyer to whom it appeared he was illegally paying kickbacks for federally subsidized low-income housing project deposits. EX D-12 and D-13.

5. Aggravating and Mitigating Factors.

a. Selfish Motive. I submit that the Hearing Officer overstates my testimony (TR 147-52 and 156-60) by asserting that I "was also motivated by personal vindication in disclosing Hamilton's confidences and secrets in the April 26, 1996 Motion for Discretionary Review in the *Barovic* case and in faxing [my] February 16, 1996 Declaration

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

to three daily newspapers." I testified (TR 151) concerning my filing with the Court of Appeals of my 90-page Motion for Discretionary Review (EX A-10) of Judge Thompson's *Barovic* case order summarily disqualifying me from further participation in the case. I truthfully acknowledged that in filing that Motion, "I was seeking some degree of vindication." The Court of Appeals did later vacate Judge Thompson's order disqualifying me. (*Estate of Barovic*, 88 Wn. App. 823 (1997)) But it is an overstatement to assert that my specific inclusion of Mr. Hamilton's 1992 comments with many public documents in the appendix "D" portion of the Motion for Discretionary Review was motivated by personal vindication. That inclusion was, in fact, motivated solely by my desire to expose corrupt Judge Anderson, and the Motion presented an appropriate public vehicle by which to accomplish that. (EX D-30) Once the Motion (EX A-10) was a public court document, I provided key portions of it to three daily newspapers, hoping they would fulfill their government "watchdog" function and hasten the departure of the corrupt judge. (TR 160) There was no vindication or other selfish motive behind my providing it to the newspapers.

b. Pattern of Misconduct. The Hearing Officer's assertion of a pattern of misconduct fails to recognize that the alleged misconduct all relates exclusively to a single extraordinary circumstance: my strong desire to expose a corrupt sitting superior court judge to responsible parties who by performing their missions could cause his departure.

c. Refusal to Acknowledge Wrongful Nature of Conduct. I consider protecting the integrity of the judicial system to be the highest duty of any lawyer or judge. The Hearing Officer asserts that preserving a client's confidences is a higher duty. He further asserts that my primary objective of removing corrupt Judge Anderson "most likely could have been achieved without violating [my] duties to Hamilton." I disagree with the Hearing Officer, based upon my own experiences with disciplinary and law enforcement authorities and with journalists. In fact, Judge Anderson was not removed for three and a half years, even with all the information that I reported in early 1996.

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

On the subject of acknowledging right from wrong, I note that the evidence indicates that Judge Anderson, Mr. Hamilton, and others defrauded a public hospital district of over $1 million from the Hoffman Estate (TR 439 and 443; EX D-20 and D-21), with Mr. Hamilton having used my services forming his corporation to assist him in their scheme. Concerning such a scenario, the 1908 American Bar Association Canons of Ethics, adopted as rules in Washington state in 1950, included the following Canon 41:

> **Canon 41. Discovery of Imposition and Deception.** When a lawyer discovers that some fraud or deception has been practiced, which has unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising his client, and if his client refused to forego the advantage thus unjustly gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.

The Washington State Supreme Court in 1972 replaced the ABA Canons of Ethics with the ABA Code of Professional Responsibility, and from 1972 through 1985, that Code as adopted in Washington included Disciplinary Rule 7-102(B)(1), which for that entire period read as follows (a 1974 ABA model amendment was not adopted here):

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

The ABA Model Rules of Professional Conduct departed from the long-established ethical norm that a lawyer might act in some circumstances to rectify his client's fraud, but that ethical norm is now becoming re-established by its recognition in the just released American Law Institute's *Restatement Third, The Law Governing Lawyers* (2000) at § 67(2):

> **§ 67 Using or Disclosing Information to Prevent, Rectify, or Mitigate Substantial Financial Loss.**
> **(2)** If a crime or fraud described in Subsection (1) [committed by a client in a matter in which the client employed the lawyer's services] has already occurred, a lawyer may use or disclose confidential client information when the lawyer reasonably believes its use or disclosure is necessary to prevent, rectify, or mitigate the loss.

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

In addition, the ABA's Commission on the Evaluation of the Rules of Professional Conduct (commonly called the "Ethics 2000 Commission") is scheduled on November 20, 2000, to release its final report recommending changes to the Model Rules of Professional Conduct, including (according to its latest draft) amendments to Rule 1.6 that would re-establish the professional norm that a lawyer might act in some circumstances to rectify his or her client's fraud. As proposed, the amendment will change Rule 1.6(b)(3) to read:

> **Rule 1.6 CONFIDENTIALITY OF INFORMATION**
> **(b)** A lawyer may reveal information relating to the representation of a client or a former client to the extent the lawyer reasonably believes necessary:
> **(3)** to rectify or mitigate substantial injury to the financial interests or property of another resulting from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

Considering the long history, and the pending re-ascendancy, of the profession's ethical norm declaring it ***not*** wrongful conduct for a lawyer to reveal confidential client information to rectify a fraud committed by the client with aid of the lawyer's engagement, I submit that I should not be judged too harshly for having done just that. Particularly under the facts of this case, with a sitting judge as the primary fraud perpetrator and a public hospital as the primary victim of a very substantial fraud.

I regard it as ironic that Disciplinary Counsel, in her closing arguments (TR 1052) accused me of violating, and read from, the Oath of Attorney as it existed in 1978 when I was admitted to practice in Washington. It is ironic because at that time, Disciplinary Rule 7-102(B)(1), quoted above, expressly permitted me to "blow the whistle" on my client's fraud under the circumstances in which I did (even without the corrupt sitting judge being factored into the equation).

d. A Mitigating Factor: Exposing a Corrupt Judge. The ABA Standards, at Section 9.31, define mitigation as "any considerations or factors that may justify a reduction in the degree of discipline to be imposed." I simply cannot fathom a reasonable person failing to recognize as a strong mitigating factor that I possessed compelling evidence that a sitting

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

superior court judge was very corrupt, and I was determined to expose him to cause his removal and thereby restore integrity to the judicial system.

My astonishment is compounded by the Hearing Officer's Conclusion of Law No. 11, asserting that I "should be commended" for my extraordinary efforts and careful and meticulous research that resulted in Judge Anderson's removal from judicial office and his stipulation to a two-year suspension of his law license. The Hearing Officer then "commends" me by recommending the suspension of my law license.

November 10, 2000

Douglas A. Schafer, WSBA 8652

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