

BEFORE THE
DISCIPLINARY BOARD
OF THE
WASHINGTON STATE BAR ASSOCIATION

In re

DOUGLAS SCHAFER,

Lawyer

Bar No. 11611

Public No. 00#00031

DISSENT

I dissent. I cannot support the majority's interpretation of the interface between RPC 1.6, RPC 8.3 and a lawyer's duty to protect the integrity of the judicial system. Additionally, the record does not support the finding that Mr. Shafer was motivated by selfish or dishonest reasons. A careful review shows that reprimand is the appropriate sanction.

RPC 1.6 states that:

- (a) A lawyer shall not reveal confidences or secrets relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation and except as stated in sections (b) and (c).
- (b) A lawyer may reveal such confidences or secrets to the extent the lawyer reasonably believes necessary: (1) to prevent the client from committing a crime.

RPC 8.3 states:

- (a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, should promptly inform the appropriate professional authority.
- (b) This rule does not require disclosure of information otherwise protected by Rule 1.6.

The rules governing the allowable disclosure of client confidences and secrets have changed over time and vary from state to state. It is understandable that Mr. Shafer would seek the advice of an ethics professor regarding the interpretation of these rules. That advice was not conclusive. In the end, Mr. Shafer concluded that his duty to expose the fraudulent activities of a judge should be afforded more weight than the duty to protect information provided by a client who sought Mr. Shafer's assistance to facilitate the fraudulent scheme. His conclusion may have been an incorrect interpretation of the RPCs but that mistake should be considered negligent and not knowing.

The record does not indicate that the client was actually subjected to criminal prosecution as a result of the disclosures. If the Hearing Officer and majority are correct that Mr. Shafer could have exposed Judge Anderson without disclosing client confidences or secrets, the client would have been equally subject to criminal sanctions, as well as personal embarrassment, absent any ethical violation. However, there was the potential for injury from such a disclosure.

It is not appropriate to suspend a lawyer for wrongly determining that the allowable, but not required, disclosure of client secrets was ethical in the narrow circumstances of this case. I agree that Mr. Shafer should not have disclosed the client's secrets and confidences given the language of RPC 1.6. However, I disagree that the record establishes that Mr. Shafer made his disclosures knowingly and because he wanted revenge on Judge Anderson. ABA Standard 4.23 applies in this case. Reprimand is the presumptive sanction.

The majority found that Mr. Shafer had a selfish motive for disclosing the secrets. The record does not support a finding that this aggravating circumstance is present in this case. Mr. Shafer stated that he wanted vindication. The majority interprets this as a selfish motivation. Vindication in this instance meant that Mr. Shafer wanted to establish that Judge Anderson was corrupt, as he had charged. The record clearly establishes that Mr. Shafer believed that Judge

Anderson had participated in a series of events that prevented a public hospital from getting all of the money left to it by the client's estate. By the time Mr. Shafer investigated and reported Anderson's conduct, Anderson was no longer involved in the estate, but the hospital did not have its money. Mr. Shafer knew enough information to reasonably question Judge Anderson's conduct and fitness for office.

Based on this information, Mr. Shafer reasonably believed that he should report Mr. Anderson's conduct to the appropriate authorities. In his zeal to protect the profession, Mr. Shafer chose to disclose his client's secrets. The purpose of the disclosure was to protect the profession, not to repeat the client's statements. There is no evidence that he sought to discredit Judge Anderson regardless of the truth of the charges, or to personally benefit. In fact, Mr. Shafer was aware that he was subjecting himself to personal risk by pursuing the investigation and disclosure. I find that the motivation for the disclosures is a mitigating factor.

The Hearing Officer and majority note that Mr. Shafer disclosed his client's statements to several agencies and the news media. This is not surprising or unusual. It is not unusual for citizens to file multiple claims in their frustration with slow-moving governmental responses. Here, Mr. Shafer wanted a public response prior to the upcoming judicial election. Again, his motivation in making the disclosure repeatedly was to protect the profession, not to harm his client or to benefit him. The multiple disclosures of the same information does not present a pattern of misconduct. Mr. Shafer's conduct in this case is a single violation. The aggravating factor of multiple violations or pattern of misconduct is not present in this case.

A proportionality review reveals no factually similar cases where suspension was imposed. Reprimand was the sanction in 2 cases resolved by stipulation. In 1993, lawyer Dale Russell stipulated to a reprimand for sending client secrets contained in a response to a bar complaint to opposing counsel, who was involved in a lawsuit with the client. The lawyer believed that the opposing lawyer could assist in explaining the situation to disciplinary counsel. Additionally,

in 1992, lawyer Stephen Carmack stipulated to a reprimand for releasing portions of a client's deposition to a newspaper editor. The released information involved the client's sexual history. The lawyer did not realize the information was not already public. In each case the lawyer negligently released client secrets and confidences. The conduct involved in these cases is similar to Mr. Schafer's conduct. Reprimand is the appropriate sanction.

Dated this 30th Day of April, 2001

Dawn Sturwold