June 1, 2008

Tim Connor
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Office of Disciplinary Counsel
Washington State Bar Association
1325 Fourth Avenue
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Seattle, WA 98101-2539

RE: Grievance of Tim Connor against Duane Swinton
WSBA Case File #07-01172

Dear Sirs and Madams:

I am writing to request that the WSBA review and reverse the April 21, 2008 decision of the Office of Disciplinary Counsel to dismiss my grievance against Spokane lawyer Duane Swinton. The decision was conveyed to me by Randy Bietel, who authored the 4/21/08 letter.

Neither the facts nor the ethical rules and guidelines relevant to Mr. Swinton's conflict of interest warrant Mr. Beitel's conclusion that "insufficient evidence exists to prove unethical conduct by Mr. Swinton." But even more importantly, the investigation and resolution of this grievance required a much higher level of diligence and transparency than is reflected in Mr. Bietel's 4/21/08 letter. I accepted the burden in my grievance of documenting what I regarded as the key facts behind my conclusions. The controversy over Mr. Swinton's conflict of interest has rightfully generated a high level of state and national interest fueled, in large part, by the *Spokesman-Review's* own reporting as well as the Washington News Council's May 2007 recommendation that the paper sever its relationship with Mr. Swinton. The interest is entirely legitimate given the principles involved and it only heightened the responsibility that Mr. Bietel should have accepted to show how his facts refuted or offset the facts I presented, and resulted in the conclusion that Mr. Swinton's conduct did not violate the ethics rules. In short, Mr. Bietel should have shown his work. But on central issues of fact, he failed to do so.

Before I filed my grievance, Stacey Cowles, the publisher of the *Spokesman-Review* newspaper (see Exhibit #1 to my July 19th grievance) told an investigator for the Washington News Council:

"We knew Duane [Swinton] could not represent both the paper and the [River Park Square] project from the start. There was a conflict there."

Here Mr. Cowles, as the client, was speaking very directly (and, I believe, dispositively) to the central professional ethical issue that I put before the WSBA.

With this one statement, Mr. Cowles was directly refuting what Mr. Bietel has concluded in his 4/21/08 letter. He was clearly saying there were at least two entities within the Cowles Publishing Company corporate structure with key differing interests. He was also clearly saying that Mr. Swinton could not represent both entities because "there was a conflict" at the outset of the River Park Square project.

Mr. Bietel writes that, in this proceeding, the burden is always on the person filing the grievance "to prove unethical conduct..by a clear preponderance of the evidence in this matter."

But with Mr. Cowles's statement (and others, which I'll get to later) the burden actually shifted to Mr. Bietel and the WSBA to produce a preponderance of evidence that Mr. Swinton either didn't have the conflict of interest his client said he had, or to show that the conflict was properly disclosed, discussed, and formally resolved *in writing* with a waiver from his clients. Mr. Bietel hasn't produced that evidence, and neither has he addressed other key factual issues in my complaint, including how he discredited Mr. Cowles's tape-recorded statement to the WNC about Mr. Swinton's conflict.

In my view, there are three and independently determinative issues where the WSBA investigation is plainly inadequate or just simply wrong.

<u>Issue #1:</u> Stacey Cowles is a client and Mr. Beitel at least had the burden of showing why Mr. Cowles's previous statements about Mr. Swinton's conflict (and whether Mr. Swinton acted with Mr. Cowles's consent) were inaccurate.

<u>Issue #2:</u> The *Spokesman-Review* itself has reported that the Cowles Publishing Company subsidiaries involved in the River Park Square were "separate" entities from the publishing company at the time Mr. Swinton took on the dual representation. Mr. Beitel improperly dismisses this published representation and concludes, without providing any new evidence, that the publishing company and River Park Square are merely "two different facets of the same entity."

<u>Issue #3:</u> Mr. Beitel simply and inexplicably failed to conduct the thorough examination of Mr. Swinton's compliance with regard to RPC 1.7 that I sought to obtain with my grievance to the WSBA.

Before I address these issues in more detail, I'd like to dispose of an issue that emerged near the end of Mr. Bietel's report. It's true I referred to the Washington News Council's May 2007 report and their recommendation, to the newspaper, that it sever its ties with Mr. Swinton. But I've also criticized the WNC report for offering what I thought was an unfounded opinion that Mr. Swinton's conflict "probably" wasn't a formal conflict. As the key WNC participants admitted to me in later, tape-recorded interviews, the WNC simply didn't do the analysis to inform that opinion one way or the other.

More importantly, I agree with Mr. Bietel that journalistic conflicts of interests "are quite different from lawyer conflicts of interest" because the conflicts are handled differently. My point was, and is, that the Cowles corporate embrace of the journalism values and ethics the newspaper espouses is not easily divorced from the remainder of the client's interests in Cowles Publishing Company. I argue they're intertwined such that Mr. Swinton was bound to accept and abide by them absent formal informed consent by his client to do otherwise. The legal ethics requirements, at a minimum, would be to *not* act in ways that subvert or undermine the publicly expressed ethics and values, unless the client has formally instructed and authorized you to do so. Not only is there evidence that this didn't happen here, there are undisputed public statements from Stacey Cowles, the client, that clearly indicate he neither knew about the conflicting conduct by Mr. Swinton, nor would have approved of the conduct if he'd been asked to consent to it.

ISSUES THIS REVIEW SHOULD ADDRESS

<u>Issue #1:</u> Stacey Cowles is a client and Mr. Beitel at least had the burden of showing why Mr. Cowles's previous statements about Mr. Swinton's conflict (and whether Mr. Swinton acted with Mr. Cowles's consent) were inaccurate.

Stacey Cowles is the publisher of the *Spokesman-Review* and clearly is either the sole client, or a co-client, in the attorney-client relationship with Mr. Swinton. As the newspaper publisher he is the logical custodian of the journalism interests that Mr. Swinton has long represented in his career as the newspaper's First Amendment lawyer, including Mr. Swinton's work advocating for open government on the newspaper's behalf.

Again, this is the quote that Mr. Cowles gave to the WNC investigator Bill Richards in a December 2006 tape-recorded interview.

"We knew Duane [Swinton] could not represent both the paper and the [River Park Square] project from the start. There was a conflict there."

Perhaps more important, are the statements that Mr. Cowles made to one of his own reporters for an April 1, 2004 article, "Developer vowed to fight

disclosure of secret offer," in the *Spokesman-Review*. [See Exhibit #7 to my July 19, 2007 grievance.] Mr. Cowles statements in the article directly rebut Mr. Bietel's statement in the 4/21/2008 letter to me that "at all times Mr. Swinton took direction from Cowles regarding all of the matters at issue."

What Mr. Cowles told his reporter is that "there's an obvious conflict there," with regard to Mr. Swinton's activities for River Park Square, and those for the newspaper.

In this instance, Mr. Cowles's statement was directly on point to one of the key episodes in my grievance: Mr. Swinton's successful effort in 1999 to induce a public agency to sign a secret confidentiality agreement binding the agency to illegally withhold a public record if it were sought with a public records request *even from one the many journalists that work for Cowles Companies.*

Here's the quote from the 4/1/04 article in context:

Cowles said in a recent interview that he knew generally about discussions to keep AMC from pulling out of the mall in 1999. But he said he didn't know that Swinton had promised the developer would fight requests to release any documents about the backup agreement and pay any fine the PDA might have been assessed.

"There's an obvious conflict of interest there," Cowles said. Had any *Spokesman-Review* reporters found out about the agreement, the paper would have hired a new attorney and gone to court to get the documents released, he said.

Then there's this excerpt deeper in the article:

Cowles said the publishing company should have given more thought to the potential conflicts the partnership with the city could create. Its real estate operations regularly rely on confidential information in negotiations, and its news operations regularly fight for public records from government.

"We obviously felt there was nothing we were doing that was against the government. If our judgment was clouded, and I think it was, that's why," he said. "You know what the road to hell is paved with. Good-intentioned people can end up with a nightmare on their hands."

Again, the point here is that Mr. Cowles is saying that Mr. Swinton had a conflict and that he (Cowles) was unaware of activities that caused him to wind up "with a nightmare" on his hands.

There should have been a strong presumption by Mr. Bietel and the WSBA that Mr. Cowles was speaking truthfully to his own reporter in 2004 and to the WNC investigator in December 2006. After I filed the grievance, Mr. Cowles had a strong and new incentive to change his story--to protect his lawyer, and himself, from the embarrassment of the lawyer being sanctioned by the WSBA.

Mr. Bietel writes that: "My interview of the Cowles principals confirms that at all times Mr. Swinton took direction from Cowles regarding all of the matters at issue."

Confirms? The review committee should ask Mr. Bietel exactly how that happened and what corroborating documents, if any, were made available to him. I doubt there are any because I would have expected Mr. Swinton to produce them in response to my grievance. And he didn't.

Mr. Bietel's statement begs at least two important questions.

(1) Did Mr. Cowles contradict his earlier statement and tell Mr. Bietel that Mr. Swinton was, in fact, acting with Mr. Cowles's informed consent when Mr. Swinton drafted a confidentiality agreement for a public agency requiring the agency to illegally withhold a public record? (And, if so, why would Mr. Bietel and the WSBA not look skeptically upon such belated statements, under these circumstances?)

(2) Did Mr. Swinton have an agreement between Stacey and Betsy Cowles that she would, alone, would be the co-client representing both the interests of Cowles Publishing Co. (as in the newspaper and the TV station) and the River Park Square development subsidiaries? If such an agreement existed then basically Mr. Cowles would have consented to keeping himself in the dark regarding Mr. Swinton's activities. Whether that consent would have been proper is another question, but at least it might better explain Mr. Bietel's mysterious statement that the exact opposite of what Mr. Cowles had said publicly, previously, was confirmed to him. If this is what happened, then the WSBA should have reported that in Mr. Bietel's letter and at least disclosed the existence of such an agreement.

There's another key issue here. If, for the sake of argument, RPC Rule 1.7 doesn't apply because WSBA accepts that the Cowles publishing and real estate development entities are really "a single entity," then RPC Rule 1.4 still must apply. Mr. Swinton was required to "reasonably consult with the client about the means by which the client's objectives are to be accomplished," and "keep the client reasonably informed."

Stacey Cowles told his own newspaper that he was unaware that his newspaper's lawyer was involved in negotiating illegal confidentiality agreements with public agencies and that if the journalists who worked for him

had learned about it, the paper "would have hired a new attorney and gone to court to get the documents released." [Exhibit #7 to my July 19th grievance.] Obviously, if it's conduct that would warrant hiring another attorney, then it's conduct that the attorney should be required under Rule 1.4 to disclose to his client, and specifically to Mr. Cowles. Mr. Cowles is on record saying that the disclosure and his informed consent did not occur.

Issue #2: The *Spokesman-Review* itself has reported that the Cowles Publishing Company subsidiaries involved in the River Park Square were "separate" entities from the publishing company at the time Mr. Swinton took on the dual representation. Mr. Beitel improperly dismisses this published representation and concludes, without providing any new evidence, that the publishing company and River Park Square are merely "two different facets of the same entity."

In my grievance, I offered two specific pieces of evidence to support my argument that the journalism arm of Cowles Publishing Company (particularly the *Spokesman-Review)* is a sufficiently distinct entity from the real estate subsidiaries of Cowles Publishing Company. I had shared the same evidence, previously, with University of Washington law professor (and member of the WSBA disciplinary board) Thomas Andrews. My question for Mr. Andrews was whether he agreed with the Washington News Council that Mr. Swinton "probably" didn't have a formal conflict of interest because he represented two parts of the same entity. Here's what he told me, and how I reported on it (See attached article, *Swinton versus Swinton*):

"I just don't see how the council could have reached that conclusion given what Mr. Swinton and Mr. Cowles have said," Andrews said. "While it's possible that either or both Mr. Swinton and Mr. Cowles could see a conflict where there isn't one, in this case their conclusions that a conflict existed are hard to dispute."

Andrews added that the ethical analysis for conflicts involving parent and subsidiary corporations is "more difficult than the council's conclusion would suggest" and that even if River Park Square were a wholly-owned subsidiary of Cowles Publishing Company, "it does not follow that he [Swinton] had only one client because lawyers often need to view subsidiaries wholly, or partially-owned affiliates as separate clients."

Thus, Mr. Andrews draws a different conclusion than does Mr. Bietel. It could be that Mr. Andrews and Mr. Bietel just have a different opinion based on the same set of facts. So, one question is: what facts did Mr. Bietel have, that Mr. Andrews lacked? It does not appear from Mr. Bietel's letter that there are any.

So, let me go over, once again, the undisputed facts that I presented. The first, of course, is Mr. Cowles's statements that he, himself, believed Mr. Swinton

had a conflict of interest from the start of the River Park Square representation.

The second is the organization chart that the newspaper published in its March 28, 2004 edition in which it reported that the family-owned LLC's that control River Park Square were created as a "separate company" from Cowles Publishing Co.

Absent additional information, there's no reason to conclude that Mr. Andrews is incorrect. Mr. Cowles's statement (*"We knew Duane [Swinton] could not represent both the paper and the [River Park Square] project from the start. There was a conflict there."*) and the organization chart are either dispositive of the issue, or can only be overcome with much stronger evidence. In his letter explaining his conclusion that Cowles Publishing Company and the River Park Square companies should *not* be treated as separate entities, Mr. Bietel neither addressed Mr. Cowles's statement nor the published organizational chart. Neither did he present new or additional evidence that disputes what Mr. Cowles said, or disputes what's presented in the published organization chart.

For those reasons, I request that you reverse his determination on this issue because it is in error.

Issue #3: Mr. Beitel simply and inexplicably failed to conduct the thorough examination of Mr. Swinton's compliance with regard to RPC Rule 1.7 that I sought to obtain with my grievance to the WSBA.

It's not reasonable for Mr. Beitel to have forced me, as the person filing the grievance, to show "by a clear preponderance of the evidence" that Mr. Swinton violated the ethics rules without, in turn, subjecting Mr. Swinton to a rigorous examination of how he exercised his responsibilities under RPC 1.7. I requested just such an examination in both my July 19, 2007 letter and my August 21, 2007 followup to Mr. Swinton's response. But there's no evidence, at all, in Mr. Beitel's letter that he even asked Mr. Swinton whether he engaged in the disclosure, consultation, and waiver procedures required by the rule. This is important because the rule requires a standard of care (for the lawyer to err on the side of disclosure and consultation) that cannot be squared with either Mr. Cowles's public statements, or Mr. Swinton's.

Clearly, there's no way to read RPC Rule 1.7 (as it existed at the time Mr. Swinton took on the RPS representation) and ABA Formal Ethics Opinion 95-390 and conclude that Mr. Swinton had no duty, at the time he took on the RPS representation, to formally review the matter with his clients.

"(A)lthough the ethical propriety of a given representation will depend on the particular circumstances, the Committee believes that as a general matter, in the absence of a clear understanding otherwise, the better course is for a lawyer to obtain the corporate client's consent before the lawyer undertakes a representation adverse to its affiliate." **ABA Formal Ethics Opinion 95-390, Conflicts of Interest in the Corporate Family Context.**

Yet, Mr. Bietel's report would have us believe that River Park Square was so intimately connected with the purposes of the newspaper, that no disclosure and consent process was necessary.

That's just not credible and, if it stands, will have the WSBA setting a terrible precedent that, in situations similar to Mr. Swinton's conflicts, may mislead members of the Washington Bar into thinking it is acceptable for them not to disclose and obtain written consent from clients on dual representations involving potentially devastating conflicts of interest.

Here, again, Mr, Bietel presented no new facts to show (e.g. a signed waiver as called for in RPC Rule 1.7) that there really *did* exist a firm understanding between attorney and client(s) that the RPS representation was not in conflict with the newspaper representation. Nor does he address the evidence I presented that Mr. Cowles, by his own statements, both realized there was a conflict of interest, and later admitted that he was uninformed about conduct by Mr. Swinton that seriously undermined the newspaper's credibility as an avowed public watchdog.

If further evidence is necessary, it comes from Mr. Swinton. Let's just look at what we know Mr. Swinton has said about how he viewed his conflict, because *contrary* to what Mr. Bietel reported, Mr. Swinton really did recognize that he did have a conflict.

Let's look again at the April 1, 2004 article by *Spokesman-Review* reporter Jim Camden. In the section of the story, below, Mr. Swinton is acknowledging his role in the illegal confidentiality agreement designed to prevent an embarrassing contract with a public agency from being disclosed to the public or the press.

Swinton said the agreement did pose a potential for a conflict of interest between his roles as the newspaper's attorney and the developer's attorney. But it never came to an actual conflict, he said recently.

If reporters had found out about the developer's pledge or the confidentiality agreement before a contract was signed with AMC, and asked him for help in securing it, he would have told them to seek outside legal advice, he said.

If they had found out about it after the mall and the theater chain signed a lease, he probably would have released the documents, he said.

Swinton said he did not give those documents or any information about the project to the newspaper. He did answer questions about the project, particularly about issues that came up from his discussions with city officials or testimony before the City Council.

Because of that, Swinton believes he was "never truly in a conflict position."

"I didn't do reviews of stories on River Park Square, either for the publisher or for the newsroom,' he said. Publisher Stacey Cowles is the president of the publishing company and vice president of the affiliates that own the mall. 'The tug of war would have been inherent within the company, the newsroom versus the developer."

The above excerpt involved the 1999 episode. But there was an earlier episode in 1998 when a key document about the city's risks in the River Park Square public private partnership was leaked to the newspaper. The newspaper chose not to publish it after Mr. Swinton advised against it. Yet, as the Washington News Council confirmed, not even Mr. Swinton himself really believed that the "one client" model (Mr. Beitel's conclusion) was applicable. He was clearly uncomfortable and sought a form of recusal.

Here's how the WNC reported it on page 15 of their May 2007 report:

For his part, Swinton says he did not act as the paper's attorney on its RPS stories. While he was often called for comment as the RPS attorney, he says, the newspaper's reporters never raised concerns about his dual role as the attorney for RPS and for the paper. In addition, he says he never took part in any pre-publication reviews of RPS stories.

"If they had come to me," Swinton says, referring to the paper's RPS coverage, "I wouldn't have reviewed them, because I would have thought that would have presented a conflict."

But on at least two occasions, Peck did ask Swinton for advice about River Park Square. Both times, Swinton says, he referred the editor to Bill Holt, a First Amendment specialist based in Tacoma.

One of those occasions, Swinton and Peck agree, involved Camden's leaked Nordstrom memo.

My point is, Mr. Bietel and Mr. Swinton cannot have it both ways. Either Mr. Swinton's role is completely sheltered by the "one client" theory or it isn't. Mr. Swinton behaved as if he wasn't sure, even to the point where he says he referred the paper's editor to outside counsel when conflicts arose. Moreover, he said he would have recused himself if other conflicts he knew about also became known to the newspaper. His conduct (which Mr. Bietel simply ignored) is actually a dispositive concession that the paper and RPS had significantly different interests as to warrant separate representation.

Mr. Bietel writes: "(W)e consider Mr. Swinton to have had only one client (hereinafter 'Cowles') regarding the matters you have raised. While that one

client, at given points in time, may have had competing internal interests to balance between its real estate interests and its role as the publisher of the local newspaper, those were issues for Betsy Cowles and Stacey Cowles and their staff to resolve."

That's just not true, by fact, or by rule. If there was clearly only one client, then why did Stacey Cowles tell the WNC that Mr. Swinton had a clear conflict of interest from the inception of the RPS project? And they why did Mr. Swinton choose to recuse himself, even if that recusal was messy, at best? Under the "one client" finding imposed on these facts by Mr. Bietel, Mr. Swinton need not have bothered.

Moreover, Mr. Bietel stands the applicable ethics rules on their heads when he asserts that these "were issues for Betsy and Stacey Cowles and their staff to resolve."

With all due respect, Mr. Bietel has it wrong. Rule 1.7, its associated guidance, and other pertinent and applicable ethical rules, encompass the practical reality that the lawyer is almost always in the better position to foresee the conflicts that can arise in competing representations, even among and between corporate family clients. That's why the rules put so much emphasis on disclosure and consultation, at the lawyer's initiative.

Here, it's clear by Mr. Cowles's and Mr. Swinton's own admission that Mr. Swinton knew about critical activities he was undertaking (i.e. the negotiating of the secret confidentiality agreement with the public agency) about which Mr. Cowles had no knowledge. Mr. Swinton had a clear duty to disclose and Mr. Bietel is just wrong to excuse him of that duty.

Finally, the review committee should be deeply suspect of Mr. Beitel's statement that: "My interview of the Cowles principals confirms that at all times Mr. Swinton took direction from Cowles regarding all of the matters at issue."

I don't understand how Mr. Bietel or any other objective person would give more credence to what the "Cowles principals" said *after* this grievance was filed than what they said *before* the grievance was filed. It's simply not equitable in a process like this to summarily dispose of documented evidence with a single, blanket statement that an interview with the people involved in the unethical conduct has provided convincing evidence to refute the documented facts. As a journalist, I've yet to work for an editor who would tolerate such unbalanced reporting and *ad hominem* reasoning. And, yet, there's at least the suggestion in Mr. Bietel's letter that the standards of evidence in this process are more rigorous than those that apply to journalists and their ethics. Assuming that's true, then the WSBA's work should demonstrate a standard of care and diligence that is absent from Mr. Bietel's letter.

I'll finish where I started on this. Where's the paper trail? Where's the signed waiver from the clients acknowledging that each corporate entity was

properly informed of the real and potential conflicts in Mr. Swinton's dual representations? What evidence is the WSBA relying upon when it disputes the facts I've offered from tape recorded interviews and articles from the *Spokesman-Review* that report on relevant statements by Mr. Cowles and Mr. Swinton?

I don't argue that I shouldn't have been required, as the person filing the grievance, to show by a preponderance of evidence that Mr. Swinton violated ethics rules. But what Mr. Bietel has failed to even acknowledge is that the ethics rules, themselves, put the burden of duty and proof on the lawyer to err on the side of disclosure and in gaining informed consent. There's simply no evidence, whatsoever, that Mr. Swinton did this. To the contrary, what we have are unrefuted statements by Mr. Cowles saying he was surprised and deeply chagrined when he learned that Mr. Swinton's had been engaged in activities that were adverse to the newspaper's publicly expressed interests and commitments.

I believe the evidence is sufficient to reverse Mr. Bietel's findings and initiate sanctions against Mr. Swinton. But I also think it's clear, at a minimum, that the WSBA's reputation for fairness and due diligence would be better served if it reopened this investigation and at least insisted that the facts I've presented be specifically rebutted by other facts, not by mere assertions that interviews with "Cowles principals" somehow "confirms" that I'm wrong.

Sincerely,