Filed July 17, 2002

Bar No. 8652

SUPREME COURT

OF THE STATE OF WASHINGTON

In the Matter of the Disciplinary Proceeding Against

DOUGLAS A. SCHAFER,

an Attorney at Law.

RESPONDENT LAWYER'S THIRD STATEMENT OF ADDITIONAL AUTHORITIES

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RESPONDENT LAWYER'S THIRD
STATEMENT OF ADDITIONAL AUTHORITIES

Pursuant to RAP 10.7, the following additional authorities are submitted without argument:

***United States v. Alexander*, 287 F.3d 811 (9th Cir. 2002).** Defense lawyer voluntarily revealed to appropriate authorities threatening remarks client had made over a seven-month period. The Court said, "We have previously held that communications with a person's legal counsel are protected only if they were made in order to obtain legal advice. [citation omitted] Alexander's threats to commit violent acts against Werner and others were clearly not communications in order to obtain legal advice."

Peter A. Joy, "Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyers' Conduct," 15 Geo. J. Legal Ethics 313 (Winter, 2002). Professor Joy comprehensively and critically surveys state bar ethics opinions and suggests reforms to improve their quality, saying at 319, "Most jurisdictions do not devote the necessary organization and personnel to produce consistently well-reasoned and unbiased decisions. In a majority of states, bar committee volunteers without any special training or expertise draft the ethics opinions. Similarly, committees of volunteers vote whether to adopt the opinions, or, in some instances, whether to recommend the opinions to bar association governing bodies for their consideration and adoption. None of these deliberative processes incorporate mechanisms to prevent volunteers and bar association leaders from voting their self-interest."

Ted Finman & Theodore Schneyer, "The Role of Bar Association Ethics Opinions in Regulating Lawyer Conduct: A Critique of the Work of the ABA Committee on Ethics and Professional Responsibility," 29 UCLA L. Rev. 67 (1981). The professors criticize the process, secrecy, and performance of the eight-member committee that issues ABA ethics opinions, concluding, "If no reforms are instituted or if reforms prove unavailing, the recurrent flaws in CEPR [Committee on Ethics and Professional Responsibility] analysis and the Committee's unimpressive record in reaching correct holdings lead us to conclude that the entire enterprise could profitably be abandoned. Half a loaf may be better than none, but halfway analysis by a body that shapes the conduct of lawyers and the decisions of Code enforcers is not." The authors critically examine ABA Opinion 341 (on confidentiality) at pages 118-23.

William H. Simon, "The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptation of Evasion and Apology," 23 Law & Soc. Inquiry 243 (1998). Professor Simon strongly condemns the organized bar's partisan and self-serving defense of a major New York law firm charged by the federal Office of Thrift Supervision with actively deceiving OTS as well as assisting the firm's client, Lincoln Savings, to do so, leading to one of the major thrift failures in the $200 billion S&L debacle. He reports that the bar's collective response was to evade scrutiny of the lawyers' misconduct and instead to challenge the federal agency's enforcement authority, saying at 264-65:

> "Neither here nor anywhere else has the ABA supported investigation of any charges against Kaye Scholer or the other lawyers accused of misconduct in the S&L disaster. Judging by the [ABA] Working Group's report and the resolution, the ABA's exclusive concern about the disaster is that it may increase lawyer exposure to liability. That some lawyers might be culpable in the matter is a possibility that the ABA either cannot conceive or is indifferent to."

Professor Simon concludes that the bar's response to the scandal "fueled doubts about its capacity for self-regulation."

William H. Simon, "'Thinking Like a Lawyer' About Ethical Questions," 27 Hofstra L. Rev. 1 (1998). Professor Simon criticizes the absolute confidentiality view of Professor Monroe Freedman embodied in the 1983 ABA Model Rules—the "Mainstream View"—for "its reliance on relatively simple or single-minded judgement" rather than on a lawyer's "professional judgment, grounded ultimately in the value of justice" and her "educated ability to relate the general body of law and philosophy of law to a specific legal problem." He also challenges the assumptions underlying the Mainstream View, at page 10, saying:

> "One of the first things to note about all mainstream arguments about confidentiality is that they are myths, which means, not that they are necessarily false, but that they are grounded in faith rather than rational analysis and investigation. . . . Even in this age of inter-disciplinary research, there is not a scrap of evidence to support the behavioral premises of the Mainstream View on confidentiality. Although the bar currently supports an excellent research institution—the American Bar Foundation—to the tune of several million dollars a year, it has never initiated any research into the premises of its most central normative commitment."

Sharon Dolovich, "Ethical Lawyering and the Possibility of Integrity," 70 Fordham L. Rev. 1629 (April, 2002). Professor Dolovich examines individual traits of character upon which ethical lawyering depends and institutional structures that foster or undermine those traits. Concerning the ABA-style confidentiality rules, she says, at page 1674:

> "From the perspective of integrity, the confidentiality rules thus present two problems. First, they deny lawyers the possibility of exercising their own judgment and acting consistently with their own moral commitments to decide when disclosure is warranted. Such strictures, that is, force the lawyer to give preference to the interests of clients even in cases where doing so conflicts with the lawyer's most strongly held moral commitments, short-circuiting the process of deliberative judgment by dictating the outcome, whatever the lawyer might conclude on the basis of his own moral sense to be the right course of action. In this way, a lawyer's own moral character and moral judgment become irrelevant, not just in the larger scheme, but to her own actions. She acts on the basis of some other actor's dictates, not her own. Second, and as a consequence, acting according to this scheme trains lawyers over time to suppress the exercise of their own moral judgment and the accompanying traits of the person of integrity: lawyers simply defer to the client. Those who adhere mechanically, without reserving to themselves the obligation of assessing in each case the moral appropriateness of the rule's dictates, can be expected to see their capacity for the traits that comprise integrity to atrophy with disuse."

Nathan M. Crystal, "Core Values: False and True," 70 Fordham L. Rev. 747 (December, 2001). Professor Crystal examines the ABA Core Values Resolution (7/2000) and asserts, in part III (pages 756-62), that neither history nor policy supports the ABA's claim that strict confidentiality is a core value of the legal profession.

Irma S. Russell, "Client Confidences and Public Confidence in the Legal Profession: Observations on the ABA House of Delegates Deliberations on the Duty of Confidentiality," 13 The Professional Lawyer, No. 3 (Spring 2002), 19. Professor Russell chides the ABA delegates for not adopting all the Ethics 2000 Commission's changes to Rule 1.6, encourages them to reconsider, and "urg[es] the delegates to: (1) beware of absolutes and consider proportionality, (2) recognize lawyers as trustwor-

thy decision makers, and (3) acknowledge the profession's responsibility to the public." Because of the limited public availability of this periodical (not being in our state or county law libraries or on Lexis) published by the ABA Center for Professional Responsibility, I have attached a copy of this article.

Jolyn M. Pope, "Transactional Attorneys—the Forgotten Actors in Rule 1.6 Disclosure Dramas: Financial Crime and Fraud Mandate Permissive Disclosure of Confidential Information," 69 Tenn. L. Rev. 145 (Fall, 2001). After examining history and policy, the student author asserts, "The uniform adoption of a permissive disclosure standard in cases of client crime and fraud would curtail attorney confusion, protect the innocent from financial devastation, and perhaps enhance the public perception of lawyers."

Deborah L. Rhode, In the Interests of Justice: Reforming the Legal Profession (Oxford University Press, 2000). Professor Rhode's "central premise off this book is that the public's interest has played too little part in determining professional responsibilities. Too much regulation of lawyers has been designed by and for lawyers." [page 2] In her chapter titled "America's Sporting Theory of Justice" she condemns the profession's current confidentiality rules [pages 106 - 115] and the bar's motives in adopting them, saying, at 112:

> "[T]he rationale for current confidentiality rules has more to do with professional than public interests. As the history of bar debates over these rules makes clear, attorneys' overriding objective has been to minimize their own risk of civil or disciplinary liability. The prevailing combination of broad confidentiality requirements with limited discretionary exceptions serves this purpose. Discretionary provisions give attorneys the option to disassociate themselves from criminal or fraudulent conduct, while reducing risks of accountability if they choose not to do so."

William H. Simon, The Practice of Justice: A Theory of Lawyer's Ethics (Harvard University Press, 1998). Professor Simon criticizes the Dominant View of lawyer ethics decisionmaking based on categorical rigid rules, arguing for a Contextual View by which decisions turn on the particular facts and the promotion of justice. He particularly criticizes the Dominant View's (as in the ABA Model Rules) nearly absolute duty of confidentiality [pages 54 - 62] and the organized bar's *bad faith* in adopt-

ing and defending them, saying at 56:

> "[T]he indications of bad faith in the bar's claims for confidentiality are too salient to pass over. The bar has always defended confidentiality in sloppy, cavalier, and dogmatic ways. The arguments are rarely articulated in any systematic manner (and then, usually, by their critics). These arguments depend on assumptions about behavioral trends, but the bar has never adduced any evidence for them and never shown any interest in investigating them. Although the American Bar Association supports an excellent research institution–the American Bar Foundation–to the tune of several million dollars a year, this institution has never done any work on the factual premises of the bar's most important normative pronouncement."

Robert W. Gordon, "Portrait of a Profession in Paralysis," 54 Stanford L. Rev. 1427 (2002, forthcoming in August). Professor Gordon discusses his general agreement with Professor Rhodes' views of the legal profession expressed in *In the Interests of Justice*, saying at 1427:

> "[H]er book draws a portrait of a profession so habituated to these [often socially harmful] practices and the mentalities that sustain them, so prone to denial about some of the resulting pathologies, or else so self-interested, fragmented, timid, or paralyzed, that it is most unlikely to take any collective action to reform them, and likely if anything to resist and effectively defeat any outside agencies' efforts at reform."

Gordon criticizes, at 1430 under the heading *Lawyers Hold (Selectively) Sacred the Norm of Confidentiality*, the bar's rationales for strict confidentiality, noting:

> "Confidentiality thus in many representations turns out to be a device that lawyers use to facilitate clients' harmful behavior rather than prevent it. Perhaps the most dramatic recent example comes from the tobacco industry, whose lawyers advised putting the industry's entire scientific research program on the effects of tobacco on health under the general counsel's office, so that counsel could protect unfortunate research results from disclosure by invoking lawyer-client privilege, and so that the companies could continue to tell regulators and the public that they believed smoking was nonaddictive and safe."

Gordon details, at 1434-39, the client-accommodating, public-be-damned roles played by lawyers in the savings-and-loan industry collapse in the 1980's and in the 2001 collapse of Enron Corporation, and laments the

bar's chronic defense of lawyers enabling their clients' frauds, at 1438:

> "I can predict with a mournful certainty, however, that most lawyers and bar groups will assert repeatedly and defiantly that all the lawyers involved conducted themselves properly and that their conduct raises no serious questions about the ethics of their roles."

Gordon laments, at 1440, the bar's resistance to public-interest reforms:

> "And even confronted with situations in which aggressive zealous advocacy on behalf of clients—stretching the law to its limits—has manifestly contributed to immense social harms, the bar is reluctant to consider moderating its role-morality and ethical rules to take third-party, social interests, or *even the effective functioning of the adversary system itself*, into account." [emphasis in original]

Gordon then examines America's rich early history of private lawyers furthering public interests and concludes, at 1448:

> "So when you hear lawyers say, as these days more and more of them do say, that it is not a private lawyer's job to look after the public's interest, you should know that the most exemplary of American lawyers have not traditionally felt that way, they have not acted that way, and there is no reason why they should act that way now and plenty of reasons why they shouldn't."

Because Professor Gordon's article is scheduled for publication in August, the page-proof that he kindly provided to me is attached. *Link*

Respectfully submitted this 16th day of July, 2002.

/s/ Douglas A. Schafer
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