Filed on January 8, 2003

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 SEVENTH STATEMENT OF ADDITIONAL AUTHORITIES

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RESPONDENT LAWYER'S SEVENTH
STATEMENT OF ADDITIONAL AUTHORITIES

These additional authorities are submitted pursuant to RAP 10.8:

Selected Public Comments About U.S. Securities and Exchange Commission ("SEC" or "Commission") Proposed Rule: Standards of Professional Conduct for Attorneys. Release 33-8150 (November 21, 2002); 67 Fed. Reg. 71669 (December 2, 2002). Of the 155 public comments received by the SEC that it has posted to date on its website, the following three are particularly relevant to this proceeding:

(1) Letter of December 17, 2002, by Law Professors Susan P. Koniak, Roger C. Cramton, and George M. Cohen and 51 other law professors, posted at http://www.sec.gov/rules/proposed/s74502/spkoniak1.htm (and in Adobe Acrobat PDF at http://www.evergreenethics.com/SEC/Koniak.Cramton.Cohen.pdf). Under the heading "***History of withdrawal and disclosure in client fraud situations***," the law professors wrote:

Link to full letter

> Noisy withdrawal is permitted under the ethics rules of almost every state. The comments by the Commission mention the ABA's Canons of Professional Ethics (1908-1969), which required lawyers to disclose ongoing client fraud, at least when the lawyer's services had been used to perpetrate the fraud. That continued to be the ABA's position after 1969, when the ABA's next rendition of model ethics rules was adopted. The ABA's Model Code of Professional Responsibility, DR 7-102(B)(1), as originally drafted and adopted by the ABA in 1969, not only allowed, it required, lawyers to disclose their clients' frauds in which the lawyers' services had been used. Moreover, that provision with its requirement of disclosure was the law in almost every state in the country until 1974 and in all but about a dozen or so states until the late 1980s.
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> In 1974, the ABA amended DR 7-102(B)(1) to add the words "except if privileged" to the end of the rule and proceeded in short order to interpret the word "privilege" to include all confidential information, not just material covered by the attorney-client privilege. See ABA Formal Op. 341 (1975). The combination of the amendment and the opinion interpreting it rendered DR 7-102(B)(1) a rule whose meaning was at war with its text. **A "shall disclose" rule was transformed in this circu-**

itous manner to a "shall not disclose" provision. The history is important because **the transformation by the ABA of DR 7-102(B)(1) was motivated by the bar's resistance to the SEC's actions in the *National Student Marketing* case**, 457 F. Supp. 682 (D.D.C.1978), in which the Commission's enforcement division argued that the securities laws demanded precisely what the ethics rules of most states and the ABA required: disclosure of client fraud when efforts to get the client to rectify ongoing fraud failed. The ABA was apparently comfortable with DR 7-102(B)(1)'s required disclosure as long as no one in authority sought to sanction lawyers who did not do what the rule insisted they must do. **When the Commission demanded, in effect, that lawyers live up to the principles articulated in ABA rules and in state law, the ABA abandoned the principle it had long articulated.**

But the states were not quick to follow the ABA's departure from the traditional understanding. Of the over 40 states that had adopted DR 7-102(B)(1) in its original form, only 14 were persuaded by the ABA to change to a "shall not disclose" rule. The ABA, however, fought on in 1983, adopting Model Rule 1.6 in 1983, which is a "shall not disclose" rule insofar as client fraud is concerned. This despite the fact that the states had overwhelmingly rejected the ABA's rewriting of DR 7-102(B)(1) to the same effect. The ABA should not have been surprised that most states rejected its new position on client fraud: silent withdrawal as the only permitted response to client fraud situations, softened by the "noisy withdrawal" comment. The high courts of the states, charged with primary responsibility for the maintenance of an independent, vigorous and trustworthy legal profession, could not be persuaded by arguments that the bar should abandon its longstanding position that a lawyer should disclose confidential information to prevent or rectify a client's ongoing or prospective fraud. (Emphasis added.)

(2) Letter of December 17, 2002, by Barrie Althoff, currently the Washington State Bar Association's Professionalism Counsel and recently its Director of Lawyer Discipline/Chief Disciplinary Counsel, expressing to the SEC his own personal views, including his lawyer-as-mercenary view that **"lawyers' duty is to their clients, not to the public,"** posted at: http://www.sec.gov/rules/proposed/s74502/balthoff1.htm.

Link to the letter

(3) Letter of December 16, 2002, by Douglas A. Schafer supporting the SEC's "noisy withdrawal" and "prevent or rectify fraud" proposals by documenting the ABA's defensive, intellectually dishonest transformation in the 1970s of its *public-interest* ethics rule that had *required* lawyer disclosure of a client's past fraud in the course of the representation into a *protect-the-guild* rule that *prohibited* such disclosure, posted at: http://www.sec.gov/rules/proposed/s74502/daschafer121602.htm.

Link to the letter

Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues*, 58 Bus. Law. 143 (Nov. 2002). Law Professor Cramton examines and critiques the current array of rules that govern lawyers in client fraud situations and calls for a single federal rule to restore public trust in the legal profession's integrity, saying:

> [at 180] [T]he ABA and state bar organizations argue that the formulation of rules of professional conduct for lawyers has been and should be carried out by the high courts of the states and not by federal regulation. The exclusion of the legislative process, both state and federal, leaves lawyers and their organizations more in control, resulting in more self-regulation than is given to any other profession. **Self-regulation** has many advantages, but **falls short when the interests of the profession are put above those of the public.** On the fundamental question of a lawyer's duty to prevent or rectify criminal or fraudulent conduct by a client or a client's agent, the ABA and a number of state bars have put the interests of the profession above those of the public. Federal legislation and regulation provide the best vehicle for needed change. (Emphasis added.)
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> [at 186] Historically, and in the vast majority of American states, the duty of confidentiality evaporates when a client abuses the attorney-client relationship by using the lawyer's services to further criminal or fraudulent activity. Disclosure to prevent future client fraud on a third person or rectify a past one involving use of the lawyer's services reflects the historic position of the legal profession, the prevailing rule in most states, and properly balances the lawyer's duty to client with responsibilities owed to third persons and the public. The same principle limits the attorney-client privilege, which evaporates when the client is using the lawyer's services to further a crime or fraud. Moreover,

> it is shamelessly inconsistent for the profession to permit lawyers to disclose information to protect their own financial interests (e.g., collect a fee) while prohibiting them from doing so when clients, abusing the relationship, are defrauding third parties. The growing balkanization of American ethics rules would be stemmed by universal adoption of a single rule on this critical subject, which is vital to public trust in the legal profession's integrity and public responsibility.

Larry P. Scriggins, *Legal Ethics, Confidentiality, and the Organizational Client*, 58 Bus. Law. 123 (Nov. 2002). The former Chair of the ABA Section of Business Law and Chair of its Ad Hoc Committee on Ethics 2000 discusses client fraud involving an organizational client and notes the different perspectives on disclosing client fraud between business lawyers and litigators, saying at 127:

> It is these business lawyers who are most often faced with the difficult questions arising under Rules 1.13 and 1.6(b). And, within the ABA, it is the Section of Business Law which has, over the years, most consistently supported the proposals of the Ethics 2000 Commission, and similar formulations, such as section 67 of the Restatement. On the other hand, the best example of the most articulate arguments against these proposals is contained in the March 2001 Report of the American College of Trial Lawyers (ACTL Report), and its prior positions. On the question of where to draw the line on authorizing third-party disclosure under Rule 1.6, the position taken by the ACTL Report is grounded significantly (of course not entirely) on the perspective of a litigator in the context of our adversarial system of justice. For a transactional or securities lawyer, where to draw that line is influenced by a different perspective [for their customary role is assisting clients to comply with the substantive law]. ... (Indeed, some may question whether facts required to be disclosed by law can properly constitute protected "confidences and secrets" of an organizational client.)

Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. of Chicago L. Rev. 1 (1998). Professor Fischel calls [at page 33] for the abolition of lawyer confidentiality rules because they "benefit lawyers but are of

dubious value to clients and society as a whole." He writes:

> [at 12] Attorneys' obligations to keep information confidential (other than the self-defense exception) have been steadily expanding in scope in recent decades. More specifically, attorneys' discretion to reveal client wrongdoing—to "blow the whistle" on client misconduct—has been radically curtailed. While the organized bar has justified expanded confidentiality obligations by emphasizing the cardinal importance of client loyalty, there is an alternative, more self-interested explanation. Lawyers have expanded confidentiality obligations to avoid being sued.
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> [at 15] [I]t is hard to escape the conclusion that confidentiality rules exist to benefit lawyers. Any other effect is coincidental.

Peter C. Kostant, *Sacred Cows or Cash Cows: The Abuse of Rhetoric in Justifying Some Current Norms of Transactional Lawyering*, 36 Wake Forest L. Rev. 49 (2001). (Avail. at http://www.law.wfu.edu/lawreview/v36n1/w06-kostant.pdf) Professor Kostant asserts that courts in the last decade have contributed to declining lawyer morality and to increasing societal distrust of lawyers by frequently absolving transactional lawyers who have enabled client fraud. The courts have published opinions that lack meaningful analysis but use rhetorical language to justify the bar's "sacred cows" of excessive confidentiality and purported independence from clients. He says:

> [at 53] In too many cases, ... courts sometimes reflexively accept a blanket presumption in favor of confidentiality. Instead of carefully explaining the need for confidentiality and limiting its scope (for example, by requiring strict accountability, not assisting with cover-ups, and not hiding behind a client's actions), the courts' expansive rhetoric sometimes treats confidentiality as an ultimate value in itself. Thus ... lawyers are effectively distanced from responsibility for the results of illegal client schemes that lawyers could have helped to prevent.
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> [at 83] [S]ome courts ... have used the rhetoric of perversity to argue that a duty not to assist with client fraud would inevitably destroy attorney-client confidentiality and this duty would necessarily result in not less, but more client fraud. This "analysis"

ignores the fact that the attorney-client privilege does not apply to communications in furtherance of a crime or fraud, that there are exceptions to an attorney's duty to protect client confidences ... and that a duty to rectify client fraud existed in most states until 1983 without dire consequences. ... Perversity rhetoric is simplistic because it makes sweeping claims without supporting empirical data. Where is the evidence that if lawyers are not required to keep client fraud confidential, clients will simply not confide in lawyers but continue to engage in fraud undeterred by their honest lawyers? By simply postulating that disclosure will result in more fraud, the perversity rhetoric ignores the possibility that clients may engage in more fraud because they could rely on strict confidentiality from lawyers who assist them with legal advice, and that clients might abandon fraudulent schemes when told that their lawyers would disclose their intended misconduct.

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Respectfully submitted this 7th day of January, 2003.

Douglas A. Schafer

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