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March 10, 2017

Clerk of the Supreme Court of Texas
P.O. Box 12248
Austin, TX 78711

Re: In re *Andrew Silver*, No. 16-0682

To the Honorable Members of this Court:

Introduction

Pursuant to Rule 11, Texas Rules of Appellate Procedures, as an *amicus curiae*, I file this letter offering my comments on the issues raised by the pending case, In re *Andrew Silver*, No. 16-0682[1]. In particular, I wish to address the current effort to have this Honorable Court extend the attorney-client privilege to patent agents in cases that rely on the law of the State of Texas for their rules of decision. It is my view that this Court should reject the request. Taking this unprecedented step would undermine the special role and responsibilities of lawyers. Extension of the attorney-client privilege to non-lawyers both weakens the privilege and

[1] These remarks are mine alone and no one else played any role in crafting this letter or funding its preparation and filing.

provides the privilege to those who know nothing about the practice of law and the procedures and jurisprudence behind the attorney-client privilege, and who have not fulfilled any of the educational requirements or testing that lawyers must fulfill.

Background

I am a lawyer duly admitted to practice in the Supreme Court of the Commonwealth of Pennsylvania, the Appellate Division, Second Department of the Supreme Court of New York, the Supreme Court of Connecticut, the United States Supreme Court, and numerous federal circuit courts of appeal and district courts. Currently, I am the George W. and Sadella D. Crawford Visiting Lecturer in Law at Yale Law School teaching legal ethics and professional responsibility, where I have taught since 2009. I am also the Supervising Lawyer of the Ethics Bureau at Yale, a *pro bono* endeavor to provide ethics advice, counseling and support to those who cannot afford such services.

I am a former member and Chair of the ABA Standing Committee on Ethics and Professional Responsibility and a former Chair of the ABA Section of Litigation, the largest section of the ABA representing almost 60,000 trial lawyers. I was an advisor to the American Law Institute's 12-year project, The Restatement of the Law Governing Lawyers. I am a Fellow of the American College of Trial Lawyers, and I was the founder and a member of Ethics 2000, the ABA Commission established to rewrite the Model Rules of Professional Conduct.

The Patent Agents Should not Be Granted the Privilege

My analysis begins with two propositions. First we know that, consistent with the due process clause of the United States Constitution, the existence of a testimonial privilege is essential to the delivery of legal services. Without it lawyers would never be able to gain the confidence of clients so that clients are willing to share with their lawyers their innermost secrets, even embarrassing

information, that is essential for the lawyers to understand before giving the client the needed advice. Thus it is an article of faith, but also a lawyer imperative set forth in the oath every lawyer takes as an officer of the court, that lawyers will maintain sacrosanct the confidentiality of all the lawyer learns during the course of the representation.

Second, we know that the privilege is constantly under attack. Because it prevents lawyers from being forced to divulge client privileged information it is viewed—incorrectly in my opinion—as an impediment to the search for the truth. But it only takes an individual becoming a client for the value of the attorney-client privilege to be recognized as far outweighing any limitation on disclosure that occurs when the privilege is invoked.

The foregoing compels one conclusion: any attempt to extend the testimonial privilege beyond the present narrow categories—lawyer-client, priest-penitent, physician-patient, spousal—runs a real risk that the privileges for lawyers will disappear entirely as accountants, investment bankers or, in this case, patent agents seek a state-mandated privilege for their parochial interests. It is one thing for the Patent and Trademark Office to declare a privilege for proceedings before that specialized agency where almost nothing is really privileged because matters before that agency require full disclosure and candor in order to receive the special status the granting of a patent bestows. But it is not a logical next tiny step, but rather a Herculean leap, to declare that such a privilege should be declared for all patent agent-customer communications.

The present importuning of this Court to declare the existence of a patent agent-customer privilege must be viewed in a larger context. It is safe to say that today the legal profession is under greater siege from those who would like to destroy it than at any earlier time in our history. Our detractors fail to recognize the unique role of lawyering as a learned profession that, through special

educational requirements, character and fitness reviews, examinations in both law and professional responsibility, seeks to produce officers of the court with sacred fiduciary responsibilities to our clients, the courts and the system of justice. Instead they would turn lawyers into just another set of service providers, merely offering one product in a department store of services including insurance, stock brokerage, investment bankers, you name it. These critics of our profession would go so far that a patent agent or accountant could be the owner and CEO of a law firm, professional responsibility rules to the contrary discarded. It is for this reason that the American Bar Association has taken such a strong position for so long that only lawyers are qualified to offer the protection of the attorney-client privilege.

Looking closer at the idea of patent agents as the beneficiaries of the attorney-client privilege demonstrates how far-fetched this notion is. In order to become a patent agent one may have to be a genius in some obscure and challenging area of science. The list of fields of study that qualify for taking the patent agent examination is impressive. But just as telling is the fact that the putative patent agents are not required to take a single law course before they qualify for a position that the patent agents hope will give them the privilege. A fortiari, they do not have to take courses in evidence, professional responsibility or ethics to receive the gift they seek. Yet we know that, even after courses in all those topics and the taking of the MPRE and a bar exam, capable lawyers struggle with the important issues raised by the availability of a lawyer-client testimonial privilege.

I spend two weeks of my course in lawyer ethics on the privilege and an equal amount of time in confidentiality. And this is in a course in which the students have already spent one year learning how to "think like a lawyer." Edna Epstein's leading treatise on the privilege, published by the ABA, now extends to three volumes. And the number of CLE courses lawyers attend addressing this

topic are beyond computation. Yet in the face of all that important training that real lawyers need, the patent agents believe a privilege that lawyers grapple with so studiously should be handed to them "for the good of their customers," without replicating the foundation provided to lawyers in law school and thereafter. The author does not agree. It is more like handing a hand grenade to a new recruit on day one of basic training.

I respectfully urge this Honorable Court to throw this proposal on the same dust heap of history where Arthur Andersen's idea that it could own a law firm is buried in the Enron cemetery.

Very respectfully yours,

/s/ Lawrence J. Fox
Lawrence J. Fox

cc: All Counsel

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this amicus brief letter was served on all counsel of record in this case, identified below, and all amici of record on March 13, 2017, by the electronic filing manager.

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Dated: March 13, 2017

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