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December 21, 2012

Mr. Joel Peterson
Legal Assistant
Departmental Disciplinary Committee
Supreme Court, Appellate Division
First Judicial Department
61 Broadway
New York, NY 10006

Re: Complaint against Andrew Weissmann
Docket No. 2012.1807

Dear Mr. Peterson:

As the complainants in the above matter, we have been served with copies of Mr. Reginald Skinner's regrettable response on behalf of Andrew Weissmann and the Department of Justice. Even putting to one side the multiple inaccuracies and misstatements discussed below, the response does not address any issue that is before the Departmental Disciplinary Committee.

In particular, the response's assertion that the complaint contains no new evidence is flat-out false. Evidence that Mr. Weissmann's Enron Task Force yellow-highlighted (before the 2005 trial) as favorable to the defendants and exculpatory was not revealed until the third team of prosecutors assigned to the case disclosed it accidentally in late March 2010. Then, in 2011, the Fifth Circuit unequivocally stated that the prosecutors "plainly suppressed" favorable evidence.

Mr. Skinner identifies himself as a member of the Constitutional Torts Staff of the Civil Division of the DOJ, so perhaps he is well familiar with *Bivens* litigation. The December 7, 2012 response reveals, however, that Mr. Skinner has never handled a lawyer discipline matter before, and indeed is not aware that lawyer discipline proceedings are a kettle of fish unto themselves. It is

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like the old saying about hammers and nails: if all one has is a *Bivens*-avoiding toolkit, then everything looks like a *Bivens* case.

The response reads as if Mr. Skinner is defending Mr. Weissmann in a proceeding in which we are either parties or opposing counsel, seeking some relief on account of Mr. Weismann's violation of the rule in *Brady v. Maryland.* The undertone is that this is somehow underhanded, because both of us formerly represented one of the four defendants in the underlying criminal case in which Mr. Weissmann served as a prosecutor.

This represents a fundamental misunderstanding of the current proceeding before the Departmental Disciplinary Committee—from two distinct points of view. First, we represent no one in this matter, *and* we seek no relief. We are like the neighbors of a crime victim—concerned citizens who bring a matter to the attention of the police or other appropriate authority, so that *the authorities* can take action and seek relief on behalf of the community.

The point is more telling, because we are not just any citizens, but lawyer-citizens who have a special moral obligation of our own to help in the self-policing of our common profession. Moreover (although this is not why we filed the complaint), we were *ethically* and *legally* obligated to bring the matter forward, because the misconduct of the Enron Task Force prosecutors seriously calls into question their fitness to continue to practice law.

Second, the assumption that we are charging Mr. Weissmann with a series of *Brady* violations is not only wrong, but bizarre, and highlights how completely irrelevant Mr. Skinner's response actually is. Our complaint is over 30 pages long; it contains neither a paragraph, a sentence, nor even a clause that suggests that Mr. Weissmann should be subject to discipline because of such a violation. Indeed, we make only a single substantive reference to *Brady*—on page 15—and that reference is made only to emphasize that we are *not* proceeding under the constitutional rule, only its analog in the law of lawyering:

> [Texas Rule 3.09(d)] is the disciplinary version of the *Brady* rule, but it (like counterpart Model Rule 3.8(d)) contains no "materiality" requirement. *All* evidence that *tends to negate guilt or mitigate the offense* must be disclosed.

By contrast, the December 7 response discusses and analyzes *Brady* (and its materiality prong) many times, but does not mention a single Rule of Professional Conduct from either New York or Texas, or any other material that is germane in a lawyer discipline case, as opposed to some other kind of case.

The response filed not only missed the point completely, but it confused, obfuscated and misrepresented the underlying proceedings (especially the ruling by the Fifth Circuit). The following comments address these problems.

Starting with the first paragraph of Mr. Skinner's response letter, it should be noted that our complaint arises out of the prosecution of four Merrill Lynch executives, only one of whom, Mr. Brown, was ever our client. Mr. Brown's co-defendants were the victims of Mr. Weismann's unethical conduct, just as much as Mr. Brown was, but they are unaware that the complaint has been filed, so far as we know. Furthermore, although the harm the four men suffered was germane to their appeals and to any *Brady*-related remedies they pursued in the criminal case, it is not germane here. Here, it is the public, the administration of justice, and the Bar that have been harmed.

Second, although it is true that the Fifth Circuit affirmed the perjury and obstruction of justice counts against Brown in its 2006 opinion, Mr. Skinner neglected to mention that the Fifth Circuit also *reversed* as to all other convictions against both Mr. Brown and his co-defendants, and that the government subsequently walked away from those 12 (of 14) counts, after the new prosecutors produced the exculpatory and favorable evidence referenced in our complaint.

Third and most important, not only was Mr. Skinner totally unable to distinguish between constitution-based *Brady* claims and grievances against lawyers in disciplinary proceedings, he also totally mischaracterized the results of the litigation with respect to Mr. Brown's motion for new trial on the two remaining counts.

Although the Fifth Circuit found that there was no *Brady* violation that would support granting a new trial, it made findings that, *standing alone*, constitute proof of violation of the ethical rules. Contrary to Mr. Skinner's response, the Fifth Circuit first rejected, *as clearly erroneous*, the district court's finding that the favorable evidence had not been suppressed. Only then did it affirm the judgment denying a new trial, but *solely* on the ground of lack of materiality. But the whole point of our complaint against Andrew Weissmann—completely ignored in the Skinner letter—is that the materiality of the evidence suppressed is *not* a factor in lawyer disciplinary proceedings; the suppression of favorable evidence alone *is* the disciplinary violation.

Thus, to the extent that the Fifth Circuit's 2011 opinion could be of assistance to the Disciplinary Committee in this disciplinary proceeding, it is decisively *against* any defense that Mr. Weissmann might proffer, and decisively *in favor* of a finding of unethical conduct under the Rules of Professional Conduct of either New York or Texas.

Finally, on the last line of page 2 of his letter, Mr. Skinner states—and italicizes for emphasis—that our complaint presents *no* new evidence not considered by the Committee in 2008. That is patently false. The most dramatic examples of favorable evidence withheld from the defense team, specifically including the yellow-highlighted testimony of Merrill Lynch's counsel Enron Treasurer Jeffrey McMahon, was concealed by Weissmann and his colleagues until 2010. Moreover, the Fifth Circuit's finding that evidence was "plainly suppressed," which is alone enough to prove a disciplinary violation, was not available until 2011.

The "response" filed on behalf of Andrew Weissmann in this disciplinary matter is not responsive to any issue before the Departmental Disciplinary Committee. It should be ignored.

Respectfully yours,

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