THE WILLIAM HODES
LAW FIRM

W. WILLIAM HODES
Attorney at Law
Admitted to Practice:
Florida
Indiana

March 30, 2013

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:

Please consider this letter as a surreply to Mr. Skinner's letter of March 15, 2013. In the interests of time I am writing in my own name, but I have consulted fully with my colleague Sidney Powell, and she agrees that I speak for both complainants.

Mr. Skinner's first contention is that New York Rule 3.8—he does not advert to the governing Texas Rule, although he would no doubt say the same thing about it—includes as an element the "materiality" prong of *Brady v. Maryland* and its progeny, despite the conspicuous lack of any textual support in the Rule for such an interpretation.

PLEASE REPLY TO:

The William Hodes Law Firm
811 Chapman Loop
Village of Hemingway
Lady Lake, FL 32162

COUNSEL AND ASSISTANCE TO LAWYERS
www.hodeslaw.com
E-Mail: wwh@hodeslaw.com

(O) 352-399-0531
(M) 352-630-5788
(F) 317-863-1163

Counsel cited only two cases for this make-or-break proposition,[1] neither of them from New York or Texas. He then drew the conclusion that it is "simply wrong" to treat Rule 3.8 as substantively different from *Brady* on the materiality issue. But if Ohio and Colorado are the only two jurisdictions in which Mr. Skinner's result obtains,[2] that leaves 49 other American jurisdictions in the opposing camp, without counting Guam, Puerto Rico and the Virgin Islands.[3]

It is true that positive *binding* authority flatly supporting the proposition that Rule 3.8 pushes *beyond* what is required by the Constitution is scarce or non-existent. But that is only because the proposition has been considered to be so obvious as to not require discussion. Moreover, essentially the identical language that now appears in Model Rule 3.8(d) has appeared in the rules of ethics of all U.S. jurisdictions for over 40 years, and very similar language first appeared 60 years before that. Neither the Kutak Commission nor the Ethics 2000 Commission even considered changing Model Rule 3.8 so that it would become co-terminus with *Brady*.

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[1] Mr. Skinner also "cited" *People v. Piscitello*, a New York Justice Court opinion, but we put that aside as an unserious response. *Piscitello* was not a disciplinary matter, and it did not involve a prosecutor—it was a mine-run criminal case in which the prosecutor had filed a motion to disqualify *defense counsel* for conflict of interest. A Justice Court has no jurisdiction to construe or apply the Rules of Professional Conduct in any event; thus, the Court's off-hand remark (made for no obvious reason) that Rule 3.8 "concerns the codified responsibility of prosecutors [to comply with *Brady*]" cannot possibly be taken as a substantive "holding" that the Rule codifies every aspect of *Brady*, *including the materiality requirement*, which is the threshold issue here.

In his March 15, 2013 letter, counsel complained of the disparaging tone of our first response, but it is unrealistic to expect to base a substantive argument about the reach of Rule 3.8 on *People v. Piscitello* and *not* be subjected to ridicule.

[2] No one questions the authority of the Supreme Courts of Ohio or Colorado to make the policy judgment in question. It would have been preferable, however, for these courts simply to have amended the Rule to reflect the now preferred policy rather than to engage in an unconvincing exercise in "statutory construction" contrary to the plain text of the Rule.

[3] In the District of Columbia, a Comment to Rule 3.8 suggests that the Rule is not intended to add to or subtract from duties that prosecutors already owe under law, including constitutional law. Whether this Comment can trump the contrary text of the Rule is now in active litigation in the D.C. courts.

References to this shared assumption are not hard to find. For example, in *Cone v. Bell*, 556 U.S. 449 (2009), a case that ultimately turned on the difference between evidence that was material under *Brady* for capital sentencing purposes as opposed to determination of guilt, the Court noted that "Although the Due Process Clause of the Fourteenth Amendment, as interpreted by *Brady*, only mandates the disclosure of material evidence, the obligation to disclose evidence favorable to the defense may arise more broadly under a prosecutor's ethical or statutory obligations," *id* at 470 n.15, referencing, among other resources, ABA Model Rule 3.8.

And in *Kyles v. Whitley*, 514 U.S. 419 (1995), perhaps the leading case applying the *Brady* standard, the Court made a similar contrast: "[*Brady*] requires less of the prosecution than the ABA Standards for Criminal Justice, which call generally for prosecutorial disclosures of any evidence tending to exculpate or mitigate;" *id.* at 437. (The Court then noted that the relevant ABA Standard is almost identical to Model Rule 3.8(d).)

As the Disciplinary Committee is of course aware, these opinions and more are discussed thoroughly in ABA Formal Op. 09-454, which explicitly states that the ethical standard is *independent* of the legal and constitutional requirement imposed on prosecutors. For current purposes, the key passage in the Opinion is as follows, with emphasis supplied:

> Rule 3.8(d) has sometimes been described as codifying the Supreme Court's landmark decision in *Brady v. Maryland*, which held that criminal defendants have a due process right to receive favorable information from the prosecution. This *inaccurate* assumption may lead to the *incorrect* assumption that the rule requires no more from a prosecutor than compliance with the constitutional and other legal obligations of disclosure, which frequently are discussed by courts in litigation.

The point of the above authorities, and others discussed in Formal Op. 09-454, is not that they are binding on a Disciplinary Committee in New York, whether applying New York or Texas Rules of Professional Conduct. The point is that they state the overwhelming majority rule. It should go without saying, moreover, that the Ohio Supreme Court's decision to read the absent word "material" into its Rule 3.8, and the decision of the Colorado Supreme

Court to read in the words "outcome determinative" are neither binding nor persuasive here. These exercises in "statutory construction" are particularly unpersuasive, in light of the fact that both courts had the power to *amend* the rules in question in order to make them mirror *Brady* rather than push beyond it.

The second argument advanced in Mr. Skinner's recent letter is that the complainants, Ms. Powell and I, have not "established" that Andrew Weissmann bears *personal* responsibility for the multiple ethical violations that we catalogued. This confuses our role with that of the Disciplinary Committee. Not being privy to the private conversations and communications between the Enron Task Force members, *and lacking either subpoena power or the ability to interview any of the participants,* we can do no more than set the scene for *the Committee's* investigation.

We *are* able to point to Mr. Weissmann's constant presence at the trial of the Merrill Lynch defendants, his routine caucusing with them throughout the long trial, and his personal participation in much of the Grand Jury interrogation of the various witnesses, including exculpatory witness Katherine Zrike, whose trial testimony he monitored intently while aware that her exculpatory evidence was being withheld.

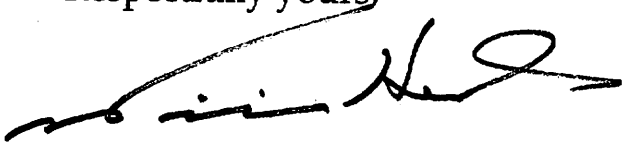
This allows us to postulate with a great deal of confidence that Mr. Weissmann "ordered, directed or ratified" the misconduct of his subordinates for purposes of Rule 5.1, and also that he "assisted or induced others" to violate the Rules, or did so "through the acts of others," for purposes of Rule 8.4(a).

In the end, however, it is the responsibility of the Disciplinary Committee to marshal the record facts to *prove* one or many individual violations of the Rules by Mr. Weissmann personally. As complainants, we are seeking no relief for ourselves, and are certainly not entitled to any form of summary ruling. Our job is done when we put the basics (and more) before the proper authorities. The Committee can come to its final conclusions only *after* a full investigation or hearing, or both.

Finally, counsel repeats briefly his earlier claim that the instant complaint is merely a re-hash of an earlier complaint filed by our former client, based on no new evidence. That is simply false, as we stated in our first response. It was not known until recently (outside the ETF) that the court-ordered "summaries" provided to the defense team were fraudulent, and provided a vehicle for more rather than less suppression of favorable evidence. Similarly, it was only recently that the Fifth Circuit Court of Appeals held that the prosecutors "plainly suppressed" evidence favorable to the defense, and that the District Court's contrary finding was clearly erroneous.

That is new, and enough to show a *prima facie* violation of either the New York or Texas version of Rule 3.8, pending further investigation and hearing by the Disciplinary Committee.

Respectfully yours,



W. William Hodes, Esq.
Attorney at Law

c.c. Reginald M. Skinner, Esq.
Sidney K. Powell, Esq.