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The State Bar of Texas
Commission for Lawyer Discipline
1414 Colorado Street
Austin, TX 78701

Ladies and Gentlemen:

The undersigned, two lawyers (one from Texas, one not) write to bring to your attention a disturbing breakdown in the disciplinary system at the Office of Chief Disciplinary Counsel and the Board of Disciplinary Appeals. In late July of this year, we filed a grievance of some 40 pages against Texas lawyer Matthew Friedrich, who, as a member of the Enron Task Force (ETF) in the early 2000s, had prosecuted a former client of ours, Merrill Lynch executive James A. Brown.

Our grievance, accompanied by 17 exhibits, charged that Mr. Friedrich, together with his ETF colleagues, had knowingly and deliberately engaged in a systematic (and successful) campaign to withhold significant favorable evidence from the defense team in a case tried in the fall of 2004 in federal court in Houston.

As described briefly below, and in full detail in the attached grievance, Matthew Friedrich's misconduct was actually worse than a deliberate withholding of clearly exculpatory material. Before trial, the District Court ordered the prosecution to provide "summaries" of the evidence that prosecutors had already yellow-highlighted for the Court, signifying that it was favorable to the defense. The prosecutors not only left out numerous crucial instances of highlighted text, but in a few key places, created a "summary" that was diametrically *opposed* to the evidence they were purportedly summarizing. Then, at trial, Mr. Friedrich and other ETF prosecutors repeatedly capitalized on having both sanitized the information produced to the defense and lied about the evidence key witnesses had given the government before trial. The prosecutors presented phony hearsay evidence directly contradicted by first-hand evidence they knew existed (and had carefully suppressed), without fear of impeachment or contradiction.

The grievance and exhibits cited to half a dozen specific provisions of the Texas Disciplinary Rules of Professional Conduct that had been violated, chief of which was Rule 3.09(d), which requires a prosecutor in a criminal case to "make timely disclosure to the defense of *all* evidence or information known to the prosecutor that *tends to* negate the guilt of the accused or mitigates the offense" (emphasis supplied).

It is beyond dispute that this Rule was violated. Indeed, the grievance against Matthew Friedrich cites the United States Court of Appeals for the Fifth Circuit's finding that exculpatory evidence "plainly had been suppressed" *and that the District Court's finding to the contrary was itself clearly erroneous*. The Fifth Circuit's subsequent refusal to grant Mr. Brown a new trial, based on its dubious analysis of the materiality prong of *Brady v. Maryland*, is legally irrelevant in the disciplinary context, because Rule 3.09 contains no materiality requirement—for the good reason that it serves a different purpose from the *Brady* doctrine. Thus, while the United States Supreme Court's denial of *certiorari* ended Mr. Brown's criminal matter, it had no effect on the validity of the grievance against Mr. Friedrich.

Despite all of this, on August 17, 2012, the Office of Chief Disciplinary Counsel issued a form letter stating that the grievance against Matthew Friedrich had been classified as an "Inquiry," and dismissed. On October 5, 2012, moreover, the Board of Disciplinary Appeals affirmed the dismissal in another form letter.

Neither of these results is defensible under the Texas Rules of Disciplinary Procedure. The grievance against Matthew Friedrich could not be classified as an "Inquiry," because according to Rule 1.06(S), an "Inquiry" is "written matter concerning attorney conduct received by the Office of the Chief Disciplinary Counsel that, *even if true*, does not allege Professional Misconduct" (emphasis supplied). Instead, contrary to the form letter issued by the Board of Disciplinary Appeals, which stated without explanation that the conduct described in the grievance "does not allege a violation" of the Rules of Professional Conduct, the grievance should have been classified as a "Complaint" A "Complaint" is defined in Disciplinary Procedure Rule 1.06(G) as "written matters received by the Office of the Chief Disciplinary Counsel that . . . *on their face* . . . allege Professional Misconduct" (emphasis supplied). Accordingly, Mr. Friedrich should have been required to respond to allegations obviously stating professional misconduct on their face, and the matter should have been sent on to the next stage of the process.

We understand the necessity of having an "inquiry" classification to divert at the threshold grievances that are not cognizable in the disciplinary process. Lay clients often write to complain that a lawyer won't return phone calls, for example, or failed to call a crucial witness to testify in a case, or even allowed the statute of limitations to expire. If true, these facts are all regrettable, but they cannot command the resources of the disciplinary system, and the grievance must be rejected (as diplomatically as possible, to avoid the public perception that lawyers are merely protecting each other).

But this is not such a situation. The grievants here are experienced and sophisticated lawyers; one is a former federal prosecutor and a veteran of dozens of high profile appellate proceedings, who has never filed a grievance arising out of any other litigation, and the other, is a former academic who is widely recognized as one of the leading authorities on legal ethics in the United States.

Remarkably, in its form rejection letter, the Office of Chief Disciplinary Counsel has stated that the facts laid out in the grievance and exhibits—*even if true*—do not violate any disciplinary rules in Texas. And the Board of Disciplinary Appeals is of the view that the same facts *on their face* do not even "allege" professional misconduct. These bald conclusions are flatly incorrect under the Rules. As the following brief recapitulation of some of the facts demonstrates, classification of the grievance against Friedrich as an "inquiry" is simply unsupportable, and the Commission cannot countenance such an utter breakdown in the process.

The prosecutorial misconduct arose out of one of the criminal prosecutions brought by the Enron Task Force in the wake of the collapse of Enron. In the so-called Nigerian Barges case, the ETF charged that in December 1999, Enron and Merrill Lynch executives conspired to enter into a sham transaction in which 3 electricity-generating barges moored off the coast of Nigeria would be sold to Merrill Lynch, and then sold back to Enron within 6 months, thereby falsely inflating Enron's earnings for 1999.

Everyone agreed, as Mr. Friedrich acknowledged to the jurors, that it was perfectly legal for Enron to sell the barges to Merrill Lynch, while agreeing to use its "best efforts" to find a buyer to take Merrill out of the deal. The transaction became an illegal sham sale *only* if Enron agreed or guaranteed that it would "repurchase" the barges if no buyer could be found. Accordingly, the only real issue at the six-week jury trial in Houston in September 2004 was whether the alleged "secret side deal" was a legal agreement that Enron would use its "best efforts" to *remarket* the barges or an illegal guarantee that Enron would *repurchase or buy back* the barges.

Throughout the trial, the prosecutors, including Mr. Friedrich, repeatedly asserted that former Enron treasurer Jeffrey McMahon had given the Merrill Defendants an illegal repurchase guarantee. McMahon, however, did not testify for the government and was repeatedly threatened with indictment (which never matured). Indeed, *none* of the multiple actual participants testified for the government--even though one was cooperating with them at the time. Instead, to prove the "McMahon guarantee," the ETF presented the *hearsay* testimony of McMahon's subordinates. They then referred to that testimony pervasively throughout the trial, including at least 50 times in closing arguments to the jury, as they argued at least 16 times that *McMahon made the illegal guarantee.*

As detailed fully in our grievance, however, long after the defendants had been convicted and had served time in prison, new prosecutors—in the wake of the debacle of the Ted Stevens trial—began dribbling to the defense what eventually amounted to more

than 6,000 pages of grand jury testimony, FBI 302s and notes of witnesses that should have been disclosed before the trial. The March 2010 production revealed that the ETF has suppressed significant evidence that was exculpatory—in particular with respect to the very issue of what Mr. McMahon himself had *actually* said about the transaction (in interviews with 6 different federal agents, for example).

The most stunning example: Jeffrey McMahon had repeatedly told a series of federal agents, "NO – [Enron] never guaranteed to take out [Merrill Lynch] w/rate of return," and many other similar statements, all showing only a lawful "best-efforts" agreement to remarket, not an illegal guarantee to repurchase. But the deceitful "summary" that Friedrich and his colleagues prepared for the defense stated simply that "McMahon does not recall any guaranteed take out at the end of the 6 month remarketing period." As the Fifth Circuit tartly remarked: "'No' is not the same thing as 'I do not recall.'"

At the same time that Mr. Friedrich repeatedly argued to the jury that *McMahon* was the originator of the supposed buy-back guarantee, he knew full well that McMahon's own statements to the government agents flatly contradicted that argument, and that the defense team was powerless to counter his deception, because Friedrich had deliberately concealed the very evidence *from McMahon* that would have cast the entire case in a wholly different light.

It is irrelevant that Mr. Friedrich might have disbelieved what he knew Jeffrey McMahon had told multiple government agents. Texas Disciplinary Rule of Professional Conduct 3.09(d) places the obligation squarely on prosecutors like Matthew Friedrich to provide "*all* evidence or information *known to the prosecutor* that *tends to* negate the guilt of the accused." It was up to the defense team, and then the jurors to make what they would of the evidence—all of it. But the underhanded and unethical tactics of the ETF prosecutors denied the defense, the jurors, and the appellate judges the opportunity to perform their functions in the justice system.

Both the text and the drafting history of Texas Rule 3.09(d) and its counterpart rules throughout the country make crystal clear that there is no "materiality" element. On the other hand, because sanctions imposed on a lawyer-prosecutor can have adverse reputational consequences, discipline is appropriate only if the prosecutor *knows* about the favorable evidence and suppresses it anyway. In this case, proper inquiry would reveal that Mr. Friedrich and his colleagues not only knew about the evidence—they had highlighted it in yellow. They deliberately and systematically removed it from the summaries they provided in response to the District Court's order. There is no other explanation, and neither Matthew Friedrich nor his ETF colleagues have ever attempted to offer one.

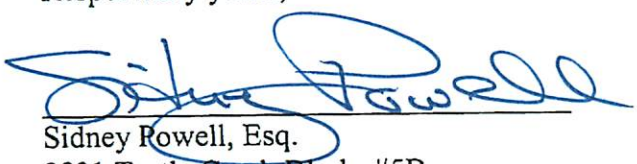
After they achieved convictions in the Nigerian Barges and other cases, the ETF prosecutors, including Mr. Friedrich, held or now hold powerful political offices at the national level. The possibility cannot be ignored that political pressure or favoritism

played a role in the dismissal of the grievance by both the Office of the Chief Disciplinary Counsel and the Board of Disciplinary Appeals. Other than that, the only plausible reason why both agencies could go so badly off the rails is that they mistakenly believed that disciplinary action is possible *only* if the defendant in the underlying criminal case actually achieves a new trial or other substantive relief under the *Brady* doctrine. If so, then surely the Commission for Lawyer Discipline will disabuse them of this notion.

Serious prosecutorial misconduct and abuse of power eats at the heart of the justice system and undermines the rule of law. But courts are often loath to overturn convictions, and prosecutors like Matthew Friedrich have absolute immunity from suit by a wronged citizen. A stern but fairly administered disciplinary system is society's best hope—and here its only hope—to curb these abuses, but so far the Texas system has failed at every turn.

The Commission should review and investigate this matter fully in order to allow the public to maintain confidence in the integrity of our system of justice and the professionalism of the Bar—not just in Texas, but throughout the country, where this case has already achieved some notoriety.

Respectfully yours,



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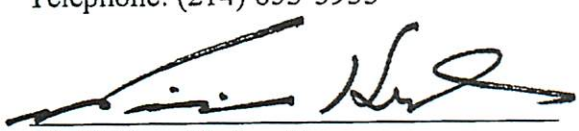

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Encls.
cc: Judy Sebesta, Chair
Grievance Oversight Committee of the Texas Supreme Court
Texas State Senator Rodney G. Ellis