May 18, 2006

Memorandum of Law

Re Matter of Eleanor J. Piel, Docket #2005.2935
and
Matter of William H. Roth, Docket #2005.2936

This memorandum of law is submitted in support of the complaint filed with the Grievance Committee by Catherine E. Malarkey ("Petitioner") in the above captioned matters against Respondents and each of them arising out of their representation of Petitioner in her discrimination case captioned Catherine E. Malarkey v. Texaco (SDNY. 1996) (the "Texaco Action").

Petitioner's allegations of wrongdoing against the Respondents are set forth in her letters to the Committee and in the accompanying identified exhibits:

- Letter of November 1, 2005 and attached Exhibits 1-7.
- Letter of December 5, 2005 and attached Exhibits 8&9.
- Letter of December 21, 2005.
- Letter of January 13, 2006 with attachments.
- Letter of January 23, 2006.

Petitioner has detailed to the Committee two distinct wrongful act by Respondents who jointly represented her in the Texaco Action. Under applicable case law and ethical standards, Respondents should be reprimanded for their

wrongful conduct against her and the S.D.N.Y. and appropriately sanctioned by this Committee for that conduct.

Petitioner's narrative of the Respondents' wrongful conduct in her letters to the Committee is supported by documentary evidence from Respondents' files, in their own handwriting, and in an official Court recording of Respondents' candid admission of neglect and false representations to the Magistrate in the Texaco Action.

Respondents, in total disregard of their fiduciary duty to Petitioner and in an effort to deflect any responsibility for this inexcusable conduct during discovery in the Texaco Action did the following:

First, Respondents lied to the Magistrate in the Texaco Action when they said they had no knowledge that Petitioner had tapes of her conversations with Texaco employees that were not produced although called for in Texaco's discovery demands. When Petitioner admitted in her deposition that she had tapes that had not been produced, Texaco's lawyers moved for sanctions, and the Magistrate fined Petitioner $500. As a result of the failure to timely produce, Respondents' cover-up, and their abandonment of Petitioner, her integrity, character and standing

as a claimant in her case against Texaco were severely diminished; and

Second, Respondents totally failed as Petitioner's counsel to properly advise and affirmatively assist her in complying with Texaco's document demand and instead recklessly told her simply to respond, giving no guidance or direction as was their clear obligation, an obligation Respondents admitted to the Magistrate they totally neglected.

I.

TO PROTECT THEMSELVES AT THE EXPENSE OF THEIR CLIENT, RESPONDENTS LIED TO THE MAGISTRATE ABOUT THE EXISTENCE OF TAPE RECORDINGS

Respondents lied when they told the Magistrate on March 26, 1997 that they did not know that Petitioner, their client, had tapes of her conversations with Texaco employees.

Lies are often hard to prove, but not this one. There is abundant documentary evidence, indeed from their own files, proving that Respondents lied when they told the Magistrate that they were ignorant of the existence of Petitioner's tapes. Set forth below is a brief summary of this uncontroverted evidence, copies of which are annexed hereto.

1. Exhibit 2 to Petitioner's letter of November 1, 2005 to the Committee (hereinafter "Petitioner's Letter")[1]

This is a four page undated document in Respondent Roth's own handwriting in which he has listed, by date and description, a group of 43 documents turned over to him by Petitioner. Document 41 on p. 4 of this document reads, in part, as follows:

"See tape of conversation" (emphasis added).

I do not know the purpose of Roth's memorandum, but it appears to be a list of documents Respondent was considering producing to Texaco's lawyers as it is captioned: "Memo to Counsel: Documents Produced."

But we do know this: page four of this Exhibit identified two documents that appear to be crossed out, as if to signal that they are not to be produced, including Document 41 quoted above which says "See tape of conversation."

2. Exhibit 3 to Petitioner's Letter

This is a copy of a letter from Respondent Roth to Respondent Piel dated November 11, 1996.

In this letter Roth reviews with Piel his thoughts on which of Petitioner's documents may be treated as privileged and, therefore, not produced to

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[1] Exhibits 1 through 7, discussed in this Memorandum, were submitted to the Committee with Petitioner's Letter of November 1, 2005. Exhibits 2 through 7 are submitted herewith.

Texaco's lawyers. On the bottom of page one, in the second to last paragraph, Respondent Roth states:

> "The only fact that bothers me is the last category of documents [requested by Texaco] is that Catherine taped conversations on the job. Do you know if she has the tapes?" (emphasis added)

This document tells us that at least as early as the date of this letter, i.e. November 11, 1996, both Respondents were aware that Petitioner had tapes responsive to Texaco's demand and that they planned to ask her about them in regard to production. And they did ask.

Petitioner has told the Committee in her submissions that when Respondents asked her about the tapes, she told them that she had taped other Texaco employees, and that Respondents instructed her not to produce the tapes to Texaco because a jury would hold the act of taping against her. (Petitioner's letter to the Committee of November 1, 2005 p.1, para. 2) Following the instructions of her counsel, Petitioner kept possession of the tapes.

3. Exhibit 4 to Petitioner's Letter

On November 19, 1996 Petitioner sent a memorandum to Respondent Piel summarizing her discussions with various Texaco employees. In regard to a discussion she had with a Texaco employee, the memorandum states:

> "I recorded this short meeting." (emphasis added).

And so, at this point in time, i.e. November 1996, we have three documents from Respondents' own files in which they are told, and have acknowledged in no uncertain terms, that Petitioner has tapes that are called for in Texaco's documentary demand. But what do Respondents do? Nothing but to instruct Petitioner to withhold the tapes.

4. Exhibits 5 and 6 of Petitioner's Letter

Exhibit 5 is a copy of Respondent Roth's January 6, 1997 letter to Texaco's counsel to which is attached Roth's privilege log. Item #1 on the privilege log (Exhibit 5 page 2) is identified as followed:

> "1. Catherine Malarkey (CEM) to Richard W. Meirowitz (RWM) November 19, 1995 – 3 pages."

That memorandum (attached as Exhibit 6) is revealing for several reasons.

First, Petitioner states on page 1, paragraph 1, of Exhibit 6 that as of November 19, 1995:

> "I got a tape recorder and hope it picks up more than the one I had before." (emphasis added).

Second, Next to the entry quoted above appears the word "Redact" in Respondent Roth's handwriting as does the word "Privileged" on the top of this page (in Roth's handwriting) specifying that this document, referring to a tape recorder, was to be put on the privilege log and not produced.

In addition to the serious and inexcusable failure to produce tapes (or any reference to them) as called for in discovery, Respondents' designation of this factual narrative of Petitioner's activities within Texaco as "privileged" is itself highly questionable.

5. Exhibit 7 to Petitioner's Letter

The privilege log (page 2 of Exhibit 5) which Respondent Roth sent to Texaco counsel with his cover letter of January 6, 1997 (Exhibit 5) identified document #6 as follows:

> "6. "Confidential Attorney-Client Communication" prepared by CEM for RWM between November 16, 1995 and December 31, 1995 – 6 pages."

Page five of document #6 was annexed to Petitioner's Letter to this Committee as part of Exhibit 7. The second entry on this page (Exhibit 7 hereto) states, in part, the following:

> "December 6, 1995 –
> See tape of conversation." (emphasis added).

Because this document referred to a "tape," Respondent Roth withheld it from production as "privileged." Again, a questionable decision as the entries on this page disclose the facts of Petitioner's activities within Texaco, which conduct is not protected by any privilege.

The documents summarized above, as well as Petitioner's summary of Respondents' instructions to her not to produce her tapes, establish that

Respondents knew tapes existed and that they decided to withhold them from production. They then facilitated their decision by wrongfully describing documents referring to tapes as "privileged" communications that need not be produced.

Once Petitioner truthfully acknowledged in her deposition that she had tapes, what were the Respondents to do? They made matters even worse by lying.

Here is what the Respondents (Piel speaking) told the Magistrate, in part, at a hearing on March 26, 1997.[2] The hearing was called at the request of Texaco's counsel to discuss the "tape" issue and Respondents' knowledge of the tapes.

> "Your Honor, with regard to this whole incident, when we received this discovery request we gave it to our client, she read it over and we thought she was responding and we said bring in everything. We never specifically spoke to her about tapes with regard to the discovery request. I don't believe that she zeroed in on it. In her defense I don't think that she thought that anything she had done with regard to taping had a connection with the discovery request. I think the whole taping thing became significant with regard to Texaco when all this came out about Lundwall in this other case. At that point, I just don't think she zeroed in on it. Your Honor, I had no idea there was such extensive taping even after she spoke about it at her deposition but I

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2 This tape transcription is annexed as Exhibit 1 to Petitioner's November 1, 2005 letter to this Committee.

> assure you we will try to get all the information for counsel." emphasis added.

In contrast to Piel's statements to the Magistrate (denying knowledge of tapes), Exhibits 1 through 7 summarized above belie Piel's statement and reveal the truth about these matters. Respondents knew there were tapes and the documents prove it. By knowingly deflecting fault to their client, Respondents sought to avoid sanctions; they succeeded. That their "success" here meant that their client would be fined $500 and her reputation irreparably damaged because of their lies was of no importance to them.

Rule 3.3 of the Model Rules of Professional Conduct (2003) captioned "Candor Toward the Tribunal" instructs:

> "a) a lawyer shall not knowingly
> (1) make a false statement of fact or law to a tribunal . . ."

The reason for this Rule is obvious: This rule is designed to protect the integrity of the decision making process, and hence the ability of the Courts to function as courts." (2) Geoffrey C. Hazard Jr. & W. William Hodes, The Law of Lawyering, § 29.2 at 29-4 (3d ed. Supp. 2004)

> In addition: "Without rules assuring that lawyers will police themselves, therefore, courts would occasionally make decisions on the basis of evidence that one of the professional participations knows is false.

Id. at 29-4.1.

The message of Rule 3.3 is that it ". . . sets forth [a] special [duty] of candor to the [Court]" and that "First, a lawyer may not lie." *Id.* § 29.3 at 29-5.

This rule was not followed by Respondents, and when caught by opposing counsel, they told the Magistrate a lie: We didn't do it, the client did. And they almost got away with it because the client was not present at the conference and no transcript was ordered. Indeed, Petitioner on her own went to the Court on December 30, 1999 and obtained a tape of the March 26, 1997 hearing which this Committee has as Exhibit 1.

If the Ethics Rules which govern the legal profession and the way law is practiced are to have any real impact, this wrong must be examined and made right by the Committee.

Respondents' unprofessional conduct cannot be trivialized by arguing that Petitioner went on to settle her case against Texaco and, besides, this all happened years ago. That is not what we do and, I respectfully submit, not what the Committee should do. There was a clear violation here which must be addressed and sanctions imposed.

II.

RESPONDENTS' ADMITTED FAILURE TO ASSIST PETITIONER IN RESPONDING TO TEXACO'S DISCOVERY DEMANDS WAS A BREACH OF THEIR PROFESSIONAL RESPONSIBILITY TO THEIR CLIENT AND THE COURT

When forced to deal with their failure to produce Petitioner's tapes, Respondents took the position that they shouldn't be held responsible because they didn't know tapes existed. But that placed them in an awkward position of answering the next question: Why didn't you know? To get out of that problem, Respondents acknowledged that they had failed in their responsibility to their client, the Court and their adversary by not responding in good faith to the Texaco's document demand. And then as if it were enough to retroactively correct this error, Respondents "dutifully" apologized to the Court for abandoning their client.

Here is what the Respondents Piel, told the Court on March 26, 1997 on this issue.

> I am terribly sorry this has happened and I would hope that Your Honor would regard it as an incident where a client does not understand when she read this that it meant that she was supposed to come up with tapes. I am sure she didn't understand that, Your Honor, and we may have failed in not going over the discovery request with her and talking to her specifically about each item, which we did not do. We gave it to her to read and said now come up with whatever you have that responds to it. Now, in a sense you can blame us for not being more careful but at the time we discussed it with her the

> whole Lundwall [mid-1990's] case had not developed and we didn't go back to her and say now that there is this tape aspect of the Texaco case, do you have anything that would respond in the discovery order."[3] (emphasis added)

What these lawyers did to Petitioner, candidly acknowledged to the Court at this hearing, was to abandon her to interpret and comply with Texaco's document demands totally on her own. That abandonment caused her harm.

- Respondents did not review the requests with her, *i.e.*, "we gave it to her to read";
- Respondents gave her no guidance as to what may be responsive, – *i.e.*, "[We] said now come up with whatever you have that responds to it"; and
- Even after taping came up in an unrelated Texaco case, Respondents deliberately avoided any mention of tapes, "we didn't go back to her and say now that there is this tape aspect of the [separate] Texaco case, do you have anything that would respond in the discovery order."

Although aware that there had been taping in another Texaco case, and that the tapes they knew were in Petitioner's possession were required to be produced, Respondents said and did nothing and thereby breached their professional and fiduciary duties to Petitioner and the Court, and their professional obligation to their adversaries.

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[3] This is a continuation of the quote that appears on p. 8 of this memorandum. The tape of the hearing before the Magistrate is Petitioner's Ex. 1 to her letter to the Committee dated November 1, 2005.

The best that can be said about how Respondents conducted themselves is that they came closest to telling the truth when they told the Court "we may have failed in not going over the discovery request with her and talking to her specifically about each item, which we did not do."[4]

> "Lawyers may not practice deliberate self deception or deliberately evade knowledge. All authorities agree, whatever their position on the basic approach of Rule 3.3. That a feigned claim of lack of knowledge, and hence no duty to reveal the truth, is pure sophistry."

2 Geoffrey C. Hazard Jr. & W. William Hodes, The Law of Lawyering, § 29.9 at 29-11.

A recent decision, Metropolitan Opera Association, Inc. v. Local 100 Hotel Employees & Restaurant Employees International Union, 212 F.R.D 178 (S.D.N.Y. 2003), reviews at length counsel's obligation to engage in diligent and responsive discovery in good faith, or suffer the consequences.

> A lawsuit is supposed to be a search for the truth," Miller v. Time Warner Communications, Inc., No. 97 Civ. 7286, 1999 WL 739528, at 1 (S.D.N.Y. Sept. 22, 1999), and the tools employed in that search are the rules of discovery. Our adversary system relies in large part on the good faith and diligence of counsel and the parties in abiding by these rules and conducting themselves and their judicial business honestly. Metropolitan Opera Ass'n, 212 F.R.D. at 181.

Respondents did not engage in a search for the truth but in obfuscation.

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[4] See, supra, p. 8, comments by Respondent Piel: "Your Honor, with regard to this whole incident, when we received this discovery request we gave it to our client, she read it over and we thought she was responding and we said bring in everything."

> In Residential Funding Corporation v. DeGeorge Financial Corporation, 306 F.3d 99 (2d Cir. 2002), the Court of Appeals recently reviewed some of the procedures set forth in Rule 37 [F.R.C.P.] for sanctioning discovery misconduct and emphasized that a court has "broad discretion in fashioning an appropriate sanction." *Id.* at 107. Courts have also noted Rule 37 sanctions may be applied both to penalize conduct that warrants sanctions and "to deter those who might be tempted to such conduct in the absence of such a deterrent." In Rule 37 cases, intentional behavior, actions taken in bad faith, or grossly negligent behavior justify severe disciplinary measures. The *Residential Funding* court also recalled earlier holdings that in determining whether evidence was made unavailable by a party with a culpable state of mind, the sanction of an adverse inference instruction was also available for negligent conduct.

Id. at 219.

Respondents' actions in this case resulted in the withholding of documents that should have been produced. Had they been timely produced, Respondents would not have been able to conceal the existence of tapes mentioned in the documents. But as a result of their conduct, discovery was impeded, a discovery conference called, and Petitioner herself wrongly sanctioned. The actions of the Respondents were clearly wrong and sanctionable.

> Pursuant to 28 U.S.C. § 1927: [a]ny attorney or other person admitted to conduct cases in any court of the United States ... who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct. 28 U.S.C. § 1927 (2002 revised ed.) Under that statute, a party must show bad faith, which is satisfied when "the attorney's actions are so completely without merit as to require the conclusion that they must have been undertaken for some improper purpose such as

> delay. Oliveri v. Thompson, 803 F.2d 1265, 1273 (2d Cir. 1986).

Id, at 220. (emphasis added).

In language particularly applicable here, the court in National Association of Radiation Survivors v. Turnage, 115 F.R.D. 543 (N.D. Cal. 1987) carefully explained that lawyers can't avoid production of documents to their adversaries by burying their heads in the sand.

> The [defendant's] various discovery omissions are directly attributable to the failure of defendant and its counsel to establish a coherent and effective system to faithfully and effectively respond to discovery requests.... [T]he defendant employed an unconscionably careless procedure to handle discovery matters, suggesting a callous disregard for its obligations as a litigant
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> The court concludes that defendant and its counsel failed in a variety of instances to conduct any reasonable inquiry into the factual basis of its discovery responses.... Such an inquiry would have required, at a minimum, a reasonable procedure to distribute discovery requests to all employees and agents of the defendant potentially possessing responsive information, and to account for the collection and subsequent production of the information to plaintiffs. Turnage, 115 F.R.D. at 556.

Similarly, the court in Tarlton v. Cumberland County Correction Facility, 192 F.R.D. 165 (D.N.J. 2000) emphasized that counsel's self imposed ignorance is no defense:

> It is not an excuse that defense counsel did not know about the retention of the cover sheets. Counsel had a duty to explain to their client what types of information would be relevant and

> responsive to discovery requests and ask how and where relevant documents may be maintained. Tarlton, at 170 (emphasis added).

In its opinion in Metropolitan Opera Association, the court went to some length to make clear that counsel cannot approach discovery cavalierly:

> As is apparent from the lengthy factual recitation above, Union counsel's participation in and supervision of discovery in … this case was in no way "consistent with the spirit and purposes of Rules 26 through 37," and mandatory sanctions under Rule 26(g) must be imposed. Fed. R. Civ. P. 26(g). Advisory Committee Notes to 1983 Amendment. Counsel had an affirmative duty under Rule 26(g) to make a reasonable inquiry into the basis of their discovery responses and to "stop and think about the legitimacy of [those responses]", Metropolitan Opera Ass'n at 221.

But no reasonable inquiry regarding the sufficiency of Petitioner's response was made by the Respondents. We know that because they did and said nothing to assist compliance. Indeed, as the court in Metropolitan Opera Association, emphasized, counsel's obligations is to affirmatively inquire of the client to satisfy himself that in fact a good faith effort has been made to locate and produce responsive documents. On this point, that court said:

> While, of course, it is true that counsel need not supervise every step of the document production process and may rely on their clients in some respects, the rule expressly requires counsel's responses to be made upon reasonable inquiry under the circumstances. *See* Fed. R. Civ. P. 26(g) Advisory Committee Notes to 1983 Amendment (attorney's certification under Rule 26(g) signifies "that the lawyer has made a reasonable effort to assure that the client has provided all the information and

> documents available to him that are responsive to the discovery demand." (emphasis added). Id. at 222.

See also Phinney v. Paulshock, 181 F.R.D. 185, 204 (D.N.H. 1998) (imposing sanctions when the defendant's lawyer: "xxx could not have known whether his clients had made a "significant search," but he nevertheless led plaintiffs to believe that every effort had been made to comply with their requests."); and Ferrero v. Henderson, 341 F. Supp. 2d 873 (S.D. Ohio 2004).

While Petitioner need not show prejudice before sanctions are imposed by this Committee against Respondents, *see* Metropolitan Opera Ass'n, 212 F.R.D. at 230, we note that she was unjustly fined $500 and her loss of reputation was severe.

What happened in the Metropolitan Opera Association is what happened here. The lawyers responsible for good faith compliance simply passed the buck to their client, without any review or instruction. That court found such conduct totally unacceptable.

> "[Union counsel] could not specifically recall discussing with [Union employees] what types of documents would be responsive . . . and there is no indication in the record that [counsel] ever discussed with [employees] at the Union, *inter alia*, that a "document included all drafts and non-identical copies and electronically-stored document." [Counsel] never doubled back after the PI hearing to assure the completeness of the Union's expedited document production . . . and had no conversations about discovery compliance with those who replaced him. Metropolitan Opera Ass'n, 227 F.R.D. at 185-6.

If this sounds familiar, this is what happened here and this Committee should find that the Respondents' conduct equally reprehensible and sanctionable.

CONCLUSION

A reliable and honorable system of legal representation that properly protects clients while truthfully presenting positions to the Court requires strict adherence to ethical standards such as those called into play in the case presented to this Committee by Petitioner.

I submit that Respondents totally failed to discharge their duties to Petitioner and to the United States Southern District Court when they (i) concealed documents by nondisclosure and the assertion of a nonexistent privilege, (ii) lied to the Court about their participation in the withholding and misdescriptions of documents, (iii) cast their client adrift in the discovery process hoping to conceal or delay the proceeding and (iv) shamefully misled the Court into imposing a $500 fine on Petitioner which wrongfully and irreparably damaged her reputation. By deliberately withholding documents, misleading their adversaries and failing to

advise their client adequately during the discovery phase. Respondents violated their duty of zealous but fair representation, their duty to protect their client and their duty to exercise prudent care over the matter while not misleading the Court or their adversaries.

Respectfully submitted,

Thomas F. Curnin