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August 17, 2011

TO: New York State Commission on Judicial Compensation
William C. Thompson, Jr., Chairman
Richard Cotton
William Mulrow
Robert Fiske, Jr.
Kathryn S. Wylde
James Tallon, Jr.
Mark Mulholland

FROM: Elena Sassower, Director
Center for Judicial Accountability, Inc. (CJA)

RE: Protecting the People of this State from Fraud: The Commission on Judicial Compensation's Duty to Identify the Case Presented by Opponents of ANY Judicial Pay Raises & to Make Findings with Respect Thereto, in Discharge of its Statutory Responsibilities

At the Commission's August 8th meeting, Commissioner Robert Fiske, Jr. announced his readiness to discuss increasing judicial compensation, stating:

"I believe that the OCA, the Coalition of New York State Judicial Associations, Former Chief Judge Judith Kaye, the bar associations, Corporation Counsel Michael Cardozo, Zachary Carter, the Chairman of Mayor Bloomberg's Committee on the Judiciary, Dennis Hughes, President of the New York State AFL-CIO, the Citizens Union, the League of Women Voters, Victor Kovner, Chair of the Fund for Modern Courts, the individual judges who testified in Albany and others, all, collectively and individually, have made a compelling case for an immediate increase in the range of the four alternatives that were set forth by Administrative Judge Ann Pfau in the OCA submission." (at 13:53, underlining added).

Commissioner Fiske's pretense that advocates of judicial pay raises "have made a compelling case for an immediate increase" was *without* identifying what examination, *if any*, he had made of the case presented by opponents of ANY judicial pay raises. Indeed, he concealed the very existence of such opposition case and its champion.

Ex J-1

It is a fraud on the People of this State for any Commissioner to purport that advocates of judicial pay raises “have made a compelling case” *without* confronting the opposition case against ANY judicial pay raises spearheaded by the non-partisan, non-profit citizens’ organization, Center for Judicial Accountability, Inc. (CJA). One does not have to be a former U.S. Attorney and the original Whitewater prosecutor – as is Commissioner Fiske – to know this. Yet at the August 8th meeting, not a single Commissioner saw fit to identify the opposition case of CJA and individual citizens¹, let alone to articulate a duty to confront it with findings. This includes the Commission’s two other lawyer members: Mark Mulholland, who expressly “adopt[ed], virtually 100% of what Mr. Fiske said”, except that he opined that a case had been made to raise judicial pay substantially further (at 26:45), and Richard Cotton, a former law clerk to U.S. Supreme Court Justice William Brennan, whose sole comment was his request for “raise history” of senior executives at the cabinet level and below of the executive branch, which he based on Budget Director Megna’s testimony (at 01:42). This was also, essentially, the Commissioners’ sole response to Chairman Thompson’s repeated question as to what additional information they “needed” or “wanted to see” to be able to come to their conclusions (at 01:09; 06:30; 07:22; 32:15).

The first requirement of the Commission’s “report to the governor, the legislature and the chief judge”, mandated by the statute creating the Commission, is for “findings” [§1(h)]. Does the Commission plan to make no findings as to CJA’s opposition case, including our assertion that advocates of judicial pay raises have inundated the Commission with fraud?

As you know, at the Commission’s July 20th hearing I testified that I had made a list of “20 specific frauds” presented by witnesses testifying for judicial pay raises. Before being cut off, I sufficed to identify one: their deceit that we have “a quality, excellent, top-rate judiciary” – as to which they had presented NO EVIDENCE, as, likewise, NO EVIDENCE that mechanisms to ensure judicial integrity are functioning and not corrupted. To enable the Commission’s statutorily-required fact-finding, I furnished countering EVIDENCE – leaving on the table from which I testified the final two motions in CJA’s public interest lawsuit against the New York State Commission on Judicial Conduct, establishing that it had been “the beneficiary of a succession of fraudulent judicial decisions without which it would not have survived – including four of the Court of Appeals”.² In so doing, I *twice expressly* urged that you call upon the witnesses who had testified – particularly the bar associations – “to assist you with the fact-finding”.

¹ These individual citizens who testified in Albany and/or made submissions include the following: William Galison, Jay Franklin, Raymond Zuppa, Esq., Terrence Finnan, Susan D. Sattenbrino, Esq., Henny Kupferstein, Catherine Wilson, Judy Herskowitz, Patrick Kevin Brady, and Joan Theresa Kloth-Zanard.

² The further documentary evidence I left for you, at the hearing, consisted of: (1) CJA’s December 16, 2009 written statement drafted for the Senate Judiciary Committee’s aborted December 16, 2009 hearing; and (2) CJA’s two March 6, 2007 statements, submitted to the Senate Judiciary Committee in opposition to confirmation of Chief Judge Kaye’s reappointment to the Court of Appeals.

Thereafter, I sent you three additional letters dated August 1st, August 5th, and August 8th, each also sent to the bar associations, particularizing further frauds by judicial pay raise advocates.

Yet, evident from your August 8th meeting is that even as to the specific frauds that my testimony and these letters resoundingly established, you nonetheless hold to them as truths⁴ – so much so that not a single Commissioner took issue with Mr. Fiske’s statement:

“As testified to by the bar associations, Michael Cardozo, and Zachary Carter, the lack of even a cost of living adjustment has impacted the ability to attract and retain the highest quality lawyers to the judiciary, both from higher paying positions in the government and from private practice. An interesting statistics in recent years, only 18 percent of the new judges in the State of New York have come from private practice...” (underlining added).

The 18% statistic, whose origin Mr. Fiske did not identify, is presumably from the New York City Bar Association’s oral and written testimony at the July 20th hearing, where it pertained to “new judges in New York City”. The meaninglessness of that 18% statistic, which, according to the New York Law Journal, Commissioner Wylde had similarly regarded as a statewide statistic, was the subject of CJA’s August 1st letter entitled:

³ These letters, as likewise ALL CJA’s submissions to the Commission, are posted on CJA’s website, www.judgewatch.org, on its specially designated webpage devoted to the judicial compensation issue, accessible *via* the top panel “Latest News” and side panel “Judicial Compensation: State-NY”.

⁴ Leading off these frauds is using, as a relevant reference point, the salaries of government employees, mostly those whose pay is controlled by civil service, collective bargaining agreements and union contracts, concealing that New York State judges are “constitutional officers”, who are “co-equals” to our state’s other “constitutional officers” – the Governor, Lieutenant Governor, Attorney General, Comptroller, and Legislators – NONE of whom have had ANY pay raises or cost of living increases since 1999 – and that, if anything, the compensation of New York State judges is comparable, if not superior, to that of their fellow “constitutional officers”, with the judges enjoying incomparably superior job security-tenure benefits. Likewise, concealing the average/median income of New York’s 160,000-plus attorneys, statewide and by county, and New York’s average/median household income.

These concealments enable such further frauds as Commissioner Fiske spouted, *ad nauseum* – without any dissent by the Commissioners and endorsed by Commissioner Mulholland – that raising judicial compensation is about “fairness to the judges”, to correct a “national disgrace”, because they are “underpaid”, and “we can’t make it up to them” and that we must “correct a manifest injustice that has gone on for 12 years”, “costing the average judge...almost 400,000 [dollars] – which is money “taken from the judges” that they were entitled to – that has “impacted the ability to attract and retain the highest quality lawyers to the judiciary”, jeopardizing our “high quality forum to resolve disputes”, and its rendering of “fair and effective justice”, and that the Court of Appeals found “13 years of constitutional violations”, which is the Commission’s job to remedy.

In fact, that is NOT what the Court of Appeals found, quite apart from the fraudulence of its February 23, 2010 decision – particularized by CJA’s July 19, 2011 letter, to which I referred when I testified.

“Ensuring that the Commission on Judicial Compensation’s Recommendations and Report are Based on Evidence: The Absence of Evidence that Judicial Compensation has Deterred Qualified Private Sector Lawyers from Becoming Judges”.

Addressed to Commissioner Wylde, the other Commissioners, and the Law Journal, the August 1st letter was also addressed to all bar leaders who had testified at the July 20th hearing, *expressly for their response*.

Enclosed is CJA’s companion August 16th letter addressed to New York City Corporation Counsel Michael Cardozo and Chairman Zachary Carter, head of Mayor Bloomberg’s Advisory Committee on the Judiciary. Entitled:

“Ensuring that the Commission on Judicial Compensation’s Recommendations and Report are Based on Evidence: The Absence of Evidence that Judicial Compensation has Deterred Qualified Public Sector or Private Sector Lawyers from Becoming Judges”,

it exhaustively chronicles the deceit of both Mr. Cardozo’s July 20th oral and written testimony and Mr. Carter’s July 20th written statement. It, too, *expressly calls for their response*.

In view of the seriousness of these two companion letters – as likewise of CJA’s August 5th letter to New York Times reporter William Glaberson, entitled:

“Setting the Record Straight: Ensuring that the Public & New York’s Judicial Compensation Commission are Not Misled by New York Times’ Reporting & Editorializing about ‘Judicial Attrition’ and the Purportedly Insufficient Pay of New York State Judges”,

also sent to the bar leaders who testified on July 20th, your duty is to protect the People of this State from fraud by demanding their response, by subpoena if necessary.⁵ Assuredly this is why the statute creating the Commission confers upon you – in the sections preceding its “findings” requirement – :

- “all the powers of a legislative committee pursuant to the legislative law”⁶ [§1(c)];

⁵ According to Chairman Thompson, the Commission’s report will contain, in addition to recommendations, statistics – and “the statistics are the statistics” (at 10:52).

⁶ See, *inter alia*, Legislative Law §62-a:

“Subpoenas; oaths. The chairman, vice-chairman or a majority of a legislative committee may issue a subpoena requiring a person to attend before the committee and be examined in reference to any matter within the scope of the inquiry or investigation being conducted by the committee, and, in a proper case, to bring with him, a book or paper. The provisions of the civil practice law and rules in relation to enforcing obedience to a subpoena lawfully

- “such facilities, resources and data of any court, department, division, board, bureau, commission, agency or public authority of the state or any political subdivision thereof...to carry out properly its powers and duties” [§1(f)];
- “reasonable assistance from state agency personnel as necessary for the performance of its functions” [§1(g)].

As the lawyer-Commissioners Fiske, Mulholland, and Cotton could surely confirm, the failure of advocates of judicial pay raises to deny or dispute CJA’s showing of fraud by them concedes it, as a matter of law. That showing, presented by the evidence I supplied on July 20th in support of my testimony and by CJA’s August 1st, August 5th, and August 8th letters – including the referred-to analysis of the Court of Appeals February 23, 2010 decision in the judicial compensation lawsuits, set forth by our July 19th letter, is entirely uncontested.

IF you believe that the Commission can lawfully ignore CJA’s August 8th letter without its members incurring liability for official misconduct and criminal fraud and without furnishing grounds for repeal of the statute creating the Commission, over and beyond the voiding of *any* Commission recommendation to raise judicial pay, you should secure an advisory opinion from the judges and lawyers who have made the supposedly “compelling case” for judicial pay raises. Indeed, CJA calls upon you to seek their opinion – and to include it in your upcoming “report to the governor, the legislature and the chief judge”.

As with CJA’s other letters, the title of our August 8th letter well reflects its content:

“Threshold Issues Barring Commission Consideration of Pay Raises for Judges:

- (1) Chairman Thompson’s Disqualification for Interest, as to which there has been No Determination;
- (2) Systemic Corruption in New York’s Judiciary, Embracing the Commission on Judicial Conduct, as to which there has been No Determination; &
- (3) The Fraud & Lack of Evidence Put Forward by Advocates of Judicial Pay Raises.”

Needless to say, as to the third threshold issue: “The Fraud & Lack of Evidence Put Forward by Advocates of Judicial Pay Raises”, it should have been followed by the same clause as followed the first and second threshold issues:

“as to which there has been NO Determination”.

issued by a judge, arbitrator, referee or other person in a matter not arising in an action in a court of record apply to a subpoena issued by a legislative committee as authorized by this section. Any member of a legislative committee may administer an oath to a witness.”

A handwritten signature in black ink, appearing to read "Steven A. Weber", with a long horizontal line extending to the right.

Enclosure: CJA's August 16, 2011 letter to NYC Corporation Counsel Michael Cardozo
& Mayor's Advisory Committee on the Judiciary Chairman Zachary Carter (15 pages)

cc: Advocates of Judicial Pay Raises
Public & Press

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Elena Sassower, Director
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August 16, 2011

TO: Michael Cardozo, Corporation Counsel of the City of New York
Zachary Carter, Chairman, Mayor's Advisory Committee on the Judiciary

FROM: Elena Sassower, Director
Center for Judicial Accountability, Inc. (CJA)

RE: Ensuring that the Commission on Judicial Compensation's Recommendations and Report are Based on Evidence: The Absence of Evidence that Judicial Compensation has Deterred Qualified Public Sector or Private Sector Lawyers from Becoming Judges

I was at the Commission on Judicial Compensation's August 8, 2011 meeting in Manhattan, at which Commissioner Robert Fiske, Jr. identified your presentations to the Commission as among those that had "made a compelling case for an immediate increase" in judicial compensation, specifying that you and the bar associations had testified that:

"the lack of even a cost of living adjustment has impacted the ability to attract and retain the highest quality lawyers to the judiciary, both from higher paying positions in the government and from private practice. An interesting statistic in recent years, only 18 percent of the new judges in the State of New York have come from private practice...".

I was also at the Commission's July 20, 2011 hearing in Albany, at which Michael Cardozo testified, expressly "on behalf of Mayor Bloomberg", essentially reading from his written statement entitled "Testimony". Both referred to "the Appendix submitted with the written testimony of Zachary Carter, the Chair of Mayor Bloomberg's Committee on the Judiciary" – which is why, on July 25th, I contacted the office of the Mayor's Committee, requesting Chairman Carter's referred-to Appendix and written testimony. When finally produced¹, it was immediately obvious that Chairman Carter's written testimony was taken, virtually *verbatim*, from his November 25, 2009 *amicus curiae* brief to

¹ I was initially told, on July 25th, that the Committee would not produce Chairman Carter's written testimony and Appendix and that I would have to secure them from the Commission on Judicial Compensation. This was reiterated to me on August 1st. Only after I wrote an August 1st fax to the Committee's Executive Director – a copy of which I sent to Chairman Carter – were the testimony and Appendix furnished on August 2nd.

the Court of Appeals in the *Larabee* judicial compensation lawsuit², a fact not disclosed, and that the Appendix was identical to the *amicus* brief Appendix, also not disclosed.

The thrust of your oral and written testimony to the Commission is that because of the disparity between judicial salaries and the salaries of senior ranks of such offices as the District Attorneys Offices for Manhattan, Queens and Kings, the Legal Aid Society, and the New York Corporation Counsel:

“...more experienced public sector attorneys are simply not applying for judgeships.”
(Cardozo written testimony, at p. 4); and

“...the Mayor’s Committee has encountered unprecedented difficulties in recruiting attorneys from [those] senior ranks” (Carter written testimony, at p. 7).

However, the only evidence you supply is of salary disparity, not of any drop in applications by “more experienced public sector attorneys” or of “unprecedented difficulties” in recruitment.

Thus, your testimony does not recount any recruitment efforts you personally made that failed because of the higher salaries among “more experienced public sector attorneys”. Nor do you allege that members and staff of the Mayor’s Committee or of the Mayor’s Office made recruitment efforts to these attorneys that failed for that reason (which, in any event, would be hearsay). No affidavits or affirmations from Committee members and staff are supplied, nor from “more experienced public sector attorneys” attesting that due solely to the salary gap, he/she had declined recruitment efforts. You refer to no surveys of these high-level attorneys and none are provided. Instead, Chairman Carter’s Appendix is, as he describes it:

“a schedule of salaries of senior attorneys employed by the various institutional law offices, including the Legal Aid Society, the Corporation Counsel’s Office and the various District Attorneys’ Offices within New York City, which graphically presents the challenge of recruiting senior attorneys from their ranks.”

This reliance on inference, over evidence, is further apparent from Corporation Counsel Cardozo’s use of a “hypothetical”, rather than a real life example³:

² Pursuant to FOIL and such other authority as may be applicable, we request a copy of the motion that Chairman Carter and/or the Committee filed with the Court of Appeals for permission to submit the *amicus curiae* brief pursuant to 500.23 of the Court’s rules.

³ The wording of your presentations further underscores their speculative nature:

“...the experience of the Committee suggests that the dramatic gap between judicial salaries and the compensation paid to senior agency and government attorneys often presents an untenable choice for highly qualified practitioners, notwithstanding their demonstrably strong

“Consider the hypothetical example of a lawyer in my office who has risen through her career to become the head of our Appeals Division. In order for her to accept a position as a Criminal Court Judge, she would have to accept a pay cut of \$33,000; a 20% pay *decrease*. While some fortunate individuals in our society – by virtue of marriage or inheritance – may be able to afford such an extraordinary compensation change for the honor of serving as a judge, it is a significant amount to ask someone with a family, or with educational loans, or with other financial obligations, to do without.” (Cardozo written testimony, pp. 3-4, italics in original).

Surely, if there were “unprecedented difficulties” in recruitment – or even “a significant recruitment challenge”, which is how it is stated in Chairman Carter’s *amicus* brief (at p. 10) – many real-life examples could have been furnished.

As for the statistical example Corporation Counsel Cardozo gives, it is meaningless and misleading. He states:

“For example, 14 of the 58 new judges the Mayor has appointed were selected from positions as either assistant district attorneys or attorneys for the Legal Aid Society – and in most cases these individuals were not serving in sufficiently senior levels at their organizations that their appointment required a financial sacrifice. These men and women, while highly qualified, could more easily make the transition to judgeships because they did not face the same financial sacrifice that would be asked of more senior, management level attorneys at the District Attorney’s Offices, the Legal Aid Society or similar public law offices.” (Cardozo written testimony, at p. 3).

The implication is that in periods when the salary differential was not great, a larger number of “more senior, management level attorneys” would have been appointed. Yet, this is not stated. Nor is this substantiated by evidence, which, if it exists, is in your exclusive possession.

Moreover, the issue is not appointments, but applicants – since the thrust of your presentations is that you cannot get these higher-paid “more senior, management level attorneys” to apply. Neither of you provide ANY statistical information about applicants, notwithstanding this information is also exclusively in your possession. Thus, you furnish no information as to the cumulative size of the applicant pool spanning the 9-1/2 years of Mayor Bloomberg’s governance – and none broken down for each of those years, although this is the only way to gauge the impact of “stagnant” judicial

commitment to public service, because of competing obligations to their dependent families.” (Carter written testimony, at p. 2, underlining added);

“The public sector government salary information...offers persuasive evidence that judicial salaries should be increased” (Cardozo written testimony, at p. 3, underlining added).

salaries spanning that period. Nor do you parse the yearly numbers of applicants so as to reveal the numbers and percentages of public sector attorneys, private sector attorneys, their average age, years of experience, etc. – without which it is impossible to discern any change in the applicant pool, let alone a change that might be attributable to “stagnant” judicial salaries.

The Committee is required to furnish the Mayor with three applicants for each vacancy.⁴ Thus, for those 58 new judgeships, the Committee would have provided the Mayor with 174 applicants. Yet, you supply no information even as to this fraction of a much larger applicant pool, whose size you have completely withheld.

That the Committee does not lack for applicants is not acknowledged by your testimony. It is evident, however, from the Committee’s website, which counsels applicants:

“Because of the volume of applications and the limited number of vacancies, the process remains continuously competitive. Your selection for interview will always depend on the comparative quality of the applicant pool at the time that vacancies arise.” (“Frequently Asked Questions”, underlining added).

As to the precise number of “the limited number of vacancies” the Mayor has filled, your testimony contains significant discrepancies. Corporation Counsel Cardozo states:

“To date the Mayor has appointed 58 individuals to the bench and reappointed approximately 100 others” (Cardozo written testimony, at p. 2)

and Chairman Carter states:

“...Under Mayor Bloomberg’s Administration, the Committee has nominated or recommended for appointment approximately 100 Judges to the Criminal Court; 35 Judges to the Family Court, and 34 Judges to the Civil Court” –

– relegating this information to the end of his footnote 1, as if it were irrelevant. Both sets of figures are incorrect.

The numbers in Chairman Carter’s footnote 1 are the same as the numbers in his identical footnote 1 of his November 25, 2009 *amicus* brief, meaning they are more than 1-1/2 years old. They are also outdated, as is evident from the Committee’s website, which posts two press releases subsequent to November 25, 2009: one dated February 9, 2010, entitled “MAYOR BLOOMBERG SWEARS IN TWENTY-SEVEN JUDGES” and another dated February 22, 2011, entitled “MAYOR BLOOMBERG SWEARS IN 20 JUDGES”. This second press release is particularly helpful, as it quotes Mayor Bloomberg as announcing:

⁴ §2(d) of Mayor Bloomberg’s March 4, 2002 Executive Order #8.

“I have now appointed and re-appointed, collectively, over 200 judges to the Criminal and Family Court bench who represent the diversity of our City and share a commitment to justice”.

More precisely, this “over 200 judges” would appear to be around 216 – which is the tally of the approximately 169 judges referred to in Chairman Carter’s footnote 1 and the 47 judges of the two press releases. Thus, Corporation Counsel Cardozo’s own tally to the Commission of approximately 158 judges is off by more than 33%, being about 60 judges short – and reducing to further worthlessness his example of “14 of the 58 new judges the Mayor has appointed”.

As for Corporation Counsel Cardozo’s plainly inaccurate statistic of “approximately 100” judges reappointed by Mayor Bloomberg, it is clear – even unaccompanied by essential statistics as to the number of judges who *unsuccessfully* sought reappointment and clarification as to whether judges initially appointed to interim Civil Court judgeships are, upon conclusion of their interim terms, deemed to be new appointments or reappointments to Criminal and Family Court vacancies upon their successful reapplication⁵ – that most New York City Criminal and Family Court judges do not choose to leave the bench upon expiration of their terms – apparently not deeming their “stagnant” salaries a deterrent. You have not noted this to the Commission – nor identified what these specific judges, who hypothetically might be earning substantially more in the private or public sectors, have told you on the subject. Or did you not ask them because you have no “attrition” problem attributable to judges leaving the bench citing judicial pay?

So that Commissioner Fiske and the other Commissioners may have the benefit of this analysis of the evidentiarily-bare and materially misleading “case for an immediate increase [in judicial compensation]” reflected by your testimony, copies of this letter are being sent to them – with a request that they compel your response, if you do not respond, voluntarily, which you are hereby called upon to do.

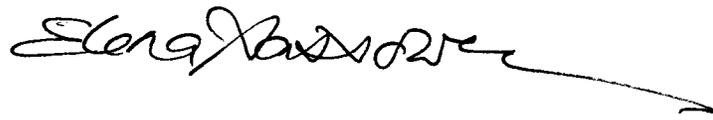
Finally, it may be presumed that the Mayor’s Committee furnished the New York City Bar Association’s Judiciary Committee with data for its conclusion that in 2009 and 2010 “Only 18 percent of new judges in New York City came from private practice”. Such conclusion, which the City Bar presented to the Commission both in written and oral testimony, has been transmogrified by Commissioner Fiske into a New York State statistic – much as it had been previously transmogrified by Commissioner Wylde, at least if the New York Law Journal is to be believed. Enclosed is CJA’s August 1, 2011 letter to the Commissioners, New York Law Journal, and bar leaders about that 18% figure, comparably titled:

⁵ According to the Committee’s answers to “Frequently Asked Questions”, interim Civil Court vacancies typically arise “when a Civil Court judge is subsequently elected to the Supreme Court” and most of the interimly-appointed Civil Court judges do not sit in Civil Court, but are “appointed to either the Criminal Court or Family Court according to the needs of the court system.”

“Ensuring that the Commission on Judicial Compensation's Recommendations and Report are Based on Evidence: The Absence of Evidence that Judicial Compensation has Deterred Qualified Private Sector Lawyers from Becoming Judges”.

We request your comment, including by disclosure of the percentages of private sector attorneys who are applying to the Mayor's Committee and who the Mayor is appointing to judgeships – information wholly absent in your testimony.⁶

Thank you.



cc: New York State Commission on Judicial Compensation
New York City Mayor Michael Bloomberg
All bar leaders who testified at the Commission's July 20, 2011 hearing
Public & Press

Enclosure: CJA's August 1, 2011 letter

⁶ Indeed, as to the outdated statistic of 58 judges appointed by Mayor Bloomberg, Corporation Counsel Cardozo makes no disclosure as to the professional backgrounds of the 44 who the Mayor had not “selected from positions as either assistant district attorneys or attorneys for the Legal Aid Society”.

The enclosure to this August 16, 2011 letter is CJA's August 1, 2011 letter to the Commissioners, New York Law Journal, & bar leaders who testified at the Commission's July 20, 2011 hearing.

It is Exhibit G in this Compendium of Exhibits (Vol. 1).