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## MEMORANDUM ON SENATE BILL #7484: INTRODUCTORY STATEMENT

The Center for Judicial Accountability, Inc. takes the position that the People of this State have a democratic right to know how its judges are performing in office. Judges are public servants, whose salaries we pay. They wield far-reaching powers over our lives, individually and as a society, and when they are incompetent, abusive, or corrupt, it is We, the People, who suffer the often irreparable consequences. That is why the State Constitution was amended to create the present Commission on Judicial Conduct--so that we could be protected from unfit judges by a publicly-funded watchdog agency.

With limited exceptions, courtrooms are open to the public. When we are exposed to, and become angered by, what we perceive as judges' on-the-bench misconduct, we should be entitled to see how complaints against these judicial public officials, arising from their performance in court proceedings, are handled by the Commission on Judicial Conduct. The state Constitution does not bar us from doing so. Why should the Legislature?

The Center's position is that the confidentiality of Judiciary Law §45 must be repealed because it is pernicious. The absolute confidentiality of complaints filed with the Commission has permitted it to conceal a paper-trail of facially-meritorious, documented complaints, which it has been dumping, without investigation, in violation of its investigative mandate under Judiciary Law §44.1. No mechanism currently exists by which even the Legislature can access those complaints from the Commission. This has enabled the Commission to become corrupt, arrogant, and unresponsive to complainants, who rightfully clamor for explanations for the dismissals of their legitimate complaints.

This confidentiality of judicial misconduct complaints filed with the Commission is the aspect most destructive of the public's trust. Such complaints must be publicly accessible--if not when they are filed, then after the Commission's initial determination, which, overwhelmingly is of dismissal. At present, complaints are never accessible--not even after the Commission has imposed public sanction at the conclusion of disciplinary proceedings.

Based on the direct, first-hand experience of our members, who have filed judicial misconduct complaints with this Commission and others, we do not subscribe to the various arguments used by proponents of confidentiality. Those arguments are, by and large, discounted in a 1994 article in the Georgetown Journal of Legal Ethics, (Vol VI: 959), entitled, "Reconciling the Need for Confidentiality in Judicial Disciplinary Proceedings with the First Amendment: A Justification Based Analysis"--a copy of which is enclosed.

MEMORANDUM ON SENATE BILL #7484

The following is a critique of the above-numbered Senate Bill. Supporting narrative is supplied to better illustrate the problems unaddressed by the Senate Bill and perpetuated by it. The Center's specific recommendations then follow.

POSITION:

The Center for Judicial Accountability, Inc. supports the Bill as a step in the right direction, but makes recommendations that will protect the public, as well as the accused judge<sup>1</sup>.

PROPOSED AMENDMENT TO JUDICIARY LAW §44.4:

As with the unamended version, there is no articulated standard to guide the Commission in determining when a formal written complaint is to be brought against the accused judge, other than that "a hearing is warranted".

Of course, there is the assumption that such determination by the Commission rests on its finding of "probable cause" of misconduct. Such assumption is reflected in the May 10, 1996 Statement of the Association of the Bar of the City of New York (Exhibit "B"):

"A finding of probable cause is analogous to the filing of a Formal Complaint in cases of judicial misconduct". (Exhibit "B", at p. 2).

RECOMMENDATION:

The underlying assumption of "probable cause" to believe that the misconduct has been committed should be made explicit.

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<sup>1</sup> The Center's position that the Senate Bill does not go far enough was set forth in its May 7, 1996 Press Release, annexed hereto as Exhibit "A".

PROPOSED AMENDMENT TO JUDICIARY LAW §45.1:

The over-broad confidentiality provisions of the unamended version remain intact, except that the amendment opens to the public the formal complaint, evidentiary data, documents and materials relevant to the disciplinary hearing initiated pursuant to Judiciary Law §44.

Such over-broad confidentiality provisions are being used to deny the public a range of legitimate information to which it is entitled. The following is illustrative:

A. The Commission uses Judiciary Law §45 to deny the public information and access to documents bearing upon the Commission's promulgated rules and procedures, 22 NYCRR §7000 et seq.

Prior to commencement of our Article 78 proceeding against the Commission on Judicial Conduct based on the unconstitutionality of 22 NYCRR §7000.3, we made a written request to the Commission, pursuant to its rules regarding public access and F.O.I.L., for "information regarding promulgation of 22 NYCRR §7000 et seq., including any rule-making history relative thereto." (Exhibit "C-1"). The Commission's response was to deny access, using Judiciary Law §45 as a basis (Exhibit "C-2").

Access to information about the Commission's self-promulgated rules was particularly vital because §7000.3 and Judiciary Law §44.1 are flagrantly discrepant (Exhibit "C-3"). However, the Administrator of the Commission refused to ameliorate the significance of such document deprivation by even providing us with an explanation as to us how the rule and statute could be reconciled (Exhibit "C-6"). To date, he has refused to reconcile the discrepancy between the rule and statute<sup>2</sup>.

The correspondence relating to our aforesaid information and documents request is annexed as Exhibits "C-1"--"C-10". Such correspondence reveals repeated respects in which the Commission's own rules regarding public access to documents (22 NYCRR §7001.1 et seq.) were violated by the Commission's staff, including its Administrator, until challenged by us. Among the violations, the Administrator usurped for himself decision-making power reposed by the rules with the Commissioners (Exhibit "C-5", "C-7").

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<sup>2</sup> That the Administrator is not constrained from doing so may be seen from a letter from the Executive Director of the New York State Committee on Open Government (Exhibit "D", p. 4), containing, as well, extensive discussion of the hurdles--over and above Judiciary Law §45--that face the public in seeking information from a government agency.

B. The Commission uses Judiciary Law §45 to deny complainants procedural information about the dismissal of their complaints and as a reason for not giving reasons why their complaints were dismissed

Prior to commencement of our Article 78 proceeding against the Commission on Judicial Conduct based on the unconstitutionality of 22 NYCRR §7000.3, we made repeated written requests to the Commission for information as to the procedures employed in the summary dismissal of our judicial misconduct complaints.

Specifically, we requested confirmation that our complaints had been presented to the Commissioners, the date of the formal meeting at which they had been reviewed and voted on, and the number of Commissioners present and voting. The Commission staff ignored our letter requests. Thereafter, we brought these informational requests to the attention of the Commissioners, under a March 10, 1995 letter addressed to them (Exhibit "E"). There has been no response by the Commission--despite reiteration of our request in a September 14, 1995 letter to the Chairman (Exhibit "F")--and the Commission staff has not provided the requested information<sup>3</sup>.

The experience of other complainants has been no more successful. They have sought confirmation that basic procedural rules have been followed in the handling of their requests--only to be ignored altogether (Exhibit "H") or denied such information on the alleged ground of the confidentiality of Judiciary Law §45 (Exhibits "I", "J", and "K").

RECOMMENDATION:

Amend Judiciary Law §45 with specific provision exempting application of confidentiality to requests for information as to rules, procedures, and reasons for dismissal of complaints.

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<sup>3</sup> The Commission staff is also most reluctant to provide the public with information as to available procedures for appealing their dismissed judicial misconduct complaints (Exhibit "G").

PROPOSED AMENDMENT TO JUDICIARY LAW §45.2:

The proposed amendment does not correct the inadequacy of this section, which is too limited as to what it discloses and to whom.

A. Need to Further Amend So As to Expand What Is Disclosable:

Judiciary Law §45.2 lists three categories of disclosable information:

- (1) "record of any proceeding pursuant to a formal written complaint...in which the applicant's misconduct was established"<sup>4</sup>;
- (2) "any pending complaint"<sup>5</sup>; and
- (3) "any pending proceeding pursuant to a formal written complaint against an applicant".

Aside from a minuscule category of disciplinary proceedings pursuant to a formal complaint where misconduct is not established (Judiciary Law §44.6), are the initial complaints, most of which the Commission dismisses without investigation<sup>6</sup>.

The basis for excluding such initial complaints is the presumption that disclosure is unnecessary because the Commission's handling of them is proper, i.e. that any complaint the Commission dismissed without investigation was dismissed, pursuant to Judiciary Law §44.1, because it was facially lacking in merit, and any complaint the Commission dismissed after investigation was because, notwithstanding the sufficiency of the investigation, it failed to establish the existence of probable cause to bring a formal proceeding.

The presumption underlying such exclusion is rebutted by the file of our Article 78 proceeding against the Commission. It shows that the Commission has rewritten its investigative mandate under

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<sup>4</sup> This category of material is also publicly available under Judiciary Law §44.7.

<sup>5</sup> Presumably what is meant is any pending initial complaint filed under Judiciary Law §44.1.

<sup>6</sup> Under the Commission's self-promulgated rule 22 NYCRR §7000.4, the Commission created a category of complaints which it dismisses with a private letter of caution.

Judiciary Law §44.1 by promulgation of 22 NYCRR §7000.3, whereby it has arrogated to itself absolute discretion to either dismiss or investigate a judicial misconduct complaint--unbounded by any standard (See Point II of our Memorandum of Law and pp. 1-2 of our 12/15/95 ltr to the Assembly Judiciary Committee).

The result of such rule is reflected by the dismissal of the nine misconduct complaints annexed to the Article 78 petition<sup>7</sup>. They establish that Commission is dismissing, without investigation, complaints which are not only facially-meritorious, but documented as to their serious allegations of criminal conduct by judges and judicial candidates.

Under such circumstances, screening/nominating/confirming authorities cannot rely on the Commission's dismissal of misconduct complaints as connoting their lack of facial merit or documentary support. They, therefore, must have access to such complaints for the same reason as the present statute gives them access to the above-three categories of materials--because they potentially bear on the fitness of the judicial candidates.

It must be emphasized that screening authorities routinely inquire of the candidates whether they have been the subject of complaint--including complaints of judicial misconduct. These inquiries are reflected by the written questionnaire forms that candidates must complete. The following is illustrative:

1. New York State Commission on Judicial Nomination:  
"Questionnaire for Candidates for Associate Judge of the Court of Appeals" (1993 forms), Question #28(a),(b): Exhibit "L-1"
2. Mayor's Advisory Committee on the Judiciary:  
"Questionnaire for Judicial Reappointment", Question #19: Exhibit "L-2"
3. Association of the Bar of the City of New York:  
"Uniform Judicial Questionnaire" Question #21: Exhibit "L-3"
4. U.S. Senate Judiciary Committee Questionnaire, Question IV, #9: Exhibit "L-4"

However, the practice of the Commission on Judicial Conduct is not to notify judges/judicial candidates that they are the subject of complaint unless the complaint is investigated (Exhibit "M"). Since 85% of the complaints are dismissed without investigation, this means that most judges/judicial candidates, against whom a complaint is filed, never know about it.

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<sup>7</sup> See Exhibits "C"--"J" and "N" to the Article 78 Petition

The consequence is that when these judges and judicial candidates seek reappointment or promotion to higher judicial office and fill out questionnaire forms which ask them whether they have been the subject of complaint, they can truthfully respond in the negative to that question when, in fact, the answer is in the affirmative.

Nor can screening authorities obtain independent verification as to whether a judge, under consideration, has been the subject of complaint from the Commission on Judicial Conduct. This is because the present confidentiality of Judiciary Law §45 bars the Commission on Judicial Conduct from providing that information.

**B. Need to Amend as to Whom Disclosable Materials are Available**

Judiciary Law §45.2(a)-(c) is inadequate. It limits the Commission's disclosure of records to the Governor's judicial appointments--all of whom are subject to the "advice and consent of the Senate". Thus, it makes records available only for candidates for the Court of Appeals, Court of Claims, and interim appointments to the Supreme Court.

Wholly omitted is any provision for disclosure to other appointing authorities. For instance, the Mayor of the City of New York appoints the City's judges to Family Court and Criminal Court, and to interim Civil Court vacancies. Yet, under Judiciary Law §45.2(a)-(c), neither the Mayor nor any screening committee employed by him is able to obtain any information about candidates under consideration for judicial appointment.

Likewise, when state court judges are seeking appointment to the federal bench, there is no provision under §45.2 whereby any of the players in the federal selection and confirmation process can obtain information. This includes the recommending senator and his screening committees, the President and the screening upon which he relies, performed by the American Bar Association and U.S. Justice Department, and the Senate Judiciary Committee and Senate.

**RECOMMENDATION:**

Amend Judiciary Law §45.2 to provide all federal, state, and local bodies involved in the judicial screening, nominating, and confirmation processes with access to complaints filed with the Commission on Judicial Conduct against the judicial candidate under consideration, as well as to the record of investigations and proceedings had thereon.