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By Priority Mail

December 15, 1995

Assembly Judiciary Committee
L.O.B. Room 831
Empire State Plaza
Albany, New York 12248

ATT: Patricia Gorman, Counsel

Dear Pat:

Time moves faster than I do. Ever since our meeting in Albany on October 24th, I have been meaning to write a note of thanks to you and Joanne Barker, counsel to the Assembly Judiciary Committee, to Anthony Profaci, associate counsel of the Assembly Judiciary Committee, to Joan Byalin, counsel to Chairwoman Weinstein, and to Josh Ehrlich, counsel to the Assembly Election Law Committee, for the two hours time each of you gave us to discuss CJA's recommendations for imperatively-required legislative action.

I did telephone Joan Byalin on October 26th and conveyed our appreciation. I hope it was passed on to Chairwoman Weinstein and to the counsel present at the October 24th meeting.

We trust you have now had sufficient time to review the documents we supplied the Assembly Judiciary Committee and to verify their extraordinary significance. This includes the court papers in our Article 78 proceeding against the New York State Commission on Judicial Conduct¹--and our related correspondence.

By your review of Point II of our Memorandum of Law²--detailed with legislative history and caselaw--there should be no question but that the self-promulgated rule of the Commission (22 NYCRR §7000.3) is, on its face, irreconcilable with the statute defining the Commission's duty to investigate facially meritorious complaints (Judiciary Law, §44.1) and with the constitutional amendments based thereon. For your convenience, copies of the rule and statutory and constitutional provisions are annexed hereto as Exhibits "A-1", "A-2", and "A-3", respectively.

¹ For ease of reference, the court papers in the Article 78 proceeding against the Commission are designated herein by the numbers assigned them by our Inventory of Transmittal.

² See Doc. 6, pp. 10-17.

Exhibit "E"

Moreover, you should now be convinced that the Supreme Court's decision of dismissal, justifying §7000.3, as written,--by an argument not advanced by the Commission--is palpably insupportable.

The definitions section of §7000.1 (Exhibit "A-1"), which the Court itself quotes in its decision³, belies its claim that "initial review and inquiry" is subsumed within "investigation". Such definitions section expressly distinguishes "initial review and inquiry" from "investigation"⁴.

Even more importantly, the Court's aforesaid sua sponte argument, which it pretends to be the Commission's "correct[] interpret[ation]" of the statute and constitution, does NOTHING to reconcile §7000.3, as written, with Judiciary Law, §44.1 (Exhibit "A-2"). This is because §7000.3 (Exhibit "A-1") uses the discretionary "may" language in relation to both "initial review and inquiry" and "investigation"--THUS MANDATING NEITHER. Additionally, as written, §7000.3 fixes NO objective standard by which the Commission is required to do anything with a complaint--be it "review and inquiry" or "investigation". This contrasts irreconcilably with Judiciary Law §44.1, which uses the mandatory "shall" for investigation of complaints not determined by the Commission to facially lack merit.

³ The Supreme Court decision does not quote the entire definition of "investigation", set forth in §7000.1(j). Omitted from the decision is the specification of what "investigation" includes. The omitted text reads as follows:

"An investigation includes the examination of witnesses under oath or affirmation, requiring the production of books, records, documents or other evidence that the commission or its staff may deem relevant or material to an investigation, and the examination under oath or affirmation of the judge involved before the commission or any of its members."

⁴ Accordingly, the "initial review and inquiry" is conducted by the "commission staff" and is

"intended to aid the commission in determining whether or not to authorize an investigation." (emphases added).

As to the issue of the constitutionality of §7000.3, as applied, your review of the papers should have persuaded you that such important issue was squarely before the Court⁵--contrary to the Supreme Court's bold representation that it was not.

Finally, we expect you have also confirmed that the threshold issues which the Supreme Court was required to adjudicate before it could grant the Commission's dismissal motion were entirely ignored by it. Those threshold issues--fully developed in the record before the Supreme Court--included the uncontroverted default of the Commission on Judicial Conduct⁶ and the uncontroverted showing that the Commission's dismissal motion was insufficient, as a matter of law⁷. This is over and beyond the conflict of interest issues affecting the Attorney General's representation of the Commission, which we made the subject of repeated objection to the Court⁸.

Consequently, based on the record before you, you should have now confirmed that the Supreme Court's decision of dismissal is a knowing and deliberate fraud upon the public--and is known to be such by the Commission on Judicial Conduct, the State Attorney General, and the State Ethics Commission, who have each received explicit and extensive communications from us on that subject (Exhibits "C", "D", and "E").

Since none of these public agencies and offices have taken steps to vacate for fraud the Supreme Court's decision of dismissal--which was pointed out as their duty to do⁹--it now falls to the Assembly Judiciary to take action to protect the public. As a first priority, the Assembly Judiciary Committee must require the Commission on Judicial Conduct to address the specific issues raised herein as to the false and fraudulent nature of the Supreme Court's decision.

⁵ See Doc. 1: Notice of Petition: (a)(b)(c); Article 78 Petition: §§ NINETEENTH, TWENTIETH, TWENTY-FIRST, TWENTY-SECOND, TWENTY-THIRD, TWENTY-FOURTH, TWENTY-FIFTH, TWENTY-SIXTH, TWENTY-SEVENTH, TWENTY-EIGHTH, TWENTY-NINTH, THIRTY-THIRD, "WHEREFORE" clause: (a), (b), (c).

⁶ See Doc. 2, Aff. of DLS in Support of Default Judgment; Doc. 5, §§2-3, 7; Doc. 6, pp. 1-2.

⁷ See Doc. 6, pp. 2-9.

⁸ See Doc. 2: DLS Aff. in Support of Default Judgment, §§9, 14, Ex. "B" thereto, p. 3; Doc. 5, §§10, 50-4

⁹ See Exhibit "D", p. 6; Exhibit "E".

STATE COMMISSION ON JUDICIAL CONDUCT

Part 7000

Operating Procedures and Rules

(Added, former part repealed, filed Nov 21, 1978, eff Nov 1, 1978.)

Sec.

- 7000.1. Definitions.
- 7000.2. Complaints.
- 7000.3. Investigations and dispositions.
- 7000.4. Use in subsequent proceedings of letter of dismissal and caution issued prior to a hearing.
- 7000.5. Use of letter of suggestions and recommendations of former State Commission on Judicial Conduct and Temporary State Commission on Judicial Conduct.
- 7000.6. Procedure upon a formal written complaint.
- 7000.7. Procedure for consideration of referee's report or agreed statement of facts.
- 7000.8. Confidentiality of records.
- 7000.9. Standards of conduct.
- 7000.10. Amending rules.
- 7000.11. Quorum voting.
- 7000.12. Commission's principal office.

* § 7000.1. **Definitions.**—For the purpose of this Part, the following terms have the meanings indicated below:

(a) *Administrator* means the person appointed by the commission as administrator.

(b) *Administrator's complaint* means a complaint signed by the administrator at the direction of the commission, which is filed as part of the commission's records.

(c) *Answer* means a verified response, in writing, to a formal written complaint.

(d) *Complaint* means a written communication to the commission signed by the complainant, making allegations against a judge as to his qualifications, conduct, fitness to perform, or the performance of his official duties, or an administrator's complaint.

(e) *Commission* means the State Commission on Judicial Conduct.

(f) *Dismissal* means a decision at any stage not to proceed further.

(g) *Formal written complaint* means a writing, signed and verified by the administrator of the commission, containing allegations of judicial misconduct against a judge for determination at a hearing.

(h) *Hearing* means an adversary proceeding at which testimony of witnesses may be taken and evidentiary data and material relevant to the formal written complaint may be received, and at which the respondent judge is entitled to call and cross-examine witnesses and present evidentiary data and material relevant to the formal written complaint.

* (i) *Initial review and inquiry* means the preliminary analysis and clarification of the matters set forth in a complaint, and the preliminary fact-finding activities of commission staff intended to aid the commission in determining whether or not to authorize and investigate with respect to such complaint.

* (j) *Investigation*, which may be undertaken only at the direction of the commission, means the activities of the commission or its staff intended to ascertain facts relating to the accuracy, truthfulness or reliability of the matters alleged in a complaint. An investigation includes the examination of witnesses under oath or affirmation, requiring the production of books, records, documents or other evidence that the commis-

sion or its staff may deem relevant or material to an investigation, and the examination under oath or affirmation of the judge involved before the commission or any of its members.

(k) *Judge* means a judge or justice of any court in the unified court system of the State of New York.

(l) *Letter of dismissal and caution* means the written confidential suggestions and recommendations referred to in sections 7000.3(c) and 7000.7(c) of this Part. (Am Jan 10, 1983.)

(m) *Retirement* means a retirement for physical or mental disability preventing the proper performance of judicial duties.

(n) *Referee* means any person designated by the commission pursuant to section 43, subdivision 2, of the Judiciary Law to hear and report on any matter in accordance with the provisions of section 44, subdivision 4, of the Judiciary Law.

* § 7000.2. **Complaints.**—The commission shall receive, initiate, investigate and hear complaints against any judge with respect to his qualifications, conduct, fitness to perform, or the performance of his official duties. Prior to commencing an investigation of a complaint initiated by the commission, the commission shall file as part of its records an administrator's complaint.

* § 7000.3. **Investigations and dispositions.**—(a) When a complaint is received or when the administrator's complaint is filed, an initial review and inquiry may be undertaken.

(b) Upon receipt of a complaint, or after an initial review and inquiry, the complainant may be dismissed by the commission or, when authorized by the commission, an investigation may be undertaken.

(c) During the course of, or after, an investigation, the commission may dismiss the complaint, direct further investigation, request a written response from the judge who is the subject of the complaint, direct the filing of a formal written complaint or take any other action authorized by section 22 of article 6 of the Constitution or article 2-A of the Judiciary Law. Notwithstanding the dismissal of a complaint, the commission, in connection with such dismissal, may issue to the judge a letter of dismissal and caution containing confidential suggestions and recommendations with respect to the complaint, the commission's initial review and inquiry, or the commission's investigation as they pertain to the judge.

(d) Any member of the commission, or the administrator, may administer oaths or affirmations, subpoena witnesses, compel their attendance, examine them under oath or affirmation, and require the production of any books, records, documents or other evidence that may be deemed relevant or material to an investigation. The commission may, by resolution, delegate to staff attorneys and other employees designated by the commission the power to administer oaths and take testimony during investigations authorized by the commission. If testimony is taken of a judge under investigation, during the course of an investigation authorized by the commission, at least one member of the commission shall be present.

(e) In the course of the investigation, the commission may require the appearance of the judge involved before the commission, or any of its members, in which event the judge shall be notified in writing of his required appearance either personally, at least three days prior to such appearance, or by certified mail, return receipt requested, at least five days prior

Operating procedures and rules, state commission on judicial conduct. 22 NYCRR §§ 7000.1 et seq. (CLS State Commission on Judicial Conduct Rules §§ 7000.1 et seq.).

§ 44. Complaint; investigation; hearing and disposition

1. The commission shall receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform, or performance of official duties of any judge, and, in accordance with the provisions of subdivision d of section twenty-two of article six of the constitution, may determine that a judge be admonished, censured or removed from office for cause, including, but not limited to, misconduct in office, persistent failure to perform his duties, habitual intemperance and conduct, on or off the bench, prejudicial to the administration of justice, or that a judge be retired for mental or physical disability preventing the proper performance of his judicial duties. A complaint shall be in writing and signed by the complainant and, if directed by the commission, shall be verified. Upon receipt of a complaint (a) the commission shall conduct an investigation of the complaint; or (b) the commission may dismiss the complaint if it determines that the complaint on its face lacks merit. If the complaint is dismissed, the commission shall so notify the complainant. If the commission shall have notified the judge of the complaint, the commission shall also notify the judge of such dismissal. *

2. The commission may, on its own motion, initiate an investigation of a judge with respect to his qualifications, conduct, fitness to perform or the performance of his official duties. Prior to initiating any such investigation, the commission shall file as part of its record a written complaint, signed by the administrator of the commission, which complaint shall serve as the basis for such investigation.

3. In the course of an investigation, the commission may require the appearance of the judge involved before it, in which event the judge shall be notified in writing of his required appearance, either personally, at least three days prior to such appearance, or by certified mail, return receipt requested, at least five days prior to such appearance. In either case a copy of the complaint shall be served upon the judge at the time of such notification. The judge shall have the right to be represented by counsel during any and all stages of the investigation in which his appearance is required and to present evidentiary data and material relevant to the complaint. A transcript shall be made and kept with respect to all proceedings at which testimony or statements under oath of any party or witness shall be taken, and the transcript of the judge's testimony shall be made available to the judge without cost. Such transcript shall be confidential except as otherwise permitted by section forty-five of this article.

4. If in the course of an investigation, the commission determines that a hearing is warranted it shall direct that a formal written complaint signed and verified by the administrator be drawn and served upon the judge involved, either personally or by certified mail, return receipt requested. The judge shall file a written answer to the the complaint with the commission within twenty days of such service. If, upon receipt of the answer, or upon

which shall continue until and including the last day of December next after the election at which the vacancy shall be filled.

* [Commission on judicial conduct; composition; organization and procedure; review by court of appeals; discipline of judges or justices.] § 22. a. There shall be a commission on judicial conduct. The commission on judicial conduct shall receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the unified court system, in the manner provided by law; and, in accordance with subdivision d of this section, may determine that a judge or justice be admonished, censured or removed from office for cause, including, but not limited to, misconduct in office, persistent failure to perform his duties, habitual intemperance, and conduct, on or off the bench, prejudicial to the administration of justice, or that a judge or justice be retired for mental or physical disability preventing the proper performance of his judicial duties. The commission shall transmit any such determination to the chief judge of the court of appeals who shall cause written notice of such determination to be given to the judge or justice involved. Such judge or justice may either accept the commission's determination or make written request to the chief judge, within thirty days after receipt of such notice, for a review of such determination by the court of appeals.

b. (1) The commission on judicial conduct shall consist of eleven members, of whom four shall be appointed by the governor, one by the temporary president of the senate, one by the minority leader of the senate, one by the speaker of the assembly, one by the minority leader of the assembly and three by the chief judge of the court of appeals. Of the members appointed by the governor one person shall be a member of the bar of the state but not a judge or justice, two shall not be members of the bar, justices or judges or retired justices or judges of the unified court system, and one shall be a judge or justice of the unified court system. Of the members appointed by the chief judge one person shall be a justice of the appellate division of the supreme court and two shall be judges or justices of a court or courts other than the court of appeals or appellate divisions. None of the persons to be appointed by the legislative leaders shall be justices or judges or retired justices or judges.

(2) The persons first appointed by the governor shall have respectively one, two, three, and four-year terms as he shall designate. The persons first appointed by the chief judge of the court of appeals shall have respectively two, three, and four-year terms as he shall designate. The person first appointed by the temporary president of the senate shall have a one-year term. The person first appointed by the minority leader of the senate shall have a two-year term. The person first appointed by the speaker of the assembly shall have a four-year term. The person first appointed by the minority leader of the assembly shall have a three-year term. Each member of the commission shall be appointed thereafter for a term of four years. Commission membership of a judge or justice appointed by the governor or the chief judge shall terminate if such member ceases to hold the judicial position which qualified him for such appointment. Membership shall also terminate if a member attains a position which would have rendered him ineligible for appointment at the time of his appointment. A vacancy shall be filled by the appointing officer for the remainder of the term.

c. The organization and procedure of the commission on judicial conduct shall be as provided by law. The commission on judicial conduct may establish its own rules and procedures not inconsistent with law. Unless the legislature shall provide otherwise, the commission shall be empowered to designate one of its members or any other person as a referee to hear and report concerning any matter before the commission.

d. In reviewing a determination of the commission on judicial conduct, the court of appeals may admonish, censure, remove or retire, for the reasons set forth in subdivision a of this section, any judge of the unified court system. In reviewing a determination of the commission on judicial conduct, the court of appeals shall review the commission's findings of fact and conclusions of law on the record of the proceedings upon which the commission's determination was based. The court of appeals may impose a less or more severe sanction prescribed by this section than the one determined by the commission, or impose no sanction.

e. The court of appeals may suspend a judge or justice from exercising the powers of his office while there is pending a determination by the commission on judicial conduct for his removal or retirement, or while he is charged in this state with a felony by an indictment or an information filed pursuant to section six of article one. The suspension shall continue upon conviction and, if the conviction becomes final, he shall be removed from office. The suspension shall be terminated upon reversal of the conviction and dismissal of the accusatory instrument. Nothing in this subdivision shall prevent the commission on judicial conduct from determining that a judge or justice be admonished, censured, removed, or retired pursuant to subdivision a of this section.

f. Upon the recommendation of the commission on judicial conduct or on its own motion, the court of appeals may suspend a judge or justice from office when he is charged with a crime punishable as a felony under the laws of this state, or any other crime which involves moral turpitude. The suspension shall continue upon conviction and, if the conviction becomes final, he shall be removed from office. The suspension shall be terminated upon reversal of the conviction and dismissal of the accusatory instrument. Nothing in this subdivision shall prevent the commission on judicial conduct from determining that a judge or justice be admonished, censured, removed, or retired pursuant to subdivision a of this section.

g. A judge or justice who is suspended from office by the court of appeals shall receive his judicial salary during such period of suspension, unless the court directs otherwise. If the court has so directed and such suspension is thereafter terminated, the court may direct that he shall be paid his salary for such period of suspension.

h. A judge or justice retired by the court of appeals shall be considered to have retired voluntarily. A judge or justice removed by the court of appeals shall be ineligible to hold other judicial office.

i. Notwithstanding any other provision of this section, the legislature may provide by law for review of determinations of the commission on judicial conduct with respect to justices of town and village courts by an appellate division of the supreme court. In such event, all references in this section to the court of appeals and the chief judge thereof shall be deemed references to an appellate division and the presiding justice thereof, respectively.

j. If a court on the judiciary shall have been convened before the effective date of this section and the proceeding shall not be concluded by that date, the court on the judiciary shall have continuing jurisdiction beyond the effective date of this section to conclude the proceeding. All matters pending before the former commission on judicial conduct on the effective date of this section shall be disposed of in such manner as shall be provided by law. (Section 22 repealed and new section 22 added by vote of the people November 8, 1977.)

[Removal of judges.] § 23. a. Judges of the court of appeals and justices of the supreme court may be removed by concurrent resolution of both houses of the legislature, if two-thirds of all the members elected to each house concur therein.