

CENTER for JUDICIAL ACCOUNTABILITY, INC.

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Elena Ruth Sassower, Coordinator

BY PRIORITY MAIL

CERTIFIED/RRR: 7099-3400-0001-2734-2120

February 26, 2001

First Department Disciplinary Committee
61 Broadway, 2nd Floor
New York, New York 10006

ATT: Thomas J. Cahill, Chief Counsel

RE: CJA's November 14, 2000 complaint
docketed as #2000.3089: Association of the Bar of the City of New
York; #2000.3090: Women's Bar Association of the State of New
York; #2000.3091: New York State Trial Lawyers Association;
#2000.3157: New York State Bar Association

Dear Mr. Cahill:

This responds to your December 11, 2000 letter (Exhibit "A") which, *without* addressing the conflict of interest issue raised by CJA's November 14, 2000 complaint, purports that "[t]he Departmental Disciplinary Committee has reviewed its investigation" of the complaint and "has decided to take no further action."

Regarding the conflict of interest issue, I direct your attention to what the November 14, 2000 complaint has to say on the subject:

"Obviously, members of the First Department Disciplinary Committee – and perhaps you, yourself – have personal and professional relationships with the powerful and prominent bar association lawyers who are the subject of this complaint, as well as with the even more powerful public officers implicated in the corruption chronicled by CJA's October 16, 2000 report¹ – which the bar lawyers

¹ See, in particular, CJA's March 26, 1999 ethics complaint and CJA's September 15, 1999 supplemental ethics complaint, which are Exhibits "A-2" and "B" to CJA's October 16, 2000 report.

covered up. In light thereof, please advise what steps will be taken to ensure the fair and impartial evaluation of this complaint. Please also supply a list of the Committee's members."

Several of the Committee's 50 members listed on its letterhead have disqualifying conflicts of interests. In light of this, it is significant that your December 11, 2000 letter does not identify any steps having been taken to "ensure the fair and impartial evaluation" of the complaint. Nor does your letter provide the identity of the single member of the Committee who, according to your letter, allegedly "concluded that no further investigation or action was warranted". Indeed, it does not even state that this single Committee member ever determined that he was uncompromised by relationships with individuals who were the subject of the complaint or implicated by it. CJA, therefore, requests this reasonable information, as well as information as to whether you ever evaluated if you yourself were compromised by relationships that would taint your handling of this complaint.

Under §§605.6(a) and (c) of the Rules and Procedures of the Departmental Disciplinary Committee, it is the Office of Chief Counsel that conducts the "appropriate" investigation of a complaint and, pursuant to §605.6(e), makes a recommendation based thereon. The possible recommendations under §605.6(e) do NOT include a recommendation of "no further action" – the disposition indicated by your letter on CJA's complaint.

Presumably, your recommendation was pursuant to §605.6(e)(2) "Dismissal for any reason (with an indication of the reason therefore) and referral to another body if appropriate" – as this is the *sole* recommendation which results in the Committee's Chairman designating a single member of the Committee for purposes of review [§605.6(f)(2)]. Please confirm that this is the case.

It is unclear from §605.6(f)(2), how the Committee Chairman makes his designation, whether randomly or not. It is also unclear from §605.6(f)(2) and §605.7(a) whether the single Committee member actually receives "the file" containing the complaint, as opposed to just the Chief Counsel's recommendation to dismiss pursuant to §605.6(e)(2). Please clarify these procedures², as well as whether the review by the single Committee member is the extent of Committee action on a Chief Counsel's dismissal recommendation.

Assuming your December 11, 2000 letter reflects your recommendation, its deficiencies should have been obvious to any fair and impartial Committee member comparing it to "the file" containing CJA's November 14, 2000 complaint, CJA's underlying November 13, 2000 report on which it was based, and CJA's transmittal letters to the presidents of the above four bar

² It would appear from the Committee's informational brochure that the Committee member is chosen "on an alternating basis" who receives and independently reviews "the entire file". See p. 8 "Dismissal".

associations.

Firstly, your December 11, 2000 letter falsely makes it appear that CJA's complaint is only against the four bar associations. This, notwithstanding the complaint, the underlying November 13, 2000 report, and the transmittal letters to the bar association presidents *all* repeatedly identify that the complaint is also against "the culpable lawyers acting on their behalf". Obviously, conduct by individual lawyers, violating the Code of Professional Responsibility, would be within the Committee's jurisdiction. Pursuant to §605.6(d)(2), this required the Chief Counsel to have solicited a response from those lawyers to the serious allegations of their misconduct particularized by CJA's November 13, 2000 report – with CJA then afforded a right to reply thereto³.

Secondly, your December 11, 2000 cites NO legal authority for its bald claim that "Bar Associations, and other attorney associations are not subject to the jurisdiction of this agency". Such legal authority and substantiating argument was plainly called for in light of Point II of CJA's November 13, 2000 report (pp. 4-6), which made a reasoned presentation on the subject:

"New York State's four Appellate Divisions have embodied the Disciplinary Rules as joint rules, which are Part 1200 of Title 22 of New York Codes, Rules and Regulations. The Appellate Divisions have also extended the disciplinary rules to law firms. They have specifically amended DR-1-102(a) to proscribe "Misconduct" by either a "lawyer or law firm" [22 NYCRR §1200.3] and amended DR-1-104 to confer upon law firms supervisory responsibilities and make them liable for failure thereof [22 NYCRR §1200.5]. Under 22 NYCRR §1200.1 entitled "Definitions" – which adopts the Code of Professional Responsibility's "Definitions" -- a "*Law firm* includes, but is not limited to, a professional legal corporation, the legal department of a corporation or other organization, and a legal services organization." (underlining added for emphasis).

Consequently, it is CJA's position that not only are "all lawyers" who participated in the bar associations' ratings culpable, but also the bar associations in whose names the lawyers acted and over whom they have supervisory responsibility. This is surely appropriate, as it would be incongruous to exempt the bar associations from the salutary exhortations and mandatory provisions of the Code of Professional Responsibility which they have promoted for individual lawyers. As collectives of thousands and thousands of lawyers, it is the bar associations that have the resources and expertise to "recognize deficiencies in the legal system and initiate corrective measures" far surpassing anything that individual lawyers could do to improve the system. Moreover, it is their "statements of fact concerning the

³ This right of reply, which does not appear in the Committee's rules, is reflected by the Committee's informational brochure. See p. 7 "Initial Investigation".

qualifications” of judicial candidates, not those of private attorneys or other individuals, which carry the most weight with appointing authorities and voters. It is these which are reported by a gullible press as worthy of deference (Exhibits “A-2”, “B-3”, C-2”, “D-3”), and then utilized by unscrupulous politicians, like the Governor, to lull the public into believing that their rights are being respected and protected.”

Thirdly, your letter makes NO referral of the complaint, notwithstanding §605.6(e)(2) expressly contemplates referral to another body may be “appropriate” where a complaint is dismissed. §605.6(f)(1) is even more explicit:

“Whenever possible in cases of lack of jurisdiction, the Office of Chief Counsel shall bring the matter to the attention of the authorities of the appropriate jurisdiction, or to any other duly constituted body which may be able to provide a forum for the consideration of the Grievances, and shall advise the Complainant of such referral”,

Obviously, if you had a good faith belief that the Committee had no jurisdiction over bar associations, your duty was to make a referral to the jurisdictionally-proper body. To do otherwise would allow the bar associations to escape all accountability for the flagrant violations of the Code of Professional Responsibility detailed by CJA’s underlying November 13, 2000 report – and the irreparable injury to the public resulting therefrom. Your failure to make any referral suggests that you did not want to have the Committee’s supposed lack of jurisdiction put to the test, as inevitably would have happened by involving other authorities and duly constituted bodies.

Plainly, too, any such referral of CJA’s complaint would have tested your simplistic assertion – likewise unsupported by any legal authority -- that bar association ratings “are expressions of opinion, and as such cannot be treated as misstatements of fact.” As pointed out at page 6 of CJA’s November 13, 2000 report:

“the premise for the bar associations’ semi-official’ role in the ‘merit selection’ process is that, consistent with the Code of Professional Responsibility, they are ‘guardians of the law’, performing a public service in ensuring the integrity of a process as to which they have specific expertise.”

The high privilege given to bar associations to participate in the “merit selection” process to our State’s highest court is *not* for purposes of allowing them to express their unfettered private “opinions”. Rather, the privilege derives from a belief, rooted in the bar associations’ own rhetoric, that they will be upholding the public interest by ratings that are fact-based evaluations by

individuals respecting ethical codes of professional responsibility. This respect is wholly absent from the behavior of the bar association lawyers described by CJA's November 13, 2000 report, who were perfectly willing to flout conflict of interest rules and up-end cognizable evidentiary and due process standards to rig ratings.

If, as it appears, your letter of "no further action" is, in actuality, a letter of dismissal pursuant to §605.6(e)(2), your December 11, 2000 letter is deficient in yet an additional respect – one whose consequence is to deprive CJA of its right to "Reconsideration" by a different Committee member pursuant to §605.7(c). In furtherance of that right, §605.8(d) explicitly states:

"The Office of Chief Counsel, by means of written notice, shall notify the Complainant of the dismissal of a Complaint... If the complaint has been dismissed pursuant to Section 605.6(e)(2), the notice shall state that the Complainant may seek reconsideration of the dismissal by submitting to the Office of Chief Counsel a written request within 30 days of the date of the notice."⁴

Your December 11, 2000 letter provides NO notice of CJA's right to seek reconsideration of a complaint that you do not even state to have been dismissed.

The above-specified numerous deficiencies of your December 11, 2000 letter, raising serious questions as to your own fairness and impartiality, require your response, which CJA requests. CJA further requests that this letter be placed on the agenda of the Committee's next meeting. This, so that the Committee membership can discuss how to fairly and impartially handle CJA's November 14, 2000 complaint, as has not heretofore been done.

CJA believes that the Committee would do well to seek an advisory opinion from the bodies expressly identified by CJA's November 13, 2000 report⁵ as being capable of having a constructive role: the Institute on Professionalism in the Law and Chief Judge Kaye's Committee to Promote Public Trust and Confidence in the Legal System.

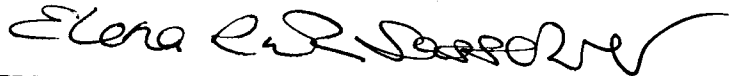
Indeed, as to the Institute on Professionalism in the Law, CJA's November 13, 2000 report identified (at p. 2) its "major responsibilities" to include:

⁴ Likewise the Committee's informational brochure specifies that "...you will be notified that your complaint is to be dismissed, but that you may request reconsideration of that decision by an additional Committee member by notifying the Committee within 30 days of the notice of dismissal to you." See p. 8 "Dismissal".

⁵ See pages 2-3, 27-28.

"monitoring and commenting upon the methods of enforcing standards of professional conduct" and "recommending legislation and modifications of the Code of Professional Responsibility to improve professionalism and encourage ethical behavior"⁶.

Yours for a quality judiciary,



ELENA RUTH SASSOWER, Coordinator
Center for Judicial Accountability, Inc. (CJA)

cc: Institute on Professionalism in the Law
Committee to Promote Public Trust and Confidence in the Legal System

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⁶ March 2, 1999 press release of the NYS Unified Court System.