CENTER for JUDICIAL ACCOUNTABILITY, INC.*

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Elena Ruth Sassower, Director
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DATE: December 14, 2006

TO: **Presenters at the January 19, 2007 Conference: "*Reclaiming the First Amendment: A Conference on Constitutional Theories of Media Reform*"**

Marjorie Heins, Esq., Brennan Center for Justice at New York University School of Law
Professor Jerome Barron, George Washington University Law School
Professor C. Edwin Baker, University of Pennsylvania Law School
Professor Lili Levi, University of Miami School of Law
Professor Ellen P. Goodman, Rutgers School of Law at Camden
Professor Robert McChesney, Institute of Communications Research, College of Communications/University of Illinois at Urbana-Champaign

Dean and Professor Aaron D. Twerski, Hofstra University School of Law
President Stuart Rabinowitz, Hofstra University
Professor Leon Friedman, Hofstra University School of Law
Professor Gregory P. Magarian, Villanova University School of Law
Marvin Ammori, Esq., Georgetown University Law Center
Robert Corn-Revere, Esq., Davis, Wright, Tremaine
Professor Neil Weinstock Netanel, University of California at Los Angeles School of Law
Professor Hannibal Travis, Florida International University College of Law
Professor Alan E. Garfield, Widener University School of Law
Professor Diane Zimmerman, New York University School of Law
Professor Anthony E. Varona, American University Washington College of Law
Professor Oren Bracha, University of Texas School of Law
Professor Frank A. Pasquale, Seton Hall College of Law
Professor David C. Kohler, Southwestern University School of Law
Professor Jennifer A. Chandler, University of Ottawa, Faculty of Law
Professor Robert Horwitz, University of California at San Diego
Cheryl A. Leanza, Esq., National League of Cities
Professor Malla Pollack, University of Idaho, College of Law
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Professor Laurence H. Winer, Arizona State University School of Law
Professor Bernard E. Jacob, Hofstra University School of Law
Professor Robin D. Charlow, Hofstra University School of Law
Professor Angela J. Campbell, Georgetown University Law Center
Professor Paul Finkelman, Albany Law School

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* **The Center for Judicial Accountability, Inc.** (CJA) is a national, non-partisan, non-profit citizens' organization dedicated to ensuring that the processes of judicial selection and discipline are effective and meaningful – a goal which cannot be achieved without honest scholarship and a press discharging its First Amendment responsibilities.

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

RE: **PUTTING THEORY INTO PRACTICE –**
– & PRACTICE INTO SCHOLARSHIP & COMMENTARY
Request for Your *Amicus Curiae* & Other Legal Assistance, *Pro Bono* or Paid, in Groundbreaking Public Interest Lawsuit against The New York Times in Vindication of the First Amendment – & for Your Bringing the Case into First Amendment & Media Law Scholarship & Commentary, Including at the January 19, 2007 Conference: "*Reclaiming the First Amendment: A Conference on Constitutional Theories of Media Reform*"

Enclosed is my memo of today's date to Hofstra Law Professor and Conference Co-Director Eric M. Freedman, to which you are indicated recipients.

The referred-to prior correspondence and law review articles are all posted on the Center for Judicial Accountability's website, www.judgewatch.org, accessible *via* the sidebar panel "Suing The New York Times".

I would be pleased to discuss any aspect of the memo with you and thank you, in advance, for the courtesy of your responses.

Elena Ruth Sassower

Enclosure

cc: Professor Eric M. Freedman, Hofstra University School of Law

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DATE: December 14, 2006

TO: Professor Eric M. Freedman, Hofstra University School of Law

RE: PUTTING THEORY INTO PRACTICE –
– & PRACTICE INTO SCHOLARSHIP & COMMENTARY
Request for Your *Amicus Curiae* & Other Legal Assistance, *Pro Bono* or Paid, in Groundbreaking Public Interest Lawsuit against The New York Times in Vindication of the First Amendment – & for Your Bringing the Case into First Amendment & Media Law Scholarship & Commentary, Including at the January 19, 2007 Conference: "*Reclaiming the First Amendment: A Conference on Constitutional Theories of Media Reform*"

This follows up my two memos to you, dated March 13, 2006 and March 24, 2006, alerting you to the Center for Judicial Accountability's landmark public interest lawsuit against The New York Times in vindication of the First Amendment – the first to implement the powerful recommendation for media accountability proposed in the 2003 law review article "*Journalistic Malpractice: Suing Jayson Blair and the New York Times for Fraud and Negligence*", 14 Fordham Intellectual Property, Media & Entertainment Law Journal 1, by Professors Clay Calvert and Robert D. Richards, Co-Directors of the Pennsylvania Center for the First Amendment at Pennsylvania State University.

I asked whether you – and the other presenters at the January 19, 2007 conference "*Reclaiming the First Amendment: A Conference on Constitutional Theories of Media Reform*", *to wit*, Professors Jerome Barron, C. Edwin Baker, Lili Levi, Ellen P. Goodman, and Robert McChesney – were familiar with that law review article and proposed that it and our lawsuit against The Times be included as part of the conference. I sent copies of the memos to them, as likewise to Marjorie Heins, Esq. of New York University's Brennan Center for Justice, the conference's co-sponsor.

I also separately wrote to Professor Barron, whose 1967 law review article "*Access to the Press – a New First Amendment Right*", 80 Harvard Law Review 1641, is being commemorated by the conference. My June 8, 2006 and June 15, 2006 letters to him asked whether he agreed that a cause of action for journalistic fraud, such as brought by our public interest lawsuit against The

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Times, represented a "legal intervention" to secure the "marketplace of ideas", the necessity of which his article had proposed 40 years ago.

All this correspondence is posted on CJA's website, www.judgewatch.org, accessible *via* the sidebar panel "Suing The New York Times", which links to a page entitled "OUTREACH: The Champions & Betrayers of Media Accountability, The First Amendment, & The Public Interest". No responses from you are posted, as none were received.

Like my prior correspondence, the purpose of this memo is two-fold: to enable you to contribute your scholarly expertise to advancing the success of the lawsuit, but, in any event, to ensure that the lawsuit is before you for your First Amendment and media law scholarship and commentary. This especially includes at the January 19, 2007 conference and in the "major papers" to be published in the "symposium issue of the *Hofstra Law Review*", where the lawsuit deserves to be examined as a case study of how "Constitutional Theories of Media Reform", espoused by scholars in law review articles, are being tested in the courts by non-scholars to reclaim the First Amendment.

I am pleased to report that the lawsuit has resoundingly demonstrated the viability of a journalistic fraud cause of action, as neither The Times nor the judge to whom the case was steered were able to confront ANY of our arguments, whether based on "*Journalistic Malpractice: Suing Jayson Blair and the New York Times for Fraud and Negligence*", or based on "*Access to the Press – A New First Amendment Right*", or based on a third law review article "*Institutional Reckless Disregard for Truth in Public Defamation Actions Against the Press*" by Professors Randall P. Bezanson and Gilbert Cranberg, 90 Iowa Law Review 887 (March 2005)[1] – all three of these law review articles being physically part of the record.[2]

Indeed, our lawsuit was so well pleaded that The Times had NO legitimate defense to our three causes of action: for defamation (¶¶139-155), defamation *per se* (¶¶156-162), and journalistic fraud (¶¶163-175) – thereby enabling us to cross-move not only for sanctions against The Times for its fraudulent motion to dismiss our complaint for failure to state a cause of action, but for summary judgment against it. The only reason we did not obtain a judgment in our favor, *as a matter of law*, is because the judge, who was hand-picked for the case in violation of random assignment rules, corrupted the judicial process by a decision which obliterated ALL cognizable legal and adjudicative standards – a decision to which he thereafter adhered upon our motion to vacate it for "fraud and lack of jurisdiction", made as part of our motion to disqualify him for "demonstrated

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[1] Professors Bezanson and Cranberg formulated a concept of "institutional recklessness" to address the media's substitution of profit-driven priorities for journalistic ones. Their proposed "public defamation action" based on "institutional recklessness" might also be viewed as a "legal intervention", especially as Professor Barron's law review article recognized the adverse effect of financial priorities on the "marketplace of ideas".

[2] Our unchallenged arguments in support of our journalistic fraud cause of action, including those based on these three law review articles, were set forth, *inter alia*, by our June 1, 2006 memorandum of law (at pp. 20-21); my June 13, 2006 affidavit (at ¶¶19-23); our August 21, 2006 memorandum of law (at pp. 17-20); and my September 25, 2006 affidavit (at ¶¶23, 26-29), all posted on our "Suing The New York Times" webpage.

actual bias and interest". You can verify this, for yourself, from the lawsuit record, posted, *in its entirety*, on our "Suing The New York Times" webpage.

As our already drafted appellants' brief can expedite your verification of the breathtaking posture of the case on appeal, I would be pleased to send it to you to buttress our request herein that you file an *amicus curiae* brief on the appeal, particularly in support of the journalistic fraud cause of action.

The appeal must be perfected by February 21, 2007, unless we avail ourselves of an extension. There is no requirement that an *amicus curiae* brief be filed simultaneously with the appeal brief. It may be filed at any time prior to oral argument, upon the granting of a motion for same, though, obviously, a motion made earlier is more likely to be granted.

Needless to say, we would also welcome your comments and suggestions on our draft brief. Hopefully, you would offer them *pro bono* so as to put into practice "Constitutional Theories of Media Reform" to "Reclaim[] the First Amendment." However, we are also willing to pay you for the benefit of your scholarly expertise so that the brief may be the best it can possibly be.

Please let me know if you are interested in filing an *amicus curiae* brief or in otherwise assisting us on a *pro bono* or paid basis and I will promptly send you our draft appellants' brief. Should you not be interested, we ask for your recommendations as to other law professors who might be.

In any event, please confirm that you will be incorporating this landmark case into your First Amendment and media law scholarship and commentary and/or referring it to other professors for their relevant scholarship and commentary, as well as to academic institutes and entities that research and/or advocate on First Amendment and media law issues. Scholarship, commentary, and advocacy must rest on evidence as to what is happening "on the ground" – and this lawsuit is a case study of how the First Amendment and media law are litigated and adjudicated when the issues of "legitimate public concern" involve judicial corruption and the press' obligations with respect thereto.

Finally, over and beyond the documentary record of our lawsuit against The Times, we have a goldmine of primary source documentary evidence as to how the press functions – both mainstream and alternative, including the blogs. Such evidence explodes a panoply of myths, including that "the gatekeepers" are gone. Indeed, that we are able to so dramatically prove that "the gatekeepers" are alive and well – not only by the media's suppression of ANY report of our lawsuit against The Times (as to which we circulated three press releases, far and wide), but by its suppression of ANY report of the *readily-verifiable* corruption in office of New York Attorney General Eliot Spitzer and Senator Hillary Rodham Clinton, resulting in their landslide 2006 electoral victories (as to which we circulated four media advisories far and wide) further reinforces the need for "legal intervention" to ensure "the marketplace of ideas" which Professor Barron deemed necessary 40 years ago. Any scholar inclined to the belief that the proliferation of the internet, blogs, and cable makes the necessity for "legal intervention" a thing of the past should

examine what we have chronicled just within the past year.[3]

I would be pleased to discuss any of the foregoing with you and thank you, in advance, for the courtesy of your response.

cc: All indicated recipients of prior March 13, 2006 and March 24, 2006 memos:
Marjorie Heins, Esq., Brennan Center for Justice at New York University School of Law
Professor Jerome Barron, George Washington University Law School
Professor C. Edwin Baker, University of Pennsylvania Law School
Professor Lili Levi, University of Miami School of Law
Professor Ellen P. Goodman, Rutgers School of Law at Camden
Professor Robert McChesney, Institute of Communications Research,
College of Communications/University of Illinois at Urbana-Champaign
Professors Clay Calvert & Robert D. Richards, Co-Directors,
Pennsylvania Center for the First Amendment at Pennsylvania State University
All subsequently scheduled presenters at the January 19, 2007 conference:
Dean and Professor Aaron D. Twerski, Hofstra University School of Law
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Professor Angela J. Campbell, Georgetown University Law Center
Professor Paul Finkelman, Albany Law School
Professors Randall P. Bezanson and Gilbert Cranberg

[3] These primary source materials are accessible *via* the "OUTREACH" link of our "Suing The New York Times" webpage and, additionally, *via* the sidepanel "Elections 2006: Informing the Voters".