

CENTER *for* JUDICIAL ACCOUNTABILITY, INC.

(914) 421-1200 • Fax (914) 684-6554

E-Mail: probono@delphi.com

Box 69, Gedney Station

White Plains, New York 10605

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 Conduct<sup>1</sup>--and our related correspondence.

By your review of Point II of our Memorandum of Law<sup>2</sup>--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.

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<sup>1</sup> 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.

<sup>2</sup> See Doc. 6, pp. 10-17.

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 decision<sup>3</sup>, belies its claim that "initial review and inquiry" is subsumed within "investigation". Such definitions section expressly distinguishes "initial review and inquiry" from "investigation"<sup>4</sup>.

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.

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<sup>3</sup> 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."

<sup>4</sup> 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 Court<sup>5</sup>--contrary to the Supreme Court's bald 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 Conduct<sup>6</sup> and the uncontroverted showing that the Commission's dismissal motion was insufficient, as a matter of law<sup>7</sup>. 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 Court<sup>8</sup>.

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 do<sup>9</sup>--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.

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<sup>5</sup> 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).

<sup>6</sup> See Doc. 2, Aff. of DLS in Support of Default Judgment; Doc. 5, ¶¶2-3, 7; Doc. 6, pp. 1-2.

<sup>7</sup> See Doc. 6, pp. 2-9.

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

<sup>9</sup> See Exhibit "D", p. 6; Exhibit "E".

In that connection, I would point out that there has been no response from the Commission on Judicial Conduct to my August 14, 1995 "Letter to the Editor", published in the New York Law Journal (Exhibit "B"). Likewise, it has failed to respond to my September 14, 1995 letter addressed to its Chairman, Henry Berger, Esq. (Exhibit "C").

In view of the seriousness of those letters, the Commission's non-response can only be viewed as further evidence of its contempt for the public, as well as for this Committee. I would point out that the Assembly Judiciary Committee was more than an indicated recipient of that September 14, 1995 letter. Its oversight was described therein as follows:

"Assuredly, the Assembly Judiciary Committee will also expect answers and explanations ...Unlike the Commission...which...has ...ignored our 'Letter to the Editor' published in the August 14, 1995 New York Law Journal--we expect the Assembly Judiciary Committee will verify the profoundly serious allegations of that published letter and demand an accounting." (Exhibit "C")

In grappling with the transcendent issues raised by our Article 78 proceeding against the Commission, we believe that the Assembly Judiciary Committee should avail itself of "expert" opinion from the Fund/Committee for Modern Courts--which has long been in possession of a full set of the court papers. We previously articulated this position in our August 22, 1995 letter addressed to Modern Court's Chairman John Feerick, which stated:

"...the significance of this litigation is not lost upon us. Therefore, a copy of this letter is being sent to counsel at the Assembly Judiciary Committee, together with a duplicate copy of the...court papers.

We expect that the Assembly Judiciary Committee will rightfully look to Modern Courts for its assessment of the frightening and dangerous situation--both at the Commission and in the state Supreme Court--fully documented by the Article 78 file." (Exhibit "F", emphasis in the original).

As you know, Modern Courts has consistently contributed its views about the Commission to the Legislature. It was instrumental in the creation of the Commission, testified at legislative hearings

on the Commission held on December 18, 1981 (by the Assembly and Senate Judiciary Committees) and on September 22, 1987 (by the Assembly Judiciary Committee). It also has rendered two written reports about the Commission--the first of which was presented in conjunction with its September 22, 1987 testimony. As to its second report, dated April 19, 1990, under the chairmanship of Michael Cardozo, Esq., it featured four specific "Recommendations to the Legislature (in its "Part I").

As pointed out by my August 22, 1995 letter to Chairman Feerick,

"in neither report did Modern Courts compare the Constitution and statute with the self-promulgated rules of the Commission, which examination shows to be facially irreconcilable. Nor does it appear that Modern Courts ever examined the kind of judicial misconduct complaints being dismissed without investigation by the Commission, so as to determine the constitutionality of the Commission's self-promulgated rule, as applied." (Exhibit "F", emphasis in the original).

Neither Chairman Feerick nor Michael Cardozo, who was sent a copy of my August 22, 1995 letter (Exhibit "F"), have denied that Modern Courts' past reports failed to examine §7000.3, as written and as applied. Only by such omission was Modern Court able to report favorably to the Assembly Judiciary Committee about the Commission on Judicial Conduct.

The only response we received from Modern Courts to my August 22nd letter (Exhibit "F") was a note from Chairman Feerick, dated August 28th, stating that he would "be sure to review the court papers and the general area to which [I] made reference in [my] letter, and discuss the subject with [Modern Court's] next executive director". A copy is annexed hereto as Exhibit "G".

Last week, I telephoned Modern Court's new Executive Director, Gary Brown and spoke with him at length. I reiterated the valuable role Modern Courts could--and should--play in assisting the Assembly Judiciary Committee.

This is all the more appropriate since, according to Mr. Brown, Modern Courts does not have the resources to assist us<sup>10</sup>, even on

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<sup>10</sup> As I pointed out to Mr. Brown, not only is Chairman Feerick the Dean of Fordham University School of Law--which has lots of law students who would jump at the opportunity to engage in an important public interest case--but many of the many

an amicus level, in litigation efforts so that the Supreme Court's fraudulent decision might be vacated or appealed. Moreover, Mr. Brown also told me that litigation is not its style.

Since the Assembly Judiciary Committee would surely invite Modern Courts to testify were public hearings on the Commission to be held--and Modern Courts would surely be "appreciative" and "honored"<sup>11</sup> to present its view--we suggest that you not delay, but invite Modern Courts, at this critical juncture, to present its views as to the constitutional and public interest issues represented by our Article 78 proceeding against the Commission.

I would note, however, that in our conversation Mr. Brown told me that even were Modern Courts to examine the constitutionality of §7000.3, as written (Exhibit "A-1"), it would not want to examine the nine complaints annexed as exhibits to the Article 78 petition so as to evaluate whether they were "facially meritorious" and, thereby, the constitutionality of §7000.3, as applied. Nor, according to Mr. Brown, would Modern Courts want to examine the complaints filed by the citizen intervenors in our Article 78 proceeding or the complaints comprising our documentary archive--as referred to in my August 14, 1995 "Letter to the Editor" (Exhibit "B").

It was in that context that I asked Mr. Brown whether Modern Courts would examine a complaint that had been filed with the Commission on Judicial Conduct by its own Executive Director, Dr. M.L. Henry, Jr.

So that the Assembly Judiciary Committee can have the benefit of yet another example of the kind of "facially meritorious" complaints being tossed out by the Commission, a copy of Dr. Henry's January 16, 1987 complaint--and the contemporaneous hand-written notes upon which it was based--are annexed hereto as Exhibit "H". The Commission's form letters of acknowledgement and dismissal are annexed hereto as Exhibits "I-1" and "I-2", respectively.

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members of Modern Courts' Board are partners in or connected to major law firms.

<sup>11</sup> Such expressions were made by Modern Courts' Executive Directors as they opened their testimony at previous legislative hearings held on the Commission (See 12/18/81, p. 150, Fern Schair: "The Committee for Modern Courts is appreciative of the opportunity to present its views."; 9/22/87, p. 151, M.L. Henry, Jr.: "the Committee for Modern Courts is honored to have been invited to testify today concerning the policies, procedures, and practices of the New York State Commission on Judicial Conduct."

It deserves emphasis that Dr. Henry was not only a "disinterested" observer of the judicial misconduct which was the subject of his complaint, but, by virtue of his professional background and experience, was in a position to offer "expert" opinion to the Commission as to the significance of the misconduct about which he was complaining<sup>12</sup>. That opinion is summed up in the last paragraph of his complaint in which he stated:

"If [the judge's] conduct on other days is the same as her conduct on December 15, 1986, she should be removed from the bench, in my opinion."

Considering that Modern Courts specializes--through its court monitoring projects--in reporting on precisely the type of judicial demeanor and bias problems that were the subject of Dr. Henry's "facially meritorious" complaint--we do not believe it can remain indifferent to the unconstitutional application of \$7000.3 (Exhibit "A-1") reflected by dismissal of Dr. Henry's complaint by the Commission. Nor, as an ethical matter, do we believe Modern Courts can "shut its eyes" to other "facially meritorious" complaints, such as those annexed to our Article 78 Petition.

To our knowledge, the Judiciary Committee has never, until now, been presented with copies of "facially meritorious" complaints being dismissed by the Commission. And, it appears that neither the Committee nor Modern Courts have recognized, until now, that access to such complaints is key to verifying long-current allegations about the Commission. The most constant of such allegations is that the Commission has pursued non-lawyer judges and justices of the peace on relatively petty charges, while--at the same time--dismissing more substantial charges against more substantial judges.

In this regard, the exchange at the September 22, 1987 hearing between former Chairman of the Assembly Judiciary Committee, Oliver Koppell and Dr. Henry, as Executive Director of Modern Courts, is most telling:

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<sup>12</sup> That Dr. Henry was well known to the Commission may be seen by his salutation to its Administrator, Gerald Stern, who he addressed as "Dear Jerry" and by his closing signature of "Hank".

[Exhibit "J": pp. 169-170]

Koppell: "Is the Commission doing a good enough job in terms of supervising not the town and village judges but, for instance, the Supreme Court or the Appellate Courts? Are they able to properly supervise those courts or the conduct of judges on those courts?"

Henry: "We don't have any way of documenting that, so I resisted going into it..."

Surprisingly, Dr. Henry made no mention of his own experience in having filed his complaint against a criminal court judge-- which just two months earlier, on July 24, 1987 (Exhibit "I-2"), the Commission had dismissed, without investigation. That experience may be reflected, however, in the continuation of Dr. Henry's extemporaneous response to Chairman Koppell:

[Exhibit "J": Transcript, pp. 170-1]

Henry: "...but my feeling is that if the Commission is speaking as a public group, trying to represent the public on this issue, that the public would like a much stronger commission, not a weaker commission, and that there are some fairly well-publicized cases of misconduct and not necessarily criminality that the Commission might have acted on, and a couple come to mind that there's no need to deal in names..

...we have a public crisis of confidence in the courts, and I think that the Commission should be doing not only everything its doing now but more."

These remarks by Dr. Henry marked a noticeable departure from the prepared text he had finished reading, whose "bottom line" conclusion was that "New Yorkers can be assured that a judge who disregards the ethical standards of his or her office will be held accountable" (Exhibits "J": p. 169, "K").

Yet, how Modern Courts came to such conclusion is truly remarkable. Observing that the number of judges publicly disciplined by the Commission had steadily diminished (from 58 in 1979, 50 in 1980, 32 in 1981, 24 in 1982, 20 in 1983, 24 in 1984, 18 in 1985 to only 16 in 1986), Modern Courts interpreted these astonishing statistics as evidencing the Commission's success in deterring misconduct (Exhibits "J": pp. 167-8, "K"). In so doing, Modern Courts ignored the fact that during this period the



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Commission was receiving a steadily increasing number of complaints--the overwhelming majority of which--like Dr. Henry's facially meritorious complaint (Exhibit "H")--it was dismissing without investigation.

So that the Commission may have yet another opportunity to voluntarily address these issues, a copy of this letter is being sent to the Commission on Judicial Conduct, for distribution to the members. A copy is, likewise, being sent to Mr. Brown, Executive Director of Modern Courts so that appropriate action on behalf of the public may yet be undertaken by it, spearheaded by its influential and well-connected Board.

Yours for a quality judiciary,



ELENA RUTH SASSOWER, Coordinator  
Center for Judicial Accountability, Inc.

Enclosures

cc: New York State Commission on Judicial Conduct  
Fund/Committee for Modern Courts  
Attorney General of the State of New York  
New York State Ethics Commission