CENTER *for* JUDICIAL ACCOUNTABILITY, INC.*

Post Office Box 8220
White Plains, New York 10602

Tel. (914) 421-1200
Fax (914) 428-4994

E-Mail: judgewatch@aol.com
Web site: www.judgewatch.org

Elena Ruth Sassower, Director
Direct E-Mail: judgewatchers@aol.com

DATE: December 14, 2006

TO: **Professor Randall P. Bezanson,**
University of Iowa College of Law
Professor Gilbert Cranberg,
University of Iowa School of Journalism and Mass Communication

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

RE: **PUTTING THEORY INTO PRACTICE –**
– & PRACTICE INTO SCHOLARSHIP & COMMENTARY
***"Institutional Reckless Disregard for Truth in Public Defamation Actions Against the Press"* – Request for Your *Amicus Curiae* and 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**

This responds to the concluding paragraph of your September 15, 2006 commentary on the Nieman Watchdog website which stated: "We are not aware of any libel suits having been filed as yet based on the concept of institutional recklessness."

Until I saw your Nieman Watchdog commentary – two days after its posting – I was unaware of your March 2005 Iowa Law Review article "*Institutional Reckless Disregard for Truth in Public Defamation Actions Against the Press*". Upon reading your commentary and article, it was immediately evident that we had embodied your concept of "institutional recklessness" in our public interest lawsuit against The New York Times Company, The New York Times, and its highest managerial and editorial levels, based on their knowing and deliberate conduct, spanning a decade and a half. The verified complaint, served six months earlier, in March 2006, joined defamation and defamation *per se* causes of action with a cause of action for journalistic fraud, based on a 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

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Amendment at Pennsylvania State University. The last of the complaint's 175 pleaded allegations, culminating the journalistic fraud cause of action, reads:

> "THE NEW YORK TIMES COMPANY has subordinated its First Amendment obligations to its own business and other self-interests. These include its interest in procuring the site for its new corporate headquarters, as well as favorable tax abatements and financial terms worth hundreds of millions of dollars. Upon information and belief, because THE NEW YORK TIMES COMPANY could not obtain same without the backing of Governor Pataki, other powerful government officials -- and the cooperation of the courts -- it has been motivated to 'steer clear' of coverage exposing their official misconduct, to the detriment of the public." (at ¶175).

After reading "*Institutional Reckless Disregard for Truth in Public Defamation Actions Against the Press*", I appended it to a September 25, 2006 affidavit and summarized its significance in further support of "express recognition of a journalistic fraud cause of action" (¶¶26-29).

I am pleased to report that the lawsuit has resoundingly demonstrated the viability of the proposed 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 based on your law review article, or the law review article of Professors Calvert and Richards, or the further law review article "*Access to the Press – A New First Amendment Right*" by Professor Jerome Barron, 80 Harvard Law Review 1641 (1967)[1], which we had also put before the court in support of the journalistic fraud cause of action.

You can verify this for yourselves from the lawsuit record, posted, *in its entirety*, on CJA's website, www.judgewatch.org, accessible *via* the sidebar panel "Suing The New York Times".[2] Such will enable you to see that the lawsuit was so well pleaded that The Times had NO legitimate defense to any of 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

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[1] Professor Barron's law review article, which endorsed "legal intervention" to secure the "marketplace of ideas" on which First Amendment jurisprudence rests, identified the same profit-driven media priorities which led you to formulate your "public defamation action" based on "institutional recklessness".

The 40th anniversary of Professor Barron's law review article is being commemorated at a January 19, 2007 conference sponsored by Hofstra University School of Law and New York University's Brennan Center for Justice. You are indicated recipients of our memo of today's date to the conference's co-director, Professor Eric Freedman, which is enclosed herewith.

[2] Our uncontested arguments with respect to your law review article and the two others – unchallenged by The Times and the judge – 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).

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 actual bias and interest".

Our already drafted appellants' brief can expedite your verification of the breathtaking record 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 in support of your concept of "institutional recklessness", as applied to the lawsuit.

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*, in recognition of the lawsuit's historic significance in advancing both media accountability and the First Amendment – including by putting into practice your own concept of "institutional recklessness". 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.

Let me know if you are interested in filing an *amicus curiae* brief or in otherwise assisting us either 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" advocated 40 years ago by

Professor Barron in "*Access to the Press – A New First Amendment Right*". 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 responses.

Enclosure

[3] These primary source materials are accessible *via* our "Suing The New York Times" webpage *via* the link entitled "OUTREACH: The Champions & Betrayers of Media Accountability, The First Amendment, & The Public Interest" and, additionally, *via* the sidepanel "Elections 2006: Informing the Voters".

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Elena Ruth Sassower, Director
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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.

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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
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
Professor Michael M. Epstein, Southwestern University School of Law
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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