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November 24, 1997

Jeffrey N. Barr, Assistant General Counsel
Administrative Office of the United States Courts
One Columbus Circle
Washington, D.C. 20005

RE: Remedies within the federal judiciary to restrain and punish on-the-bench misconduct by federal judges violative of recusal statutes and codes of judicial conduct

Dear Mr. Barr:

This letter follows up our several telephone conversations about *Sassower v. Mangano, et al.* (2nd Cir. #96-7805) -- as far back as January or February of this year. Pursuant thereto, and most particularly our lengthy conversation on November 4th, I finally duplicated and assembled the appellate papers and, on Wednesday, November 19th, mailed them to you (Certified Mail # P-543-172-747). As of Friday, November 21st, when we spoke, they had not arrived.

Presumably, these appellate papers will reach you today. "Clear the decks"! -- they are substantial. To assist you, the papers are divided into three separate packages, each with its own inventory. The three inventories are separately entitled "THE APPEAL", "APPELLATE CASE MANAGEMENT PHASE", and "POST-APPEAL PROCEEDINGS". A cumulative inventory is annexed hereto as Exhibit "A".

Because the federal judiciary has a budget of approximately $3,000,000,000 -- including to fund the Judicial Conference of the United States, the Administrative Office of the United States Courts, and the Federal Judicial Center with ample staff and state-of-the-art equipment on site -- you may not appreciate how costly and time-consuming it was for our non-profit citizens' organization to reproduce and assemble these appellate papers. We have gone to this expense and effort to enable you, as Assistant General Counsel of the Administrative Office, to earn the salary which the taxpayers of this country pay you in the belief that you will be true to the obligations required of *every* lawyer under ethical and professional codes. These include your obligations as "an officer of the legal system

and a public citizen", reflected by the Preamble to the ABA Model Rules of Professional Conduct, and specifically, Rule 8.3(b), requiring that:

> "A lawyer having knowledge that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge's fitness for office shall inform the appropriate authority".

Following your review of the transmitted documentation -- which should fully satisfy your olfactory sense that the serious allegations herein do not "smell unsupported" (*Cf.* your response last year, as recounted in our September 20, 1996 letter to you) -- we expect you to channel these materials to the appropriate persons, committees, and offices in the federal judiciary[1] so that they may take necessary steps to protect the "administration of justice", all but destroyed by a district judge and, thereafter, by Second Circuit appellate judges. *Sassower v. Mangano* establishes -- by a breath-taking paper trail -- the corruption of the judicial process by two levels of the federal judiciary, which have flouted federal disqualification statutes and the Judicial Conference's own Code of Judicial Conduct, based on the ABA Code -- as if they do not exist. The judges' dishonest and fraudulent decision/orders are a manifestation of this.

During its brief tenure, the National Commission on Judicial Discipline and Removal was too busy touting the quality and integrity of the federal judiciary to examine this kind of empirical evidence. As you know, the National Commission never even identified dishonest decisions as a form of judicial misconduct[2] and blithely ignored the case evidence we provided it: the appellate papers in *Sassower*

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[1] The 1993 Report of the National Commission on Judicial Discipline and Removal -- both Final (at pp. 126-7) and Draft (at pp. 128-129) -- noted "the current dispersion of authority regarding judicial ethics and judicial misconduct and disability among a variety of Conference committees and the lack of any group responsible for coordinating the collection and analysis of relevant data and the development of policy proposals." Without making a specific recommendation, it suggested that "the judiciary would be well served by a standing committee of the Judial Conference to monitor and periodically evaluate experience under the 1980 Act and other formal and informal mechanisms for dealing with problems of judicial misconduct and disability" and raised the possibility that the Judicial Conference's Committee to Review Circuit Council Conduct and Disability Orders be given a "broader charge" and its membership expanded. What -- if anything -- has the Judicial Conference done in this regard?

[2] This was pointed out in my November 28, 1995 testimony before the Second Circuit's Task Force on Gender, Racial, and Ethnic Fairness in the Courts -- a copy of which was sent you under a December 1, 1995 coverletter. (*See* Exhibit "A", p. 2 of Doris L. Sassower's April 28, 1997 Supplemental Affidavit. APPELLATE CASE MANAGEMENT: Doc. 5). The Second Circuit's Task Force's Draft Report, issued last June, ignored the issues presented by my testimony and that of

v. Field, et al. (2nd Cir. #91-7891). Like this case, *Sassower v. Field* documented the utter perversion of the judicial process by two levels of the federal judiciary in the Second Circuit, culminating in dishonest and fraudulent decisions. It additionally demonstrated the Supreme Court's failure to meet its supervisory responsibilities following the Second Circuit's denial of our Petition for Rehearing with Suggestion for Rehearing *En Banc*.

At present, ***Sassower v. Mangano*** is pending before the Second Circuit on a Petition for Rehearing with Suggestion for Rehearing *In Banc*, challenging the Circuit to confront the National Commission's judicially-self-serving conclusions as to the efficacy of appellate review and "peer disapproval" as "fundamental checks" of judicial misconduct. Moreover, because the Petition incorporates our §372(c) complaints against the district judge and three-judge appellate panel, it requires the Circuit to grapple with the "Achilles heel" issues dodged by the National Commission in evaluating the 1980 Act: the definition of "merits-relatedness" in the context of complaints alleging biased, bad-faith, judicial conduct motivated by illicit purposes and the relationship between disciplinary review and "normal adjudicative procedures".

Whereas the Federal Rules of Appellate Procedure do not require a Circuit to give reasons when it denies a petition for rehearing, the §372(c) statute expressly requires that a Chief Judge's dismissal of a §372(c) complaint be by "written order stating his reasons". Six years *before* the National Commission's recommendations -- thereafter endorsed by the Judicial Conference, following recommendation by its Committee to Review Circuit Council Conduct and Disability Orders -- the Commentary to Illustrative Rule 4 of the Special Committee of the Conference of Chief Judges of the United States Court of Appeals advised that such dismissal orders should provide the complainant with a "relatively expansive explanation" and called upon the Circuits to create a body of case-law precedent relative to the disposition of §372(c) complaints. This, likewise, was endorsed by the Judicial Conference following Committee approval. [For citations, *see* Exhibit "E", p. 1 to Doris L. Sassower's October 10, 1997 recusal/vacatur for fraud motion: POST APPELLATE PROCEEDINGS: Doc. 2].

Of course, these recommendations -- designed to maintain the integrity of the §372(c) process and create public confidence in the judiciary's claim that it can police its own -- mean nothing to the Second Circuit. We demonstrated this last year when we filed our §372(c) complaint against then Chief Judge Jon Newman (#96-8511) for his dishonest and fraudulent decision in *Sassower v. Field.* Without the requisite explication, Acting Chief Judge Amalya Kearse dismissed that fully-documented complaint as "merits related" and "unsupported" -- a dishonest dismissal thereafter adhered to by the Circuit, in the face of our fully-documented petition for rehearing. By coverletter dated June 7,

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my co-presenter, Doris L. Sassower [R-890-900] -- issues devoted to the inadequacy of mechanisms within the federal judiciary to address bias and misconduct by federal judges: §372(c), appellate review, recusal, and writs of mandamus.

1996, we sent you a copy of the file of that §372(c) complaint, requesting that it be presented to the Judicial Conference's Committee to Review Circuit Council Conduct and Disability Orders, to which you are staff liaison. We reiterated this request in our September 20, 1996 letter and, thereafter, in at least two phone calls. Yet, you failed and refused to present it -- as recounted in my article "*Without Merit: The Empty Promise of Judicial Discipline*" in the current issue of The Long Term View[3]-- the pertinent portion of which I read to you during our November 4th phone conversation -- and, thereafter, faxed (Exhibit "B").

Although §372(c) complaints are not "judicially reviewable on appeal or otherwise" [§372(c)(10)], our instant §372(c) complaints against the district judge and three-judge appellate panel in *Sassower v. Mangano* will be judicially reviewable in the U.S. Supreme Court. This is because they are incorporated in our Petition for Rehearing, as well as in our post-appeal recusal/vacatur for fraud motion. You may expect them to be focally presented in our cert petition to the Supreme Court in the event the Second Circuit denies rehearing and dismisses, without investigation, our fully-documented §372(c) complaints. Such cert petition will highlight the Supreme Court's supervisory function -- which is all the greater when the Circuits are subverting *both* the appellate process and disciplinary mechanism by fraudulent decisions. Moreover, since the Circuits have demonstrated their disinclination to resolve the issues of "merits-relatedness" and the interplay between appellate and disciplinary remedies by their failure to publish a body of interpretive dismissal orders, we will call upon the Supreme Court to give its "authoritative" voice so as to reinvigorate the §372(c) mechanism.

As discussed, should the Supreme Court deny our cert petition and thereby fail to address the profound judicial misconduct/corruption issues presented by *Sassower v. Mangano*, it will only reinforce that the federal judiciary's commitment to disciplining its own is a self-promoting appearance *devoid* of substantive reality. You may be certain that such fact will not be lost on the House Judiciary Committee. Indeed, the extraordinary record of *Sassower v. Mangano* will eclipse even that of *Sassower v. Field* -- heretofore the "star" case for our upcoming presentation to the House Judiciary Committee.

Assuredly -- and because of the unique posture of *Sassower v. Mangano*, SIMULTANEOUSLY embracing both disciplinary and appellate remedies -- the House Judiciary Committee will be particularly interested in a response from the costly "superstructure" of the federal judiciary's bureaucracy: the Judicial Conference, the Administrative Office, and the Federal Judicial Center. Our view, however, is that if this superstructure -- which operates in Congress as a vigorous judicial lobby

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[3] Massachusetts School of Law, Vol. 4. No. 1 (summer 1997).

-- pressing for judicial salary increases and for statutory immunities, blocking recusal remedies[4], and urging judicial control over judicial discipline -- has anything to say about the Second Circuit's disregard for disqualification statutes and its destruction of the judicial process, as demonstrated by *Sassower v. Mangano*, it should say it NOW in the context of ethically-mandated action.

Lest the Judicial Conference be inclined to "lay low" and do nothing -- much as it did nothing in response to our document-supported testimony before its Long Range Planning Committee on December 9, 1994 -- a copy of which we transmitted to you under our July 20, 1995 letter -- we would remind its judges that they are not only bound by Rule 8.3(b) of the ABA Model Code of Professional Conduct, but by Canon 3B(3) of its *own* Code of Judicial Conduct[5]:

> "A judge should initiate appropriate action when the judge becomes aware of reliable evidence indicating the likelihood of unprofessional conduct by a judge or lawyer".

These important reporting obligations should have been -- but were not -- highlighted or even remarked upon by the National Commission.

The record in *Sassower v. Mangano* is replete with clear, uncontroverted, and incontrovertible evidence establishing outright fraud by federal judges, as well as by the mostly lawyer defendants, including state judges and the New York State Attorney General sued for public corruption. Should there be the slightest doubt as to the Judicial Conference's duty under the circumstances to "initiate appropriate action", including referral of the involved federal judges for investigation either by the House Judiciary Committee or the Justice Department's Public Integrity Section of its Criminal Division, we request that it turn to its Committee on Codes of Conduct for an advisory opinion. Fortunately, you are also liaison to that Committee.

What is here at issue is *not* the judicial independence of the Second Circuit judiciary -- but willful abuse of that independence for the ulterior purposes particularized in the Petition for Rehearing with Suggestion for Rehearing *In Banc* and in the §372(c) complaints. If -- notwithstanding the statutory grant of authority to the Judicial Conference under 28 U.S.C. §331, empowering it to "prescribe and modify rules for the exercise of the authority provided in section 372(c)", with "all judicial officers and employees of the United States" required to "promptly carry into effect all [its] orders" -- the

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[4] The enclosed item from the May 16, 1997 *New York Law Journal* (Exhibit "C") is an illustrative example of the kinds of issues about which the Judicial Conference testifies before Congress. We would appreciate a copy of the testimony referred to therein -- which would appear to be quite relevant to the issues presented by our §372(c) complaints, both present and past.

[5] *See also*, Canon 3D the ABA Code of Judicial Conduct.

Conference believes itself "powerless" to take action based on THIS RECORD, it should, pursuant to that statute, "submit to Congress...its recommendations for [enabling] legislation". If it believes that the only recourse within the federal judiciary is by appeal, e.g. appeal to the U.S. Supreme Court, we ask for a written statement to that effect -- including its own endorsement of Supreme Court review so that the profound issues relating to judicial independence and accountability may be addressed by the judicial branch *before* they are addressed by Congress. In the event there is another route by which the Judicial Conference, headed by the Chief Justice of the Supreme Court, can alert the Supreme Court to the imperative to accept review of this important "case in controversy", we ask that it do so. You indicated that there is no equivalent of the certification provision of 28 U.S.C. §1254(2), applicable to the Circuits. We, therefore, request that, pursuant to 28 U.S.C. §331, the Judicial Conference make a legislative recommendation to Congress for such statutory authority when confronted with a "case in controversy" of this nature.

Sassower v. Mangano demonstrates that if Congress' purpose of ensuring the fairness and impartiality of federal judges is to be met, legislative changes must be made in the recusal statutes, 28 U.S.C. §§144 and 455(a), as well as in the statute creating the federal judicial disciplinary mechanism, 28 U.S.C. §372(c). Indeed, one of the National Commission's important recommendations -- although not highlighted in bold type -- was in a paragraph that read as follows:

> "In light of the indeterminacy of the Act's core substantive conduct standard -- 'conduct prejudicial to the effective and expeditious administration of the business of the courts ' -- it was to be expected that chief judges and circuit councils would seek more concrete guidance in the Code of Conduct. They have done so **frequently** in dispositions under the Act [emphasis added][6]. Yet, the Code was not intended as a source of disciplinary rules, and not all of its provisions are appropriately regarded as enforceable under the Act. The same may be true of other statutes and rules establishing ethical norms for federal judges, particularly if they have their own enforcement mechanisms. The Commission believes the subject deserves continuing

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[6] Is this yet another instance of the dishonesty of the National Commission's Report? This claimed frequency with which the federal judiciary relies upon the Code of Judicial Conduct, appearing in *both* the Commission's Final and Draft Reports, diametrically *contradicts* your own underlying consultants' study, "*Judicial Discipline: Administration of the 1980 Act*". You found that: "**Only 13 (3%)** of the chief judges' orders we sampled have cited the Code of Judicial Conduct. By way of comparison, 34 (7.5%) of the complaints we sampled cited the code...**None** of the chief judges we spoke to had **ever** had occasion to consult the Advisory Committee..." (Research Papers, Vol. I, p. 543) and "Of the 127 judicial council orders we sampled disposing of petitions for review, **only a handful** cited any authority at all. Eight cited local rules; two cited prior orders under §372(c); **one** cited the Code of Judicial Conduct; and **none** cited advisory opinions of the ethics committee." (Research Papers, Vol. I, p. 549) [emphases added].

> study and clarification, much of which can be expected to emerge on a case by case basis if dispositions under the Act are circulated and selectively published. The Commission can also see room for fruitful study of various committees of the Judicial Conference charged with responsibility for ethics and discipline issues, and perhaps by appropriate congressional oversight committees." Final Report of the National Commission on Judicial Discipline and Removal, pp. 98-99.

Obviously, included among the "other statutes...establishing ethical norms" with "their own enforcement mechanisms" are 28 U.S.C.§§144 and 455(a), whose enforcement is by way of motion practice and appeal or by a petition for mandamus. *Sassower v. Mangano* resoundingly proves the worthlessness of these statutes and their illusory "enforcing mechanisms"[7] -- apart from enforcement under §372(c) which remains to be seen.

Considering the fact that you have told me several times -- in response to my repeated telephone inquiries -- that you would be quite surprised if there have been many published §372(c) dismissal orders from the Circuits -- the Judicial Conference could not possibly have undertaken the kind of "case by case" "fruitful study" envisioned by the National Commission. Please confirm if it has done *any* "continuing study and clarification" in the four years since the National Commission's 1993 Report-- and how many published dismissal orders exist to date beyond the 15 referred to in your consultants' study, "*Judicial Discipline: Administration of the 1980 Act*", underlying that Report (Research Papers, Vol. I, p. 544). Of course, we would also like to know whether you have located any response to former Chief Judge Patricia Wald's September 25, 1987 memo, as quoted in my article "*Without Merit: The Empty Promise of Judicial Discipline*" (Exhibit "B") -- and about which we inquired as least as far back as our October 1, 1995 letter to you[8].

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[7] The National Commission's Report conceals the conclusions of Charles Gardiner Geyh's underlying consultant's study, "*Judicial Discipline Other than the 1980 Act*", which states: "While the text of sections 144 and 455 appear to create a relaxed standard for disqualification that would be relatively easy to satisfy, judicial construction has limited the statutes' application, so that recusal is rare, and reversal of a district court refusal to recuse, is rarer still." Research Papers, Vol. I, pp. 771. Doris L. Sassower's testimony before the Second Circuit Task Force on Gender, Racial, and Ethnic Bias in the Courts [R-896-898] quoted Geyh's study and referred to treatises going back more than 50 years as to how the recusal statutes have been transformed into worthlessness by reason of the judicial interpretation of them. *See also*, "*Statutory Disqualification of Federal Judges*", David C. Hjelmfelt, Kansas Law Review, Vol. 30, pp. 255-263 (1982).

[8] According to footnote 117 of the law review article "*Regulating Judicial Misconduct and Divining 'Good Behavior' for Federal Judges*", [Michigan Law Review, Vol 87: 765-96 (1989)] authored by Judge Wald's successor as Chief Judge of the Court of Appeals for the District of Columbia Circuit, Harry T. Edwards, a copy of her memo is "on file with the Michigan Law

Pursuant to the Judicial Conference's power under 28 U.S.C. §331 to "prescribe and modify rules for the exercise of the authority provided in section §372(c) of this title", we request the Conference modify Illustrative Rule 4(c) since it is not in conformity with the statute -- and, likewise, modify the Second Circuit's essentially identical Rule 4(c) -- because they mandate dismissal of "merits-related" complaints, whereas such dismissal is discretionary under the §372(c) statute. To enable the Judicial Conference to better understand the consequences of the word switch from "may dismiss", which is how it appears in the statute, to "will be dismissed", which is how it is phrased in the Illustrative Rules followed by the Circuits, we ask that you provide it with our May 30, 1996 Petition for Rehearing of Acting Chief Judge Kearse's dismissal of our §372(c) complaint against then Chief Judge Newman, where we showed how such switch has enabled the federal judiciary to get out of issuing reasoned, non-conclusory dismissal orders.

Needless to say, we are excited by the Fifth Circuit's notification to you last week that it will be changing the "will" to "may" -- especially since its former Chief Judge, Charles Clark, played a pivotal role in formulating the Illustrative Rules. Please ascertain for us the background to this modification. Is it the result of some recent §372(c) complaint or a series of complaints -- and are they the subject of published orders? (Or perhaps the Fifth Circuit judges are responding to my article, e.g., p. 94 "...the statute does not actually require dismissal of 'merits-related' complaints, but only that such complaints 'may' be dismissed..." (Exhibit "B")).

Last but not least, we request that the Conference examine the Second Circuit's application of its Rule 16 (which is essentially identical to Illustrative Rule 16). Not content to hermetically seal §372(c) judicial misconduct complaints filed as such, the Circuit physically removed such complaints and related materials annexed as exhibits to our recusal/vacatur for fraud motion in *Sassower v. Mangano*. (*See* p. 7 of our November 19, 1997 letter to Deputy Clerk Madsen. POST-APPEAL PROCEEDINGS: Doc. 6).

You may be assured of our complete cooperation in advancing the true "administration of justice".

Yours for a quality judiciary,

Elena Ruth Sassower

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

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memos from each of the Circuits responding to a request for their experience under the 1980 Act from 1981 through 1987. We request copies, as well as any cumulative report of the Judicial Conference based thereon.

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