CENTER for JUDICIAL ACCOUNTABILITY, INC.

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July 24, 1997

Floyd Abrams, Esq.
Cahill, Gordon, & Reindel
80 Pine Street
New York, New York 10005

RE: Vindicating the Public Interest in the First Amendment

Dear Mr. Abrams:

We write you because you are a member of the New York Law Journal's Board of Editors -- and among this nation's foremost experts on the First Amendment, championing the media's role in preserving the rule of law and democracy. On behalf of the public interest, we seek your leadership.

Many years ago, The New York Times published your Letter to the Editor in which you quoted the words of Jeremy Bentham:

> "Without publicity, all other checks are insufficient, in comparison of publicity other checks are of small account."

The Center for Judicial Accountability, Inc. (CJA) is a non-partisan, non-profit citizens organization working to depoliticize our judiciary. Over the past eight years, we have *documented*, time and again, that essential checks designed to protect the public from unfit judges -- for whom the rule of law means nothing -- are not only insufficient, but have been corrupted by political influence.

Because the media has failed to fulfill its role to inform the public about the corruption of these checks, CJA has shouldered the enormous expense of running paid ads. On October 26, 1994, we ran a $16,770 ad on the Op-Ed page of The New York Times, *"Where Do You Go When Judges Break the Law?"*. We re-ran that ad in the New York Law Journal on November 1, 1994 at an additional cost to us of $2,282.57 (Exhibit "A-1"). On November 20, 1996, the Law Journal printed our ad, *"A Call for Concerted Action"*, which cost us $1,648.36 (Exhibit "A-2").

Last week, we paid the Law Journal another $2,356.20 for an ad that was scheduled to run on July 17th (Exhibit "B"). Inspired by the Perspective Column, *"Liars Go Free in the Courtroom"*, by Matthew Lifflander, also a member of the Law Journal's Board of Editors, our ad was entitled *"Restraining 'Liars in the Courtroom' and on the Public Payroll"*. It described how the New York State Attorney General engages in litigation misconduct, including fraud, in defending state officials

and agencies sued for corruption and abuse -- and the complicity of state and federal judges. Over and over again, our ad emphasized that this was "readily verifiable from litigation files" -- two Article 78 proceedings and a §1983 federal action, whose index and docket numbers we supplied -- and, further, that Attorney General Vacco had been notified, in writing, of his staff's litigation misconduct and fraud, but had failed and refused to take any corrective steps.

Like our November 20, 1996 ad (Exhibit "A-2"), which was originally submitted to Law Journal Executive Editor Ruth Hochberger as a proposed Letter to the Editor, the July 17th ad (Exhibit "B") had been submitted to her nearly two months earlier for publication as either a Letter to the Editor or a Perspective Column. Our May 22nd transmittal letter *expressly* stated that the information presented by our submission was *all* documented and that we would be pleased to provide to her the files of the two Article 78 proceedings and the §1983 federal action. We described these cases as "shocking beyond words". We also transmitted a copy of our May 14th testimony before the City Bar, described in our submission, including the May 5th letter[1] it incorporated, addressed to those in leadership positions, in and out of government, among them, the Attorney General (Exhibits "C" and "D").

The high quality and meticulously-documented nature of CJA's work is well-known to Ms. Hochberger, who has received substantial materials from us over the past many years. However, in the weeks following our submission, Ms. Hochberger never asked to see the proffered file proof, ignored our *repeated* telephone inquiries as to whether our submission would be published, and, on June 17th, had the Law Journal publish a Letter to the Editor from an Assistant Attorney General, whose opening sentence read: "Attorney General Dennis Vacco's worst enemy would not suggest that he tolerates unprofessional or irresponsible conduct by his assistants after the fact." This, notwithstanding the subject of our unpublished submission was the Attorney General's knowledge of, and complicity in, his staff's litigation misconduct, including fraud, before, during, and after the fact.

Yet, even the June 17th published Letter concluded with the recognition that the practices in the Attorney General's office were "a question of fact, subject to verification" . This we pointed out in a June 17th faxed letter to Ms. Hochberger, emphasizing that the specific case files identified in our submission constituted verifying proof of the Attorney General's extraordinary litigation misconduct[2].

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[1] Annexed to our May 5th letter (Exhibit "D") is a copy of our Letter to the Editor, which the Law Journal published on August 14, 1995 under the title "*Commission Abandons Investigative Mandate*".

[2] During this period, Ms. Hochberger had reinforcing evidence of the fully-documented nature of CJA's work. We sent her a copy of our June 2, 1997 letter to Governor Pataki setting forth facts showing that his May appointment of Westchester Supreme Court Justice Nicholas Colabella to the Appellate Division, First Department was improper and not the product of any "thorough inquiry", as required by his Executive Orders #10 and #11. Moreover,

Ms. Hochberger did not respond until after we wrote to Mr. Lifflander -- at which point she wrote us saying that the Law Journal would not be able to publish our submission as either a letter or perspective column. She ignored our request for reasons.

We then proceeded with arrangements to run our submission as a paid ad. That these arrangements were extremely time-consuming and costly for us had been previously made known to Ms. Hochberger and Mr. Lifflander in our communications with them.

At 10 a.m. on Monday, July 14th, we faxed an initial lay-out of our ad to the Law Journal. Thereafter, I received a call from our Account Executive, Peter Hano, from whom I understood that our ad was approved. On that basis, we spent additional time and money to finalize the lay-out. Meanwhile, Mr. Hano took our credit card information and put through the charges. At 9:00 a.m. the next morning, July 15th, I telephoned Mr. Hano to let him know that our finalized copy would be hand-delivered to the Law Journal by noon and to inquire whether we should fax it to him since we had made minor changes in the text. Mr. Hano told me it was not necessary. I faxed it to him anyway -- just to ensure there would be no unexpected delays.

At 2:30 p.m., several hours after we had hand-delivered the finalized copy, Mr. Hano called to tell us that our ad had been "declined". He stated that he did not know the reason and connected us to Kevin Vermeulen, the Law Journal's Advertising Manager, who also stated that he did not know why our ad had been "declined". I immediately requested reasons, describing for Mr. Vermeulen, at length, the enormous amount of time, effort, and money we had invested in the good-faith belief that such an ad -- true and correct in every respect on an issue of transcending public importance -- would be published. I expressed our complete willingness to resolve any problem in the ad and stated that if the Law Journal wished to see the substantiating documentation, which we had repeatedly offered, I would immediately bring it down. Mr. Vermeulen promised to get back to us -- but never did. At 4:50 p.m., I left a recorded message on Mr. Vermeulen's machine reiterating that the ad was completely accurate and that I was "on call" to deliver all relevant documentation so that the ad could appear, as scheduled, on July 17th.

By 12:45 p.m. the next day, July 16th, after several unreturned phone messages for Mr. Vermeulen, reiterating that we were ready to come down with the documentation, if that was the issue, I telephoned Mr. Finkelstein. I managed to speak with him on my "second try". It was by then approximately 2:20 p.m.. Mr. Finkelstein did not know the particulars of our ad, but stated that he had been told by counsel that it contained "no less than 15 libels". I immediately protested to

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because those Executive Orders give the public the right to inspect the screening committee reports of the Governor's appointees, we asserted the public's rights to the reports relating to Justice Colabella, as well as the Governor's approximately 100 other judicial appointees. Our coverletter to Ms. Hochberger expressed the view that without media pressure the Governor would not respect the public's rights and implored the Law Journal "to follow through". The Law Journal has not -- and the Governor has completely ignored our profoundly serious letter.

Mr. Finkelstein that our ad was 100% accurate and that we had offered substantiating documentation to back it up. I asked if his counsel was James Goodale. Mr. Finkelstein stated that it was and said that he would have no objection to my speaking with him directly. He told me to call Debevoise, Plimpton.

I did so immediately. Mr. Goodale did not take my call -- although I heard his voice when he picked up the receiver as I was leaving my name on his recorded message system about the ad that had been scheduled to run in the next day's Law Journal. Three quarters of an hour later, having received no return call, I again telephoned Mr. Goodale. This time, he took my call. Mr. Goodale was not particularly interested in specifically identifying the "15 libels". Only after coaxing did he state that the alleged libels consisted of the allegations of "crimes" appearing in our ad -- assumedly, corruption, fraud, and perjury.

Mr. Goodale's brief conversation with us was as if he were completely unfamiliar with the purpose behind the protections afforded the press under the First Amendment: to ensure that debate on public issues is "uninhibited, robust, and wide-open". This former General Counsel to The New York Times behaved as if he had never read the landmark U.S. Supreme Court case of *The New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), concerning a paid advertisement and a libel action brought by a public official, in which the Court delineated the pertinent libel standards: differentiating public officials from private persons, differentiating advertisements presenting issues of public concern, and articulating a heightened standard for libel in those circumstances: it is not enough that the published matter is false, a public official libel plaintiff is required to show that the defendant has acted with "'actual malice' -- that is, with knowledge that it was false or with reckless disregard of whether it was false or not".

None of these standards made a whit of difference to Mr. Goodale. He did not care that the corruption, fraud, and perjury described by our ad were committed by public officials, acting in their public capacity, that the issues presented by the ad were -- and expressly stated to be -- of "transcending public importance", and that the allegations of official misconduct were identified in the ad itself as being "readily verifiable" from specific case files. The fact that our ad chronicled our exhaustive efforts to bring such file evidence to the attention of those in leadership, particularly the file of our Article 78 proceeding against the Commission on Judicial Conduct -- reflected our good-faith belief that these files demonstrated precisely what we said they did. This was further reinforced by the failure and refusal of anyone to say otherwise, as our ad also chronicled. Indeed, the only "actual malice" and "reckless disregard" was by Mr. Goodale, who flatly refused to review the substantiating documentary proof we offered him so that the absolute truth of our ad could be demonstrated to him -- and our ad published on schedule.

We cannot recall precisely when Mr. Goodale hung up on us, but it was shortly after our question to him as to why our prior ads, "*Where Do You Go When Judges Break the Law?*" and "*A Call for Concerted Action*" (Exhibits "A-1" and "A-2"), which each described the same or similar corruption and fraud, had been published by the Law Journal -- with no denials or lawsuits by the accused public

officials -- but not "*Restraining 'Liars in the Courtroom' and on the Public Payroll*" (Exhibit "B").

You are, no doubt, a very busy man. But, the public interest here is wholly unprotected -- except by us -- and we need your expertise and leadership. Our ad is not about soap, but about what is happening to the rule of law, the paramount check. And what is left of the First Amendment when the Law Journal refuses, without reasons, to publish as a Perspective Column specific and obviously verifiable information about the destruction of essential legal safeguards by public officials and then blocks its presentment as a paid ad by refusing to verify its truth? You're the First Amendment champion. Your name heads the list of the Law Journal's Board of Editors. We find it hard to imagine that you would agree with Mr. Goodale's cavalier treatment of this matter, depriving the public and the legal profession of the important and completely truthful information presented by our ad.

This is not a situation where what the public doesn't know doesn't hurt it. This is about governmental corruption and misconduct so profound and far-reaching that the State Attorney General and judges in both state and federal court are obliterating the legal remedies designed to protect the public. How is the public to protect itself if the press won't even allow a paid ad that presents that information? As emphasized by our previous ad "*A Call for Concerted Action*" and by "*Restraining 'Liars in the Courtroom' and on the Public Payroll*", those in leadership to whom we have turned to protect the public have kept silent. The public, therefore, cannot count on its so-called leaders, but must rely on itself. But how can it do that when it is kept in a state of ignorance? Isn't the public's right to know what the First Amendment is supposed to be all about?

We will gladly provide you with the case file proof. Because the Attorney General's misconduct is so blatant -- and was the subject of such vigorous protest by us, all ignored by the court -- the files are neither difficult nor particularly time-consuming to review. And the issues are major: the constitutionality of New York's attorney disciplinary law, *as written and as applied*, and the constitutionality, *as written and applied*, of the self-promulgated rule of the New York State Commission on Judicial Conduct, by which it converted its statutory duty to investigate facially-meritorious complaints into a discretionary option unbounded by any standard (*Cf.* 22 NYCRR §7000.3 and Judiciary Law §44.1).

Because time is of the essence, we take the liberty of enclosing copies of our letters to the Attorney General relative to each of these three cases, notifying him of the misconduct of his office, rising to a level of fraud (Exhibits "E" and "F")[3]. We will hold off providing you with copies of the

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[3] Our September 19, 1995 letter, addressed to Attorney General Vacco (Exhibit "E"), was hand-delivered, as confirmed by the stamp receipt. It transmitted copies of two letters, one to the New York State Ethics Commission and one to the Chairman of the Commission on Judicial Conduct -- and they are enclosed. Our January 14, 1997 letter, addressed to Attorney General Vacco (Exhibit "F"), was faxed and sent certified mail, as confirmed by the fax and return mail receipts. Of its enclosures, we include a September 29, 1994 letter, sent to Mr. Vacco, who

voluminous correspondence with leaders in and out of government, as referred to in our ad, which are all immediately available, upon request.

Likewise, we will make available to you our written correspondence with Ms. Hochberger and Mr. Lifflander so that you can verify, for yourself, our good-faith efforts to get the Law Journal to recognize its duty to present vital and fully-documented information to the legal community -- without our having to pay for it.

By copy of this letter to Mr. Goodale, we ask that he furnish you, us, and Mr. Finkelstein, a copy of our ad, circling the alleged "libels" which formed the basis of his advice to Mr. Finkelstein, who is not a lawyer, that the Law Journal not publish our ad. That way, we can all address this matter more effectively.

Before formally presenting this matter to the full Board of Editors of the Law Journal, we respectfully solicit your opinion, assistance, and guidance on behalf of the public interest.

Yours for a quality judiciary,

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

Enclosures

cc: James Finkelstein, Publisher, New York Law Journal
Ruth Hochberger, Editor-in-Chief, New York Law Journal
Kevin Vermeulen, Advertising Manager, New York Law Journal
Peter Hano, Account Executive, New York Law Journal
James Goodale, Esq.

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was then a candidate for the office of Attorney General. The confirmatory certified mail return receipt is also enclosed.