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Elena Ruth Sassower, Director

BY E-MAIL & FAX

January 24, 2013

Ellen P. Chapnick, Dean for Social Justice Initiatives
Columbia Law School
New York, New York

RE: FUNDAMENTAL STANDARDS OF SCHOLARSHIP, ACADEMIC & ATTORNEY RESPONSIBILITY & DUE PROCESS: Your Response to CJA's November 5, 2012 Letter

Dear Dean Chapnick:

As you refused to put in writing what you stated to me in our phone conversation on Friday, January 18, 2013, despite my repeated requests that you do so, this is to memorialize what you told me.

By way of context, you telephoned me on January 18, 2013 in response to my phone call to your assistant, Brian Juergens, a short time earlier, in which I stated to him that I had just received your voice mail message from the previous day – and wished clarification about it. I identified this to include:

- the whereabouts of the case file, *Center for Judicial Accountability, Inc., et al. v. Cuomo, et al.*, that I had left with you on November 5, 2012 in substantiation of my November 5, 2012 letter;

- the basis for your assertion that you, Professor Tierney, and Professor Briffault had all decided that Columbia Law School could not "assist" with respect to my November 5, 2012 letter;

- the basis upon which, according to your message. you had contacted "Central Administration" about me – inferentially, to bar me from visiting your offices;

- disclosure of conflicts of interest impacting upon your judgment – and that of Professors Tierney and Briffault – as to which I furnished an illustrative example: your personal and

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* **Center for Judicial Accountability, Inc.** (CJA) is a national, non-partisan, non-profit citizens' organization, working to ensure that the processes of judicial selection and discipline are effective and meaningful.

professional relationships with Caitlin Halligan, who had served in the New York State Attorney General's Office under then Attorney General Eliot Spitzer – and who, like yourself, is a lecturer-in-law at Columbia Law School. This, in addition to your personal and professional relationships with the succession of New York State Attorneys General whose official misconduct and that of their executive level and litigation staff is evidentiarily established by the record of *CJA v. Cuomo – to wit*, G. Oliver Koppell, Denis Vacco, Eliot Spitzer, Andrew Cuomo, and Eric Schneiderman.

Mr. Juergens confirmed that he had been with you when you had called me the previous day, as your voice mail had indicated. He stated that you were not then in the office and that he would convey my instant message to you.

However, when you called me back a short time later, you made no disclosure of any conflicts of interest, notwithstanding I stated to you that only conflicts of interest could explain your conduct: willfully disregarding my serious and substantial November 5, 2012 letter for 2-1/2 months, ignoring my follow-up November 30, 2012 and December 17, 2012 voice mail messages, my November 26, 2012 and December 17, 2012 e-mails, as well as my two further January 9, 2013 phone messages, the first on your voice mail, the second left with Mr. Juergens – culminating, a week later, in your shocking January 17, 2013 voice mail message to me, wherein you stated:

> *"Hi. It's Ellen Chapnick and Brian Juergens returning your call to Columbia Law School's Social Justice Initiatives office about your request for assistance by SJI, by the National State Attorneys General Program, and by Richard Briffault. Jim Tierney, Richard Briffault and I have all discussed your request and decided that Columbia Law School cannot assist you with your project. We think that further communications between you and us would not be availing and encourage you to take this as our response. We have notified the Central Administration about you and if you'd like to speak on the phone I would be happy to receive a phone call from you, but please don't visit any of our offices. Thank you. Bye."*[1]

Your elaboration of this voice mail, in your January 18, 2013 call-back to me, was as follows:

You baldly claimed that the matters presented by my November 5, 2012 letter were "not appropriate" for Columbia Law Students and not within the scope of work being done by Professors Tierney and Briffault – which you would not explain in any way, despite my repeated requests that you do so.

You refused to answer my questions as to whether you had ever examined the *CJA v. Cuomo* case file I had furnished in substantiation of the letter; refused to answer whether Professors Tierney and

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[1] The recording of your January 17, 2013 voice mail message is posted on our website, www.judgewatch.org – on a special webpage devoted to "Building Scholarship" on *CJA v. Cuomo*, accessible *via* the top panel "Latest News". My November 5, 2012 letter and follow-up November 26, 2012 and December 17, 2012 e-mails are also posted there.

Briffault had examined it, and stated to me, in response to my question as to the whereabouts of the file, that it had been discarded as part of the "winter break cleaning". You offered no explanation as to why you had not returned to me the voluminous file, which was plainly expensive and time-consuming to reproduce and assemble, so that I might furnish it to other scholars for their scholarship. Had you examined it – which it appeared you had not – you would have known that I had included original litigation papers from the Attorney General's office.

As for your explanation for contacting "Central Administration" about me, you stated it was because you were aware that I had a "pattern of disruptive conduct" and wanted the necessary notification in place so it could remove me in the event I came to your offices. You stated that your knowledge of this "pattern of disruptive conduct" was from "articles" you had read about me – which you refused to identify. As to this denial of due process, compounding your failure to have phoned me to ask whether I was even thinking of coming to your offices or to express concern that I might be "disruptive", you were completely unapologetic. Nor did you take the opportunity of our phone conversation to belatedly inquire about any "disruptive conduct" representing the "pattern" from which you needed to be protected. Suffice to say, you did not dispute my assertions that there is not the slightest basis in fact and law for such "disruptive conduct" as is purported in whatever unspecified articles you read and that the factual and legal baselessness of same would have been obvious to you from CJA's website, on which, parenthetically, all known "articles" are posted.

You also refused my request for the phone numbers of "Central Administration" and the Dean of the Law School so that I might follow-up with them. You stated to me that I could find their numbers for myself.

Should you dispute the accuracy of the foregoing recitation, please advise, without delay, setting forth your version – and, in any event, furnish the disclosure you failed to make as to the myriad of personal and professional relationships and other conflicts of interests germane to my November 5, 2012 letter, impeding your ability to impartially discharge your professional responsibilities, as both an academic and attorney, heading Columbia Law School's "Social Justice Initiatives" that purports to be "non-ideological" in its commitment to *pro bono*, public interest work – "a cornerstone of every attorney's professional responsibilities"[2] – and which places students in "Externships on the New York Attorney General's Role in Law Enforcement and Social Justice".[3] Among the necessary disclosure: your relationships with the present and former New York State Attorneys General and with the other public officers and leaders in all three branches of New York State government, as well as with bar associations, "good government" organizations, attorneys, academics, and press, culpable and complicit in the constitutional and statutory violations and fraud, chronicled by the *CJA v. Cuomo* verified complaint and its incorporated exhibits.

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[2] http://web.law.columbia.edu/social-justice/students/pro-bono

[3] . In fact, the purported "law enforcement" does not include public integrity or constitutional governance. *See* sidebar panel "Externships" (Spring 2013), accessible *via* the Social Justice Initiatives' website: http://web.law.columbia.edu/social-justice.

As you purported to speak – and act – not only for yourself, but for Professors Tierney and Briffault, I am simultaneously e-mailing this letter to them so that they can make comparable disclosures of relationships and conflicts of interests, in addition to identifying whether they authorized you to make such representations as you made on their behalf and to take the actions you did. In that connection, I specifically ask them to state whether they reviewed the *CJA v. Cuomo* case file I delivered to your office on November 5, 2012 in substantiation of the letter– and which I expressly identified as having been furnished to you when I personally delivered the November 5, 2012 letter to Professor Briffault, *in hand*, and to Professor Tierney, *via* Frances Laviscount. Certainly, too, if they reviewed the *CJA v. Cuomo* file – whether the hard copy or as posted on our website – they are in a position to refute my assertions that it establishes:

- the unconstitutionality and unlawfulness of Chapter 567 of the Laws of 2010, *as written and as applied*, pertaining to the Special Commission on Judicial Compensation and its August 29, 2011 Report recommending judicial pay raises;

- Attorney General Schneiderman's obligation, pursuant to Executive Law §63.1, to himself have brought the lawsuit based on CJA's October 27, 2011 Opposition Report to the Commission on Judicial Compensation's August 29, 2011 Report;

- Attorney General Schneiderman's obligation, pursuant to Executive Law §63.1, to be representing plaintiffs in the lawsuit, not his co-defendants, for whom he is corrupting the judicial process by litigation fraud because he has no legitimate defense.

As stated by my November 5, 2012 letter:

> "*CJA v. Cuomo* chronicles conduct by New York Attorney General Schneiderman and prior New York Attorneys General that is <u>diametrically opposite</u> from what [Professor Tierney is] teaching about the state attorneys general as champions of the rule of law, constitution, and public interest" (at p. 2, underlining in original)

Do Professors Tierney and Briffault deny this? And can they – or you, occupying a leadership position at the National State Attorneys General Program with Professor Tierney – explain why:

> "[the National State Attorneys General] website, which identifies 'policy areas' of the state attorneys general[fn2], does not include government integrity or constitutional governance among them, though these are core functions of the state attorneys general, deserving of research and scholarship by the National State Attorneys General Program." (November 5, 2012 letter, at p. 4)

"fn2 According to your website, these are 'underdeveloped, emerging areas of jurisdiction for Attorneys General'."

Is it because research and scholarship as to these core functions of the state attorneys general would expose the false and misleading pedagogy of the National State Attorneys General Program – so resoundingly demonstrated by *CJA v. Cuomo* with respect to New York State Attorneys General?

Does Professor Tierney intend to continue to extol state attorneys general as protectors of the rule of law, constitution, and public interest and to continue to purport that ethical codes guide their conduct, as if contrary evidence, such as *CJA v. Cuomo*, does not exist? How about you? And Professor Briffault? Is this how they – and you – conduct your research and scholarship at Columbia Law School: cherry-picking evidence to advance fixed biases born of undisclosed personal and professional relationships and other interests and disregarding and discarding refuting evidence?

Before closing this letter, three additional comments are in order.

The first relates to the student paper "*Qui Tam Provisions and the Public Interest: An Empirical Analysis*" by Christina Orsini Broderick, 107 Columbia Law Review 949 (2007), posted on the National State Attorneys General Program website. Quite apart from the pervasive assumptions about the integrity of attorneys general and the courts, substituting for any review of cases files of *qui tam* actions or contact with, and interviews of, any citizen plaintiffs in *qui tam* actions, the law review article states, under a heading "State Governments Need Improved Data Collection Before and After Enacting *Qui Tam* Statutes":

> 'Prior to enacting a *qui tam* provision, states need to undertake factfinding measures to assess their specific needs in combating fraud. Pertinent considerations include: (1) the type or types of fraud that are most prevalent in the state; (2) the resources and manpower available to the Attorney General to aid him in discovering fraud; (3) the degree to which politics influences the Attorney General's ability to pursue fraud; and (4) the number of claims of fraud initiated by the Attorney General.[fn] By examining these factors, a state can customize its *qui tam* provision to meet its exact needs. For example, if a state finds that its Attorney General is ineffective at combating fraud, or that even with plenty of resources he chooses not to do so, the state may want to adopt a broad *qui tam* provision that does not restrict the types of fraud to which it applies. If, on the other hand, it finds that the Attorney General is proficient in combating all types of fraud except medical assistance fraud, as appears to be the case with the federal government, the state may want to restrict the use of its *qui tam* provision to this type of fraud alone. Whichever is the case, the key point is that each state needs to determine what particular circumstances it faces before enacting a *qui tam* provision." (at p. 999).

Surely it would have been obvious to Professor Tierney – who presumably advised Ms. Broderick in developing her paper – that *CJA v. Cuomo,* with its dispositive showing of how Attorney General

Schneiderman covers-up and abets the most flagrant, fully-documented fraud by New York's highest constitutional officers, is precisely the kind of evidence needed for New York State to develop a powerful *qui tam* statute to protect the People from the Attorney General's derelictions and misfeasance – whose cost to New York taxpayers, this year alone, is $27.7 million dollars. Clearly, were it not for his conflicts of interest, Professor Tierney would have recognized this as a worthwhile project for Columbia Law students seeking *pro bono* research projects within the purview of the National State Attorneys General Program[4] – and all the more so as it dovetails with skills they could acquire through the Legislative Drafting Research Fund.

My second comment relates to the Legislative Drafting Research Fund, whose website,[5] unlike those of the Social Justice Initiatives and National State Attorneys General Program – consists only of a homepage containing the most minimal information. It does identify that the Legislative Drafting Research Fund was founded in 1911, "may be regarded as the oldest 'clinical' establishment in the Law School", and "addresses legislative problems of public importance, undertaken chiefly at the request of legislative committees, executive agencies, and private law-improvement organizations." (underlining added). However, there is nothing about who Joseph P. Chamberlain was and his connection to legislation, in whose honor Professor Briffault is the Joseph P. Chamberlain Professor of Legislation, in addition to being Director of the Legislative Drafting Research Fund. I had to scour the internet to locate a June 1956 law review article, "*A University Service to Legislation: Columbia's Legislative Drafting Research Fund*" (Louisiana Law Review, Vol 16, No. 4)[6], by the Fund's then director, Professor John M. Kernochan, who had succeeded Professor Chamberlain, who established the Fund and was its Director from 1918-1951 . Among the courses then being taught at Columbia Law School was:

> "Seminar in state constitutional law. 3 pts. Winter. Professor Kernochan.
> Current problems of practical interest and importance in the field of state constitutional law. The seminar will consider such subjects as: the nature of state constitutions; bills of rights in state constitutions; powers of taxation; division of powers between states and the nation and between states and localities. Emphasis will be placed on the litigation of state constitutional questions and on the drafting of constitutional provisions and statutory implementation." (fn. 14, underlining added).

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[4] New York's *qui tam* statute, enacted in 2007, is featured by Attorney General Schneiderman's website, www.ag.ny.gov, as part of his "Criminal Justice" -- "Public Integrity Bureau". It excludes actions "against…the state…or any officer or employee thereof acting in his or her official capacity." (§§190(1) & (2a)).

[5] http://web.law.columbia.edu/legislative-drafting

[6] It is posted on our webpage "Building Scholarship", beneath this letter, accessible *via* the top panel "Latest News", as is my other correspondence with you relating to *CJA v. Cuomo*, hereinafter recited.

As *CJA v. Cuomo* is a "litigation of state constitutional questions", I can only conclude that Professor Briffault is not teaching such course emphasizing "litigation of state constitutional questions". But does he also not do scholarship on that subject? Indeed, it would appear he does not, as he expressed no interest in the constitutional questions that *CJA v. Cuomo* presents when, on July 3, 2012, I telephoned him about the case – or, on July 25, 2012, when I copied him on an e-mail that linked to a July 9, 2012 letter I had written recounting the proposal for scholarship I had made to SUNY-New Paltz Political Science Professor Gerald Benjamin, formerly Research Director of the Temporary State Commission on Constitutional Revision, with whom Professor Briffault had worked 20 years earlier.

The July 9, 2012 letter stated: "there must be scholarly analysis of 'court interpretation' of constitutional questions" (at p. 3, underlining in the original) – and proposed scholarly analysis of the Court of Appeals' February 23, 2010 decision on the three judicial compensation lawsuits brought by New York State judges, purporting to find a separation of powers constitutional violation in the linking of judicial salaries with legislative salaries and other considerations – thereafter resulting in Chapter 567 of the Laws of 2010 creating a Special Commission on Judicial Compensation, whose judicial pay raise recommendations would require no further action by the Legislative and Executive branches to become law – challenged as unconstitutional by *CJA v. Cuomo*. Indeed, the letter stated that the verified complaint in *CJA v. Cuomo* warranted scholarship "for a further reason":

> "it offers an unparalleled opportunity to critically examine, in one fell swoop, what became of the three constitutional amendments approved by New York voters in 1977: (1) 'merit selection' appointment of Court of Appeals judges; (2) the Commission on Judicial Conduct; and (3) the Unified Court System – as to which, 35 years later, there has been NO scholarship." (July 9, 2012 letter, at p. 4, underlining and capitalization in original).

My third comment relates to Professor Briffault's expertise in constitutional law and legislation, enabling him to have recognized what the second cause of action in the *CJA v. Cuomo* verified complaint (¶¶145-154) had not: namely, that Chapter 567 of the Laws of 2010 establishing, every four years, a Special Commission on Judicial Compensation, whose recommendations would become law, automatically, without affirmative action required by either the Legislature or the Governor, was even more unprecedented than the health facilities statute challenged in *Mary McKinney v. Commissioner of the New York State Department of Health*,[7] of which it is the dangerous progeny and as to which, in late September 2007, the New York City Bar Association had filed an *amicus curiae* brief with the Court of Appeals, in support of leave to appeal, stating:

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[7] The citations for *Mary McKinney v. Commissioner of the New York State Department of Health* are: 15 Misc. 3d 743 (2007); 41 AD3d 252 (2007); appeal dismissed, 9 NY3d 891 (2007); appeal denied, 9 NY3d 815 (2007), motion granted, 9 NY3d 986 (2007). These decisions – and such portions of the record as we have been able to secure, including the City Bar's *amicus curiae* brief – are posted on our website, accessible from our *CJA v. Cuomo* webpage.

"...The question for which plaintiffs-appellants seek leave to appeal...is an important one...to our democratic institutions generally. The 'legislation by inaction' model created by the Enabling Legislation L.2005, ch.63, Part E..., and the embedded potential for error or abuse in that paradigm, should not be allowed to supplant constitutionally mandated decision making by the Legislature. The question for which plaintiffs-appellants seek leave to appeal must be carefully reviewed now because it will recur in other contexts if approved here." (¶ 2 of City Bar affirmation in support of leave to file *amicus curiae* brief, underlining added)

"...the courts below failed to appreciate the extraordinarily broad lawmaking powers that were granted to the Berger Commission..and created dangerous precedent that allows legislators to relinquish their constitutional responsibilities to enact laws and institute policies on behalf of the voters to whom they must be politically-accountable..." (at p. 11)

"It is no coincidence that the parties have been unable to cite to New York precedent that analyzes the delegations of legislative authority in a form similar to the Berger Commission. The truth is that the Enabling Legislation created a process of lawmaking never before seen in the State of New York, whereby an unelected commission was granted broad discretion to restructure the state's delivery of services to its constituents, and whose final recommendations have been thrust upon state residents with the force of law without legislative review, approval or accountability...

This novel form of legislation is in direct conflict with representative democracy and cannot withstand constitutional scrutiny. By failing to appreciate the breadth of authority granted to the Berger Commission...the courts below ignored New York's established non-delegation doctrine. If this legislation is allowed to stand, it will mean that lawmaking can be shielded from public scrutiny and state policy without accountability to New Yorkers..." (at pp. 24-5, underlining added).

"One of the most unusual features of the Enabling Legislation -- not acknowledged by the courts below -- is the 'self-executing' mechanism by which the recommendations formulated by an unelected commission automatically become law...without any legislative action. The significance of this aspect of the Enabling Legislation cannot be overstated....

...the Appellate Division fail[ed] to identify this key difference between the Enabling Legislation and any other known law..." (at pp. 28-9, underlining added).

Does Professor Briffault agree with the City Bar's assertions that the health facilities statute challenged in *McKinney* "created a process of lawmaking never before seen in the state of New York" and could not "withstand constitutional scrutiny?" If so, how does he reconcile it with the fact that the Court of Appeals had, by then, already dismissed an appeal of right by the *McKinney* plaintiffs "*sua sponte*, upon the ground that no substantial constitutional question is directly

involved" — its standard boilerplate – and that two months later, on November 27, 2007, the same day as the Court of Appeals granted the City Bar's *amicus curiae* motion, it denied, without reasons, the *McKinney* plaintiffs' motion for leave to appeal – and, simultaneously, on the same day, dismissed the appeal of right for yet another challenge to the health facilities statute, *St. Joseph Hospital v. Novello*, also "*sua sponte*, upon the ground that no substantial constitutional question is directly involved" where the Appellate Division, Fourth Department decision before it contained a dissenting opinion which would have held the statute unconstitutional.[8] Surely, what the Court of Appeals did with respect to *McKinney* and *St. Joseph Hospital* is corroborative of my July 9, 2012 proposal for "scholarly analysis of 'court interpretation' of constitutional questions", to which Professor Briffault had not responded.

Notably, in May 2007, when the City Bar announced its intention to file an *amicus* brief in *McKinney,* it did so in the context of its May 2007 Report "*Supporting Legislative Rules Reform: The Fundamentals*", stating (at pp. 9-10) that the statute challenged in *McKinney* was the result of New York's dysfunctional legislative process that is the product of its rules. Such is also clearly the case with Chapter 567 of the Laws of 2010 and the verified complaint in *CJA v. Cuomo* makes evident that the statute emanated from an utterly dysfunctional Legislature. Indeed, irrespective of whether Professor Briffault is familiar with the Pace Law Review article "*Albany's Dysfunction Denies Due Process*", Vol. 30, Issue 3, Spring 2010, by Hofstra Law School Dean Eric Lane, with whom he also worked 20 years ago at the Temporary State Commission on Constitutional Revision, he surely is in a position to recognize that *CJA v. Cuomo* – with its unique plaintiffs, acting "on their own behalf and on behalf of the People of the State of New York & the public interest", rock-solid-evidence, and 20-plus-years chronicling of legislative dysfunction by Senate and Assembly defendants – can easily be amended to be the lawsuit to successfully challenge the constitutionality of Senate and Assembly rules.

As stated by Dean Lane – who is the Eric J. Schmertz Distinguished Professor of Public Law and Public Service at Hofstra Law School:

> "...from *King* and *Campaign for Fiscal Equity* we learn that the Court of Appeals, with the proper plaintiffs and claims, has been willing to vindicate the broad rights of New Yorkers to a representative, accessible, and deliberative democratic government. How else can we read the court's expressed concerns about the 'civic scrutiny and involvement'[fn] (*King*) and 'express vote and the will of the People's representatives'[fn] (*Campaign for Fiscal Equity*)?..." (at pp. 992, underlining added).

Does Professor Briffault deny that *CJA v. Cuomo* presents "proper plaintiffs and claims" to succeed in securing, for the People of the State of New York, "a representative, accessible, and deliberative

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[8] Thereafter, the Court of Appeals not only denied, without reasons, a motion by the plaintiffs in *St. Joseph Hospital* for leave appeal, but imposed "one hundred dollars costs and necessary reproduction disbursements." This decision – and the predecessor decisions in *St. Joseph Hospital* – are also posted on our website, accessible *via* our *CJA v. Cuomo* webpage. See fn. 7, *supra*.

democratic government" by court-ordered legislative rule change – assuming the integrity of the courts?

As I stated in the subject line of my November 26, 2012 and December 17, 2012 e-mails, which you, Professor Tierney, and Professor Briffault each ignored, "Time is of the Essence".[9] It still is. Please let me have your responses, as soon as possible – but no later than a week's time – so that I may be guided accordingly.

Meantime, a copy of this letter is being furnished to Columbia Law School Assistant Dean and Chief of Staff Lynn Beller, with whom I spoke on Friday, January 18, 2013, immediately following my conversation with you

Thank you.

Yours for a quality judiciary,
& honest scholarship and pedagogy,

ELENA RUTH SASSOWER, Director
Center for Judicial Accountability, Inc. (CJA)

cc: Professor James Tierney, Director, National State Attorneys General Program,
Professor Richard Briffault, Joseph P. Chamberlain Professor of Legislation
& Director/Legislative Drafting Research Fund
Lynn Beller, Assistant Dean and Chief of Staff
Professor Gerald Caplan, University of the Pacific/McGeorge School of Law
Professor Deborah L. Rhode, Director/Center on the Legal Profession, Stanford Law School

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[9] Professor Briffault additionally ignored a "time is of the essence" January 5, 2013 e-mail entitled "Expert Opinion Needed: The Most Important Votes of the Upcoming 236th Legislative Session" relating, *inter alia*, to the potential of *CJA v. Cuomo* to achieve legislative rule reform and an overthrow of legislative leadership on the first day of the Legislature's new session – January 9, 2013. It is posted on our "Building Scholarship" webpage, accessible *via* "Latest News".