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THE COMMISSION on Legislative, Judicial and Executive Compensation held a public hearing Monday at the New York City Bar Association. From left, commissioners **Barry Cozier**, senior counsel at LeClairRyan; **James Lack**, a former state senator and former Court of Claims judge; **Shelia Birnbaum**, a partner at Quinn Emanuel Urquhart & Sullivan; **Mitra Hormozi**, Revlon's general counsel and chief compliance officer; **Fran Reiter**, a partner at the Reiter Giuliani Group and **Roman Hedges**, former deputy secretary of the Assembly's Ways and Means Committee, heard testimony from New York State Bar Association President **David Miranda**, seated left.

OCA Asks Pay Commission for Parity With US Judges

BY ANDREW KESHNER

THE OFFICE of Court Administration is asking a pay commission to bring the salaries of state Supreme Court justices, now \$174,000, into line with those of federal district judges, expected to reach \$203,100 next year.

In a written submission to the Commission on Legislative, Judicial and Executive Compensation, court administrators requested that Supreme Court justices receive a 16.7 percent pay raise to restore parity as of April 2016 and that parity be continued thereafter.

Court administrators have also

asked the commission, which is chaired by Sheila Birnbaum, a partner at Quinn Emanuel Urquhart & Sullivan, to correct longstanding pay discrepancies among county- and city-level courts throughout the state, tying their pay to a proportion of the pay for Supreme Court judges.

Finally, OCA said the commission should recommend that all state judges receive an annual cost of living adjustment on April 1 of 2017, 2018 and 2019.

Chief Administrative Judge Lawrence Marks outlined OCA's recommendations at a Monday hearing of the seven-member pay commission, held at the New York

City Bar Association.

Marks said when it came to judicial pay decisions, there had been a "difficult, troubled history" during the past approximately 40 years.

Though a different commission convened in 2011 to address a judicial pay freeze lasting more than a decade, Marks said the results partially addressed judicial pay issues.

Likewise, in its written submission, OCA said, "This commission has an opportunity to strengthen and complete the work of its predecessor by recommending as a benchmark for the state Judiciary the inflation-adjusted salary of a federal district court judge. We urge the commission

the nation's biggest city, and it comes as health advocates, federal regulators and some in the food industry are trying to get Americans to cut down on salt. Experts say most Americans consume too much salt, raising their risks of high blood pressure and heart problems.

But the plan faces opposition from restaurant groups and salt producers, who say the city is going overboard.

The salt warning will apply to an estimated 10 percent of menu items at the New York City outlets of chains with at least 15 outlets nationwide, according to the Health Department. While eateries are expected to comply as of Tuesday, the city won't start collecting \$200 fines until March 1.

Restaurateurs say healthy eating initiatives shouldn't single out any one ingredient and that the city shouldn't create its own salt-warning scheme when federal regulators are working on new, national sodium guidelines.

Such local requirements put an "overly onerous and costly burden" on city chain restaurants, often owned by small-time franchisees, the National Restaurant Association said in a statement Monday. The group said it is planning a legal challenge to the city's salt warning.

—Associated Press

Third Department Proposes Tighter Rein on Law Interns

Administrators in the Appellate Division, Third Department, are seeking public comment on proposed revisions to a rule to tighten supervision of law interns as they provide criminal and civil legal services to clients.

The amendment would require the "immediate"

in the first, second and third departments.

He said the changes were not being proposed in response to specific incidents.

The rules define interns as law students who have completed at least two semesters of law school and law school graduates who have been appointed as interns, often for district attorneys' office and not-for-profits in the Third Department.

Attorneys serving as immediate supervisors must be the head of the department, agency or not-for-profit group employing the interns, or the supervisors' designees.

The proposed changes are to Rule (22 NYCRR) §805.5 (b) and are subject to formal adoption by the Third Department justices.

Comments may be sent to ad3-rulecomment@nycourts.gov or by regular mail: Robert Mayberger, Clerk of the Court, Appellate Division, Third Department, P.O. Box 7288, Capitol Station, Albany, NY 12224-0288. Comments must be received by Jan. 26.

—Joel Stashenko

Panel Faults Interrogation Of Shooting Suspect

A man's assault convictions were overturned after an appeals court found police improperly questioned him after he told them that he had a lawyer and did not want to talk.

An Appellate Division, Third Department, panel

Scalia Sees Slippery Slope After Historic Gay Rights Ruling

»2

Silver, 71, considered resignation as the forewoman read out the guilty verdict on each count and the automatic death knell of the Democrat's 39-year career in the Assembly representing lower Manhattan. Flanked by his defense attorneys, the man who held the

Sheldon Silver, center, the former New York Assembly speaker, leaving court after the verdict with his attorneys Steven Molo of MoloLamken, left, and Joel Cohen of counsel at Stroock & Stroock & Lavan.

Joel Cohen, counsel at Stroock & Stroock & Lavan, who suffered a series of adverse rulings from the bench before and during trial.

In the courtroom after the verdict, Molo told report-

Panel Tosses Malicious Prosecution Lawsuit

BY ANDREW DENNEY

A BROOKLYN appeals court has thrown out a malicious prosecution suit filed by a man who spent 20 years in prison for murder before being released on a petition for habeas corpus, saying that New York City police had probable cause to believe the man committed the crime.

The Appellate Division, Second Department, in *Batten v. City of New York*, 41001/04, reversed a 2013 decision by Brooklyn Supreme Court Justice Sylvia Ash to deny motions by the city and four police officer defendants to dismiss Floyd Batten's malicious prosecution claim and bid for damages.

Batten was convicted of the Nov. 4, 1983 murder of Igor Khutorsky, who was shot and killed during a morning robbery at Khutorsky's furniture store in Brooklyn.

A store employee identified Batten as one of the two perpetrators, the panel said in an unsigned ruling. Batten was arrested three days after the fatal robbery; a second perpetrator was never identified.

Batten, 51, was 20 years old at the time of Khutorsky's murder. According to Batten's court papers,

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Online

» The Second Department decision is posted at nylj.com.



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DECISIONS OF INTEREST

First Department

CIVIL PRACTICE: Non-party established that he is entitled to immunity from service of subpoena. *Genger v. Genger*, Supreme Court, New York.

TORTS: C-Town, which did not exclusively control gate, is not liable for plaintiff's injuries. *Bonifacio v. C-Town LLC*, Supreme Court, New York.

CIVIL PRACTICE: Marginal changes affecting Education Law do not render complaints moot. *Dauids v. State of New York*, Supreme Court, New York.

CONTRACTS: Broker makes prima facie showing that it earned commission fee for sale of premises. *NRT New York LLC v. Morin*, Supreme Court, New York.

Second Department

TORTS: Doctor fails to establish absence of departure from accepted medical practice. *Grayson v. Weisman*, Supreme Court, Suffolk.

Fourth Department

TORTS: Issues of fact exist whether alleged sidewalk defect was an unreasonable risk. *Hines v. HSBC Bank USA Inc.*, Supreme Court, Wayne.

U.S. Courts

INTELLECTUAL PROPERTY: Issuance of 2015 retroactive sublicense did not violate terms of 2006 license agreement. *Canon Inc. v. Tesseron Ltd.*, SDNY.

ALTERNATIVE DISPUTE RESOLUTION: Preliminary injunction freezing assets to preserve award's enforcement granted. *GE Transp. (Shenyang) Co. Ltd. v. A-Power Energy Generation Sys. Ltd.*, SDNY.

CRIMINAL PRACTICE: Inexcusable delay noted in denial of coram nobis relief as to \$32,500 court fine. *Goldfarb v. U.S.*, SDNY.

CIVIL PRACTICE: University's VP, lab chief may be deposed about accident incident report's creation. *Roberts v. Los Alamos Nat'l Security*, WDNY.

EMPLOYMENT: Director was fiduciary to company with claim beyond land acquisition by Indian subsidiary. *Narayanan v. Sutherland Global Holdings Inc.*, WDNY.

DECISION SUMMARIES, Page 21
FULL-TEXT DECISIONS, nylj.com

Divided Court Upholds DMV's Harsh License Suspension Rule

BY JOEL STASHENKO
ALBANY

FOR THE SECOND time in less than four months, a divided Appellate Division, Third Department, panel has upheld a strict driver's license suspension regulation imposed by the Cuomo administration on repeat drunken driving offenders.

The 3-2 majority in *Matter of Carney v. New York State Department of Motor Vehicles*, 520382, ruled that the rules don't violate the separation of powers doctrine and

were within the authority of the state when established by Barbara Fiala, who was commissioner of the Department of Motor Vehicles in November 2012.

Since promulgated, the rules have led to extended suspensions or revocations of more than 8,000 drivers' licenses for DWI-related

violations, according to DMV statistics.

The court's majority said that the disputed regulation, 15 NYCRR 136.5(b)(1), is "commensurate with the Legislature's policies of promoting highway safety and reducing instances of impaired or intoxicated driving."

Its establishment also was within the boundaries recognized for state agencies between acceptable rule-making and illegal usurpation of the law-making powers of the governor and Legislature in *Boreali v. Axelrod*, 71 NY2d 1 (1987), and

New York Statewide Coalition of Hispanic Chambers of Commerce v. New York City Department of Health and Mental Hygiene, 110 AD3d 1 (2013), the panel held.

"While the regulation at issue here imposes a stricter standard over re-licensing determinations than the Vehicle and Traffic Law imposes in the revocation of licenses, we find that

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» The Third Department decision is posted at nylj.com.

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to take this important step for the sake of preserving a strong and independent State Judiciary.”

OCA’s pay parity request and its bid to overhaul salary structure for non-Supreme Court justices won support from a range of bar groups and judges’ associations.

William Condon, a Suffolk County Supreme Court Justice and president-elect of the Association of Justices of the Supreme Court of the State of New York, told the commission that OCA’s request was “realistic . . . equitable and fair.”

The commission must submit its report on judicial compensation recommendations to state lawmakers by Dec. 31.

The 2011 commission made a 4-3 decision to phase in a raise designed to bring Supreme Court justices into parity with federal district court judges by 2014. Marks and several other witnesses noted economic conditions were better now than four years ago.

Adrienne Holder, attorney-in-charge of the Legal Aid Society’s Civil Practice, said the current commission was better positioned “to address the real judicial salary needs,” adding that a common theme of the three 2011 commission member dissents was that the raises were too small and should have taken immediate effect.

Supreme Court justices were making \$136,700 in 2011. Their salaries climbed to \$160,000 in April 2012. Two years later, in April 2014, justices received \$174,000.

Meanwhile, however, federal salaries increased, as a federal court ruled that judges should receive six cost-of-living increases that had been withheld by Congress.

Moreover, OCA argues in its latest recommendations that the “welcome and needed” pay increase of 2012-2014 still “only partially restored the welcome of state judicial salaries.”

With the adjustments for regional cost of living, New York’s \$113,960 salary for trial court judges of general jurisdiction ranked 47th among 50 states as of October 2015, according to the National Center for State Courts.

Pegging the state’s Supreme Court salaries to those in federal court could bring New York to the 33rd rank for states on a cost-adjusted basis.

Several witnesses noted that judges in Delaware—a state handling more commercial litigation by dollar amount—now had the third-top adjusted salary, at \$169,885.

Sara Moss, executive vice president and general counsel of Estée Lauder Companies, said the difference in pay for Delaware and New York state judges was “appalling.”

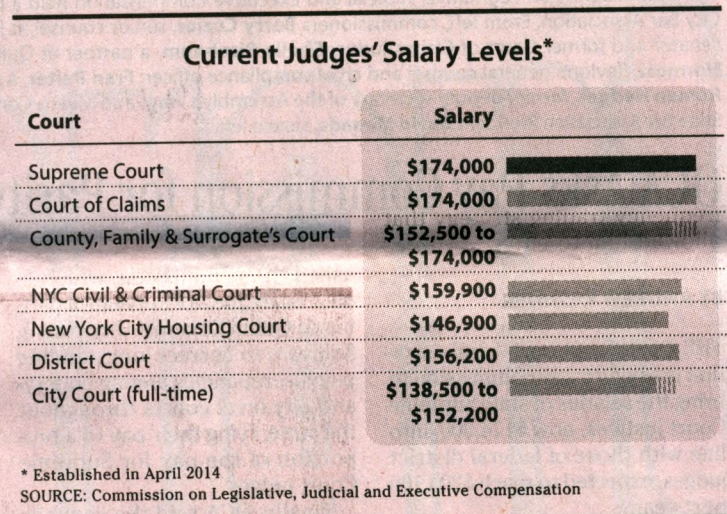
Appellate Division, First Department, Justice Paul Feinman, president of the Association of Justices of the Supreme Court of the State of New York, noted many businesses chose to base themselves and litigate in New York state courts due to the quality of the bench.

“That requires capable judges. To attract capable judges, we need fair and just compensation,” he said.

Debra Raskin, the city bar’s

president, said another justification for retaining judges through higher salaries is that many litigants went through the courts unrepresented on crucial issues, like debt and housing matters. Working with pro se litigants on such significant cas-

es required retaining judges with “skill and patience.”



New York State Bar Association president David Miranda said the group had a long history of advocating for increased judicial pay, adding “our great state needs to continue to take steps to ensure that we not repeat past mistakes of neglect.”

Miranda said an independent analysis by an economist retained by the group showed the value of state judicial salaries was “significantly less” than those in other states and on the federal bench.

Appellate Division, Second Department Justice Sheri Roman, president of the Supreme Court Justices’ Association of the City of New York, noted colleagues have left the bench to earn more in other jobs.

She said the more than decade-long judicial pay freeze “twisted and constricted the pipeline” of judicial talent. “How many smart and capable men and women looked elsewhere for career fulfillment, Roman wondered aloud.

Nassau County District Court Judge Gary Knobel, president of the New York State District Court Judges Association, said the organization supported parity between federal judges and Supreme Court justices, but also sought parity between District Court judges and

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Internal Pay Disparities

In addition, OCA said the courts face an internal “pay disparity problem,” which was a vestige of the state’s 1977 assumption of funding for county- and city-level courts.

With some municipalities at the time paying their judges more than others “the resulting statewide judicial salary structure was at its outset neither logical nor equitable,” the administration said.

For example, it noted that Nassau and Suffolk County’s 50 District Court judges, who adjudicate misdemeanors and small civil cases, make \$156,200 yearly. But 59 County Court judges—who preside over felonies, small civil matters, and often Family Court and Surrogate’s Court—make \$152,500.

As a result, in its submission, OCA asks that going forward, County, Family and Surrogate’s Court judges be paid no less than 95 percent of a Supreme Court justice salary. Any of the positions already above the 95 percent mark would remain at that percentage.

District Court judges, as well as New York City Civil Court and Criminal Court judges, would make 93 percent of the Supreme Court justice salary.

City Court and New York City Housing Court judges would make 90 percent of the Supreme Court salary.

OCA’s submission noted that the 2011 commission “faced with the difficult challenge of adjusting long-frozen judicial salaries in the midst of a state fiscal crisis,” took no position on the court system’s pay disparity issue. Correcting internal pay disparities would cost another \$3 million a year.

The proposed pay increases was not without its critics, who challenged the quality of the state bench and said no raise was deserved.

Among them was Elena Sasser, the director and co-founder of the Center for Judicial Accountability. She said judges and “judicial pay raise advocates . . . tout the excellence and high quality of the Judiciary—implicitly recognizing that judicial salary increases are predicated on judges fulfilling their constitutional function of rendering justice.”

Sassower said “they need a reality check if they are actually unaware of the lawlessness and non-accountability that reigns in New York’s judicial branch.”

With the hearing complete, the commission will now hold public meetings on Dec. 7 and Dec. 16, though no testimony will be heard.

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Current Judges’ Salary Levels*

Court	Salary
Supreme Court	\$174,000
Court of Claims	\$174,000
County, Family & Surrogate’s Court	\$152,500 to \$174,000
NYC Civil & Criminal Court	\$159,900
New York City Housing Court	\$146,900
District Court	\$156,200
City Court (full-time)	\$138,500 to \$152,200

* Established in April 2014
SOURCE: Commission on Legislative, Judicial and Executive Compensation

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their Supreme Court counterparts. OCA acknowledges in its submission that establishing Supreme Court parity with the federal bench would cost the state approximately \$35.56 million annually. “While this is not an insignificant cost, there is sufficient evidence suggesting that the state is in a fully responsible position to fund what is a fair, appropriate and necessary increase,” OCA said, noting an improved economic climate compared to 2011.

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PROFESSIONAL ANNOUNCEMENTS

September 1, 2015

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Has Joined the Firm as Counsel

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Hon. Melvin L. Schweitzer

having retired as

Acting Justice of the Supreme Court (Commercial Division, Manhattan)

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Judge of the New York State Court of Claims

announces the establishment of an Arbitration and Mediation Practice as

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September 8, 2015

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September 1, 2015

Liddle & Robinson, L.L.P.

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READ KEMP McCAFFREY

Formerly of Patton Boggs LLP

Has Joined the Firm as Counsel

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