

## CENTER for JUDICIAL ACCOUNTABILITY, INC.

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October 14, 2016

TO: New York's Attorney Disciplinary Committees of its Four Judicial Departments:

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

RE: Testing the efficacy of New York's attorney disciplinary committees in policing district attorney conflicts of interest and obligations to report attorney misconduct:

- (1) conflict-of-interest/misconduct complaint against Albany County District Attorney P. David Soares for "sitting on" corruption complaints presenting threshold issues of his financial and other interests;
- (2) conflict-of-interest/misconduct complaint against New York's other district attorneys for colluding in D.A. Soares' nonfeasance with respect to the corruption complaints in which they are similarly interested;
- (3) referral of D.A. Soares and all New York's complicit district attorneys to criminal authorities for their larcenous pocketing of district attorney salary increases they know to be unlawful and for their other knowing and deliberate violations of penal laws they are charged with enforcing.

On June 8, 2016, at the Capitol, Senator John DeFrancisco and Assemblyman N. Nick Perry held a public forum about identical bills they had sponsored to establish a commission on prosecutorial conduct – S.24-b/A.1131-b. Opposing the bills were district attorneys and their organizational/lobbying entity, the District Attorneys Association of the State of New York (DAASNY). They appeared, at the hearing, by Albany County District Attorney P. David Soares, who sat beside DAASNY's incoming president, Oneida County District Attorney Scott McNamara. With them was Bronx County District Attorney Darcel Clark and, additionally, Executive Assistant Queens County District Attorney Robert Masters, who identified himself as substituting for DAASNY's then president, Rockland County District Attorney Thomas Zugibe. They were united in stating that there was no need for a commission on prosecutorial conduct because, according to them, there are adequate existing avenues for redressing district attorney misconduct – New York's attorney disciplinary committees, chief among them. In the words of District Attorney McNamara, "we are policed by the grievance committee" (video, at 2:37 hours).<sup>1</sup>

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<sup>1</sup> A link to the video is posted on CJA's webpage for this letter. It is accessible via CJA's homepage, [www.judgewatch.org](http://www.judgewatch.org), from the prominent center link: "No Pay Raises for New York's Corrupt Public Officers – The Money Belongs to their Victims!", whose #14 menu listing is entitled: "A New Round of Disciplinary & Criminal Complaints".

Also posted is CJA October 5, 2016 e-mail to Assemblyman Perry's legislative director. In addition to reflecting CJA's request for the transcript of the June 8, 2016 public forum, the written statements of witnesses, and other supporting documents, it presents an evidentiary rebuttal to assertions made by legislators and witnesses.

This conflict-of-interest/misconduct complaint tests the efficacy of New York's attorney disciplinary committees in policing district attorney conflicts of interest<sup>2</sup> and obligations to report attorney misconduct.<sup>3</sup> It is, in the first instance, against D.A. Soares – who, since July 2013, has been willfully and deliberately “sitting on” corruption complaints against Governor Cuomo, Attorney General Schneiderman, and other high-ranking New York public officers with whom he has professional, political, and personal relationships, each complaint furnishing open-and-shut, *prima facie* proof of their “grand larceny of the public fisc” with respect to slush-fund judiciary and legislative budgets and embedded fraudulent, statutorily-violative, and unconstitutional judicial salary increases on which his own district attorney salary rests.

Additionally, this conflict-of-interest/misconduct complaint is against all the district attorneys of New York's other 62 counties who, for like reasons of financial interest and professional, political, and personal relationships, have colluded in D.A. Soares' willful and deliberate nonfeasance. This includes the nine district attorneys who, with D.A. Soares, were appointed by Governor Cuomo and Attorney General Schneiderman as members of the Commission to Investigate Public Corruption in July 2013.<sup>4</sup> Although five of these nine are no longer district attorneys, they remain attorneys subject to your jurisdiction. While in office, they benefitted from the district attorney salary increases – and now and in the future benefit and will benefit from the increased pensions resulting therefrom.<sup>5</sup>

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<sup>2</sup> Rule 1.7 of New York's Rules of Professional Conduct, entitled “Conflict of Interest: Current Clients”, states:

“...a lawyer shall not represent a client if a reasonable lawyer would conclude that... (2) there is a significant risk that the lawyer's professional judgment on behalf of a client will be adversely affected by the lawyer's own financial, business, property or other personal interests.”

The client that the district attorneys represent is The People of the State of New York.

<sup>3</sup> As stated by D.A. McNamara at the June 8, 2016 forum, “there's an ethical rule that if we believe there might be something unethical going on, we have to report it”. (video, at 39:30 minutes). Presumably, he was referring to Rule 8.3 of the Rules of Professional Conduct, entitled “Reporting Professional Misconduct”. Its subsection (a) states:

“A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.”

<sup>4</sup> Also appointed, as “special counsel” to the Commission to Investigate Public Corruption, was former New York County District Attorney Robert Morgenthau.

<sup>5</sup> The district attorney members of the Commission to Investigate Public Corruption – each having a nearly \$40,000 a-year salary interest in CJA's July 19, 2013 and January 7, 2014 corruption complaints (Exhibits A and B) – are identified at footnote 2 of CJA's June 29, 2016 letter to then DAASNY President

The facts giving rise to this conflict-of-interest/misconduct complaint against D.A. Soares and New York's other district attorneys are particularized by the following:

- Exhibit A: CJA's July 19, 2013 corruption complaint to D.A. Soares and its accompanying incorporated April 15, 2013 corruption complaint to U.S. Attorney Preet Bharara – simultaneously furnished to the Commission to Investigate Public Corruption;
- Exhibit B: CJA's January 7, 2014 supplemental corruption complaint to the members of the Commission to Investigate Public Corruption, entitled "FOLLOWING THE MONEY", simultaneously furnished to D.A. Soares;
- Exhibit C: CJA's June 21, 2016 second supplemental corruption complaint to D.A. Soares;
- Exhibit D: CJA's June 29, 2016 letter to the District Attorneys Association of the State of New York, sent to the attention of its then president, Rockland County District Attorney Thomas Zugibe, and its incoming president, Oneida County District Attorney McNamara, entitled "CONFRONTING THE EVIDENCE: District Attorney Salaries & Accountability – Including for the Establishment of a Commission on Prosecutorial Conduct";<sup>6</sup>
- Exhibit E: CJA's July 1, 2016 letter to all New York's 62 district attorneys entitled "How Many D.A.s Does It Take to Confront Evidence & Abide by Ethical Rules?";

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Zugibe (Exhibit D) as follows: (1) D.A. Zugibe; (2) D.A. Soares; (3) Commission Co-Chair Onondaga County D.A. William Fitzpatrick, who made no disclosure that his wife, a judge, also had a salary interest of nearly \$40,000 a year – and that, to remain on the bench, she was additionally dependent on reappointment by the Governor; (4) Commission Co-Chair (then) Nassau County D.A. Kathleen Rice; (5) (then) Bronx D.A. Robert Johnson, who made no disclosure that his wife, also a judge, had a nearly \$40,000 a year salary interest, nor that he had his own judicial ambitions (which he would achieve by his election to the bench in November 2015); (6) (then) Franklin County D.A. Derek Champagne, who made no disclosure that he had judicial ambitions (which he would achieve by his election to the bench in November 2014); (7) (then) Erie County D.A. Frank Sedita III, who made no disclosure that he had judicial ambitions (which he would achieve by his election to the bench in November 2015); (8) Warren County D.A. Kathleen Hogan; (9) Essex County D.A. Kristy Sprague; and (10) (then) Broome County D.A. Gerald Mollen.

<sup>6</sup> The enclosures to the June 29, 2016 letter (Exhibit D), in addition to the June 21, 2016 second supplemental complaint to D.A. Soares (Exhibit C), were CJA's June 10, 2016 e-mail to President Zugibe and CJA's November 13, 2013 letter to D.A. Soares – also sent to the Commission to Investigate Public Corruption. They are annexed to Exhibit D as Enclosure #1 and Enclosure #2, respectively.

Exhibit F: CJA's July 8, 2016 letter to the 56 county governments whose judicially-linked district attorney salaries are paid from their county budgets – copies of which were simultaneously furnished to the district attorneys of those 56 counties – entitled:

“GIVING NOTICE: Your duty to repudiate & challenge the state-imposed district attorney salary increases based on your own district attorney's findings of fact and conclusions of law with respect to rock-solid, prima facie evidence establishing them to be based on judicial salary increases that are statutorily-violative, fraudulent – & unconstitutional”

Copies are enclosed herewith. In the interest of economy, I incorporate them by reference. Likewise, the mountain of substantiating evidentiary proof which accompanied them and to which they refer, all posted on, or accessible from, CJA's webpage for this letter (fn 1, *supra*). This includes:

- the video of my testimony before the Commission to Investigate Public Corruption, at its September 17, 2013 public hearing, wherein I asked:

“...How are you – what are your rules and procedures, what is your protocol for conflicts of interests?... How are you going to deal with conflicts of interest? And how are you dealing with conflicts of interest involving the judicial pay raises when district attorney salaries are tied to the judicial pay raises? How are you dealing with conflicts of interests?”

- my successive correspondence with the Commission to Investigate Public Corruption and D.A. Soares pertaining to their conflicts of interest – all ignored – appended to my April 23, 2014 proposed verified complaint to intervene in the legislature's declaratory judgment action against the Commission (*Senate v. Rice*, NY Co. #160941-2013) and summarized and recited therein;
- my December 31, 2015 letter to then Westchester County District Attorney/New York Chief Judge Nominee Janet DeFiore, raising the threshold issue of her own financial conflict of interest. Entitled “So, You Want to be New York's Chief Judge? – Here's Your Test: Will You Safeguard the People of the State of New York – & the Public Fisc?”, the letter was the subject of ¶¶-274-276 of CJA's March 23, 2016 verified second supplemental complaint in our citizen taxpayer action *CJA v. Cuomo, et al.* (Albany Co. #1788-14) – and Exhibit 37 thereto.<sup>7</sup>

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<sup>7</sup> As the disciplinary committees are empowered to *sua sponte* initiate disciplinary complaints against attorneys, CJA would welcome their doing so against then Westchester County District Attorney/now Chief Judge DiFiore and against the plethora of attorney public officers and other attorneys complicit in the larceny and fraud that underlies and perpetuates the judicial and district attorney salary increases and the slush-fund

With the exception of Allegany County District Attorney Keith Slep, whose response to the July 1, 2016 letter was a single-sentence e-mail: “Your an idiot”, I have received no substantive response from any of the district attorneys to the above three corruption complaints and correspondence thereon. None have denied or disputed the accuracy of their recited facts and supporting proof. This includes:

(1) my assertion that the August 29, 2011 report of the Commission on Judicial Compensation and the December 24, 2015 report of the Commission on Legislative, Judicial and Executive Compensation – on which their district attorney salary increases since 2012 rest – are “each false instruments, violating a succession of penal law provisions”, including:

Penal Law §175.35 (“offering a false instrument for filing in the first degree”);  
Penal Law §155.42 (“grand larceny in the first degree”);  
Penal Law §190.65 (“scheme to defraud in the first degree”);  
Penal Law §195.20 (“defrauding the government”);  
Penal Law §195 (“official misconduct”);  
Penal Law §105.15 (“conspiracy in the second degree”);  
Penal Law §20.00 (“criminal liability for conduct of another”); and  
Penal Law §496 (“corrupting the government”) – part of the “Public Trust Act”.

(2) my assertion that the evidence of penal law violations presented by CJA's three corruption complaints is *prima facie* and open-and-shut, imposing upon D.A. Soares the duty – allowing no discretion – to bring criminal prosecutions based thereon – and that the only reason for his failure to do so is his financial and other interests, which they share;

(3) my assertion that confronting these financial and other interests is the threshold duty of D.A. Soares and his fellow district attorneys – and that steps must be taken to secure an independent prosecutor for the corruption complaints.

Indeed, the financial interest of D.A. Soares and his fellow district attorneys in the three corruption complaints is HUGE. Since 2012, as a result of the August 29, 2011 report of the Commission on Judicial Compensation, the yearly salary of each district attorney has risen nearly \$40,000. Now, with the December 24, 2015 report of the Commission on Legislative, Judicial and Executive Compensation, their yearly salaries rise by another \$19,000 – and in some cases considerably more. And, it doesn't end there. Based on the December 24, 2015 report, their yearly salaries will likely go up next year to reflect a cost-of-living increase and then, as of April 1, 2018, will be upped another \$10,000, with a likely further cost-of-living increase the following year.

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budgets appropriating monies for them, based on the mountain of evidence that underlies this complaint.

As a consequence, exposing the penal law violations represented by these two commission reports would mean that the yearly salary of each district attorney would take a nearly \$60,000 nosedive. On top of that, there would be a “claw-back” of the salary increases each district attorney received since April 1, 2012 – approximately \$100,000 to date – plus tens of thousands of additional dollars from salary-based non-salary benefits, such as pensions.

The National Prosecution Standards of the National District Attorneys Association state in its Section 1-3.3 “Specific Conflicts”, subdivision (d):

“The prosecutor should excuse himself or herself from any investigation, prosecution, or other matter where personal interests of the prosecutor would cause a fair-minded, objective observer to conclude that the prosecutor’s neutrality, judgment, or ability to administer the law in an objective manner may be compromised.”

Consistent therewith, Section 1-3.4 “Conflict Handling”, states:

“Each prosecutor’s office should establish procedures for handling actual or potential conflicts of interest. These procedures should include, but are not limited to:

- a. The creation of firewalls and taint or filter teams to ensure that prosecutors with a conflict are not improperly exposed to information or improperly disclose information; and
- b. Methods to accurately document the manner in which conflicts were handled to ensure public trust and confidence in the prosecutor’s office.”

Its immediately-following Section 1-3.5 “Special Prosecutors” reads:

“Where an actual or potential conflict of interest exists that would prevent the prosecutor’s office from investigating or prosecuting a criminal matter, the prosecutor’s office should appoint, or seek the appointment of a ‘special prosecutor,’ or refer the matter to the appropriate governmental authority as required by law....”

Also relevant, its Section 1-1.6 “Duty to Respond to Misconduct” states:

“A prosecutor is obligated to respond to professional misconduct that has, will, or has the potential to interfere with the proper administration of justice:

- a. Where the prosecutor knows that another person associated with the prosecutor’s office has engaged, or intends to engage in professional misconduct that could interfere with the proper administration of justice, the

prosecutor should address the matter in accordance with internal office procedures.

b. If the office lacks adequate internal procedures to address allegations of professional misconduct, a prosecutor who learns of the misconduct may, in the first instance, request that the person desist from engaging in the misconduct. If such a request is, or is likely to be, futile or if the misconduct is of a sufficiently serious nature, a prosecutor should report the misconduct to a higher authority within the prosecutor's office.

c. If, despite a prosecutor's best efforts, no action is taken in accordance with the prior procedures to remedy the misconduct, a prosecutor should report the misconduct to appropriate officials outside the prosecutor's office (to the extent permitted by the law and rules of ethical conduct of the state).

d. A prosecutor's failure to report known misconduct may itself constitute a violation of the prosecutor's professional duties."

These provisions are all relevant to the situation at bar with respect to the July 19, 2013, January 7, 2014, and June 21, 2016 corruption complaints. Yet, D.A. Soares and his fellow district attorneys have ignored my explicit assertions to them of their conflicts of interest, have not come forward with their protocols and procedures for handling conflicts of interests, and have gone full steam ahead in profiting from HUGE salary increases that are completely unlawful as they are based on judicial salary increases that are fraudulent, statutorily-violative, and unconstitutional, as the evidence furnished by those complaints resoundingly establishes.

And reinforcing that evidence is now the sixth, seventh, and eighth causes of action of CJA's newly-commenced second citizen-taxpayer action, *CJA v. Cuomo, et al.*, (Albany Co. #5122-16), seeking declarations voiding the December 24, 2015 report of the Commission on Legislative, Judicial and Executive Compensation and the August 29, 2011 report of the Commission on Judicial Compensation. These causes of action from CJA's September 2, 2016 verified complaint are essentially IDENTICAL to the thirteenth, fourteenth, and fifteenth causes of action of the March 23, 2016 verified second supplemental complaint in CJA's predecessor citizen-taxpayer action, *CJA v. Cuomo, et al.* (Albany Co. #1788-14) on which CJA's June 21, 2016 corruption complaint to D.A. Soares and subsequent correspondence to the district attorneys focally rely. As with the prior citizen-taxpayer action, wherein plaintiffs were entitled to SUMMARY JUDGMENT, so, too, with this newly-commenced citizen-taxpayer action. And underscoring this is plaintiffs' September 30, 2016 memorandum of law in support of summary judgment. Together with the substantiating record on which it is based, the memorandum is accessible from CJA's webpage for this letter and is incorporated herein by reference.<sup>8</sup>

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<sup>8</sup> See, in particular, pages 27-31 of the September 30, 2016 memorandum of law in opposition to the Attorney General's five-sentence "argument" for dismissal of the sixth, seventh, and eighth causes of action of plaintiffs' September 2, 2016 verified complaint and in support of plaintiffs' entitlement to summary judgment

How will you be enforcing fundamental standards of attorney and district attorney conduct with respect to CJA's July 19, 2013, January 7, 2014, and June 21, 2016 corruption complaints that D.A. Soares has been "sitting on" – and which his fellow district attorneys have collusively allowed him to "sit on" because it financially and politically benefits them, just as it does him.

And will you be referring D.A. Soares and his D.A. co-conspirators to criminal authorities so that they can be prosecuted for their crimes. Most fitting would be prosecutions pursuant to the "Public Trust Act" (Penal Law §496), which, as recited by the July 19, 2013 and June 21, 2016 corruption complaints, the district attorneys clamored for as a necessary tool for rooting out government corruption. In the words of Governor Cuomo, in announcing the "Public Trust Act" on April 9, 2013, arm and arm with the district attorneys:

"Let us affirm and expand a simple fact: If you are a public official and if you break the law, you will get caught, you will be prosecuted, and you will go to jail".

Surely, the attorney disciplinary committees, whose jurisdiction is disciplinary, not criminal, have mandatory obligations to make criminal referrals, where, as here, the violations of standards of attorney and district attorney conduct are in furtherance of corrupting government and other criminal acts.

To expedite your handling of this fully-documented conflict-of-interest/misconduct complaint against New York's district attorneys, a copy is being simultaneously sent to each of the complained-against district attorneys for a two-fold purpose: (1) for their response; and (2) as a FOIL request for records responsive to the question posed by the penultimate paragraph of CJA's July 8, 2016 letter to the counties, which they could have voluntarily answered, but did not:

"What are your procedures for handling public corruption complaints, filed with your district attorney offices, where you have financial and other conflicts of interest?"  
(Exhibit F: at p. 6).

Per the attestation required by the complaint form of D.A. Soares' Public Integrity Unit (Exhibits A and C):

"I understand that any false statements made in this complaint are punishable as a Class A Misdemeanor under Section 175.30 and/or Section 210.45 of the Penal Law."

Thank you.



ELENA RUTH SASSOWER



cc: New York's 62 District Attorneys –  
& the district attorney members of the Commission to Investigate Public Corruption

Participants at the June 8, 2016 public forum on S.24-b/A.1131-b

Chairs and ranking members of the Senate and Assembly committees and joint commissions with oversight jurisdiction over New York's 62 district attorneys, their salaries & New York's attorney disciplinary committees:

Senate Judiciary Committee

Chair John Bonacic

Senate Codes Committee

Chair Michael Nozzolio & Ranking Member Daniel Squadron

Senate Committee on Investigations and Government Operations

Chair Andrew Lanza & Ranking Member Brad Hoylman

Senate Committee on Local Government

Chair Kathleen Marchione & Ranking Member Todd Kaminsky

Assembly Judiciary Committee

Chair Helene Weinstein & Ranking Member Michael Montesano

Assembly Codes Committee

Chair Joseph Lentol & Ranking Member Al Graf

Assembly Committee on Governmental Operations

Chair Crystal Peoples-Stokes & Ranking Member Janet Duprey

Assembly Committee on Oversight, Analysis, and Investigation

Chair Ellen Jaffe & Ranking Member Peter Lawrence

Assembly Committee on Local Governments

Chair William Magnarelli & Ranking Member Christopher Friend

Legislative Commission on Government Administration

Assembly Chair Brian Kavanaugh

Legislative Commission on State-Local Relations

Assembly Chair Sean Ryan