Center for Judicial Accountability, Inc. (CJA)

From: Center for Judicial Accountability, Inc. (CJA) [elena@judgewatch.org]

Sent: Monday, August 01, 2011 1:08 PM

To: 'contact@judicialcompensation.ny.gov'; 'kfischer@alm.com'; 'wstory@alm.com'; 'jstashenko@alm.com'; 'joel.stashenko@alm.com'; 'dwise@alm.com'; 'akeshner@alm.com'; 'vdoyle@nysba.org'; 'Stewart.Aaron@aporter.com'; 'l.kelmachter@fuchsberg.com'; 'mmaney@hancocklaw.com'; 'hherrera@nassaubar.org'; James Tallon Jr. (jtallon@uhfnyc.org); Kathryn S. Wylde (kwylde@pfnyc.org); Mark Mulholland (mmulholland@rmfpc.com); Richard Cotton (rick.cotton@nbcuni.com); Robert Fiske Jr. (robert.fiske@davispolk.com); William C. Thompson Jr. (wthompson@sbsco.com); William Mulrow (william.mulrow@blackstone.com)

Cc: 'rmaldonado@balberpickard.com'; 'arothstein@nycbar.org'; 'ekocienda@nycbar.org'

Subject: Absence of Evidence that Judicial Compensation has Deterred Qualified Private Sector Lawyers from Becoming Judges

Attachments: 8-1-11-ltr-to-cc-recipients.pdf

Attached is CJA's already-faxed August 1, 2011 letter to Roger Juan Moldonado, Chair of the New York City Bar Association's Council on Judicial Administration – with coverletter to the indicated recipients: (1) the Commission on Judicial Compensation; (2) New York Law Journal; and (3) the bar association leaders who testified at the Commission's July 20, 2011 hearing.

Consistent with CJA's commitment to transparency, evidence, and public accountability on the judicial compensation issue, it will be posted on CJA's website, www.judgewatch.org – as likewise your responses thereto.

Thank you.

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

CENTER *for* JUDICIAL ACCOUNTABILITY, INC.

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Elena Sassower, Director

August 1, 2011

TO: Kathryn S. Wylde & Other Members of the Commission on Judicial Compensation
New York Law Journal: Joel Stashenko & Editors
Bar Leaders Testifying at the July 20, 2011 Hearing:
Vincent E. Doyle, III, President, NYS Bar Association
Stewart Aaron, President, NY Co. Lawyers' Association
Leslie Kelmachter, President, NYS Trial Lawyers Association
Lance D. Clarke, Past President, Nassau County Bar Association
Maureen Maney, President-Elect, Women's Bar Association of NYS

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

RE: Ensuring that the Commission on Judicial Compensation's Recommendations and Report are Based on Evidence: The Absence of Evidence that Judicial Compensation has Deterred Qualified Private Sector Lawyers from Becoming Judges

In substantiation of my assertions at the Commission on Judicial Compensation's July 20, 2011 hearing that witnesses advocating for judicial pay increases had put forth "rhetoric, not evidence" and that I had compiled a list of "20 specific frauds" they had presented[1] – assertions unreported by the New York Law Journal – enclosed is CJA's letter of today's date to one such witness: Roger Juan Maldonado, Chair of the Council on Judicial Administration of the New York City Bar Association – to which you are indicated recipients.

Such letter is occasioned by Commissioner Wylde's comments to the Law Journal, as reported on July 29, 2011 in Joel Stashenko's article "*Commission to Focus on Amount of Judges' Raise*".

Enclosure (8 pages)
cc: Roger Juan Maldonado, Chair
Council on Judicial Administration/New York City Bar Association

[1] Having received no response from the Commission to CJA's July 21, 2011 letter as to whether it would be stenographically transcribing the video of its July 20, 2011 hearing, I transcribed my own testimony. It is posted, together with the video, on CJA's website, www.judgewatch.org, accessible *via* our top panel "Latest News".

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August 1, 2011

Roger Juan Maldonado, Chair
Council on Judicial Administration
New York City Bar Association

RE: The Absence of Evidence that Judicial Compensation has Deterred Qualified Private Sector Lawyers from Becoming Judges

Dear Mr. Maldonado:

According to the July 29, 2011 New York Law Journal, Kathryn S. Wylde – Chief Judge Lippman's appointee to the Commission on Judicial Compensation who had "helped organize a show of support by business leaders for a judicial pay raise in 2007" – has found it:

> "compelling that between 2007 and 2009, only 18 percent of the people entering the judiciary were from the private sector.
>
> 'Particularly for the business community, having a judiciary with business experience is very important,' she said." ("*Commission to Focus on Amount of Judges' Raise*", NYLJ, 7/29/11, front-page article by Joel Stashenko)

It would appear that this figure of "only 18 percent", which Ms. Wylde purportedly regards as a statewide statistic for 2007-2009, is drawn from your oral testimony at the Commission's July 20, 2011 public hearing where you stated:

> "The City Bar Association's Judiciary Committee analyzed recently where are new judges coming from in 2009 and 2010. Only 18 percent of new judges in New York City came from private practice." (at 01:42:55).

Similarly, the City Bar's written statement:

> "An examination of new judges in New York City in 2009 and 2010 reviewed by the City Bar's Judiciary Committee shows only 18% came from the private sector." (at p. 4).

Isn't this "only 18 percent" a meaningless and misleading statistic, as it implies, but does not state, that in previous years a higher percentage of "new judges in New York City" came from the private sector? What are the undisclosed percentages for previous years – and do you have them for each year from 1999 onward?

Moreover, because "new judges" are the winners of judicial elections or of appointive processes of the Mayor and Governor, how can the percentages of "new judges" from the private sector illuminate whether private practitioners deemed judicial compensation levels attractive? Wouldn't these percentages more accurately indicate voter preference in seating public sector lawyers on the bench – or a similar preference by the Mayor and Governor?

Ascertaining whether judicial compensation levels have deterred private practitioners from becoming "new judges in New York City" – or elsewhere in New York State – requires examination of the pool of candidates who have sought placement on the ballot and who have applied for appointment by the Mayor and Governor. Would you not agree? And shouldn't such examination span the years since 1999 to have greatest value? Has the City Bar undertaken any such study? How about the other bar associations?

Of course, the most direct way to probe whether judicial compensation has deterred private practitioners from becoming "new judges" is by surveying them. Has the City Bar surveyed New York attorneys in private practice – including those who are its members? How about the other bar associations?

Assuredly, a proper survey would have questioned private practitioners about their own compensation – and about the myriad of office expenses and insurance premiums – malpractice, health, etc. – for which they pay from their own pockets, unlike judges who receive, in addition to their salaries, non-salary benefits that are significant and substantial. Indeed, has the City Bar – or the other bar associations and advocates of judicial pay raises – examined these non-salary benefits and issued any reports as to their monetary and other value, comparing them to what pertains in the private sector and the views of private practitioners with respect thereto?[1]

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[1] In the absence of any such reports and surveys, we offer the following description, presumably by an attorney, quite likely a private practitioner, which we received, apparently anonymously:

> "Empirical evidence does not support the judicial postulate [that New York judicial salaries are scandalously low]. A salary of $135,000 a year is 2-3 times what New York City residents typically earn, and is worth more upstate...
>
> There is no New York judicial-salary scandal...
>
> ...Judges and justices want the guaranteed salaries of judicial office, the tenure of judicial offices, and the prestige of judicial offices. On top of that, they want the very-high incomes which attend upon the entrepreneurial risks of private practice, e.g., clients dumping lawyers; clients fighting billings; breakings up of partnerships.
>
> Griping and grumbling of judges and justices overlook payment, by the State of New York, of all their office expenses – from rent to cleaning and maintenance, from electricity to water to telephone to Internet account, from furniture to computer, from records clerks to guards, and from secretary to law clerk. Attorneys in private practice must pay all their office

So that the Commission and public are not misled by the lone "18 percent" statistic that Ms. Wylde reportedly finds "compelling", I am sending a copy of this letter to Ms. Wylde, to the other Commissioners, to the Law Journal – and, for response, to the other bar associations whose leadership testified at the July 20, 2011 hearing in support of increasing judicial pay.

Finally, I enclose another copy of CJA's July 26, 2011 letter, whose requested information as to the average/mean salaries of your association's lawyer membership, of New York lawyers generally, and about surveys is clearly relevant to whether judicial compensation levels would deter qualified private practitioners from becoming judges. As yet, I have received no response from you or from the other bar association leaders to that letter.

Please respond expeditiously as the Commission's statutory time-clock is fast ticking.

Thank you.

Yours for a quality judiciary,

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

Enclosures

cc: Kathryn S. Wylde & Other Members of the Commission on Judicial Compensation
New York Law Journal: Joel Stashenko & Editors
Bar Leaders Testifying at the July 20, 2011 Hearing:
Vincent E. Doyle, III, President, NYS Bar Association
Stewart Aaron, President, NY Co. Lawyers' Association
Leslie Kelmachter, President, NYS Trial Lawyers Association
Lance D. Clarke, Past President, Nassau County Bar Association
Maureen Maney, President-Elect, Women's Bar Association of the State of NY

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expenses out of gross income.

Sniveling and puling by judges and justices overlook their immunity from suit, even if official conduct is patently illegal, even if official conduct is malicious. An attorney in private practice can be sued for malpractice no matter that he did no wrong, so he must carry hefty, expensive professional liability insurance."

The full remarks are annexed, as they are germane to evidentiary issues that the bar associations and other advocates of judicial pay raises have both concealed and falsified in their presentations to the Commission on Judicial Compensation.

From CVA's files
author unknown

The Court of Appeals will decide, in appeals from *Larabee v. Governor*, 880 N.Y.S. 256 (1st Dep't 2008) and *Matter of Maron v. Silver*, 58 A.D.3d 102 (3rd Dep't 2008), whether judges and justices of New York courts may sue for a salary increase.

If the response to this issue is "Yes," the Court of Appeals would likely send the cases back to the Supreme Court for trial. On remand, the first likely issue is whether, in principle, there should be a salary increase, and the second likely issue is the amount of the salary increase.

The plaintiff judges and justices made crystal clear that their demand is a hefty salary increase plus back pay for themselves, and, by extension, for their fellow and sister judges and justices throughout the state.

Larabee and *Maron*, and two other cases of the same ilk, *Chief Judge v. Governor*, Index No. 400763/08 (Sup. Ct. N.Y. Cty. 2008) and *Silverman v. Silver*, Index No. 117058 (Sup. Ct. N.Y. Cty. 2008), were filed and pursued by judges and justices in context of bemoanings by judges and justices of alleged asinine lawsuits by the peasantry. There was no judicial hesitation on the part of judges and justices to rush to court with *their* asinine lawsuits. Oxen of judges and justices were gored, so they acted as do the peasants whom they berate, and whose civil actions and proceedings they detest.

The Appellate Division opinions and Supreme Court opinions in *Larabee* and in *Maron* postulated blithely that New York judicial salaries are scandalously low. In Logic, a postulate is not proven. Instead, the truth of a postulate is deemed self evident. The postulated truth is the starting point for deductions and inferences which lead to other truths.

Empirical evidence does not support the judicial postulate. A salary of $135,000 a year is 2-3 times what New York City residents typically earn, and is worth more upstate.

Scholarship does not support the judicial postulate. Stephen J. Choi, G. Mitu Gulati and Eric A. Posner, "Are Judges Overpaid? A Skeptical Response to the Judicial Salary Debate," THE JOURNAL OF LEGAL ANALYSIS, vol. 1, no. 1, https://ojs.hup.harvard.edu/index.php/jla/article/view/3/28 (2009).

There is no New York judicial-salary scandal. Rather, the scandal is that no action was taken by the Commission on Judicial Conduct regarding the filing of *Larabee* and *Maron* and *Chief Judge* and *Silverman*. Each of the four cases is unbecoming judicial conduct, and each brings reproach to the administration of justice.

None of the plaintiff judges and justices in *Larabee*, *Maron*, *Chief Judge* and *Silverman* has yet been investigated, let alone charged, by the commission. There is no need for the commission to sit idly by, and wait for a complaint to be filed. The commission has authority to initiate complaints against judges and justices. N.Y. Jud. L. § 44; 22 N.Y.C.R.R. § 7000.2.

Though an investigation must relate solely to individual alleged misconduct, it is interesting that the New York judiciary is not a novice at litigation-based impropriety. The judiciary has a history of litigation-engendered unbecoming judicial conduct and reproach to the administration of justice. *Wachtler v. Cuomo*, No. 91/6034 (Sup. Ct. Albany Cty. 1991) (contending that governor and legislature violated constitutional obligation to provide adequate funding for judicial branch). *See Cuomo v. Wachtler*, No. 91-CV-3874 (E.D.N.Y. 1991), *Wachtler v. Cuomo*, No. 91-CV-1235 (N.D.N.Y. Nov. 21, 1991) (lawsuits about lawfulness of state litigation). A criminal milieu breeds criminality.

While Chief Judge Jonathan Lippman was Chief Administrative Judge, he wrote favorably of *Wachtler v. Cuomo* (Albany County). According to Chief Judge Lippman:

The responsibility to be a good partner [of the other branches of state government] has definite limits because the judicial branch must have the minimum resources necessary to carry out its constitutionally mandated functions. * * *

When minimally adequate resources are not forthcoming, the judicial branch must stand firm. No judiciary wants confrontation or litigation with other government branches, but each judiciary must decide for itself what tactics are appropriate based on the particular situation and political dynamics within the jurisdiction. New York's landmark experience more than a decade ago in *Wachtler v. Cuomo*, in which the chief judge brought suit against the governor based on the inherent powers doctrine, demonstrated the pros and cons of confrontation. It chilled interbranch relations in the short term but established a precedent that still resonates today, namely, that the judiciary is willing to defend its status as an independent branch.

Jonathan Lippman, "New York's Efforts to Secure Sufficient Court Resources in Lean Times," 43 *Judges' Journal* 21, 22, available at https://www.abanet.org/jd/publications/jjournal/2004summer/lippman.pdf (2004).

It is amazing that Chief Judge Lippman thinks that a money-grubbing lawsuit is a precedent which "resonates." Unfortunately, the judges and justices assigned to *Larabee*, *Maron*, *Chief Judge* and *Silverman* heard the siren song of resonance.

Black-letter law categorizes the constitutional position of the judiciary as that of an "independent branch." Chief Judge Lippman probably intended more by the term: that the judiciary is a *worthwhile* independent branch. In fact, the judiciary, like every governmental unit, is a sclerotic bureaucracy and is incapable of efficient service to the public.

The status of the judiciary in the public mind is not that of a worthwhile institution. To the public, the judiciary is possessed of the charm and efficiency of the United States Postal Service. Rightly so. Judicial delivery of adjudications is on par with USPS delivery of mail: slow, indifferent, of limited benefit, and expensive. Like mailmen, postal clerks and postal supervisors, judges and justices want more money for less and less service.

The governmental judiciary is to a private-adjudication service, such as JAMS, as the governmental post office is to a private express-delivery service, such as UPS.

To use a state-government metaphor, the judiciary, to the public, is possessed of the charm and efficiency of the Department of Motor Vehicles. Again, rightly so.

The governmental judiciary is to a private-adjudication service as registration with the governmental Department of Motor Vehicles is to registration with a private online service.

In contrast to Chief Judge Lippman, District Judge Jack B. Weinstein of the Eastern District of New York referred to the lawsuit before him (*Cuomo v. Wachtler*) as an "unseemly conflict" and as a potential "public spectacle with no benefit to the people." Joel Stashenko, "N.Y. Judiciary's 1992 Lawsuit Recalled as 'Painful Episode'," N.Y.L.J., http://www.law.com/jsp/article.jsp?id=1176800657196&rss=newswire (Apr. 8, 2007) (internal quotation marks omitted)

It is not by-the-way that fellow and sister judges and justices of the Court of Appeals judges are plaintiffs in the cases on appeal. The Rule of Necessity, which asserts that a judge or justice may hear a case though it affects him personally, will be invoked by the Court of Appeals, as it was by the Appellate Division and by the Supreme Court. That rule is judicial pretending that judicial intellectual honesty can vanquish judicial self interest. It won't, because it can't.

Just look at how the appellate opinions and trial opinions *Larabee* and *Maron* are written. All of them *started* with the *conclusion* that New York judicial salaries are scandalously low. It did not matter to the Appellate Division or to the Supreme Court that a *conclusion* should be at the *end* of a decision.

Further, it did not matter to the Appellate Division or to the Supreme Court that the merits were not at issue, or that the respective positions advanced by the plaintiff judges and justices were not proven. Judicial sentiment about the merits was and is strong, so the sentiment was proclaimed, in the Appellate Division opinions and in the Supreme Court opinions, loud enough for the deaf to hear. The risk inherent in invocation by the Court of Appeals of the Rule of Necessity is that, in a dissimulation of neutral adjudication, the Court of Appeals will echo the sentiment.

Larabee and *Maron* epitomize entrenchment of personal interests in the public sector. Judges and justices want the guaranteed salaries of judicial office, the tenure of judicial offices, and the prestige of judicial offices. On top of that, they want the very-high incomes which attend upon the entrepreneurial risks of private practice, e.g., clients dumping lawyers; clients fighting billings; breakings up of partnerships.

Griping and grumbling by judges and justices overlook payment, by the State of New York, of all their office expenses -- from rent to cleaning and maintenance, from electricity to water to telephone to Internet account, from furniture to computer, from records clerks to guards, and from secretary to law clerk. Attorneys in private practice must pay all their office expenses out of gross income.

Sniveling and puling by judges and justices overlook their immunity from suit, even if official conduct is patently illegal, even if official conduct is malicious. An attorney in private practice can be sued for malpractice no matter that he did no wrong, so he must carry hefty, expensive professional-liability insurance.

The severe attitude problem of judges and justices is not unlike the severe attitude problem of members of teachers' unions. Government-school teachers want tenure, and they want guaranteed salary and benefits advancements, within the governmental school bureaucracy. Further, they want compensation fit for the private sector. So, too, government-judiciary judges and justices want tenure, and guaranteed salary and benefits advancements, within the governmental judicial bureaucracy, and they want private-sector compensation to boot.

Judges and justices bemoan their workload, as if they were coerced into judicial service and are unable to free themselves from judicial service. In fact, there was no coercion, and freedom is gained easily. Judges and justices who feel financially constricted by judicial employment may leave it. The exodus should begin with the plaintiff judges and justices in *Larabee, Maron, Chief Judge and Silverman.*

Should there be a clearing of the benches, the plaintiff judges and justices would not have standing. None of them pleaded existence of a class. Without standing and without a class, the allegations in the complaints would not have to be attended to.

In the meantime, the Court of Appeals has to adjudicate the appeals in *Larabee* and *Maron.* The Court of Appeals should throw the money-grubbing, asinine lawsuits of the plaintiff judges and justices out of court.

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July 26, 2011

TO: BAR LEADERS TESTIFYING AT THE JULY 20, 2011 PUBLIC HEARING OF THE NEW YORK STATE COMMISSION ON JUDICIAL COMPENSATION:
Vincent E. Doyle, III, President, NYS Bar Association
Roger Juan Maldonado, Chair, Council on Judicial Administration
NYC Bar Association
Stewart Aaron, President, NY Co. Lawyers' Association
Leslie Kelmachter, President, NYS Trial Lawyers Association
Lance D. Clarke, Past President, Nassau County Bar Association
Maureen Maney, President-Elect, Women's Bar Association of the State of NY

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

RE: The Average/Mean Salaries of Your Lawyer Membership and of NY Lawyers; Their Views of the Compensation of NY Judges, of the Quality of NY Judges, of the Efficacy of Safeguarding Mechanisms – and Whether Your Bar Associations Have Examined These Issues

In your testimony on July 20, 2011 before New York's Commission on Judicial Compensation, none of you provided any information as to the average and/or mean salaries of the lawyer members of your bar associations. Do your bar associations not have that information?

How about information as to the average and/or mean salaries of the approximately 160,000 lawyers in New York, as to which you also did not testify. Do your bar associations not have that information either?

Additionally, none of you testified as to any polls or surveys conducted by your bar associations of your lawyer members or of the larger pool of 160,000 New York lawyers to ascertain their views of the compensation of New York judges. Have your bar associations conducted no such polls or surveys – and if they have, what are the details?

Finally, what polling or surveying have your bar associations done of lawyer members and of New York's 160,000 lawyer-population to ascertain their views of the quality of New York judges and of the efficacy of existing mechanisms to safeguard judicial integrity, as for instance, recusal procedures; appellate review; requests for oversight by supervisory judges; and complaints to the Commission on Judicial Conduct. Have any of your bar committees examined judicial misconduct complaints and the adequacy of mechanisms of discipline and removal,

particularly where the misconduct involves judicial decisions which flagrantly falsify and omit the material facts and disregard controlling black-letter law? Can you supply copies of their committee reports?

I would appreciate your responses by Friday, July 29th to my direct e-mail address: elena@judgewatch.org – as well as copies of your written testimony and such substantiating materials as you provided the Judicial Compensation Commission.

Thank you.