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18 pages

January 30, 1998

John Eiseman, Deputy Counsel  
Office of Court Administration  
25 Beaver Street, 11th Floor  
New York, New York 10004

RE: Reconsideration and Withdrawal of OCA Waiver to Court of  
Claims Judge Andrew O'Rourke and Informational Requests

Dear Mr. Eiseman:

This letter memorializes our phone conversation yesterday wherein you took exception to the characterization that the OCA had granted Mr. O'Rourke a "waiver" permitting him to receive a \$80,000 a-year pension on top of his annual \$113,000 judicial salary. In your words, the OCA had simply made a "legal decision", as to which it had "no discretion" and which was "ministerial", based on the Retirement and Social Security Law -- the pertinent section of which you stated was either §211 or §212. You would *not* fax me a copy of whichever was the correct section and told me that I would have to obtain it myself from the law library.

You also stated that it was Michael Colodner, the OCA's Counsel, who had made the "legal decision" on Mr. O'Rourke's pension request. However, you were uncertain as to precisely when Mr. Colodner had made his decision. You acknowledged that on Monday, January 26th, CJA had telephoned Mr. Colodner's office about this matter and then again on Tuesday, January 27th. As you know, it was at about 2:30 on Tuesday afternoon that you reached me by phone to ask us to set forth our informational queries in writing<sup>1</sup>. You did not then indicate that Mr. Colodner had already rendered his "legal decision" -- or that it had been acted upon by Chief Administrative Judge Jonathan Lippman, who heads the OCA. In that phone conversation and in the fax I sent approximately an hour later (Exhibit "A"), I made known that we wished to provide citizen input to the OCA's

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<sup>1</sup> In our yesterday's phone conversation, you stated that you had unsuccessfully tried to call us late in the day on Monday, January 26th.

evaluation of Mr. O'Rourke's waiver request. Yesterday, you told me that citizen participation was unnecessary because Mr. Colodner's decision had been "a matter of law". According to you, such "legal decision" hinged on the fact that Mr. O'Rourke had been nominated by the Governor and confirmed by the Senate. My *immediate* response was to tell you that the nomination and confirmation was for a \$113,000 judgeship -- and that there was nothing to indicate that Mr. O'Rourke would have been nominated and confirmed had it been known that he was going to try to get an \$80,000 pension in addition -- which would have required the Governor and Senators to have represented that there were no other qualified persons for the judgeship. This they had not done, either in the Governor's press release announcing the nomination (Exhibit "B"), or during the Senate confirmation at which I was present.

We have now obtained a copy of both §211 and §212 of the Retirement and Social Security Law and verified that the pertinent section is §211 (Exhibit "C")<sup>2</sup>. We have also obtained the January 27th letter of Senators Richard Dollinger and Franz Leichter to Chief Judge Jonathan Lippman (Exhibit "D"), reported in the January 28th Gannett article, "*O'Rourke Get OK to Collect Pension While Serving As Judge*", (Exhibit "E-1"), as well as in yesterday's New York Times article, "*Ex-County Chief's Deal On Pension is Questioned*" (Exhibit "E-2").

The Senators' letter reflects their view that what is involved is a "waiver" -- one "created under Section 211" and requiring that "an applicant must meet the criteria set forth in that statute". Further, the Senators explicitly state:

"During the recent deliberations of the Senate Judiciary Committee regarding Judge O'Rourke, there was no mention of this waiver or that Judge O'Rourke intended to apply for this waiver." (Exhibit "D")

In other words, the Senators' letter makes plain *precisely* what I told you by phone yesterday and what should be obvious to anyone in the counsel's office at OCA: Mr. O'Rourke is *not* entitled to a pension on top of his salary simply because he was nominated and confirmed to the Court of Claims.

Moreover, Mr. O'Rourke's nomination and confirmation only *inferentially* establish the first of the four criteria set forth in subdivision 2(b) of the statute, to wit, that he is "duly qualified" and "competent" (Exhibit "C"). As summarized by the two-pages enclosed with our January 27th fax, outlining CJA's opposition to Mr. O'Rourke's confirmation (Exhibit "A"), the available evidence shows that Mr. O'Rourke is not "duly qualified" or "competent" to be any kind of judge -- let alone one for the Court of Claims. This, quite apart from the fact that his nomination to the Court of Claims is a nullity because -- in violation of *express* provisions of the Governor's *own* Executive Order #10 -- it was *unsupported* by any screening committee report of his qualifications, which report

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<sup>2</sup> We thank the Chairman of the City Bar's Judiciary Committee for providing us with those statutes.

was to have been made "publicly available" upon announcement of the nomination -- December 12th. but was not released then or thereafter. Under such circumstances, there was no nomination properly before the Senate to confirm on January 13th -- a position publicly stated by me before the Senate Judiciary Committee on that date, as reflected by Gannett's January 14th article, "*O'Rourke Confirmed as Judge*" (Exhibit "E-3").

Indeed, had Mr. Colodner bothered to have read §211 before rendering his "legal decision" on Mr. O'Rourke's application, he would have known that as to the four criteria for a waiver, the statute *expressly* requires that there be a "finding, on evidence". The statute also *expressly* requires a "written request of the prospective employer of such retired person, *which request shall state detailed reasons therefor related to the standards*" (Exhibit "C", subdivision 2(b), emphasis added).

Although you indicated that we would have to commence a legal action to get the OCA to rescind its waiver to Mr. O'Rourke, subdivision 5 of the statute gives Chief Administrative Judge Lippman authority to "rescind approval granted for the employment of a retired person upon finding that such approval was obtained by deception or misrepresentation of any material fact..." The *only* explanation for Mr. Colodner's palpably deficient and insupportable determination on Mr. O'Rourke's waiver request -- aside from gross incompetence or his having been swayed by political or other extraneous and improper considerations -- both of which warrant his removal from office -- is that Mr. O'Rourke, or someone purporting to be his "employer", engaged in deception or misrepresentation in connection therewith.

A copy of this letter is being sent to Chief Administrative Judge Lippman in conjunction with CJA's request that the OCA reconsider and rescind approval of Mr. O'Rourke's waiver -- and undertake an evaluation of Mr. Colodner's fitness to continue in office based on his handling of this matter. Such action is warranted by the fact that Mr. O'Rourke flagrantly does *not* meet the criteria required under §211. It is also warranted by documentary materials showing that Mr. O'Rourke has *not* legally assumed his Court of Claims judgeship. As discussed, copies of these materials, which were part of CJA's opposition to Mr. O'Rourke's nomination and confirmation, are in the possession of Chief Judge Judith Kaye. I telephoned her Chambers yesterday asking that they be transmitted to Chief Administrative Judge Jonathan Lippman in support of this request.

Finally, the letter of Senators Dollinger and Leichter (Exhibit "D") specifically inquires as to waivers given to other judges over the past five years. We, too, request such information -- in addition to CJA's previously-asserted requests for information about Mr. O'Rourke's waiver application<sup>3</sup>. In this regard, Mr. Colodner will have an opportunity to make a "ministerial" decision, as to which he will have "no discretion" -- since §211, subdivision 6, *expressly* affords the public sweeping information

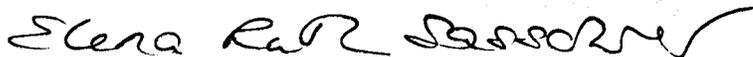
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<sup>3</sup> Our January 27, 1998 letter (Exhibit "A") also sought information as to the OCA's review procedures. We note that under subdivision 8 of §211 (Exhibit "C"), the Chief Administrator is empowered to "adopt appropriate regulations, procedures and forms for implementation of the provisions of this section".

rights:

"Any request for approval of the employment of a retired person under this section, including the reasons stated therefor, and the findings and determination on such request shall be a public record open for inspection..." (Exhibit "C").

Yours for a quality judiciary,



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

Enclosures

cc: Chief Administrative Judge Jonathan Lippman  
Chief Judge Judith Kaye  
Senator Richard Dollinger  
Senator Franz Leichter  
Michael Cardozo, President, Association of the Bar of the City of New York  
Joshua Pruzansky, President, New York State Bar Association  
Blair Horner, Legislative Director, NYPIRG  
Rachel Leon, Executive Director, Common Cause  
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