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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).

*Enclosure*

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?<sup>1</sup>

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<sup>1</sup> 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.

Gripping 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 CJA's files  
a/Ror 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:

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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 29<sup>th</sup> to my direct e-mail address: [elena@judgewatch.org](mailto:elena@judgewatch.org) – as well as copies of your written testimony and such substantiating materials as you provided the Judicial Compensation Commission.

Thank you.

A handwritten signature in black ink, appearing to read "Elena Rossow", with a long horizontal flourish extending to the right.