

September 9, 2011

FR: Hon. David B. Saxe, Appellate Division - First Dept.

RE: 2011 Judicial Compensation Commission Recommendation

I suggest that a viable CPLR Article 78 challenge may exist against the determination of the 2011 Judicial Compensation Commission on the ground that its recommendation contradicts both its own implicit finding and its mandate.

The legislature created the commission to "examine, evaluate and make recommendations with respect to *adequate* levels of compensation" for state court judges (L.2010 ch. 567). While the compensation levels it arrived at would normally be treated as an implicit determination that each level of compensation was adequate compensation for that calendar year, that assumption is questionable here. The commission clearly did not come to the three graduated salary levels by determining what would be adequate in each of the three years; rather, because the third year's compensation was set at the current salary paid to federal district court judges, \$174,000, there is every reason to infer that the commission considered the minimum adequate level of compensation for state judges, not only in 2014, but right now, to be the level at which the federal bench is currently paid. Indeed, the comments of members of the commission in the course of its proceedings provide further support for that conclusion. Nevertheless, having determined the salary level that it deemed adequate for an increase was to bring the state judges

in parity with the federal judges, the commission then adopted a planned increase that left the state judges with an *inadequate* salary for the first two years, by not raising salaries to that adequate level until April 1, 2014. In so doing, it violated its very mandate.

Even if we were to accept that the commission actually concluded that \$174,000, the current salary level of federal district court judges, was needed to pay adequate compensation for 2014, but that a lesser amount was needed to provide an adequate salary for 2012 and 2013, the commission had no basis to find that the adequate salaries for 2012 and 2013 respectively was \$14,000 and \$7,000 less than the adequate salary level for 2014. Importantly, the graduated increase from 2012 to 2014 cannot be logically explained as intended to compensate for cost-of-living increases; that possibility is precluded by the lack of any increase for the final year of the four-year period the commission was assigned to address, and by the absence of any support for the calculation of COLAs in arriving at the graduated recommendations. Nor was there any basis for finding that the prevailing economic conditions would be different in 2014 than they would be in 2012 and 2013. While the gradual increase to the proper level is understandable as an attempt to make the increase more palatable to the legislature, it is nevertheless an improper award of a less-than adequate salary in the face of a mandate to make adequate adjustments.

Perhaps, this is an issue that can be taken up by our Judicial Associations.