

# CENTER *for* JUDICIAL ACCOUNTABILITY, INC.

Post Office Box 8101  
White Plains, New York 10602

Tel. (914)421-1200

E-Mail: [mail@judgewatch.org](mailto:mail@judgewatch.org)  
Website: [www.judgewatch.org](http://www.judgewatch.org)

January 4, 2017

TO: Chairs of the Attorney Grievance Committees for the Fourth Judicial Department  
Carl M. Darnall, Esq./Chair – Seventh Judicial District: Rochester  
James H. Messinger, Jr., Esq./Chair – Fifth Judicial District: Syracuse  
Mark R. McNamara, Esq./Chair – Eighth Judicial District: Buffalo

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

RE: (1) Reconsideration of CJA's October 14, 2016 complaint entitled "Testing the efficacy of New York's attorney disciplinary committees in policing district attorney conflicts of interest and obligations to report attorney misconduct";  
(2) FOIL request: written conflict-of-interest procedures utilized by the 22 district attorney offices within the Committees' jurisdiction – including applicable to their handling of public corruption complaints in which they have financial and other interests

Pursuant to §1240.7(e)(3) of the Rules for Attorney Disciplinary Matters [22 NYCRR §1240.7(e)(3)], I hereby file this written request for reconsideration of the December 5, 2016 letter of Chief Counsel Gregory J. Huether, informing me that "it has been determined" that my October 14, 2016 conflict-of-interest/misconduct complaint "does not provide a sufficient basis to conduct an investigation" of the 23 complained-against current, former, and acting district attorneys within the geographic jurisdiction of the three attorney grievance committees of the Fourth Judicial Department. According to Chief Counsel Huether, "the Committee is unable to assist [me]."

§1240.7(e)(3), entitled "Review of Dismissal or Declination to Investigate", states:

"Within 30 days of the issuance of notice to a complainant of a Chief Attorney's decision declining to investigate a complaint, or of a Committee's dismissal of a complaint, the complainant may submit a written request for reconsideration to the chair of the Committee. Oral argument of the request shall not be permitted. The Chair shall have the discretion to grant or deny reconsideration, or refer the request to the full Committee, or a subcommittee thereof, for whatever action it deems appropriate."

At the outset, I object that Chief Counsel Huether's letter does not apprise me of my right to seek reconsideration pursuant to §1240.7(e)(3). Is it the normal and customary practice of the three

grievance committees of the Fourth Judicial Department to conceal this right from complainants?

Likewise, I object that Chief Counsel Huether's letter generically states that "Pursuant to the Rules for Attorney Disciplinary Matters (formally cited as 22 NYCRR part 1240), Chief Counsel is vested with the authority to decline to investigate a complaint for several reasons", without then using a pronoun to connote that with respect to my complaint it is he alone who has determined that it "does not provide a sufficient basis to conduct an investigation" – and that he has done so for all three grievance committees of the Fourth Judicial Department, not just for the Grievance Committee of the Seventh Judicial District, whose letterhead he is using. Is this the Committees' normal and customary practice to have its one chief attorney – who goes by the designation chief counsel – not directly apprise complainants that it is he who is dismissing their complaints and for which committee?

I also object that Chief Counsel Huether purports that "careful review" underlies the determination that my complaint "does not provide a sufficient basis to conduct an investigation". No "careful review" could produce the mischaracterizations of my complaint on which is founded the deceit that it is insufficient to warrant investigation.

According to his letter,

"The substance of [my] complaint alleges that the subject attorneys, acting in their respective capacities as an officially elected or appointed County District Attorney, each engaged in a 'conflict of interest/misconduct' by not undertaking an investigation or prosecution of alleged criminal corruption, and further engaged in a 'larcenous pocketing' of salary increases they knew to be unlawful.

Pursuant to 22 NYCRR 1240, the concerns outlined by [my] letter and submissions do not warrant further involvement by this office. The exercise of the Constitutional powers and duties specifically given to District Attorneys is not a subject for review by this office. The issue of the propriety of their acceptance of legislatively approved pay increases is similarly not appropriate for review by this office, despite the serious and conclusory allegations [I] raise by [my] letter. As [my] letter indicates, this is already the subject of pending litigation, and again, is not appropriate for review by this office."

This is multiply false.

First, the "substance" of my complaint – so-reflected by its "RE clause" title – is the district attorneys' violations of ethics rules governing conflict of interest and the duty to report attorney misconduct. Pertinent rules are both cited and quoted by my complaint, *to wit*, New York's Rules of Professional Conduct: Rule 1.7 entitled "Conflict of Interest: Current Clients" and Rule 8.3 entitled "Reporting Professional Misconduct", subsection (a); the National Prosecution Standards of the National District Attorneys Association, Section 1-3.3 entitled "Specific Conflicts", subdivision (d);



Section 1-3.4 entitled “Conflict Handling”; Section 1-3.5 entitled “Special Prosecutors”; and Section 1-1.6 entitled “Duty to Respond to Misconduct”. Enforcement of these rules is the Committees’ function, is it not?

Second, the Committees are not being asked to review “the exercise of the Constitutional powers and duties specifically given District Attorneys”, but to enforce threshold conflict of interest rules and procedures that district attorneys must observe if they are to discharge their constitutional powers and duties. Conflict of interest rules are threshold, are they not?

Third, it is certainly “appropriate” for the Committees to review the “propriety” of district attorneys accepting salary increases where, as the complaint recites, they have not denied or disputed the accuracy of the particularized notice and evidence furnished them that the increases rest on commission reports that are “false instruments”, violative of the very penal laws they are charged with enforcing – nor confronted their mandatory obligations pertaining to conflicts of interest and reporting attorney misconduct.

Fourth, the complaint does not rest on “conclusory allegations”, but on a mountain of specific facts, law, and evidence, all readily-verifiable, establishing that the district attorney salary increases and the judicial salary increases to which they are linked are a “grand larceny of the public fisc”, already costing taxpayers well in excess of \$150 million – and that the complained-against district attorneys have not only violated ethics rules, but penal laws by their collusion with those they are duty-bound to criminally investigate and prosecute for penal law violations.

Fifth, the “pending litigation”, identified at page 7 of the complaint, is a citizen-taxpayer action to secure declarations of statutory violations, fraud, and unconstitutionality. It has nothing to do with punishing district attorneys for willfully violating ethics rules governing conflicts of interest and reporting attorney misconduct – the subject of the October 14, 2016 complaint. These violations are “appropriate for review” by the Committees, which are the entities in which is vested the responsibility for breaches of ethics and professionalism of attorneys – and district attorneys.

Of course, should you believe that any of the succession of serious, substantial – and fully documented – ethics and criminal violations encompassed by my complaint are better resolved elsewhere or by a legal proceeding – excepting, of course, the violations of mandatory rules pertaining to conflicts of interest and duty to report attorney misconduct, as to which the Committees’ disciplinary jurisdiction is exclusive – the Committees are empowered to make referrals and my complaint expressly requested that they do so. Indeed, entirely ignored by Chief Counsel Huether is the referral relief expressly sought by the third branch of my complaint’s “RE clause” – and as to which the complaint concluded by stating:

“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.” (p. 8, underlining in the original)

There being no basis in fact or law for Chief Counsel Huether’s December 5, 2016 letter declining to investigate my October 14, 2016 complaint or to otherwise assist me, your duty, as the Committees’ chairs, is to grant reconsideration and direct the investigation which Chief Counsel Huether was mandated to authorize pursuant to Rule §1240.7(b). This includes a direction to the 23 complained-against current, former, and acting district attorneys that they each “provide a written response to the complaint”. This, they already have a head-start on, since – as reflected by the complaint (at p. 8) – I provided them each with a copy for the two-fold purpose of their response and as a FOIL request for records responsive to the question:

“What are your procedures for handling public corruption complaints, filed with your district attorney offices, where you have financial and other conflicts of interest?”<sup>1</sup>

I received no responses from any of the complained-against district attorneys within your jurisdiction other than Wyoming County District Attorney Donald O’Geen.<sup>2</sup>

As your three Committees should reasonably have copies of the written conflict-of-interest procedures utilized by the 22 district attorney offices within your jurisdiction – including applicable to their handling of public corruption complaints in which they have financial and other interests – I take this opportunity to request that these be furnished to me pursuant to FOIL (Public Officers Law Article VI).

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<sup>1</sup> National Prosecution Standards of the National District Attorneys Association, Section 1-3.4: “Conflict Handling”:

“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.”

Cited and quoted at p. 6 of my October 14, 2016 conflict-of-interest/misconduct complaint.

<sup>2</sup> District Attorney O’Geen’s response is posted on CJA’s webpage of responses to the October 14, 2016 conflict-of-interest/misconduct complaint. It is accessible from CJA’s homepage, [www.judgewatch.org](http://www.judgewatch.org), via the prominent link: “NO PAY RAISES FOR NEW YORK’s CORRUPT PUBLIC OFFICERS: The Money Belongs to their Victims!” See entry #14 entitled “A New Round of Disciplinary & Criminal Complaints”.

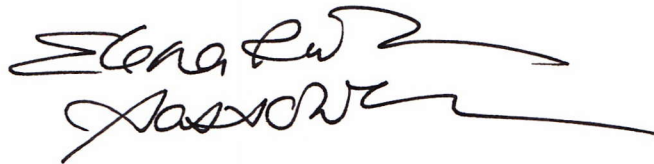


Needless to say, you and the other 60 members of your three Committees are all appointed by the justices of the Appellate Division, Fourth Department (§1240.4), whose statutorily-violative, fraudulent, and unconstitutional judicial salary increases underlie the district attorney salary increases. As each of you have professional, political, and personal relationships and interests that may impact upon your ability to impartially discharge your responsibilities, I trust you will be adhering to applicable rules of disclosure and disqualification – and that you will demand same, as well, from Committee staff.

In that connection, please be advised that Chief Counsel Huether's December 5, 2016 letter materially replicates, including *verbatim*, a November 23, 2016 letter signed by Glenn Simpson, a staff counsel at the Grievance Committee for the Ninth Judicial District – itself copied, *verbatim*, by a November 28, 2016 letter signed by Chief Counsel Mitchell T. Borkowsky of the Grievance Committee for the Tenth Judicial District and by a November 30, 2016 letter signed by Chief Counsel Diana Maxwell Kearse of the Grievance Committee for the Second, Eleventh, and Thirteenth Judicial Districts.<sup>3</sup>

Chief Counsel Huether may be presumed to know that his letter – like those three letters – cannot be justified, with his letter possibly the most indefensible because of its brazen falsehood that the complaint rests on “conclusory allegations”.

Thank you.

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

cc: see next page

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<sup>3</sup> Mr. Simpson's November 23, 2016 letter, Chief Counsel Borkowsky's November 28, 2016 letter, and Chief Counsel Kearse's November 30, 2016 letter are posted on CJA's webpage of responses to the October 14, 2016 conflict-of-interest/misconduct complaint. (see fn. 2, *supra*). That is where my written requests for reconsideration of those letters are also posted – largely identical to this written reconsideration request.

cc: The complained-against district attorneys, current, former, and acting, within the Committees' jurisdiction:

Fifth Judicial District Attorney Disciplinary Committee

Herkimer County District Attorney Jeffrey S. Carpenter  
Jefferson County District Attorney Kristyna S. Mills  
Lewis County District Attorney Leanne K. Moser  
Oneida County District Attorney Scott D. McNamara  
Onondaga County District Attorney William J. Fitzpatrick  
Oswego County District Attorney Gregory S. Oakes

Seventh Judicial District Attorney Disciplinary Committee

Cayuga County District Attorney Jon E. Budelmann  
Livingston County District Attorney Gregory J. McCaffrey  
Monroe County District Attorney Sandra Doorley  
Ontario County District Attorney R. Michael Tantillo  
Seneca County District Attorney Barry Porsch  
Steuben County District Attorney Brooks Baker  
Wayne County District Attorney Richard M. Healy  
Yates County District Attorney Valerie G. Gardner

Eighth Judicial District Attorney Disciplinary Committee

Allegany County District Attorney Keith A. Slep  
Cattaraugus County District Attorney Lori Rieman  
Chautauqua County Acting District Attorney Patrick Swanson  
Erie County Acting District Attorney Michael J. Flaherty, Jr.  
Genesee County District Attorney Lawrence Friedman  
Niagara County Acting District Attorney Theodore A. Brenner  
Orleans County District Attorney Joseph V. Cardone  
Wyoming County District Attorney Donald O'Geen  
Former Erie County District Attorney Frank Sedita III – now Supreme Court Justice

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