STATE OF NEW YORK
SUPREME COURT COUNTY OF ALBANY

In the Matter of the Application of The NEW YORK STATE COMMISSION ON JUDICIAL CONDUCT,

Petitioner,

For an Order Pursuant to CPLR 2308 compelling compliance with a subpoena

-against-

GREGORY PEIREZ, ESQ. AND SHAWN SMITH, ESQ.,

Respondents.

ATTORNEY AFFIRMATION
Index No. 8115-22
Hon. Gerald Connolly

MICHELLE A. STORM, an attorney admitted to practice in the courts of the State of New York and not a party to this action, hereby affirms the following to be true under the penalties of perjury:

1. I am an attorney duly admitted to practice law in the State of New York and am associated with the law firm of Monaco Cooper Lamme & Carr, attorneys for respondents, Gregory Peirez, Esq. and Shawn Smith, Esq., and as such, I am fully familiar with all the facts, circumstances, and proceedings heretofore had herein.

2. I submit this affirmation in opposition of petitioner's request for an order pursuant to CPLR 2308(b) and CPLR 411 directing respondents to give testimony and produce copies of all emails in their possession and sealing documents, and in support of

respondents cross motion to quash the subpoenas as served, or alternatively order petitioners to limit their request by subject matter at issue in this investigation. Also attached hereto for this Court's consideration is an Attorney Affirmation of Shawn Smith, Esq.

3. Petitioner's motion should be denied, and respondents' cross motion granted, because the subpoena as issued is improper in that it does not provide any subject matter at issue for this investigation and therefore is nothing more than a fishing expedition and further improperly prevents respondents from proper preparation for testimony sought.

4. On the outset it is important to set forth that the respondents are not refusing to cooperate in the pending investigation by the petitioners. Rather, the respondents are calling into question the validity of the subpoena as issued in that it fails to limit the demand to subject matters at issue in the investigation. A review of the caselaw and relevant rules demonstrates that such demand is improper and goes beyond the authority of the Commission.

5. Judiciary Law Section 42(1) only gives the Commission the power to conduct hearings and subpoena witnesses to be examined under oath concerning "evidence that it may deem relevant or material."

6. Similarly, Judiciary Law Section 43(2) authorizes a referee to subpoena witnesses for examination under oath but it too must be regarding evidence that the refer deems "relevant or material to the subject of the hearing."

7. Although 22 NYCRR 7000.6(e) grants the referee reasonable requests for subpoenas, NYCRR 7000.6(i)(2) states that "at the hearing, the testimony of witnesses may be taken relevant to the formal written complaint."

8. Consistent with these provision, Judiciary Law Section 44(4) provides that the Commission may only take the testimony of witnesses relevant to the complaint.

9. As set forth in 28 N.Y. Jur.2d Courts and Judges Section 454:

> Any member of the Commission on Judicial Conduct, or the Administrator, may administer oaths or affirmations, subpoena witnesses, compel their attendance, examine them under oath or affirmation, and require the production of any books, records, documents, or other evidence which may be deemed relevant or material to an investigation. **An overly broad subpoena may be judicially modified to eliminate those portions requesting writings relating to transactions having no relation to the matters under investigation**. Where the proponent of subpoena fails to establish a factual basis that shows relevancy to the investigation's subject matter, the referee issuing the subpoena has exceeded his or her power, and the subpoena must be quashed.

Id. (emphasis added).

10. Questions of relevancy with respect to items sought by subpoenas can only be determined by reference to complaints. Otherwise, the scope of an investigation would be without limits and subpoenas could be utilized as instruments of abuse and harassment. Nicholson v. State Com. On Judicial Conduct, 68 AD 2d 851, 852 (1st Dept. 1979).

11. Here, respondents were served with a subpoena which demanded all email communications between "smithlaw9@[redacted]" and [redacted] and between "gpeirez@[redacted]" and [redacted] from "June 20, 2022 to the present". See Petitioners' Exhibits 1 and 2 respectively.

12. The subpoenas also demanded respondents to appear for deposition testimony.

13. The subpoenas however did nothing to advise the respondents as to the subject matter of the investigation. Indeed, the first time the Judicial Commission explicitly stated that the investigation was surrounding complaints that the Judge "engaged in

inappropriate email correspondence" was in its motion papers. Even still, this is vague and insufficient to meet its burden.

14. The Commission's failure to limit the subpoenas in scope based on subject matter is nothing less than a fishing expedition and an attempt to engage in unfettered inquiry.

15. Importantly, the Court of Appeals has recognized that the "materiality and relevancy requirements were included in section 42 of the Judiciary Law to prevent investigatory fishing expeditions." Matter of New York State Commn. On Jud. Conduct v. Doe, 61 NY 2d 56, 60 (1984). Indeed, the Commission can only exercise its subpoena power "within bounds circumscribed by a reasonable relation to the subjection matter under investigation." Id.

16. Where, as is the case here, a subpoena is challenged asserting lack of relevancy it is incumbent upon the issuer to come forward with a factual basis establishing the relevancy to the subject matter of the investigation. Matter of New York City Dept. of Investigation v. Passannate, 148 AD 2d 101, 104 (1989). It is not simply enough that the proponent merely hopes or suspects that relevant information will develop. See Matter of Temporary Comm. Of Investigation of State of N.Y. v. French, 68 AD 2d 681, 691 (1979).

17. Where the proponent of the subpoena fails to establish a factual basis that shows the relevancy to the subject matter of the investigation, the referee issuing the subpoena has exceeded his or her power under Judiciary Law Section 43(2) and Section 44(4) and the subpoena must be quashed. Matter of Morgenthau, 73 AD 3d 415, 419 (1st Dept. 2010).

18. In the Matter of Morgenthau, it was determined that a subpoena requiring the county district attorney to testify before the Commission on Judicial Conduct in a judicial misconduct proceeding went beyond the scope of Commission's investigation. There the Court decided that even if the district attorney had a political bias against the judge, where the district attorney's involvement was limited to permitting the Commission's administrator to conduct interviews with members of his staff who might have had information pertinent to the investigation of the alleged misconduct, the district attorney was neither the complainant nor the source of information leading to the investigation, and there was no indication that the district attorney witnessed any alleged misconduct. Matter of Morgenthau, 73 AD 3d 415, 419 (1st Dept. 2010).

19. Similar to the case at bar, this is nothing more than an impermissible fishing expedition, and the court held that, "[i]t is simply not enough that the [subpoena's] proponent merely hopes or suspects that relevant information will develop." Id.

20. Here, in response to respondents' lawful request seeking the petitioner to limit its subpoena to documents and testimony relating to the subject matter of the investigation, the petitioners refused to do so citing an obligation for the investigation to be confidential. See Petitioner's Exhibit 4. Such argument is erroneous.

21. Certainly, respondents have a duty to maintain confidentiality in this matter. That is not at issue.

22. What is at issue is whether petitioners can refuse to disclose the subject matter of the investigation to the witnesses when seeking their private emails and their testimony under the guise of "confidentiality".

23. It is evident that the petitioners are attempting to use "confidentiality" as both a sword and shield in this matter. The petitioner is stating that the subject matter is confidential yet is seeking to depose the respondents on that very topic. If petitioners are going to question the respondents on the subject matter of the investigation, they certainly cannot claim that they cannot disclose the subject matter prior to the testimony because it is "confidential".

24. In their moving papers petitioners also argue that the respondents are not entitled to know the specifics of the investigation. This is an ill-founded argument as the respondents are not seeking the specifics of the investigation but rather simply the subject matter of the investigation. See generally, Petitioner's' Exhibit 3.

25. Indeed, respondents do not contest that the petitioners are engaged in a meaningful investigation, they are merely seeking the subject matter of the investigation so that they can properly disclose relevant email communication and, perhaps more importantly, prepare for their depositions. Respondents should not be blindsided at their respective depositions.

26. Moreover, as outlined in Mr. Smith's accompanying affidavit, the Investigator, in telephone conversations with Mr. Smith, stated words to the effect, "We will not know if its relevant until we see it, and after we see all emails we will determine what is relevant." See Smith Affidavit.

27. Again, subpoenaing respondents' emails and depositions with the mere hope of developing relevant testimony once on the stand is precisely the kind of investigatory fishing expedition that the law forbids. Id. at 420.

28. To that end, if the investigation is truly regarding complaints engaged in "inappropriate email correspondence" as so stated in petitioner's papers, it is unclear as to the need for the deposition testimony of the respondents. If the subject of the investigation engaged in inappropriate email correspondence, same would be evident on its face and would not require testimony. Certainly, my client cannot begin to testify as to the intent and meaning behind any communication sent by the subject judge.

29. As such it is respectfully submitted that the subpoenas -- as served without limitation -- do exactly what the Appellate Division sought to prevent, abuse and harass respondents.

30. Importantly, respondents are not refusing to comply with the subpoena for documents and testimony, nor are they failing to obey RPC 8.3(b) in seeking the Commission to limit the scope of the subpoena to relevant information. RPC 8.3(b) requires that a lawyer shall not fail to respond to a "lawful" demand for information. Respondents are merely calling into the question the "lawfulness" of the subpoena as issued – an action that is well within their rights.

31. As such, respondents respectfully request that this Court require the Commission notify respondents as to the subject matter of the investigation and limit their Subpoena accordingly.

WHEREFORE, respondents, Peirez and Smith, respectfully request an Order denying petitioners' motion to compel and granting their motion to quash the subpoenas as served, or alternatively order petitioners to limit their request by subject matter at issue in this investigation, with costs, together with such other and further relief as the Court may see just and proper.

Dated: November 8, 2022
Albany, New York

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