SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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In the Matter of the Application of THE HONORABLE LEE L. HOLZMAN,

Petitioner-Appellant,

Index No.: 108251/2011

-against-

NOTICE OF MOTION

THE COMMISSION ON JUDICIAL CONDUCT,

Respondent-Respondent.

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PLEASE TAKE NOTICE that upon the annexed affirmation of David Godosky, Esq., dated the October 4, 2011, and the annexed thereto, and upon all the pleadings and proceedings heretofore had herein, the undersigned will move this Court, at the Courthouse thereof, located at 27 Madison Avenue, New York, New York 10010, on the _____ day of _____, 2011, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an Order:

1. staying any proceedings by the respondent, including the hearing scheduled for October 11, 2011, pending determination of the appeal in this matter;

2. temporarily restraining respondent pending disposition of the within application; and

3. awarding such other and further relief as the Court deems just and proper.

Dated: New York, New York
October 4, 2011

David Godosky, Esq.
GODOSKY & GENTILE, P.C.
Attorneys for Petitioner-Appellant
61 Broadway
New York, New York 10006
(212) 742-9700

To: Eric T. Schneiderman
Attorney General of the State of New York
Attorney for Respondent
120 Broadway
New York, New York 10271

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

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In the Matter of the Application of
The Honorable Lee L. Holzman,

Petitioner-Appellant,

-against-

The Commission on Judicial Conduct,

Respondent-Respondent.

----------x

Index No.: 108251/2011

AFFIRMATION IN SUPPORT

DAVID GODOSKY, an attorney duly licensed to practice law in the State of New York, states the following under the penalties of perjury:

I am a member of the law firm of Godosky & Gentile, attorneys for petitioner-appellant, The Honorable Lee L. Holzman ("Petitioner"), in the above-captioned matter. I am fully familiar with the facts and circumstances of this case based upon a review of the file maintained by my office. I submit the within affirmation in support of the instant application to request a stay of any proceedings by the Respondent, including the hearing scheduled for October 11, 2011, pending determination of this appeal, and issue a temporary restraining order pending disposition of this application by the full bench.

On October 4, 2011 Petitioner appealed from the Order of the Supreme Court, New York County (Jaffe, J.) dated September 22, 2011 (Notice of appeal, annexed hereto as Exhibit A) which denied Petitioner's Article 78 Petition requesting a stay of his disciplinary proceeding pending the resolution of a related

criminal matter, and dismissed the Petition. (Annexed hereto as Exhibit B)

Petitioner is a Judge elected to the Surrogate's Court, Bronx County in 1987. On January 4, 2011, pursuant to the authorization of the Commission on Judicial Conduct ("Commission"), Respondent served Petitioner with a Formal Written Complaint ("Complaint"), alleging four violations of the Rules of the Chief Administrator of the Courts Governing Judicial Conduct ("Rules"). (Annexed to Exhibit "B" hereto as Exh. B). By and large the charges brought against Petitioner are allegations of a failure to supervise the former Counsel to the Public Administrator, Michael Lippman. Mr. Lippman is under indictment and is currently awaiting trial in Bronx County on criminal allegations arising out of alleged conduct as Counsel to the Public Administrator.

Commission Proceedings and The Stay Application

The First Charge of the Complaint alleges that from 1995 to 2009, Mr. Lippman requested fees in allegedly "boilerplate" affidavits of legal services that the Commission asserts failed to comply with the Surrogate's Court Procedure Act ("SCPA"), and that Petitioner approved those requests. The Second Charge alleges that in 2005 and 2006 Mr. Lippman took unearned advanced legal fees without the approval of the court and that Petitioner failed to report him. The Third Charge alleges that from 1997 to 2005 Petitioner failed to adequately supervise the work of Public Administrator Esther Rodriguez. The Fourth Charge alleges that

Mr. Lippman allegedly raised money for Petitioner's 2001 campaign for Surrogate and that Petitioner failed to disqualify himself from Mr. Lippman's cases in 2001 through 2003.

Petitioner served an Answer with Affirmative Defenses dated January 21, 2011, which is annexed to Exhibit "B" hereto as Exh. F. Petitioner also filed an affirmation in support of a Motion to Dismiss the Formal Written Complaint, (annexed to Exhibit "D" hereto as Exh. G) or in the alternative, requesting that the Commission stay the proceeding pending the completion of Mr. Lippman's criminal trial. Counsel to the Commission opposed Petitioner's motion on February 25, 2011(annexed to Exhibit B hereto as Exh. H). On March 4, 2011 Petitioner submitted a Reply affirmation in further support of his motion. (Annexed to Exhibit B hereto as Exh. I) Oral argument was not held on Petitioner's motion, and the Commission issued a written denial of the motion on March 21, 2011. (Annexed to Exhibit B hereto as Exh. A) Despite the fact that the facts, testimony, records, and witnesses related to the criminal charges against Mr. Lippman were within the exclusive control of the criminal prosecution, the Commission scheduled a hearing before a Referee on May 9, 2011, which was later adjourned.

On July 29, 2011, Petitioner filed by Order to Show Cause an Article 78 Petition in New York Supreme Court challenging the March 21, 2011 decision of Respondent denying Petitioner's motion to dismiss the complaint without prejudice to re-file or to grant a stay of his disciplinary proceeding pending the resolution of

Mr. Lippman's criminal trial. (Exhibit "B") Petitioner annexed to the petition as Exhibit "E" an affidavit by Mr. Lippman's attorney stating that if Mr. Lippman were to be called to testify at Petitioner's hearing, he would advise his client to refuse to testify pursuant to the Fifth Amendment. On July 28, 2011, Respondent filed an affirmation in opposition (Exhibit "C") to Petitioner's application for a temporary restraining Order. On September 8, 2011 Judge Jaffe issued an Order denying the request for the stay and dismissed the Petition. (Annexed hereto as Exhibit "D") The Order stated that the application was premature in that Mr. Lippman had not yet invoked his Fifth Amendment right, and thus the affidavit by Mr. Lippman's attorney was insufficient to grant the stay. The Commission's hearing before the referee was scheduled to begin on September 12, 2011. On that day, Petitioner filed an Order to Show Cause to renew and reargue the request for the stay, (annexed hereto as Exhibit "F") supported by an affidavit by Mr. Lippman stating that if he were to be called to testify during the hearing, he would indeed invoke the Fifth Amendment (annexed hereto as Exhibit "F"). Judge Jaffe issued a ten-day interim stay pending the commencement of Mr. Lippman's trial, which was scheduled for September 20, 2011. On September 20, 2011, Mr. Lippman's criminal case was adjourned to November 1, 2011. On September 22, 2011 Judge Jaffe issued an Opinion and Order that denied Petitioner's request for a stay of the disciplinary hearing pending the conclusion of Mr. Lippman's criminal trial (annexed hereto as Exhibit "G").[1]

[1] Based upon the affidavits of both Mr.4Lippman and his counsel, we submit

The hearing before the Commission is currently scheduled for October 11, 2011; a stay is therefore required. Petitioner-appellant will file the brief as to this appeal on or before November 3, 2011.

To require Petitioner to proceed with the hearing when he is unable to mount a competent defense violates his right to Due Process. Access Capital, Inc. v. DeCicco, 302 A.D.2d 48, 52 [1st Dept. 2002]; Walden Marine, Inc. v. Walden, 266 A.D.2d 933, 933-34 [4th Dept. 1999]; Britt v. Int'l Bus Services, Inc., 255 A.D.2d 143, 143-44 [1st Dept. 1998]. Here, the failure to stay the hearing (or dismiss the Complaint without prejudice to re-file) is in violation of Petitioner's right to mount a competent defense, in violation of his due process rights, because not only will he be precluded from calling as a witness the actual wrongdoer, but key evidence gathered in the criminal investigation remains beyond Petitioner's grasp and is within the exclusive possession of the criminal prosecutor's office.

Certain cases relied upon by the lower court state that while it may be within the court's discretion whether to stay a disciplinary hearing until after a criminal trial, (see Chaplin v. New York City Dept. of Educ., 48 A.D.3d 226 [1st Dept. 2008]; Matter of Watson v. City of Jamestown, 27 A.D.3d 1183 [4th Dept. 2006]; Matter of Mountain, 89 A.D.2d 632 [3rd Dept. 1982]), **those are cases where the petitioners themselves asserted a Fifth Amendment right and requested to stay their own disciplinary**

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there can be no dispute that this critical witness is "unavailable" while the criminal charges remain pending.

hearing pending the outcome of their own criminal trial. That is decidedly not the circumstance in the case at bar.

Britt, 255 A.D.2d 143 and Access Capital, 302 A.D.2d 48 are the relevant precedent for the instant matter where it is a "material and necessary" witness who is asserting a constitutional privilege which, in turn, denies the accused the opportunity to examine and mount a competent defense. Further, it is the pendency of the criminal matter which serves to deprive Petitioner of the material and testimony gathered over the three (3) year criminal investigation into Mr. Lippman's conduct that culminated in the indictment of two (2) individuals (not Petitioner) and the termination of the Public Administrator. Petitioner, after more than two decades of service as Surrogate's Court Judge, is entitled to the right of a competent defense that includes the receipt and use of the voluminous investigative materials as well as the opportunity to examine the former counsel to the Public Administrator who is being prosecuted for defrauding and deceiving the court by, *inter alia*, filing false documents with the court.

Respectfully, constitutional concerns, which are clearly implicated here, do not wax and wane with the time of year. Judge Jaffe's original order stayed the proceeding due to constitutional concerns when the criminal trial of Mr. Lippman was scheduled for September 20, 2011. Judge Jaffe seemed less impressed with Petitioner's Due Process rights when People of the State of New York v. Lippman was adjourned to November 1, 2011, and even less so should the trial not commence until January, 2012. (See Exh.

"G", Judge Jaffe's Decision and Order dated September 21, 2011)

Petitioner's right to vigorously and competently oppose these charges should be absolute and unwavering; it should not depend upon his age (69 years old), the trial schedule or backlog in Bronx County, or the Commission on Judicial Conduct's desire to prosecute the case. Upholding constitutional principles of due process and fairness can often cause procedural issues and concerns. The Fourth Amendment often results in the dismissal of cases due to suppression or constitutional infirmities, but we accept this because it strengthens the constitutional system of laws upon which we rely and exalt. To force Petitioner, the Surrogate's Court Judge of Bronx County, to go forward in defense of these charges before the evidence, facts, and witnesses that have inculpated Mr. Lippman and exculpated Judge Holzman are fully known and available is a trampling of rights far more valuable than any determination by the Commission on Judicial Conduct.

While we submit that the substantive charges leveled against Petitioner are, indeed, meritless, we seek this stay because the procedural and constitutional infirmities presented are abhorrent to the notion of due process.

Based on the foregoing, Petitioner has a meritorious appeal, with a strong likelihood for success on his constitutional claims. In addition, pursuant to CPLR 5519, and under longstanding judicial precedent, the party requesting the stay must also demonstrate the danger of irreparable injury in the absence of preliminary injunctive relief and a balance of equities in favor

of the moving party. See, e.g., Nobu Next Door, LLC v. Fine Arts Housing, Inc., 4 N.Y.3d 839, 840 [2005].

If a stay is not granted pending the appeal, Petitioner, the sitting Surrogate Judge in Bronx County, could be forced to defend his career and reputation in a constitutionally infirm public proceeding. Petitioner, in his last year of a twenty-four-year career as a judge, could potentially face public discipline or even removal from the bench without the ability to examine the witness who is central to the proceedings brought against him.

The irreparable harm faced by Petitioner if a stay is not granted is much greater than any harm to Respondent if the hearing is stayed until after Mr. Lippman's criminal trial. Respondent is merely facing a delay in advancing its interests. Previously Respondent was more than satisfied with and consented to a May, 2011 hearing date when Respondent mistakenly believed that Petitioner would retire at the end of 2011 - thereby acknowledging that six months from the commencement of the hearing was sufficient time in which to complete the proceedings. Accordingly, now that Respondent knows that Petitioner will not be retiring until year-end 2012, it can no longer make an argument for time-sensitivity, leaving Respondent with no other claim for prejudice if the hearing were to be stayed. In addition, Petitioner is prepared to file its brief on this appeal in as little as one month's time so as to lessen any further delays.

Factual Background and Summary

During the years that petitioner served as Surrogate he

signed in excess of 2,500 decrees or orders each year and authored approximately 800 decisions annually. In 1998 Petitioner appointed Esther Rodriguez as Public Administrator, and in 2006 he appointed John Raniolo as Public Administrator. Mr. Lippman performed legal services for the Public Administrator as either an associate or a principal in a firm since the early 1970's and was appointed Counsel to the Public Administrator by Surrogate Gelfand in 1983. Upon becoming Surrogate in 1998, Petitioner retained Mr. Lippman as Counsel to the Public Administrator. In April 2006, Petitioner appointed Mark Levy as Counsel to the Public Administrator. Mr. Lippman continued to serve as Counsel under Mr. Levy and thereafter until 2009.

In October 2002, the Administrative Board for the Offices of the Public Administrators of New York State issued guidelines for the compensation of counsel pursuant to Surrogate's Court Procedure Act ("SCPA")§ 1128. Petitioner chaired the Board and was actively involved in the preparation of the guidelines. The Board Guidelines require Public Administrators to ensure that all requests for compensation by counsel are supported by an affidavit of legal services containing the information set forth in SCPA 1108(2)(c).

The Board Guidelines recognize that it is the responsibility of the Surrogate to fix Counsel's compensation after consideration of the factors set forth in SCPA § 1108(2)(c) by noting that "the enacted schedule does not in any way impinge upon either the rights of interested parties with regard to

counsel fees or the jurisdiction of the court to determine such issue." The guidelines provided that "in the absence of extraordinary circumstances, the Public Administrators shall require their counsel to limit their request for compensation in any estate to an amount not to exceed a fee computed under" a sliding scale based on six percent (6%) of the estate's value for the first $750,000, with decreasing percentages charged for estates in inverse proportion to the estate's size beyond the initial $750,000.

Prior to the promulgation of the sliding scale fee schedule, the prevailing practice within New York City was to award counsel to the Public Administrator a fee equal to six percent (6%) of the estate's value, even for those estates valued in the millions. The Board noted the following in its report in support of the sliding scale fee schedule: (1) "the adopted schedule provides the customary fee charged . . . for similar services in the overwhelming majority of estates that are administered by the Public Administrator and establishes a cap on the legal fees requested by counsel in these estates;" (2) "the Board also considered that it is well settled that it is not appropriate to base a legal fee in this area of the law solely on a time-clock approach, and in some instances, time might be the least important factor to be considered (citations omitted);" and, (3) "additionally, in arriving at a fair fee for the services performed the Board balanced the fact that each estate pays for its legal services against the economic reality that most estates

administered by the Public Administrator are relatively modest and that the Public Administrators would be unable to retain competent counsel to provide legal services in many of these estates if counsel did not have the opportunity to receive more significant compensation in the more substantial estates."

From in or about October 2002 to in or about April 2009, Petitioner approved legal fees in numerous cases for Mr. Lippman based upon affirmations of legal services and Petitioner's review of the entire estate file, input from any other interested or represented parties, and all other relevant facts. The affidavits recited the role of Counsel to the Public Administrator and the types of services such Counsel would generally perform. The affidavits set forth the time or hours spent but did not contain contemporaneous time records nor were they itemized as to the hours spent on any specific or particular task.

From in or about October 2002 to in or about April 2009, in numerous cases, Mr. Lippman requested and Petitioner awarded a legal fee calculated pursuant to the sliding scale fee schedule promulgated by the Administrative Board Guidelines, which the Board's report stated is both the customary and the maximum fee to be charged "in the overwhelming majority of estates that are administered by the Public Administrator."

In most of the cases in which legal fees for Counsel to the Public Administrator are fixed, the interested parties who have the right to object to the legal fee paid to counsel to the

Public Administrator are: (1) the Attorney General, (2) counsel for the alleged distributees, and, (3) the guardian ad litem for unknown distributees. There has been no appeal from any legal fee fixed by Petitioner for Counsel to the Public Administrator.

At the end of December 2005, the Petitioner requested and received a letter of resignation from Esther Rodriguez, and thereafter the Petitioner learned by early to mid 2006 that Esther Rodriguez had paid legal fees to Mr. Lippman in violation of the Surrogate's Court legal fee protocol in which a portion of the legal fee was not to be paid until the filing of the estate accounting. Upon learning about Mr. Lippman's violations of this legal fee protocol, Petitioner admonished Mr. Lippman about his conduct, removed him from the position of Counsel to the Public Administrator, the violations of protocol ceased, and Mr. Lippman's involvement in performing legal services for the Public Administrator was greatly reduced. Furthermore, his right to continue in any capacity was contingent upon his agreeing that any legal fees payable to him from that time forward would be used to reimburse an estate in which the legal fee protocol had not been followed.

In April 2006, Petitioner appointed Mark Levy as Counsel to the Public Administrator and in May 2006, Petitioner appointed John Raniolo as Public Administrator. Mr. Levy and Mr. Raniolo worked in conjunction in overseeing the estates to which Mr. Lippman was to make repayment from new fees earned by him.

Just as it took Respondent a period of approximately two and one-half years from the date it launched the investigation in this proceeding to the date a formal complaint was served upon the Petitioner due to the need to review voluminous records and examine potential witnesses, the new Public Administrator and his Counsel were engaged in a slow, time consuming process, with revelations as to the extent of Mr. Lippman's violations of legal fee protocol spanning over a period of several years. During the same time period, Mr. Lippman's involvement in handling the legal affairs of the Public Administrator's Office continued to diminish to the point where eventually he was limited to finishing those cases that were previously assigned to him. Petitioner permitted Mr. Lippman to continue to have some role in the Public Administrator's legal affairs after Petitioner initially became aware of some of Mr. Lippman's violations of legal fee protocol both because Petitioner was of the opinion that Mr. Lippman had performed valuable legal services to the Public Administrator for a period of approximately three decades, which entitled him to finish the cases on which he had already received a fee because this would be in the best interests of the beneficiaries of those estates. Nonetheless, by April 2009, Petitioner believed that he had sufficient information to conclude that Mr. Lippman should be discharged from performing any additional legal services for the Public Administrator. Accordingly, Petitioner discharged Mr. Lippman.

Almost one and one-half years after Mr. Lippman ceased to

have any connection with the Bronx County Public Administrator's office he was indicted in Supreme Court, Bronx County, under Indictment #02280-2010. (Annexed to Exhibit "B" hereto as Exh. C) The Indictment alleges that Lippman committed the following criminal actions:

- Between February 5, 2002 and March 31, 2009, Mr. Lippman engaged "in a scheme constituting a systematic ongoing course of conduct with intent to defraud more than one person and so obtained property…that being, a sum of United States Currency from the Bronx Public Administrator" as the Administrator of various estates.
- On June 10, 2004 and March 1, 2005, Mr. Lippman filed accountings and affidavits of legal services that were knowingly false, contained false statements and/or entries, and were done for the purpose of defrauding the State.
- Between the dates of March 5, 2002 and July 7, 2010, Mr. Lippman stole amounts of money ranging from in excess of $3,000 to in excess of $50,000 held by the Public Administrator for a certain estates.
- Mr. Lippman is also charged with multiple acts of scheming to defraud, falsifying business records, filing false instruments, and committing larcenies.

In a press release, the Bronx District Attorney's Office noted that Mr. Lippman took certain actions, including filing fraudulent documents, specifically <u>in order to conceal criminal acts from the Surrogate's Court</u>. The statement also notes that

Mr. Lippman undertook other fraudulent actions in an effort to conceal or hide any excessive fees he derived from the estates. (Annexed to Exhibit "B" hereto as Exh. D)

Petitioner immediately removed Michael Lippman from his position upon learning that certain court protocols had not been followed. Petitioner then brought in new counsel and appointed a new Public Administrator to address each and every issue raised by Mr. Lippman's actions. Upon Mr. Lippman's indictment, the Bronx County District Attorney thanked the present Bronx County Public Administrator and her Counsel for their cooperation and assistance in the investigation. That investigation resulted in Mr. Lippman's indictment and the criminal proceeding now pending in Bronx Supreme Court.

It is beyond cavil that Michael Lippman's testimony and the enormous evidence gathered by the Bronx District Attorney's Office, Department of Investigation and other agencies in a three (3) year investigation is both material and necessary and, significantly, unavailable to Petitioner while the criminal case against Mr. Lippman continues. The deprivation to Petitioner of the constitutional right of due process and the ability to mount a competent defense is manifest and the remedy is clear.

Conclusion

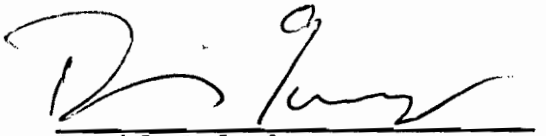
We therefore ask that this Court issue a stay of any proceedings by the Commission, including the scheduled hearing, pending determination of this appeal, and issue a temporary restraining order pending disposition of this application by the

full bench.

No prior application has been made to any court for the relief requested herein.

WHEREFORE, for the foregoing reasons, it is respectfully submitted that the within motion should be granted, that the Court issue a stay of any proceedings by the Commission, including the scheduled hearing, pending determination of this appeal, and issue a temporary restraining order pending disposition of this application by the full bench, and that this Court should issue any other relief it deems just and equitable.

Dated: **New York, New York**
October 4, 2011



David Godosky

EXHIBIT A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

IN THE MATTER OF THE APPLICATION OF
THE HONORABLE LEE L. HOLZMAN,

Petitioner-Appellant

- against -

THE COMMISSION ON JUDICIAL CONDUCT,

Respondent-Respondent

----------X

NOTICE OF APPEAL

Index No: 108251/11

PLEASE TAKE NOTICE, that petitioner hereby appeals to the Appellate Division of the Supreme Court of the State of New York held in and for the First Judicial Department from the Decision and Order of the Hon. Jaffe, Justice of the Supreme Court of the State of New York, County of New York, dated September 21, 2011, and entered in the office of the Clerk of the Supreme Court of the County of New York on September 22, 2011, and served with Notice of Entry by the undersigned on October 3, 2011, copies of which are attached hereto.

Dated: New York, New York
October 4, 2011

GODOSKY & GENTILE, P.C.
Attorneys for Plaintiff
61 Broadway - 20th Floor
New York, New York 10006
(212) 742-9700

DAVID GODOSKY, ESQ.

To:

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for The Commission on Judicial Conduct
120 Broadway, 24th Floor
New York, New York 10271

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X Index No. 108251/11

In the Matter of the Application of
The Honorable Lee L. Holzman,

Petitioner,

-against-

The Commission on Judicial Conduct,

Respondent.

ORDER WITH NOTICE OF ENTRY

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

----------X

PLEASE TAKE NOTICE, that the within is a true copy of the Decision and Order dated September 21, 2011, entered in the office of the Clerk of the within named Court on September 22, 2011.

Dated: New York, New York
October 3, 2011

GODOSKY & GENTILE, P.C.

David Godosky, Esq.
Counsel for Petitioner
61 Broadway, 20th Floor
New York, New York 10006
Tel # (212)742-9700

TO:
Eric T. Schneiderman
Attorney General of the State of New York
120 Broadway, 24th Floor
New York, New York 10271

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. BARBARA JAFFE PART 8

Justice

In the Matter of the Application of the Honorable Lee L. Holtzman,

Petitioner,

-v-

The Commission on Judicial Conduct,

Respondent.

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

INDEX NO. 108251/11

MOTION DATE 9/21/11

MOTION SEQ. NO. 002

The following papers, numbered , were read on this motion to renew:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answer — Affidavits — Exhibits	2, 3
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

By order to show cause dated September 12, 2011, petitioner moves for an order staying the disciplinary proceeding presently pending. Respondent opposes.

Although petitioner now offers the affidavit of Michael Lippman, who attests that he will invoke his fifth amendment right against self-incrimination if called as a witness in petitioner's disciplinary proceeding given the criminal case presently pending against him in Supreme Court, Bronx County, the absence of the affidavit was not the sole ground for the denial of petitioner's motion for a stay. Moreover, having temporarily stayed the instant matter on September 12, 2011 for 10 days given the parties' representation that the criminal trial of Michael Lippman was scheduled to commence on September 20, 2011, and as the criminal case was not scheduled for trial but for a decision on the omnibus motion, and as the criminal trial will not go forward until November 1, 2011 at the earliest, and likely not until January 2012, it is hereby

ORDERED, that petitioner's motion for a stay of the disciplinary proceeding is denied.

Dated: 9/21/11

J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

IN THE MATTER OF THE APPLICATION OF
THE HONORABLE LEE L. HOLZMAN,

Pre-Argument Statement

Petitioner-Appellant

- against -

Index No: 108251/11

THE COMMISSION ON JUDICIAL CONDUCT,

Respondent-Respondent

----------X

TO: Appellate Division of the Supreme Court of the State of New York
First Judicial Department

1. The title of the action is set forth above. There has been no change in the parties.

2. The full names of the parties are as follows:

HONORABLE LEE HOLZMAN
Petitioner-Appellant

COMMISSION ON JUDICIAL CONDUCT
Respondent-Respondent

3. The name, address and telephone number of counsel for Petitioner-Appellant is as follows:

GODOSKY & GENTILE, P.C.
61 Broadway, 20th Floor
New York, NY 10006
(212) 742-9700

4. The name, address and telephone number of counsel for Respondent-Respondent is as follows:

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
120 Broadway, 24th Floor
New York, New York 10271

5. The appeal is taken from a Decision and Order of the Supreme Court, New York County.

6. This is an Article 78 Petition requesting that the Commission on Judicial Conduct stay the disciplinary hearing against Petitioner pending the outcome of a related criminal trial or in the alternative to dismiss the Complaint with permission to re-file.

7. Petitioner filed the Article 78 Petition because if the hearing were to go forward prior to the completion of a related criminal matter, Petitioner would be unable to competently mount a defense in violation of his right to Due Process.

8. Petitioner respectfully submits that the Order should be reversed as the Court below misinterpreted the law.

9. The Notice of Appeal is being filed and served simultaneously with this Pre-Argument Statement. The Notice of Appeal is timely as Notice of Entry was served on Respondent on October 3, 2011.

Dated: New York, New York
October 4, 2011

Yours etc.,

DAVID GODOSKY, ESQ.
GODOSKY & GENTILE, P.C.
Attorneys for Petitioner-Appellant
61 Broadway, 20th Floor
New York, New York 10006
212-742-9700

TO:

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorneys for The Commission on Judicial Conduct
120 Broadway, 24th Floor
New York, New York 10271

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Margaret Lejman, being duly sworn, deposes and says:

Deponent is not a party to the within action, is over eighteen (18) years of age and resides in Kings County, New York.

On October 3, 2011 , deponent served the within **ORDER WITH NOTICE OF ENTRY** upon:

Eric T. Schneiderman
Attorney General of the State of New York
120 Broadway, 24th Floor
New York, New York 10271

by depositing a true copy of same securely enclosed in a postpaid wrapper in a post office box regularly maintained by the United States Government in the County and State of New York, directed to the aforesaid attorneys at the addresses within the State designated by them for that purpose upon the preceding papers in this action, between which places there, then, was and now is a regular communication by mail.

Margaret Lejman

Sworn to before me this
3rd day of October, 2011

Barbara Marchese
Notary Public

BARBARA MARCHESE
Notary Public, State of New York
Qualified in New York County
No.: 01MA6239959
Commission Expires Apr. 25, 2015

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

BARBARA MARCHESE, being duly sworn, deposes and says:

Deponent is not a party to the within action, is over the age of 18 years and resides in West Long Branch, New Jersey.

On October 4, 2011, deponent served the within Notice of Appeal; Pre-Argument Statement upon the following party or parties, at the addresses set forth below as designated by said party or parties for that purpose, by depositing a true copy of same, enclosed in a post-paid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York:

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Respondent-Respondent
120 Broadway, 24th Floor
New York, New York 10271

Barbara Marchese
BARBARA MARCHESE

Sworn to before me this
4th day of October, 2010

Marie R. D'Ambrosio
Notary Public

MARIE R. D'AMBROSIO
Notary Public, State of New York
No. 01D 4940340
Qualified in Nassau County
Commission Expires Aug. 8, 20 11

EXHIBIT B

ORIGINAL

GODOSKY & GENTILE, P.C.

In Part IAS ____ of the Supreme Court of the State of New York, held in and for the County of New York, on the ____day of July, 2011

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

In the Matter of the Application of
The Honorable Lee L. Holzman,

Petitioner,

-against-

The Commission on Judicial Conduct,

Respondent.

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

----------X

Index No. 108251/2011

ORDER TO SHOW CAUSE

Oral Argument is Requested

UPON, the annexed ~~affirmation~~ verified Petition of David Godosky, Esq., dated July 18, 2011, and the proceedings had herein:

Let the Respondent, The Commission on Judicial Conduct, or counsel appear and Show Cause at the Part IAS ____ of the Supreme Court, New York County, located at 60 Centre Street, New York, New York, on the ___ day of _____ 2011, at 9:30 o'clock in the forenoon of that day, or as soon as thereafter the matter may be heard why an Order should not be entered granting Petitioner's application:

1. Pursuant to Article 78, directing the State Commission on Judicial Conduct to Dismiss the Complaint filed against Petitioner, without prejudice to re-file upon the conclusion of a related criminal trial or, in the alternative, directing a stay of the disciplinary proceedings against Petitioner pending the conclusion of a related criminal trial;

2. That pending the hearing ~~and determination~~ of this application, the Respondent,

The Commission on Judicial Conduct be enjoined from proceeding with the prosecution of the Petitioner;

J.S.C.

3. That the papers in this matter be sealed pursuant to §216.1 of the Uniform Rules for New York State Trial Courts and Judiciary Law §44(4).

4. For such other, further and different relief as this Court may seem just, proper and equitable; and furthermore, ordered that pending the determination of this motion, the Clerk of the Court is directed to restrict the court file to everyone except the parties, their attorneys and court personnel.

J.S.C.

This is a special proceeding for a Writ of Mandamus and/or a Writ of Prohibition.

LET service of a copy of the Order, the Petition and Supporting documents upon which it is granted by personal service, upon the Commission On Judicial Conduct at 61 Broadway, New York, NY, and Eric Schneiderman, The Attorney General at 120 Broadway, New York, NY and the Clerk of the Court, N.Y. County on or before July, 2011 be deemed good and sufficient service. Case is submitted as of Aug 12.

Oral Argument Directed

JSC

BARBARA JAFFE
J.S.C.

ENTER

BARBARA JAFFE
J.S.C.

J.S.C.

7/29/11

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X

In the Matter of the Application of
The Honorable Lee L. Holzman,

Petitioner,

-against-

The Commission on Judicial Conduct,

Respondent.

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

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Index No.

PETITION

Petitioner Hon. Lee L. Holzman, by his attorney, David Godosky, respectfully alleges:

NATURE OF THE PROCEEDING

1 This is an Article 78 proceeding brought by Petitioner The Honorable Lee L. Holzman ("Petitioner") to challenge the March 21, 2011 decision of the Commission on Judicial Conduct ("Respondent") denying petitioner's motion to dismiss the complaint without prejudice to re-file or to grant a stay of his disciplinary proceeding pending the resolution of a related criminal matter. (Attached hereto as "Exhibit A" is the March 21, 2011 Order).

2 The denial of Petitioner's motion compels him to proceed with the disciplinary proceeding despite the fact the critical witness (and actual wrongdoer), Michael Lippman ("Lippman"), former Counsel to the Public Administrator, is currently indicted in Bronx County, under Indictment number #02280-2010 for a number of related incidents. The matter is next on September 20, 2011, before judge Stephen Barrett in Supreme Court, Bronx County.

3 The Commission has scheduled a Hearing in this matter on September 12, 2011.

4 By affidavit of Mr. Lippman's attorney, if called to testify at Petitioner's disciplinary proceeding, he has affirmed that he will plead the Fifth Amendment and refuse to testify. Without Mr. Lippman's testimony, Petitioner is deprived of his constitutional right to defend himself before the Commission.

5 As we will demonstrate, Petitioner has a Constitutional right to mount a defense against the charges brought by the Commission. The inability to call a key witness to testify during the course of the proceedings directly violates his right to Due Process.

6 Based on the foregoing, there can be no doubt that the Order denying Petitioner's request for a stay pending the conclusion of Mr. Lippman's criminal trial, and thus compelling Petitioner to proceed in violation of his constitutional right to due process, the Commission was acting in excess of its jurisdiction and thus should be prohibited from compelling petitioner to proceed. Accordingly, pursuant to CPLR Article 78, Petitioner is entitled to an Order:

a. Directing the dismissal of the Complaint filed against him by the Commission on Judicial Conduct, without prejudice to re-file or, in the alternative, a stay of his Disciplinary Proceeding pending the conclusion of Mr. Lippman's criminal trial.

STATEMENT OF FACTS

The relevant facts, drawn from the accompanying affidavits and exhibits, are as follows:

THE PARTIES

7 Petitioner was admitted to practice as an attorney in New York in 1966. He was elected Judge of the Surrogate's Court, Bronx County in 1987.

8 The State Commission on Judicial Conduct is the disciplinary agency designated with reviewing complaints of judicial misconduct pursuant to Article 6, Section 22 of the Constitution of the State of New York and Article 2-A of the Judiciary Law of the State of New York

BACKGROUND

9 During the years that petitioner served as Surrogate he signed in excess of 2,500 decrees or orders each year and authored approximately 800 decisions annually. During the years that petitioner served as Surrogate he performed the following services: (1) he chaired The Administrative Board For the Offices of the Public Administrator which resulted in guidelines for legal fees payable to counsel to the Public Administrators within New York City approved by the Board on October 3, 2002 and March 20, 2006, and he is a member of the present Board; (2) he is presently and has been for more than a decade a member of the Surrogate's Court Advisory Committee of the Office of Court Administration; (3) he is and has been Chairman of the Board of the Surrogate's Association for more than a decade; and, (4) without compensation, on almost an annual basis he has been a presenter in separate CLE programs sponsored by the Brooklyn Archdiocese and Calvary Hospital as well as a frequent presenter in programs sponsored by the New York State Bar Association, the Association of the Bar of the City of New York and the Bronx County Bar Association.

10 Petitioner appointed Esther Rodriguez as Public Administrator in the Bronx in 1998. Petitioner appointed John Raniolo as Public Administrator in May 2006.

11 Michael Lippman performed legal services for the Public Administrator as either an associate

or a principal in a firm since the early 1970's and was appointed Counsel to the Public Administrator by Surrogate Gelfand in 1983. Upon becoming Surrogate in 1998, Petitioner retained Mr. Lippman as Counsel to the Public Administrator.

12 Petitioner appointed Mark Levy as Counsel to the Public Administrator in April 2006. Mr. Lippman continued to serve as counsel under Mr. Levy and thereafter under Reddy, Levy & Ziffer until his services were terminated in April 2009.

AS TO THE CHARGES

13 From in or about October 2002 to in or about April 2009, Petitioner approved legal fees payable to Michael Lippman as Counsel to the Public Administrator in numerous cases that were based on affidavits of legal services that to a substantial extent set forth the general services performed by Counsel to the Public Administrator. Petitioner acknowledges he reviewed these affidavits of legal services when he approved the legal fee in each decree judicially settling an account. At that time the Petitioner, in considering the legal fee, had the benefit of the entire court file containing all documents that had been filed in the estate.

14 SCPA 1108(2)(c) requires that an award of legal fees to the Counsel to the Public Administrator must be supported by an affidavit setting forth in detail the services rendered, the time spent, and the method or basis by which requested compensation was determined.

15 SCPA 1108(2)(c) requires the Surrogate, when fixing legal fees for Counsel to the Public Administrator, to consider: (1) the time and labor required, (2) the difficulty of the questions involved, (3) the skill required to handle the problems presented, (4) the lawyer's experience, ability and reputation, (5) the amount involved and benefit resulting to the estate from the services, (6) the customary fee charged by the bar for similar services, (7) the contingency

or certainty of compensation, (8) the results obtained and (9) the responsibility involved.

16 In October 2002, the Administrative Board for the Offices of the Public Administrators of New York State issued guidelines for the compensation of counsel pursuant to SCPA § 1128. Petitioner chaired the Board and was actively involved in the preparation of the guidelines.

17 The Board Guidelines require Public Administrators to ensure that all requests for compensation by counsel are supported by an affidavit of legal services containing the information set forth in SCPA 1108(2)(c).

18 The Board Guidelines recognize that it is the responsibility of the Surrogate to fix counsel's compensation after consideration of the factors set forth in SCPA § 1108(2)(c) by noting that "the enacted schedule does not in any impinge upon either the rights of interested parties with regard to counsel fees or the jurisdiction of the court to determine such issue." The guidelines provided that "in the absence of extraordinary circumstances, the Public Administrators shall require their counsel to limit their request for compensation in any estate to an amount not to exceed a fee computed under" a sliding scale based on six percent (6%) of the estate's value for the first $750,000, with decreasing percentages charged for estates in inverse proportion to the estate's size beyond the initial $750,000. Prior to the promulgation of the sliding scale fee schedule, the prevailing practice within New York City was to award counsel to the Public Administrator a fee equal to six percent of the estate's value, cven for those estates valued in the millions. The Board noted the following in its report in support of the sliding scale fee schedule: (1) "the adopted schedule provides the customary fee charged . . . for similar services in the overwhelming majority of estates that

are administered by the Public Administrator and establishes a cap on the legal fees requested by counsel in these estates;" (2) "the Board also considered that it is well settled that it is not appropriate to base a legal fee in this area of the law solely on a time-clock approach, and in some instances, time might be the least important factor to be considered (citations omitted);" and, (3) "additionally, in arriving at a fair fee for the services performed the Board balanced the fact that each estate pays for its legal services against the economic reality that most estates administered by the Public Administrator are relatively modest and that the Public Administrators would be unable to retain competent counsel to provide legal services in many of these estates if counsel did not have the opportunity to receive more significant compensation in the more substantial estates."

19 From in or about October 2002 to in or about April 2009, in numerous cases including but not limited to those set forth in the Schedules to the Complaint, Petitioner approved legal fees for Mr. Lippman based upon affirmations of legal services and Petitioner's review of the entire estate file, any input from any other interested or represented parties and all other relevant facts.

A. The affidavits recited the role of Counsel to the Public Administrator and the types of services such Counsel would generally perform.

B. The affidavits set forth the time or hours spent but did not contain contemporaneous time records nor were they itemized as to the hours spent on any specific or particular task.

20 From in or about October 2002 to in or about April 2009, in numerous cases Mr. Lippman

requested and petitioner awarded a legal fee calculated pursuant to the sliding scale fee schedule promulgated by the Administrative Board Guidelines, which the Board's report stated is both the customary and the maximum fee to be charged "in the overwhelming majority of estates that are administered by the Public Administrator."

21 In most of the cases in which legal fees for counsel to the Public Administrator are fixed the interested parties who have the right to object to the legal fee paid to counsel to the Public Administrator are: (1) the Attorney General, (2) counsel for the alleged distributees, and, (3) the guardian ad litem for unknown distributees. There has been no appeal from any legal fee fixed by Petitioner for Counsel to the Public Administrator.

22 The Rules of the Chief Administrator require the Petitioner and other Surrogates within the City of New York to submit a form and a copy of the affidavit of legal services of Counsel to the Public Administrator in those estates where the legal fee is $5,000 or greater. The Petitioner has never been advised that the affidavits of legal services submitted did not comply with SCPA 1108(2)(c) or were in any way insufficient.

23 In a number of cases Michael Lippman, as Counsel to the Public Administrator, was given a fee less than an amount calculated pursuant to the Board's sliding scale fee schedule.

24 Although there is no statutory provision or Board Guideline governing the time when Counsel to the Public Administrator is permitted to receive a payment on account for legal services rendered or to be rendered for an estate, the long-standing protocol in Surrogate's Court, Bronx County was that counsel was not allowed any payment until an account was filed with the court, at which time counsel would be paid 75% of the projected legal fee with the balance of the fee payable when the Petitioner approved the legal fee by the entry of a decree judicially

settling the account ("legal fee protocol").

25 At the end of December 2005, the Petitioner requested and received a letter of resignation from Esther Rodriguez, and thereafter the Petitioner learned by early to mid 2006 that Esther Rodriguez had paid legal fees to Mr. Lippman in violation of the legal fee protocol.

26 Upon learning about Mr. Lippman's violations of legal fee protocol, petitioner admonished Mr. Lippman about his conduct, the violations of protocol ceased, and Mr. Lippman's involvement in performing legal services for the Public Administrator was greatly reduced. Furthermore, his right to continue in any capacity was contingent upon his agreeing that any legal fees payable to him from that time forward would be used to reimburse an estate in which the legal fee protocol had not been followed.

27 In April 2006, petitioner appointed Mark Levy as Counsel to the Public Administrator and in May 2006, petitioner appointed John Raniolo as Public Administrator. Mr. Levy and Mr. Raniolo worked in conjunction in overseeing the estates to which Mr. Lippman was to make repayment from new fees earned by him.

28 Just as it took petitioner a period of approximately two and one-half years from the date it launched the investigation in this proceeding to the date a formal complaint was served upon the petitioner due to the need to review voluminous records and examine potential witnesses, the new Public Administrator and his Counsel were engaged in a slow, time consuming process, with revelations as to the extent of Mr. Lippman's violations of legal fee protocol spanning over a period of several years.

29 During the same time period Mr. Lippman's involvement in handling the legal affairs of the Public Administrator's Office continued to diminish to the point where eventually he was

limited to finishing those cases that were previously assigned to him.

30 Petitioner permitted Mr. Lippman to continue to have some role in the Public Administrator's legal affairs after petitioner initially became aware of some of Mr. Lippman's violations of legal fee protocol both because petitioner was of the opinion that Mr. Lippman had performed valuable legal services to the Public Administrator for a period of approximately three decades, entitling him to finish all the cases on which he had already received a fee and because this would be in the best interests of the beneficiaries of those estates. Nontheless, by April 2009, petitioner was of the opinion that he had sufficient information to conclude that Mr. Lippman should be discharged from performing any additional legal services for the Public Administrator and he was discharged.

31 Almost one and one-half years after Mr. Lippman ceased to have any connection with the Bronx County Public Administrator's office he was indicted in Bronx County in connection with some of the activities which were in violation of the legal fee protocol. Included in these charges was an allegation that Mr. Lippman filed false papers in proceedings in the Surrogate's Court, Bronx County.

32 Petitioner, the then Public Administrator and his Counsel were aware of the investigation by the Bronx County District Attorney almost from its inception. Prior to that time, the same parties were aware of investigations of Mr. Lippman by several other governmental agencies. Upon Mr. Lippman's indictment, the Bronx County District Attorney thanked the present Bronx County Public Administrator and her Counsel for their cooperation and assistance in the investigation.

33 Michael Lippman a former counsel to the Bronx County Public Administrator, received a

subpoena to give sworn testimony to the Commission. After answering some questions, Mr. Lippman exercised his right not to incriminate himself. Our investigation reveals that shortly thereafter Barbara Ross, an employee of the Daily News, called Mr. Lippman to inquire about legal fees that he had received as counsel to the Public Administrator and about whether he was the subject of an investigation by the Bronx County District Attorney's Office. Although not authored by Ms. Ross, subsequently the Daily News published an unfavorable article about Mr. Lippman.

34 Robert Tembeckjian, Administrator and Counsel to the Commission, is married to Barbara Ross, the Daily News employee. Ms. Ross, inter alia, does investigative reporting for that publication. Ms. Ross and Nancy Katz have collaborated on articles appearing in the Daily News. Mr. Tembeckjian commenced this investigation of the Respondent based upon a Daily News article authored by Ms. Katz.

35 Because of the particularly sensitive time-period in which contact was made by the Administrator's spouse with the attorney who is now under indictment for acts allegedly committed while serving as Counsel to the Public Administrator and the fact that this witness has now made himself unavailable to questioning, we believe there is certainly the appearance of impropriety in which the target of the criminal investigation was in communication with the wife of the Administrator and an article appeared shortly thereafter and many of the statements in that article are echoed in the Complaint. As set forth more fully below, the inability of Petitioner to determine what information, if any, was divulged by Mr. Lippman and its connection to the article and the charges, is another aspect of the demonstrable prejudice Petitioner sustains if forced to proceed in the present posture.

36 While certain communications and contact may not have resulted in any relevant or material evidence, the fact that Mr. Lippman will not be available for Respondent to question at the hearing and the temporal proximity of the News article after the telephone call to Mr. Lippman, threatens to undermine the integrity of this disciplinary process. It certainly speaks to whether the Commission, by and through its Counsel, has acted in a manner inconsistent with its role as a neutral investigator of judicial conduct.

37 Subsequent to publication in the Daily News, a Formal Written Complaint was issued.

THE COMPLAINT

38 Pursuant to the Commission's authorization, Petitioner was served with a Formal Written Complaint ("Complaint"), dated January 4, 2011. (Annexed hereto as Exhibit "B"). The Complaint charges violations of the Rules of the Chief Administrator of the Courts Governing Judicial Conduct ("Rules"). The Complaint contains four charges. The First Charge alleges that from 1995 to 2009, the Counsel to the Bronx Public Administrator's Office, Michael Lippman, requested fees that failed to comply with the Surrogate's Court Procedure Act ("SCPA"), and that Petitioner approved those requests. The Second Charge alleges that in 2005 and 2006 Mr. Lippman took unearned advanced legal fees without the approval of the court and that Petitioner failed to report him. The Third Charge alleges that from 1997 to 2005 Petitioner failed to adequately supervise the work of Public Administrator Esther Rodriguez. The Fourth Charge alleges that Mr. Lippman allegedly raised money for Petitioner's 2001 campaign for Surrogate and that Petitioner failed to disqualify himself from Mr. Lippman's cases in 2001 through 2003.

THE CRIMINAL ACTION

39 By and large the charges brought against Petitioner are allegations of a failure to supervise the former Counsel to the Public Administrator, Michael Lippman, who was indicted on July 7, 2010 in Supreme Court, Bronx County, under Indictment #02280-2010 for said acts. (Annexed hereto as Exhibit "C ").

40 The Indictment alleges that Lippman committed the following criminal actions:

- Between February 5, 2002 and March 31, 2009, Lippman engaged "in a scheme constituting a systematic ongoing course of conduct with intent to defraud more than one person and so obtained property...that being, a sum of United States Currency from the Bronx Public Administrator" as the Administrator of various estates.
- On June 10, 2004 and March 1, 2005, Lippman filed accountings and affidavits of legal services that were knowingly false, contained false statements and/or entries, and were done for the purpose of defrauding the State.
- Between the dates of March 5, 2002 and July 7, 2010, Lippman stole amounts of money ranging from in excess of $3,000 to in excess of $50,000 held by the Public Administrator for a certain estates.
- Lippman is also charged with multiple acts of scheming to defraud, falsifying business records, filing false instruments, and committing larcenies.

41. In a press release, the Bronx District Attorney's Office noted that Lippman took certain actions, including filing fraudulent documents, specifically in order to conceal criminal acts

from the Surrogate's Court. The statement also notes that Lippman undertook other fraudulent actions in an effort to conceal or hide any excessive fees he derived from the estates. A copy of the July 8, 2010 Bronx District Attorney's Press Release is annexed hereto as Exhibit "D".

42 At this time, the facts, testimony, records, and witnesses related to the criminal charges against Mr. Lippman are within the exclusive control of the criminal prosecution.

43 In addition, Mr. Lippman's criminal defense attorney, Murray Richman, Esq. attests in an affidavit (annexed hereto as Exhibit "E") to the pendency of the criminal action and that while such action is pending, should his client be compelled by subpoena to appear at a hearing in this matter, he would advise his client to refuse to answer questions or give testimony pursuant to his rights under the Fifth Amendment of the United States Constitution. Mr. Lippman has already invoked his Fifth Amendment right in testimony at a Commission investigative deposition.

PROCEDURAL HISTORY

44 Petitioner was served with a Formal Written Complaint on January 4, 2011. (Exhibit B) Petitioner served an Answer with Affirmative Defenses dated January 21, 2011, which is annexed hereto as Exhibit "F". Petitioner also filed an affirmation in support of a Motion to Dismiss the Formal Written Complaint, (annexed hereto as Exhibit "G") or in the alternative, requesting that the Commission stay the proceeding pending the completion of Mr. Lippman's criminal trial so that Petitioner can access the documents and testimony in the possession of the Prosecution as well as the ability to call Mr. Lippman as a witness who will not refuse to testify under the Fifth Amendment. Counsel to the Commission opposed Petitioner's motion by memorandum on February 25, 2011. (Annexed hereto as Exhibit "H"). On March 4, 2011

Petitioner submitted a Reply affirmation in further support of his motion. (Annexed hereto as Exhibit "I") Oral argument was not held on the motion, and the Commission issued a written denial of Petitioner's motion on March 21, 2011. (Exhibit "A") Petitioner is now seeking a review of the denial of his request for a stay and his motion to dismiss without prejudice with leave to re-file.

ARGUMENT

45 The relief sought by this petition is necessitated by the simple fact that the public servant who was deceived by and a victim of Mr. Lippman's despicable acts is being forced to defend his own actions before the criminal himself is tried and the acts and evidence attendant to Lippman's criminal and fraudulent actions are fully known to Petitioner and his attorneys. Furthermore, Mr. Lippman is unwilling to testify based on his Fifth Amendment right. As such, requiring Petitioner to proceed with defending himself in the disciplinary proceeding without the ability to question Mr. Lippman or to access documents and evidence within the exclusive control of the Prosecutors in the criminal action deprives Petitioner of his constitutional right to mount a defense as well as to confront and cross-examine the actual wrongdoer. As will be further explained below, the Commission's decision to proceed with the hearing despite the foregoing violates Petitioner's constitutional rights, and it should be prohibited from doing as such until such time as this constitutional defect is cured.

46 Article 78 of the New York Civil Practice Law and Rules provides an expedited mechanism to challenge the actions of a government body or officer. Prohibition is available both to restrain an unwarranted assumption of jurisdiction and to prevent a court from exceeding its authorized powers in a proceeding over which it has jurisdiction. See, e.g., Matter of Nigrone

v. Murtagh, 36 N.Y.2d 421, 423-424 (1975); Matter of State of New York v. King, 36 N.Y.2d 59, 62 (1975); Matter of Roberts v. County Ct. of Wyoming County, 34 N.Y.2d 246, 248 (1976). Further, Prohibition is warranted to proscribe a "clear legal wrong." Matter of City of Newburgh v. Public Empl. Relations Bd. of State of N.Y., 63 N.Y.2d 793 (1984).

47 Article 78 permits a Petitioner to challenge an executive official's action where such an official has "proceeded, is proceeding[,] or is about to proceed without or in excess of jurisdiction." N.Y. C.P.L.R.§ 7803(2). While we submit that Petitioner has exhausted administrative remedies by obtaining a decision on his motion to the Commission, awaiting appellate review of any future determination is not appropriate. As the Petitioner is the sitting Surrogate Judge in Bronx County, the possibility exists that Petitioner could face public discipline or removal from the bench before being afforded his right to examine the witness who is central to the proceedings brought against Petitioner. Even if a reviewing court were to determine subsequent to a hearing and, perhaps, sanction, that Petitioner was denied this fundamental right, there will simply be no way to "un-ring the bell" and undo the irreparable harm to Petitioner and his reputation. Hence, immediate court intervention is necessary and proper. DiBlasio v. Novello, 29 A.D.3d 339 (1st Dept. 2006). Petitioner asserts that the Commission, in refusing to dismiss the disciplinary action or to grant a stay pending the conclusion of the related criminal action, proceeded in excess of its lawful authority in that its denial results in a violation of Petitioner's right to due process, which exposes Petitioner to "a clear legal wrong."

48 Initially, it is without doubt that this court has subject matter jurisdiction to review the activities of the Commission on Judicial Conduct. Matter of Nicholson v. State Judicial Commission on Judicial Conduct, 50 N.Y.2d 597 (1980).

49 When a petitioner seeks relief in the nature of prohibition, the court must engage in a two-part analysis which requires it to determine, as a threshold question, "whether the issue presented is the type for which the remedy may be granted" and, if it is, whether prohibition is warranted by the merits of the claim. Vinluan v. Doyle, 60 A.D.3d 237, 243 (2nd Dept. 2009), as amended (July 21, 2009) (citing Matter of Holtzman v. Goldman, 71 N.Y.2d 564, 568 (1988)).

50 The primary function of prohibition is to prevent "an arrogation of power in violation of a person's rights, particularly constitutional rights." Matter of Nicholson, 50 N.Y.2d at 606. Although "not all constitutional claims are cognizable by way of prohibition," (Matter of Rush v. Mordue, 68 N.Y.2d 348, 354 (1986)), the presentation of an "arguable and substantial claim" which implicates a fundamental constitutional right generally results in the availability of a proceeding in the nature of prohibition. Matter of Nicholson, 50 N.Y.2d at 606.

51 In this case, petitioner raises claims of potential violations of due process and a legal wrong. The Commission's failure to dismiss the Complaint without prejudice or grant the stay compels petitioner to proceed in such a way that his right to due process is violated.

52 While courts have found the granting of a stay due to the pendency of a criminal proceeding is discretionary when it is the defendant in the criminal proceeding seeking the stay – see, DeSiervi v. Liverzani, 136 A.D.2d 527 (2nd Dept. 1988) (citing United States v. Kordel, 397 U.S. 1 (1969); Klitzman, Klitzman & Gallagher v. Krut, 591 F.Supp. 258, 269-270, n. 7, affd.

744 F.2d 955 (3rd Cir. 1984)) – courts have applied heightened scrutiny when it is a matter of protecting the party from a non-party's assertion of the privilege.

53 In that instance, a stay or dismissal without prejudice is necessary so as to protect the party's constitutional right to mount a competent defense. See Access Capital, Inc. v. DeCicco, 302 A.D.2d 48, 52 (1st Dept. 2002). See also Walden Marine, Inc. v. Walden, 266 A.D.2d 933, 933-34 (4th Dept. 1999) (finding that a stay is appropriate to protect the rights of a party to assert a competent defense when an essential non-party witness intended to invoke the privilege); Graffagnino v. Lower Manhattan Dev. Corp., 910 N.Y.S.2d 762 (N.Y. Sup. Ct. 2010) ("[Defendant] has not shown that absent that person's testimony, it will be unable to defend itself properly."); Allen v. Rosenblatt, 5 Misc. 3d 1014(A), 798 N.Y.S.2d 707 (N.Y. Civ. Ct. 2004). See also, *infra*, Britt v. Int'l Bus Services, Inc., 255 A.D.2d 143, 143-44 (1st Dept. 1998); Stolowski v. 234 E. 178th St. LLC, 819 N.Y.S.2d 213 (N.Y. Sup. Ct. Bronx 2006).

54 In Britt, the Appellate Division granted the defendant's motion for a stay of a civil action pending the resolution of a criminal action involving a co-defendant. The defendant contended that because of the unresolved criminal proceedings, the co-defendant intended to assert his Fifth Amendment privilege against self-incrimination in the civil action, and that his testimony was both necessary and critical to a competent defense of the civil action. The co-defendant's counsel had indicated that his client clearly intended to invoke his right against self-incrimination. The court found that without the co-defendant's critical and necessary testimony in the civil action, the petitioner would be unable to assert a competent defense. Britt, 255 A.D.2d at 143-44.

55 Similarly, in Stolowski, the defendant argued that due to the anticipated assertion of the Fifth Amendment by all of the witnesses during the pendency of the related criminal proceedings, the defendant would be unable to assert a competent defense in the civil action. The court acknowledged that cases dealing with stays in civil cases, pending the outcome of a related criminal proceeding, are not entirely uniform or consistent. Despite that inconsistency, "trial courts have nevertheless rather consistently found the privilege against self-incrimination to be a compelling factor and therefore found it appropriate to stay related civil cases during the pendency of criminal prosecutions." Id. Furthermore, when there are non-party witnesses who are expected to exercise their Fifth Amendment rights and will refuse to give testimony, it hampers the defendant from preparing a competent defense. The court explained that "granting a stay appears to be more liberal when the witnesses invoking the 5th Amendment privilege are unrelated non-party witnesses. Thus, the fact that discovery from these unrelated persons will be unavailable in this action provides an independent basis for, and augers in favor of, a limited stay." Id. Thus, the issue presented allows for the issuance of a writ of prohibition, the court must proceed to the second tier of the analysis.

56 The second prong of the analysis is to determine whether the remedy of prohibition is "warranted by the merits of the claim" by weighing relevant factors. Matter of Holtzman, 71 N.Y.2d at 568; Matter of Town of Huntington v. New York State Div. of Human Rights, 82 N.Y.2d 783, 786 (1993).

57 In exercising this discretion, a number of factors should be considered. The gravity of the harm which would be caused by an excess of power is an important factor to be weighed. See Matter of Culver Contr. Corp. v. Humphrey, 268 NY 26, 40. Also important, but not

controlling, is whether the excess of power can be adequately corrected on appeal or by other ordinary proceedings at law or in equity. See, e.g., Matter of State of New York v. King, 36 N.Y.2d 59, 62 (1975) ; Matter of Roberts v County Ct. of Wyoming County, 34 N.Y.2d 246, 249 (1974). If appeal or other proceedings would be inadequate to prevent the harm, and prohibition would furnish a more complete and efficacious remedy, it may be used even though other methods of redress are technically available. See, e.g., Matter of Lee, 27 N.Y.2d at 437; Matter of Culver Contr. Corp., 268 NY at 40.

59 The gravity of a constitutional violation augurs in favor of granting this Petition.

The Fourteenth Amendment's due process clause protects a person's liberty and property interests with procedural safeguards. For example, "(w)here a person's good name, reputation, honor or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential." Board of Regents v. Roth, 408 U.S. 564, 573 (1972); Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971); Wieman v. Updegroff, 344 U.S. 183, 191 (1952). That the issues could be raised on appeal from any disciplinary action taken has been held to not be a persuasive reason for denying the availability of the remedy. Nicholson v. State Comm'n on Judicial Conduct, 50 N.Y.2d 597, 607 (1980).

60 While an Article 78 proceeding does not normally contemplate the granting of a stay, in this case, the request for the stay is premised on the need to prohibit the Commission from violating Petitioner's constitutional rights. It would incur substantial prejudice upon Petitioner– prejudice that could never be cured or ameliorated– if Petitioner is forced to mount a defense when the key witness who is uniquely aware of the facts underlying the charges against Petitioner will refuse to answer any questions if called to testify prior to resolution of

his criminal case. More importantly, upon information and belief, a multitude of witnesses have provided statements and/or testimony to the District Attorney's Office and the Grand Jury, with the identity of such persons as well as the substance of their statements largely undiscoverable to Petitioner.

61 If a stay is not granted in this proceeding Petitioner's constitutional right to mount a competent defense will assuredly be violated. As Mr. Lippman will be available to testify upon completion of his criminal trial, as the issue of self-incrimination will no longer apply, the Commission has provided no rational explanation for denying Petitioner's request for a stay. It is beyond cavil that the State has an overriding interest in the integrity and impartiality of the judiciary. Nicholson v. State Comm'n on Judicial Conduct, 50 N.Y.2d 597, 607-08 (1980). Nevertheless, this interest can and will still be advanced at a time when Petitioner is assured of his due process protections.

62 The investigation commenced in the summer of 2008, and the Complaint was not served upon the Petitioner until approximately two and one-half years thereafter. Moreover, the Administrator originally believed that Petitioner would be 70 in May 2011. Consequently, in opposition to an application to postpone the hearing date from May 2011, he argued that the Commission would be prejudiced because it would lose jurisdiction over the Respondent when he retired at the end of 2011. The Administrator and the Commission now realizes that Petitioner will not be 70 until May 11, 2012. As noted previously the criminal prosecution of Mr. Lippman is presently calendered for September of this year.

63 Moreover, Petitioner would also be unfairly penalized in the presentation of a defense as to sanctions. The indictment itself makes no suggestion of any proof that Petitioner was aware

during the relevant period that Lippman was engaging in fraudulent and criminal conduct. Indeed, a New York Law Journal article on the Lippman Indictment and Press Release noted, "[t]here is no suggestion in the indictment that Surrogate Holzman was aware that Mr. Lippman had charged excessive fees. In fact, in a statement distributed by the Bronx District Attorney's Office, prosecutors said that "in some instances" Mr. Lippman underreported his fees "in reports filed with the court to hide the excessive fees." (N.Y.L.J., July 9, 2010). By its very nature, the acts perpetrated by Lippman were undertaken with the express goal of hiding his misconduct from Petitioner. The measures taken by Lippman in this regard, and the extent to which such subterfuge was successful, is clearly a critical component of any sanction that would be considered against Petitioner were any charges of misconduct sustained. Again, to deprive Petitioner of such evidence in defending his life's work and reputation were he to face sanctions in this matter is unacceptable. To prosecute Petitioner now and only later learn the full extent of the actions of an accused criminal and rogue actor – proof which may well serve to mitigate Petitioner's responsibility or knowledge of such acts – leaves the realm of the reasonable and enters a "shoot 'em first, ask questions later" style of prosecution. "The rules governing judicial conduct are rules of reason." (The Rules Governing Judicial Conduct, *Preamble*). The failure of the Commission to abide by its own rules further compromises Petitioner's right to Due Process, and thus the purpose behind this Petition.

SEALING

64 We respectfully request that the papers in this matter be sealed pursuant to §216.1 of the Uniform Rules for New York State Trial Courts and Judiciary Law §44(4). We note that the investigation of a judge by the Commission is confidential (see, Judiciary Law §44(4)). While we are cognizant of the presumption that civil actions and proceedings be open to the public, same must be balanced by a finding of "good cause" by a court. This analysis requires the court to consider the interest of the public as well as of the parties. §216.1(a). At a minimum we submit that the exhibits to the Petition which contain numerous Commission documents should be sealed. This includes the Formal Written Complaint, the motion papers submitted to the Commission and the Commission's written decision. See, Nicholson v. State Comm'n on Judicial Conduct, 50 N.Y.2d 597(1980).

CONCLUSION

Petitioner has no adequate remedy in law and will sustain and continue to suffer irreparable damages unless the acts of Respondent or their threatened acts are prohibited.

Petitioner has exhausted all remedies available to him.

No previous application for the relief demanded herein has been made to any court or judge.

WHEREFORE, Petitioner Hon. Lee Holzman prays that this Court enter an Order and Judgment pursuant to Article 78 of the Civil Practice Law and Rules:

1. Pursuant to Article 78, directing the State Commission on Judicial Conduct to Dismiss the Complaint filed against Petitioner, without prejudice to re-file upon the conclusion of a related criminal trial or, in the alternative, directing a stay of the disciplinary proceedings against Petitioner pending the conclusion of a related criminal trial;

2. That pending the hearing and determination of this application, the Respondent, The Commission on Judicial Conduct be enjoined from proceeding with the prosecution of the Petitioner;

3. That the papers in this matter be sealed pursuant to §216.1 of the Uniform Rules for New York State Trial Courts and Judiciary Law §44(4).

4. For such other, further and different relief as this Court may seem just, proper and equitable.

Dated: New York, New York
July 18, 2011

DAVID GODOSKY

VERIFICATION

STATE OF NEW YORK)
:SS.:
COUNTY OF NEW YORK)

I, DAVID GODOSKY, the undersigned, am an attorney admitted to practice law in the Courts of New York State, and say that:

I am associated with the firm of **GODOSKY & GENTILE, P.C.**, attorneys of record for the Petitioner, I have read the annexed **PETITION** know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon the following:

Investigation, interviews with clients, records, reports, documents, correspondence, data, memoranda, etc., in the file.

The reason I make this affirmation instead of the PETITIONER is that the PETITIONER resides outside of the County of New York wherein I maintain my offices.

I affirm that the foregoing statements are true under penalties of perjury.

Dated: New York, New York
July 19, 2011

DAVID GODOSKY

EXHIBIT

A

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

- -

In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

LEE L. HOLZMAN,

a Judge of the Surrogate's Court,
Bronx County.

DECISION
AND
ORDER

- -

THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Stephen R. Coffey, Esq., Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Elizabeth B. Hubbard
Nina M. Moore
Honorable Karen K. Peters
Honorable Terry Jane Ruderman

The matter having come before the Commission on March 17, 2011; and the Commission having before it the Formal Written Complaint dated January 4, 2011, and respondent's Verified Answer dated January 21, 2011; and the Commission, by order dated January 25, 2011, having designated Honorable Felice K. Shea as referee to hear and report proposed findings of fact and conclusions of law; and respondent, by notice of

motion and supporting papers dated February 2, 2011, having moved to dismiss the Formal Written Complaint or, in the alternative, for a stay of the proceedings against respondent; and the administrator of the Commission having opposed the motion by memorandum dated February 25, 2011; and respondent having replied by affirmation dated March 4, 2011; and due deliberation having been had thereupon; now, therefore, the Commission

DETERMINES that respondent's motion is denied in all respects; and it is, therefore

ORDERED that the Formal Written Complaint is referred to the referee for a hearing.

Dated: March 21, 2011

Jean M. Savanyu, Esq.
Clerk of the Commission
New York State
Commission on Judicial Conduct

EXHIBIT

B

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

LEE L. HOLZMAN,

a Judge of the Surrogate's Court,
Bronx County.

NOTICE OF FORMAL WRITTEN COMPLAINT

NOTICE is hereby given to respondent, Lee L. Holzman, a Judge of the Surrogate's Court, Bronx County, pursuant to Section 44, subdivision 4, of the Judiciary Law, that the State Commission on Judicial Conduct has determined that cause exists to serve upon respondent the annexed Formal Written Complaint; and that, in accordance with said statute, respondent is requested within twenty (20) days of the service of the annexed Formal Written Complaint upon him to serve the Commission at its New York City office, 61 Broadway, Suite 1200, New York, New York 10006, with his verified Answer to the specific paragraphs of the Complaint.

Dated: January 4, 2011
New York, New York

ROBERT H. TEMBECKJIAN
Administrator and Counsel
State Commission on Judicial Conduct
61 Broadway, Suite 1200
New York, New York 10006
(646) 386-4800

To: David Godosky, Esq.
Godosky & Gentile, P.C.
61 Broadway, Suite 2010
New York, New York 10006

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

LEE L. HOLZMAN,

a Judge of the Surrogate's Court,
Bronx County.

FORMAL
WRITTEN COMPLAINT

1. Article 6, Section 22, of the Constitution of the State of New York establishes a Commission on Judicial Conduct ("Commission"), and Section 44, subdivision 4, of the Judiciary Law empowers the Commission to direct that a Formal Written Complaint be drawn and served upon a judge.

2. The Commission has directed that a Formal Written Complaint be drawn and served upon Lee L. Holzman ("respondent"), a Judge of the Surrogate's Court, Bronx County.

3. The factual allegations set forth in Charges I through IV state acts of judicial misconduct by respondent in violation of the Rules of the Chief Administrator of the Courts Governing Judicial Conduct ("Rules").

4. Respondent was admitted to the practice of law in New York in 1966. He has been a Judge of the Surrogate's Court, Bronx County, since 1988. Respondent's current term expires on December 31, 2011.

CHARGE I

5. From in or about 1995 to in or about April 2009, respondent approved legal fees payable to Michael Lippman, Counsel to the Bronx Public Administrator's Office in numerous cases, including but not limited to those set forth in Schedule A, that were: (1) based on "boilerplate" affidavits of legal services that did not contain case-specific, detailed information as to the actual services rendered to the estate, the time spent, and the method or basis by which requested compensation was determined as required by Surrogate's Court Procedure Act ("SCPA") § 1108(2)(c) and (2) awarded without consideration of the statutory factors set forth in SCPA § 1108(2)(c).

Specifications to Charge I

6. SCPA § 1108(2)(c) requires that an award of legal fees to the Counsel to the Public Administrator must be supported by an affidavit setting forth in detail the services rendered, the time spent, and the method or basis by which requested compensation was determined.

7. SCPA § 1108(2)(c) requires the Surrogate, when fixing legal fees for Counsel to the Public Administrator, to consider: (1) the time and labor required, (2) the difficulty of the questions involved, (3) the skill required to handle the problems presented, (4) the lawyer's experience, ability and reputation, (5) the amount involved and benefit resulting to the estate from the services, (6) the customary fee charged by the bar for similar services, (7) the contingency or certainty of compensation, (8) the results obtained and (9) the responsibility involved.

8. In October 2002, the Administrative Board for the Offices of the Public Administrators of New York State issued guidelines for the compensation of counsel pursuant to SCPA § 1128 ("Administrative Board Guidelines"). The guidelines require public administrators to ensure that requests for compensation of counsel are supported by an affidavit of legal services containing the information set forth in SCPA § 1108(2)(c).

9. The Administrative Board Guidelines recognize that it is the responsibility of the Surrogate to fix the reasonable compensation of counsel after consideration of the factors set forth in SCPA § 1108(2)(c). The guidelines set a sliding scale of maximum recommended legal fees based on six percent of the estate's value for the first $750,000, with decreasing percentages charged for estates in inverse proportion to the estate's size beyond the initial $750,000.

10. From in or about 1995 to in or about April 2009, in numerous cases including but not limited to those set forth in Schedule A, respondent repeatedly approved legal fees for Mr. Lippman based upon affirmations of legal services that did not comply with SCPA § 1108(2)(c).

11. From in or about 1995 to in or about April 2009, in numerous cases including but not limited to those set forth in Schedule A, Mr. Lippman requested the maximum legal fee recommended in the Administrative Board Guidelines, regardless of the size or complexity of the estate.

12. From in or about 1995 to in or about April 2009, in numerous cases including but not limited to those set forth in Schedule A, respondent repeatedly

approved legal fees for Mr. Lippman without considering the statutory factors set out in SCPA § 1108(2)(c).

13. From in or about 1995 to in or about April 2009, in numerous cases including but not limited to those set forth in Schedule A, respondent awarded Mr. Lippman the maximum fee recommended in the Administrative Board Guidelines, calculated as a percentage of the value of the assets of each estate, regardless of the size or complexity of the estate.

14. By reason of the foregoing, respondent should be disciplined for cause, pursuant to Article 6, Section 22, subdivision (a), of the Constitution and Section 44, subdivision 1, of the Judiciary Law, in that respondent failed to uphold the integrity and independence of the judiciary by failing to maintain high standards of conduct so that the integrity and independence of the judiciary would be preserved, in violation of Section 100.1 of the Rules; failed to avoid impropriety and the appearance of impropriety, in that he failed to respect and comply with the law and failed to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary, in violation of Section 100.2(A) of the Rules, allowed a social, political or other relationship to influence his judicial conduct or judgment, in violation of Section 100.2(B) of the Rules, and lent the prestige of judicial office to advance his own private interest or the interest of others, and conveyed or permitted others to convey the impression that they were in a special position to influence him, in violation of Section 100.2(C) of the Rules; and failed to perform the duties of judicial office impartially and diligently, in that he failed to be faithful to the law and maintain professional competence

in it, in violation of Section 100.3(B)(1) of the Rules, and failed to avoid favoritism and approved compensation of appointees beyond the fair value of services rendered, in violation of Section 100.3(C)(3) of the Rules.

CHARGE II

15. In or about 2005 and 2006, despite his knowledge that in numerous cases Michael Lippman, Counsel to the Public Administrator, had taken unearned advance legal fees without the approval of the court and/or fees that exceeded the amount prescribed by the Administrative Board Guidelines, respondent: (1) failed to report Mr. Lippman to law enforcement authorities or to the Departmental Disciplinary Committee of the Appellate Division, First Department, and (2) continued to award Mr. Lippman the maximum legal fee recommended in the Administrative Board Guidelines in subsequent cases and/or to award Lippman fees without consideration of the statutory factors set forth in Surrogate's Court Procedure Act § 1108(2)(c).

Specifications to Charge II

16. In or about late 2005, respondent learned that in numerous cases, Mr. Lippman had taken advance legal fees equal to 100% of maximum legal fee recommended in the Administrative Board Guidelines without the approval of the court.

17. In or about late 2005 or early 2006, respondent learned that in numerous cases, Mr. Lippman had been paid in excess of the maximum legal fees recommended in the Administrative Board Guidelines.

18. Notwithstanding this knowledge, respondent did not report Mr. Lippman to either law enforcement authorities or the Departmental Disciplinary Committee.

19. In or about 2006, respondent implemented a system by which Mr. Lippman would repay the advance and/or excess legal fees that he had previously collected.

20. At respondent's direction, Mr. Lippman was kept on staff to "work off" the excess and advance legal fees. Respondent appointed his court attorney, Mark Levy, as Counsel to the Public Administrator and asked him to oversee the repayment system. Respondent also appointed another court attorney, John Raniolo, as the Public Administrator and asked him to assist in overseeing the system.

21. From in or about 2006 to in or about 2009, Mr. Lippman turned over all legal fees he earned in more recent Public Administrator cases to repay the unearned advance and/or excess legal fees he had collected on prior pending matters.

22. In awarding fees to Mr. Lippman that were used for the repayment, respondent failed to apply the individual consideration to each estate as required by SCPA § 1108(2)(c).

23. Mr. Lippman continued to work as one of the counsels to the Public Administrator until 2009, when John Reddy, the new Counsel to the Public Administrator, terminated his services.

24. By reason of the foregoing, respondent should be disciplined for cause, pursuant to Article 6, Section 22, subdivision (a), of the Constitution and Section

44, subdivision 1, of the Judiciary Law, in that respondent failed to uphold the integrity and independence of the judiciary by failing to maintain high standards of conduct so that the integrity and independence of the judiciary would be preserved, in violation of Section 100.1 of the Rules; failed to avoid impropriety and the appearance of impropriety, in that he failed to respect and comply with the law and failed to act in a manner that promotes public confidence in the integrity and impartiality of the judiciary, in violation of Section 100.2(A) of the Rules, and allowed a social, political or other relationship to influence his judicial conduct or judgment, in violation of Section 100.2(B) of the Rules; and failed to perform the duties of judicial office impartially and diligently, in that he failed to be faithful to the law and maintain professional competence in it, in violation of Section 100.3(B)(1) of the Rules, and failed to take appropriate action upon receiving information indicating a substantial likelihood that a lawyer had committed a substantial violation of the Code of Professional Responsibility, in violation of Section 100.3(D)(2) of the Rules.

CHARGE III

25. From in or about 1997 to in or about 2005, respondent failed to adequately supervise and/or oversee the work of court staff and appointees, including but not limited to Public Administrator Esther Rodriguez, resulting in: (1) Michael Lippman, Counsel to the Public Administrator, taking advance legal fees without filing an affirmation of legal services and/or taking advance legal fees that exceeded the maximum amount recommended in the Administrative Board Guidelines, without the court's approval, (2) numerous delays in the administration of estates that were lengthy and

without valid excuse, (3) numerous individual estates with negative balances, (4) estate funds being placed in imprudent and/or unauthorized investments and (5) the Public Administrator's employment of a close acquaintance who billed estates for services that were not rendered and/or overbilled estates.

Specifications as to Charge III

Advance and Excess Legal Fees

26. From in or about 1997 to in or about 2005, in numerous cases including but not limited to those set forth in Schedule B, Public Administrator Rodriguez routinely paid to Mr. Lippman, and/or Mr. Lippman took, advance legal fees without obtaining the court's approval or requiring affirmations of legal services setting forth the work performed on the estate.

27. From in or about 1997 to in or about 2005, Ms. Rodriguez routinely paid to Mr. Lippman, and/or Mr. Lippman took, advance legal fees that exceeded the maximum legal fees recommended in the Administrative Board Guidelines, without obtaining the court's approval:

a. In numerous cases including but not limited to those set forth in Schedule C, Mr. Lippman failed to refund money to the overcharged estates.

b. In numerous cases including but not limited to those set forth in Schedule D, Mr. Lippman refunded money to the overcharged estates.

Delays in Estate Administration

28. From in or about 1997 to in or about 2005, in numerous cases including but not limited to those set forth in Schedule E, respondent failed to properly supervise and/or oversee his appointees with the result that cases were not timely processed and final decrees were not timely filed. In 26 cases set forth in Schedule E, respondent's failure to supervise resulted in estates remaining open for periods between five and ten years before issuance of a final decree.

Negative Balances in Numerous Estates

29. From in or about 1997 to in or about 2005, respondent failed to ensure that the Public Administrator filed adequate monthly statements of accounts that were closed or finally settled, as required by SCPA § 1109.

30. From in or about 1997 to in or about 2005, respondent failed to ensure that the Public Administrator filed adequate bi-annual reports of every estate that had not been fully distributed within two years from the date of issuance of letters of administration or letters testamentary, as required by SCPA § 1109, in that the reports did not include every estate or *inter alia* "the approximate amount of gross estates, approximate amount that has been distributed to beneficiaries, approximate amount remaining in fiduciary's hands, reason that the estate has not yet been fully distributed."

31. As a result of his failure to ensure that the Public Administrator filed adequate reports, respondent failed to recognize that numerous individual estates had negative balances.

32. From in or about 1997 to in or about 2005, respondent received quarterly reports from the accountant, Paul Rubin, which failed to contain any information on individual estates holdings and instead contained the aggregate monies held by the Public Administrator's Office in a the commingled account.

Imprudent or Unauthorized Investments

33. From in or about 1997 to in or about 2005, respondent failed to properly supervise and/or oversee his appointees with the result that the Public Administrator's Office invested approximately $20 million of estate monies in auction rate securities, an investment that was risky and imprudent, not authorized by the SCPA § 1107 and/or contrary to the Administrative Board Guidelines.

34. In or about February 2008, the auction rate securities markets froze, with the result that the Public Administrator's Office could not sell the securities and pay out distributions to estates whose assets had been invested in the securities.

35. In or about October 2008, upon an agreement entered into the by Attorney General of the State of New York and Bank of America and Royal Bank of Canada, the banks agreed to redeem the illiquid auction rate securities, including those held by the Public Administrator's Office.

Improper Billing

36. Respondent failed to properly supervise and/or oversee his appointees with the result that, at various times while she was Public Administrator, Esther Rodriguez used her position to hire her boyfriend, John Rivera, as an independent

contractor and permitted him to overbill estates and/or to bill estates for services that were not rendered.

37. By reason of the foregoing, respondent should be disciplined for cause, pursuant to Article 6, Section 22, subdivision (a), of the Constitution and Section 44, subdivision 1, of the Judiciary Law, in that respondent failed to uphold the integrity and independence of the judiciary by failing to maintain high standards of conduct so that the integrity and independence of the judiciary would be preserved, in violation of Section 100.1 of the Rules; failed to avoid impropriety and the appearance of impropriety, in that he failed to respect and comply with the law and to act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary, in violation of Section 100.2(A) of the Rules; and failed to perform the duties of judicial office impartially and diligently, in that he failed to be faithful to the law and maintain professional competence in it, in violation of Section 100.3(B)(1) of the Rules, failed to maintain professional competence in judicial administration, in violation of Section 100.3(C)(1) of the Rules, and failed to require staff, court officials and others subject to the judge's direction and control to observe the standards of fidelity and diligence that apply to the judge, in violation of Section 100.3(C)(2) of the Rules.

CHARGE IV

38. In or about 2001 to in or about 2003, respondent failed to disqualify himself from cases in which Michael Lippman appeared, notwithstanding that Mr. Lippman raised more than $125,000 in campaign funds for respondent's 2001 campaign for Surrogate, Bronx County.

39. By reason of the foregoing, respondent should be disciplined for cause, pursuant to Article 6, Section 22, subdivision (a), of the Constitution and Section 44, subdivision 1, of the Judiciary Law, in that respondent failed to uphold the integrity and independence of the judiciary by failing to maintain high standards of conduct so that the integrity and independence of the judiciary would be preserved, in violation of Section 100.1 of the Rules; failed to avoid impropriety and the appearance of impropriety, in that he permitted social and political relationships to influence his conduct and judgment, in violation of Section 100.2(B) of the Rules; and failed to perform the duties of judicial office impartially and diligently, in that he failed to exercise the power of appointment impartially and on the basis of merit, in violation of Section 100.3(C)(3) of the Rules, and failed to disqualify himself in proceedings in which his impartiality might reasonably be questioned, in violation of Section 100.3(E)(1) of the Rules.

WHEREFORE, by reason of the foregoing, the Commission should take whatever further action it deems appropriate in accordance with its powers under the Constitution and the Judiciary Law of the State of New York.

Dated: January 4, 2011
New York, New York

ROBERT H. TEMBECKJIAN
Administrator and Counsel
State Commission on Judicial Conduct
61 Broadway
Suite 1200
New York, New York 10006
(646) 386-4800

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

VERIFICATION

LEE L. HOLZMAN,

a Judge of the Surrogate's Court,
Bronx County.

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

ROBERT H. TEMBECKJIAN, being duly sworn, deposes and says:

1. I am the Administrator of the State Commission on Judicial Conduct.

2. I have read the foregoing Formal Written Complaint and, upon information and belief, all matters stated therein are true.

3. The basis for said information and belief is the files and records of the State Commission on Judicial Conduct.

Robert H. Tembeckjian

Sworn to before me this
4th day of January 2011

Notary Public

ROGER J. SCHWARZ
Notary Public-State of New York
No. 01SC4524866
Qualified in New York County
My Commission Expires Jan. 31, 2011

SCHEDULE A

Case Name	Case Number
Bell, Esther	658A2005
Bielfeld, Peter	151A2002
Celnick, Harold	375A2000
Cerbone, Ermelina	382A2005
Coakley, Loretta	282A2003
Conde, Jacqueline	542A2001
Danziger, John	238A2001
Demick, Evelyn	268A2004
Diop, Modou	172A2006
Echevarria, Victor	389A2002
Einstein, Florence	276A2002
Eng Bee, Edward	48A2005A
Falodun, Ayorinde	916A2002
Feingenbaum, Julius	124A2002
Gaskiewicsz, Jan	639A1994
Glasco, Diane	318A2004
Harris, Jeanette	256A1999
Kissler, Norman	597A2001
Kreisher, Josephine	347A2000
Laporte, Louis	225A1998
Lifshitz, Ida	387A2001
Marks, Helen	303A202
Packin, Morris	461A2003
Patane, Joseph	25A2000
Reinstein, Sylvia	152A2004
Santiago, Edwin	100A1995
Sinclair, Delores	712A2005
Tacoronte, Carmelo	198A2005
Tarrago, John	8A2002
Vasquez, Angel	264A2001
Waks, Lawrence	409A2004

SCHEDULE B

Case Name	Case Number
Acaba, Carmen	112A2004
Acosta, Armando	344A2000
Alston, Lorenzo	48A2002B
Artis, Michael	2007-348
Blanchard, Hardy	1016P2004A
Briel, Graciela De Cordova	593A2000
Brown, Lillian	492P2003
Camara, Mohmammad	491A2000
Carter, Cornelia	714A2004
Chenault, James	192A1995
Chesterfield, David	789A2000
Dewart, Violet	217A2005
Douglas, James	626A1990
Fleischer, Isidore	766A2003
Frankolino, Gerald	25A1999
Gainer, William	78A1997
Gordon, Edith	49A2005
Hambright, Natasha	137A2000
Hollington, Floyd	641A2003/442A2002
Johnson, Owens	738A90
Kelson, James	210A2004
Laster, Sarah	384A2004
Martinez, Aristedes	143A2000
Martinez, Consuelo	140A2000
Miles, George	608M2006
Mohamed, Abullah	564A1994
Montiel, Isabel	51A1997
Raven, Julius	749A2004
Ress, Lynn	491A2005
Rossbach, Mollie	134A2006
Scott, Jacqueline	955A1996
Simpson, Ray	80A2001

SCHEDULE C

Case Name	Case Number
Biefield, Peter	151A2002
Brown, Lillian	492P2003
Carter, Cornelia	714A2004
Cokker, Naomi	164P1997
Cushman, Louis	711A2001
Eng Bee, Edward	48A2005
Falodun, Ayorinde	916A2002
Fleischer, Isidore	766A2003
Gordon, Edith	49A2005
Hollington, Floyd	641A2003/442A2002
Martinez, Aristedes	143A2000
McGoldrick, Frank	905A2002
Packin, Morris	461A2003
Rizzo, Josephine	19A2005
Simpson, Ray	80A2001

SCHEDULE D

Case Name	Case Number
Acaba, Carmen	112A2004
Acosta, Armando	344A2000
Babineau, Alice	801A1995
Bell, Esther	658A2005
Blanchard, Hardy	1016P2004
Brady, John	385A2004
Brown, Lillian	492P2003
Camara, Mohammed	491A2000
Chenault, James	192A1995
Clark, Albert	618A2005
Coakley, Loretta	282A2003
Covias, Antoinette	541A1999
Demick, Evelyn	268A2004
Dewart, Violet	217A2005
Diop, Modou	172A2006
Echevarria, Victor	389A2002
Einstein, Florence	276A2002
Frankolino, Gerald	25A1999
Glasco, Diane	318A2004
Graham, Viola	414A2004
Greenbaum, Renee	178A2004
Hambright, Natasha	137A2000
Hollywood, Peter	515A2003
Kissler, Norman	597A2001
Kreischer, Josephine	347A2000
Lashkoff, Galena	269A2005
Reinstein, Sylvia	152A2004
Ritz, Dorothy	140A2003
Rizzo, Josephine	19A2005
Santiago, Edwin	100A1995
Sinclair, Delores	712A2005A
Tacoronte, Carmelo	198A2005
Vandermark, Mary	2004A855
Vasquez, Angel	264A2001

SCHEDULE E

Case Name	Case Number
Alcantara, Samuel	730A2000
Babineau, Alice	801A1995
Blanch, Geraldine	716A2000 74A2001
Blanch, Geraldine	74A2001
Chenault, James	192A1995
Chesterfield, David	789A2000
Cushman, Louis	711A2001
Danziger, John	238A2001
Demick, Evelyn	268A2004
Echevarria, Victor	398A2002
Fleming, Elaine	819A1994
Frankolino, Gerald	25A1999
Hambright, Natasha	137A2000
Kreischer, Josephine	347A2000
Lederman, Stanley	122A1999
Martinez, Consuelo	140A2000
Montiel, Isabel	51A1997
Rodriquez, Christina	111A2000
Santiago, Edwin	100A1995
Scott, Jacqueline	955A1996
Sinclair, Delores	712A2005
Twist, Margaret	4A1995
Vandermark, Mary	2004A855
West, Margaret	45A1999
White, Warren	648A2001
Wilson, Jean	841A1995

EXHIBIT

C

I N D I C T M E N T

S U P R E M E C O U R T O F T H E S T A T E O F N E W Y O R K

C O U N T Y O F B R O N X

PEOPLE OF THE STATE OF NEW YORK
AGAINST

(X) LIPPMAN, MICHAEL
DEFENDANT: IBNA

INDICTMENT #:
GRAND JURY #: 43276/2010

COUNTS

SCHEME TO DEFRAUD IN THE FIRST DEGREE (ONE COUNT)

OFFERING A FALSE INSTRUMENT FOR FILING IN THE FIRST DEGREE (FOUR COUNTS)

FALSIFYING BUSINESS RECORDS IN THE FIRST DEGREE (FOUR COUNTS)

GRAND LARCENY IN THE SECOND DEGREE (TWO COUNTS)

GRAND LARCENY IN THE THIRD DEGREE (THREE COUNTS)

CONFLICT OF INTEREST (ONE COUNT)

B Panel
7th Term
JULY 7, 2010

A TRUE BILL

FOREPERSON

ROBERT T. JOHNSON
DISTRICT ATTORNEY

FIRST COUNT

THE GRAND JURY OF THE COUNTY OF THE BRONX BY THIS INDICTMENT, ACCUSES THE DEFENDANT MICHAEL LIPPMAN OF THE CRIME OF SCHEME TO DEFRAUD IN THE FIRST DEGREE, IN VIOLATION OF PENAL LAW § 190.65(1)(B), COMMITTED AS FOLLOWS:

THE DEFENDANT, MICHAEL LIPPMAN ON OR ABOUT AND BETWEEN FEBRUARY 5, 2002 AND MARCH 31, 2009, IN THE COUNTY OF THE BRONX, DID ENGAGE IN A SCHEME CONSTITUTING A SYSTEMATIC ONGOING COURSE OF CONDUCT WITH INTENT TO DEFRAUD MORE THAN ONE PERSON AND SO OBTAINED PROPERTY WITH A VALUE IN EXCESS OF ONE THOUSAND DOLLARS FROM ONE OR MORE SUCH PERSONS, THAT BEING, A SUM OF UNITED STATES CURRENCY FROM THE BRONX PUBLIC ADMINISTRATOR AS ADMINISTRATOR OF THE ESTATES OF CUSHMAN, GREENBAUM, MCGOLDRICK, LASKHOFF, AND RIZZO.

SECOND COUNT

THE GRAND JURY OF THE COUNTY OF THE BRONX BY THIS INDICTMENT, ACCUSES THE DEFENDANT MICHAEL LIPPMAN OF THE CRIME OF OFFERING A FALSE INSTRUMENT FOR FILING IN THE FIRST DEGREE, IN VIOLATION OF PENAL LAW § 175.35, COMMITTED AS FOLLOWS:

THE DEFENDANT, MICHAEL LIPPMAN, ON OR ABOUT JUNE 10, 2004, IN THE COUNTY OF THE BRONX, KNOWING THAT A WRITTEN INSTRUMENT CONTAINED A FALSE STATEMENT OR FALSE INFORMATION AND WITH INTENT TO DEFRAUD THE STATE OR ANY POLITICAL SUBDIVISION, PUBLIC AUTHORITY, OR PUBLIC BENEFIT CORPORATION OF THE STATE, DID OFFER OR PRESENT IT TO A PUBLIC OFFICE OR PUBLIC SERVANT WITH THE KNOWLEDGE OR BELIEF THAT IT WOULD BE FILED WITH, REGISTERED OR RECORDED IN OR OTHERWISE BECOME A PART OF THE RECORDS OF SUCH PUBLIC OFFICE OR PUBLIC SERVANT, PUBLIC AUTHORITY, OR PUBLIC BENEFIT CORPORATION, THAT BEING AN AFFIRMATION OF LEGAL SERVICES RENDERED AS COUNSEL TO THE PUBLIC ADMINISTRATOR, AS ADMINISTRATOR OF THE ESTATE OF CUSHMAN.

THIRD COUNT

THE GRAND JURY OF THE COUNTY OF THE BRONX BY THIS INDICTMENT, ACCUSES THE DEFENDANT MICHAEL LIPPMAN OF THE CRIME OF OFFERING A FALSE INSTRUMENT FOR FILING IN THE FIRST DEGREE, IN VIOLATION OF PENAL LAW § 175.35, COMMITTED AS FOLLOWS:

THE DEFENDANT, MICHAEL LIPPMAN, ON OR ABOUT JUNE 10, 2004, IN THE COUNTY OF THE BRONX, KNOWING THAT A WRITTEN INSTRUMENT CONTAINED A FALSE STATEMENT OR FALSE INFORMATION AND WITH INTENT TO DEFRAUD THE STATE OR ANY POLITICAL SUBDIVISION, PUBLIC AUTHORITY, OR PUBLIC BENEFIT CORPORATION OF THE STATE, DID OFFER OR PRESENT IT TO A PUBLIC OFFICE OR PUBLIC SERVANT WITH THE KNOWLEDGE OR BELIEF THAT IT WOULD BE FILED WITH, REGISTERED OR RECORDED IN OR OTHERWISE BECOME A PART OF THE RECORDS OF SUCH PUBLIC OFFICE OR PUBLIC SERVANT, PUBLIC AUTHORITY, OR PUBLIC BENEFIT CORPORATION, THAT BEING AN ACCOUNTING PREPARED BY MICHAEL LIPPMAN, ESQ. AS COUNSEL TO THE BRONX PUBLIC ADMINISTRATOR, AS ADMINISTRATOR FOR THE ESTATE OF CUSHMAN.

FOURTH COUNT

THE GRAND JURY OF THE COUNTY OF THE BRONX BY THIS INDICTMENT, ACCUSES THE DEFENDANT MICHAEL LIPPMAN OF THE CRIME OF FALSIFYING BUSINESS RECORDS IN THE FIRST DEGREE, IN VIOLATION OF PENAL LAW § 175.10, COMMITTED AS FOLLOWS:

THE DEFENDANT, MICHAEL LIPPMAN, ON OR ABOUT JUNE 10, 2004, IN THE COUNTY OF THE BRONX, WITH INTENT TO DEFRAUD AND WITH THE INTENT TO COMMIT ANOTHER CRIME OR TO AID OR CONCEAL THE COMMISSION THEREOF, DID MAKE OR CAUSE A FALSE ENTRY IN THE BUSINESS RECORDS OF AN ENTERPRISE, THAT BEING AN AFFIRMATION OF LEGAL SERVICES RENDERED AS COUNSEL TO THE PUBLIC ADMINISTRATOR, AS ADMINISTRATOR OF THE ESTATE OF CUSHMAN.

FIFTH COUNT

THE GRAND JURY OF THE COUNTY OF THE BRONX BY THIS INDICTMENT, ACCUSES THE DEFENDANT MICHAEL LIPPMAN OF THE CRIME OF FALSIFYING BUSINESS RECORDS IN THE FIRST DEGREE, IN VIOLATION OF PENAL LAW § 175.10, COMMITTED AS FOLLOWS:

THE DEFENDANT, MICHAEL LIPPMAN, ON OR ABOUT JUNE 10, 2004, IN THE COUNTY OF THE BRONX, WITH INTENT TO DEFRAUD AND WITH THE INTENT TO COMMIT ANOTHER CRIME OR TO AID OR CONCEAL THE COMMISSION THEREOF, DID MAKE OR CAUSE A FALSE ENTRY IN THE BUSINESS RECORDS OF AN ENTERPRISE, THAT BEING AN ACCOUNTING PREPARED BY MICHAEL LIPPMAN, ESQ. AS COUNSEL TO THE BRONX PUBLIC ADMINISTRATOR, AS ADMINISTRATOR FOR THE ESTATE OF CUSHMAN.

SIXTH COUNT

THE GRAND JURY OF THE COUNTY OF THE BRONX BY THIS INDICTMENT, ACCUSES THE DEFENDANT MICHAEL LIPPMAN OF THE CRIME OF GRAND LARCENY IN THE SECOND DEGREE, IN VIOLATION OF PENAL LAW § 155.40(1), COMMITTED AS FOLLOWS:

THE DEFENDANT, MICHAEL LIPPMAN ON OR ABOUT AND BETWEEN MARCH 5, 2002 AND JULY 7, 2010, IN THE COUNTY OF THE BRONX, DID STEAL PROPERTY HAVING A VALUE OF MORE THAN FIFTY THOUSAND DOLLARS, THAT BEING A SUM OF UNITED STATES CURRENCY, HELD BY THE BRONX PUBLIC ADMINISTRATOR AS ADMINISTRATOR TO THE ESTATE OF CUSHMAN.

SEVENTH COUNT

THE GRAND JURY OF THE COUNTY OF THE BRONX BY THIS INDICTMENT, ACCUSES THE DEFENDANT MICHAEL LIPPMAN OF THE CRIME OF OFFERING A FALSE INSTRUMENT FOR FILING IN THE FIRST DEGREE, IN VIOLATION OF PENAL LAW § 175.35, COMMITTED AS FOLLOWS:

THE DEFENDANT, MICHAEL LIPPMAN, ON OR ABOUT MARCH 1, 2005, IN THE COUNTY OF THE BRONX, KNOWING THAT A WRITTEN INSTRUMENT CONTAINED A FALSE STATEMENT OR FALSE INFORMATION AND WITH INTENT TO DEFRAUD THE STATE OR ANY POLITICAL SUBDIVISION, PUBLIC AUTHORITY, OR PUBLIC BENEFIT CORPORATION OF THE STATE, DID OFFER OR PRESENT IT TO A PUBLIC OFFICE OR PUBLIC SERVANT WITH THE KNOWLEDGE OR BELIEF THAT IT WOULD BE FILED WITH, REGISTERED OR RECORDED IN OR OTHERWISE BECOME A PART OF THE RECORDS OF SUCH PUBLIC OFFICE OR PUBLIC SERVANT, PUBLIC AUTHORITY, OR PUBLIC BENEFIT CORPORATION, THAT BEING AN AFFIRMATION OF LEGAL SERVICES RENDERED AS COUNSEL TO THE PUBLIC ADMINISTRATOR, AS ADMINISTRATOR OF THE ESTATE OF GREENBAUM.

EIGHTH COUNT

THE GRAND JURY OF THE COUNTY OF THE BRONX BY THIS INDICTMENT, ACCUSES THE DEFENDANT MICHAEL LIPPMAN OF THE CRIME OF OFFERING A FALSE INSTRUMENT, IN VIOLATION OF PENAL LAW § 175.35, FOR FILING IN THE FIRST DEGREE COMMITTED AS FOLLOWS:

THE DEFENDANT, MICHAEL LIPPMAN, ON OR ABOUT MARCH 1, 2005, IN THE COUNTY OF THE BRONX, KNOWING THAT A WRITTEN INSTRUMENT CONTAINED A FALSE STATEMENT OR FALSE INFORMATION AND WITH INTENT TO DEFRAUD THE STATE OR ANY POLITICAL SUBDIVISION, PUBLIC AUTHORITY, OR PUBLIC BENEFIT CORPORATION OF THE STATE, DID OFFER OR PRESENT IT TO A PUBLIC OFFICE OR PUBLIC SERVANT WITH THE KNOWLEDGE OR BELIEF THAT IT WOULD BE FILED WITH, REGISTERED OR RECORDED IN OR OTHERWISE BECOME A PART OF THE RECORDS OF SUCH PUBLIC OFFICE OR PUBLIC SERVANT, PUBLIC AUTHORITY, OR PUBLIC BENEFIT CORPORATION, THAT BEING AN ACCOUNTING PREPARED BY MICHAEL LIPPMAN, ESQ. AS COUNSEL TO THE BRONX PUBLIC ADMINISTRATOR, AS ADMINISTRATOR FOR THE ESTATE OF GREENBAUM.

NINTH COUNT

THE GRAND JURY OF THE COUNTY OF THE BRONX BY THIS INDICTMENT, ACCUSES THE DEFENDANT MICHAEL LIPPMAN OF THE CRIME OF FALSIFYING BUSINESS RECORDS IN THE FIRST DEGREE, IN VIOLATION OF PENAL LAW § 175.10, COMMITTED AS FOLLOWS:

THE DEFENDANT, MICHAEL LIPPMAN, ON OR ABOUT MARCH 1, 2005, IN THE COUNTY OF THE BRONX, WITH INTENT TO DEFRAUD AND WITH THE INTENT TO COMMIT ANOTHER CRIME OR TO AID OR CONCEAL THE COMMISSION THEREOF, DID MAKE OR CAUSE A FALSE ENTRY IN THE BUSINESS RECORDS OF AN ENTERPRISE, THAT BEING AN AFFIRMATION OF LEGAL SERVICES RENDERED AS COUNSEL TO THE PUBLIC ADMINISTRATOR, AS ADMINISTRATOR OF THE ESTATE OF GREENBAUM.

TENTH COUNT

THE GRAND JURY OF THE COUNTY OF THE BRONX BY THIS INDICTMENT, ACCUSES THE DEFENDANT MICHAEL LIPPMAN OF THE CRIME OF FALSIFYING BUSINESS RECORDS IN THE FIRST DEGREE, IN VIOLATION OF PENAL LAW § 175.10, COMMITTED AS FOLLOWS:

THE DEFENDANT, MICHAEL LIPPMAN, ON OR ABOUT MARCH 1, 2005, IN THE COUNTY OF THE BRONX, WITH INTENT TO DEFRAUD AND WITH THE INTENT TO COMMIT ANOTHER CRIME OR TO AID OR CONCEAL THE COMMISSION THEREOF, DID MAKE OR CAUSE A FALSE ENTRY IN THE BUSINESS RECORDS OF AN ENTERPRISE, THAT BEING AN ACCOUNTING PREPARED BY MICHAEL LIPPMAN, ESQ. AS COUNSEL TO THE BRONX PUBLIC ADMINISTRATOR, AS ADMINISTRATOR FOR THE ESTATE OF GREENBAUM

ELEVENTH COUNT

THE GRAND JURY OF THE COUNTY OF THE BRONX BY THIS INDICTMENT, ACCUSES THE DEFENDANT MICHAEL LIPPMAN OF THE CRIME OF GRAND LARCENY IN THE THIRD DEGREE, IN VIOLATION OF PENAL LAW § 155.35, COMMITTED AS FOLLOWS:

THE DEFENDANT, MICHAEL LIPPMAN ON OR ABOUT AND BETWEEN MARCH 18, 2004 AND JULY 7, 2010, IN THE COUNTY OF THE BRONX, DID STEAL PROPERTY HAVING A VALUE OF MORE THAN THREE THOUSAND DOLLARS, THAT BEING A SUM OF UNITED STATES CURRENCY, HELD BY THE BRONX PUBLIC ADMINISTRATOR AS ADMINISTRATOR TO THE ESTATE OF GREENBAUM.

TWELFTH COUNT

THE GRAND JURY OF THE COUNTY OF THE BRONX BY THIS INDICTMENT, ACCUSES THE DEFENDANT MICHAEL LIPPMAN OF THE CRIME OF GRAND LARCENY IN THE THIRD DEGREE, IN VIOLATION OF PENAL LAW § 155.35, COMMITTED AS FOLLOWS:

THE DEFENDANT, MICHAEL LIPPMAN ON OR ABOUT AND BETWEEN JANUARY 9, 2003 AND JULY 7, 2010, IN THE COUNTY OF THE BRONX, DID STEAL PROPERTY HAVING A VALUE OF MORE THAN THREE THOUSAND DOLLARS, THAT BEING A SUM OF UNITED STATES CURRENCY, HELD BY THE BRONX PUBLIC ADMINISTRATOR AS ADMINISTRATOR TO THE ESTATE OF MCGOLDRICK.

THIRTEENTH COUNT

THE GRAND JURY OF THE COUNTY OF THE BRONX BY THIS INDICTMENT, ACCUSES THE DEFENDANT MICHAEL LIPPMAN OF THE CRIME OF GRAND LARCENY IN THE THIRD DEGREE, IN VIOLATION OF PENAL LAW § 155.35, COMMITTED AS FOLLOWS:

THE DEFENDANT, MICHAEL LIPPMAN ON OR ABOUT AND BETWEEN MAY 7, 2005 AND JULY 7, 2010, IN THE COUNTY OF THE BRONX, DID STEAL PROPERTY HAVING A VALUE OF MORE THAN THREE THOUSAND DOLLARS, THAT BEING A SUM OF UNITED STATES CURRENCY, HELD BY THE BRONX PUBLIC ADMINISTRATOR AS ADMINISTRATOR TO THE ESTATE OF LASKHOFF.

FOURTEENTH COUNT

THE GRAND JURY OF THE COUNTY OF THE BRONX BY THIS INDICTMENT, ACCUSES THE DEFENDANT MICHAEL LIPPMAN OF THE CRIME OF GRAND LARCENY IN THE SECOND DEGREE, IN VIOLATION OF PENAL LAW § 155.40(1), COMMITTED AS FOLLOWS:

THE DEFENDANT, MICHAEL LIPPMAN ON OR ABOUT AND BETWEEN JANUARY 7, 2005 AND JULY 7, 2010, IN THE COUNTY OF THE BRONX, DID STEAL PROPERTY HAVING A VALUE OF MORE THAN FIFTY THOUSAND DOLLARS, THAT BEING A SUM OF UNITED STATES CURRENCY, HELD BY THE BRONX PUBLIC ADMINISTRATOR AS ADMINISTRATOR TO THE ESTATE OF RIZZO.

FIFTEENTH COUNT

THE GRAND JURY OF THE COUNTY OF THE BRONX BY THIS INDICTMENT, ACCUSES THE DEFENDANT MICHAEL LIPPMAN OF THE CRIME OF CONFLICT OF INTEREST, IN VIOLATION OF N.Y.C. CHARTER CHAPTER 68, § 2604(B)(3), COMMITTED AS FOLLOWS:

THE DEFENDANT, MICHAEL LIPPMAN ON OR ABOUT AND BETWEEN FEBRUARY 5, 2002 AND JULY 7, 2010, IN THE COUNTY OF THE BRONX, DID USE HIS POSITION AS A PUBLIC SERVANT TO OBTAIN FINANCIAL GAIN OR OTHER PRIVATE OR PERSONAL ADVANTAGE, DIRECT OR INDIRECT, FOR THE PUBLIC SERVANT OR ANY PERSON OR FIRM ASSOCIATED WITH THE PUBLIC SERVANT.

ROBERT T. JOHNSON
DISTRICT ATTORNEY

G R A N D J U R Y R E P O R T

C O U N T Y : B R O N X

INDICTMENTS# GRAND JURY # 43276/2010 FINDING: INDICTED

DEFENDANTS	CORRESPONDING DOCKETS
1. LIPPMAN, MICHAEL	IBNA

INDICTMENT CHARGES

SCHEME TO DEFRAUD IN THE FIRST DEGREE (ONE COUNT)
P.L. 190.65(1)(b)

OFFERING A FALSE INSTRUMENT FOR FILING IN THE FIRST DEGREE (FOUR COUNTS)
P.L. 175.35

FALSIFYING BUSINESS RECORDS IN THE FIRST DEGREE (FOUR COUNTS)
P.L. 175.10

GRAND LARCENY IN THE SECOND DEGREE (TWO COUNTS)
P.L. 155.40(1)

GRAND LARCENY IN THE THIRD DEGREE (THREE COUNTS)_
P.L. 155.35

CONFLICT OF INTEREST (ONE COUNT)
N.Y.C.C. 2604(B)(3)

SCHEDULED ARRAIGNMENT DATE:

ARRAIGNMENT PART:

OTHER ASSOCIATED INDICTMENTS:

DATE COMPLETED: JULY 7, 2010

ADA: MOSTAJO, MARIA C
BUREAU: RACKETS BUREAU

EXHIBIT

D

Press Release

2010-25 Thursday, July 8, 2010

July 8, 2010

GRAND JURY INDICTS FORMER COUNSEL TO THE BRONX PUBLIC ADMINISTRATOR WITH OVERCHARGING LEGAL FEES INVOLVING THE ESTATES OF PEOPLE WHO DIED WITHOUT LEAVING A WILL

Public Information
198 E. 161st St.
Bronx, NY
10451
(718) 590-2234

Bronx District Attorney Robert T. Johnson and NYC Department of Investigation Commissioner Rose Gill Hearn announced today the indictment and arrest of attorney Michael Lippman, former Counsel to the Bronx Public Administrator.

Robert T. Johnson
District Attorney

A grand jury returned a 15 count indictment charging Lippman with Grand Larceny in the 2nd and 3rd degrees, Scheme to Defraud in the 1st degree, Offering a False Instrument for Filing in the 1st degree, Falsifying Business Records in the 1st degree, and Conflict of Interest. The most serious offense, Grand Larceny in the 2nd degree is a Class C felony offense punishable by a maximum sentence of up to 15 years imprisonment.

The charges in this indictment are merely accusations and the defendant is presumed innocent unless and until proven guilty.

Lippman surrendered with his attorney and was arraigned before Acting State Supreme Court Justice Steven Barrett who released Lippman on his own recognizance with the People's consent.

Today's arrest is the result of a joint investigation by the New York City Department of Investigation and the Office of the Bronx District Attorney.

The investigation uncovered evidence that the defendant allegedly charged the estates of five individuals $300,000 in excessive legal fees and filed fraudulent documents with the Surrogate Court in order to conceal the thefts.

The Public Administrator in each of the City's five counties is responsible for administering the estates of those who die intestate (without a will), or when no other individual is willing or qualified to do so. The Administrators report to their respective county Surrogates. Each Administrator has assigned counsel to assist in the collection of assets, the payment of debts, managing the decedents' assets and search for possible heirs. The Administrator is also responsible for filing tax returns on behalf of heirs and eventually the distribution of collected assets. In addition, counsel to the Administrator is responsible for the preparation and submission of informatory Accountings to the county Surrogate, explaining the transactions conducted on behalf of the estate, as well as the submission of Affirmation of Legal Services, indicating the nature of the work performed, the amount of time spent and the legal fees to be paid by the estate. Legal fees paid to counsel for the Public Administrator are set by the Interim Report and Guidelines of the Administrative Board for the Offices of the Public Administrators (Administrative Board Guidelines) and are approved by the county's Surrogate.

The indictment charged that Michael Lippman received advance legal fees and fees in excess of the Administrative Board Guidelines. Moreover, it is alleged that Lippman failed to file Accountings in a timely manner, which led the estates to linger unattended for years and beneficiaries did not receive their inheritance. Lippman is also charged with, in some instances, under-reporting the fees which he actually received, in reports filed with the court in an effort to hide the excessive fees.

Lippman was relieved of his position as counsel to the Public Administrator in April 2009 after having served as counsel for more than thirty years.

District Attorney Johnson and Commissioner Hearn thanked the following for their hard work and dedication which resulted in this indictment: Floralba Paulino, Chief Investigative Auditor; Keith Schwam, Assistant Commissioner; Bonnie Gould, Bronx County Public Administrator; and Counsel to the Public Administrator, John Reddy of the Law Firm Reddy, Levy and Ziffer; Assistant District Attorney Thomas Leahy, Chief of the Rackets Bureau; and Assistant District Attorneys Maria Mostajo and Vanessa McEvoy of the Rackets Bureau.

-

Back

EXHIBIT

E

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Proceedings Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to

LEE L. HOLZMAN,

a Judge of the Surrogate's Court, Bronx County.

Affidavit of Murray Richman

STATE OF NEW YORK)
)ss.:
COUNTY OF)

MURRAY RICHMAN, ESQ., being duly sworn, deposes and says:

1. I am an attorney and a member of The Law Offices of Murray Richman, a law firm specializing in the field of Criminal Law.

2. I am over the age of eighteen (18) and I am not a party to this action. I am an attorney admitted to the New York Bar in 1964.

3. I currently represent Michael Lippman, former Counsel to the Bronx Public Administrator's Office, in a criminal action, *People of the State of New York v. Michael Lippman*, currently pending in Supreme Court, Bronx County under the Case Number 02280-10.

4. I recently have became aware of the proceedings currently related to the Honorable Lee L. Holzman, the subject of this motion herein.

5. Should my client, Mr. Lippman, be subpoenaed to testify in this proceeding prior to the resolution of his criminal prosecution, in response to any questions posed, I would advise my

client to exercise his constitutional rights to refuse to answer any such questions under the Fifth Amendment.

Murray Richman, Esq.

Sworn to before me this
31st day of January, 2011

Notary Public

RENEE' C. HILL
Notary Public, State of New York
No. 03-5011465
Qualified in Bronx County
Commission Expires 4/19/11

EXHIBIT

F

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Proceedings Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to

LEE L. HOLZMAN,

a Judge of the Surrogate's Court, Bronx County.

VERIFIED ANSWER TO FORMAL WRITTEN COMPLAINT

LEE L. HOLZMAN, by his attorneys GODOSKY & GENTILE, PC., as and for his answer to the Formal Written Complaint, sets forth as follows:

1. Admits allegations in paragraph "1" of the Formal Written Complaint.

2. Denies knowledge or information sufficient to form a belief with respect to paragraph "2" of the Formal Written Complaint.

3. Denies each and every allegation contained in paragraph "3"of the Formal Written Complaint.

4. Admits allegations contained in paragraph "4" of the Formal Written Complaint, except Denies that the Respondent's current term expires on December 31, 2011.

ANSWERING CHARGE I

5. Denies each and every allegation contained in paragraph numbered and designated as "5".

6. Admits allegations in paragraphs numbered and designated as "6", "7", and "8".

7. Denies each and every allegation contained in paragraph numbered and designated as "9", except admits that the Administrative Board Guidelines recognize that it is the responsibility of the Surrogate to fix the reasonable compensation of counsel after consideration of the

factors set forth in SCPA § 1108(2)(c).

8. Denies each and every allegation contained in paragraphs numbered and designated as "10", "12", "13" and "14".

9. Denies knowledge or information sufficient to form a belief with respect to paragraph numbered and designated as "11".

ANSWERING CHARGE II

10. Denies each and every allegation contained in paragraphs numbered and designated as "15", "17", "22" and "24".

11. Denies each and every allegation contained in paragraph numbered and designated as "16", except that Respondent admits he learned at some point in time that Michael Lippman had received advance legal fees.

12. Denies knowledge or information sufficient to form a belief with respect to paragraph numbered and designated as "18", except Admits that Respondent did not report Mr. Lippman to Law Enforcement Authority or the Departmental Disciplinary Committee, but there came a time when the Respondent was aware that Mr. Lippman was under investigation.

13. Denies knowledge or information sufficient to form a belief with respect to paragraph numbered and designated as "19", except to admit that in or about 2006 respondent implemented a system by which Mr. Lippman would repay advance legal fees he had collected.

14. Admits allegations in paragraphs numbered and designated as "20", except denies that at respondent's direction Mr. Lippman was kept on staff to "work off" excess legal fees.

Respondent implemented a system wherein fees earned by Mr. Lippman were first used to repay advance legal fees he had collected.

15. Denies knowledge or information sufficient to form a belief with respect to paragraph numbered and designated as "21".

16. Admits the allegation in paragraph numbered and designated as "23", except denies that John Reddy had the authority to terminate Mr. Lippman without the authorization of respondent and that respondent so authorized the termination.

ANSWERING CHARGE III

17. Denies each and every allegation contained in paragraphs numbered and designated as "25", "28", "29", "30", "31", "33", "36" and "37".

18. Denies knowledge or information sufficient to form a belief with respect to paragraphs numbered and designated as "26" and "27", in that the factual allegation is nonsensical, vague and overly broad.

19. Admits allegations in paragraph numbered and designated as "32".

20. Denies knowledge or information sufficient to form a belief with respect to paragraphs numbered and designated as "34" and "35".

ANSWERING CHARGE IV

21. Denies knowledge or information sufficient to form a belief with respect to paragraph numbered and designated as "38".

22. Denies each and every allegation contained in paragraph numbered and designated as "39".

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

The Complaint must be dismissed as it fails to state a claim, cause of action or violation of the Rules.

AS AND FOR SECOND AFFIRMATIVE DEFENSE

The Complaint must be dismissed as the factual allegations set forth therein are unconstitutionally vague, overly broad and fail to advise the Respondent of the specific cases or actions upon which the alleged violations are predicated.

AS AND FOR THIRD AFFIRMATIVE DEFENSE

The Complaint and the charges are violative of the Respondent's due process rights.

WHEREFORE, respondent, LEE L. HOLZMAN, respectfully requests that the complaint against him be dismissed in all respects.

Dated: New York, New York
January 21, 2011

DAVID GODOSKY, ESQ.
GODOSKY & GENTILE, P.C.
Attorneys for Defendant
61 Broadway
New York, New York 10006
(212) 742-9700

TO:
ROBERT H. TEMBECKJIAN
Administrator and Counsel
State Commission on Judicial Conduct
61 Broadway
New York, New York 10006
(646) 386-4800

INDIVIDUAL VERIFICATION

STATE OF NEW YORK)
BRONX)
COUNTY OF ~~NEW YORK~~) ss. :

LEE L. HOLZMAN, being duly sworn, deposes and says:

I am the respondent in the within action. I have read the annexed ANSWER, know the contents thereof, and the same is true to my knowledge, except those matters stated upon information and belief, and as to those matters I believe them to be true.

Lee L. Holzman
LEE L. HOLZMAN

Sworn to before me on this
20th day of January, 2011

Notary Public

MARK J. LEVY
NOTARY PUBLIC, State of New York
No. 02LE4625414, Bronx County
Commission Expires March 30, 2014

EXHIBIT

G

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Proceedings Pursuant
to Section 44, subdivision 4, of the
Judiciary Law in Relation to

MOTION TO DISMISS
FORMAL WRITTEN COMPLAINT

LEE L. HOLZMAN,

a Judge of the Surrogate's Court,
Bronx County.

PLEASE TAKE NOTICE that, upon the annexed Affirmation of David Godosky, Esq., dated February 2, 2011, and upon all the pleadings herein, plaintiff will move the Commission on Judicial Conduct, at 61 Broadway, New York, New York, on the **4th day of March, 2011**, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an Order Dismissing the Formal Written Complaint without prejudice to re-file or, in the alternative, requesting a stay of the proceedings against Respondent, and for such other, further and different relief as The Commission deems just and proper.

Dated: New York, New York
February 2, 2011

David Godosky, Esq.
GODOSKY & GENTILE, P.C.
Attorneys for Respondent
61 Broadway
New York, New York 10006
(212) 742-9700

TO:
ROBERT H. TEMBECKJIAN
Administrator and Counsel
State Commission on Judicial Conduct
61 Broadway
New York, New York 10006
(646) 386-4800

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Proceedings Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to

LEE L. HOLZMAN,

a Judge of the Surrogate's Court, Bronx County.

MOTION TO DISMISS FORMAL WRITTEN COMPLAINT

DAVID GODOSKY, ESQ., an attorney duly admitted to practice law in the State of New York, does hereby affirm the truth of the following under penalty of perjury:

1. I am a member of the law firm of Godosky & Gentile, P.C., attorneys for the Honorable Lee L. Holzman ("Respondent").
2. This Affirmation is submitted to the Commission on Judicial Conduct ("Commission") in support of a Motion to Dismiss the Formal Written Complaint without prejudice to re-file or, in the alternative, requesting a stay of the proceedings against Respondent.
3. As set forth more fully below, the charges contained in the Formal Written Complaint dated January 4, 2011, relate almost exclusively to misconduct – indeed, criminal misconduct – committed by Michael Lippman, former Counsel to the Public Administrator in Bronx County. The investigation and prosecution of this criminal actor is pending. Mr. Lippman is being prosecuted in Supreme Court, Bronx County, under Indictment #02280-2010. At this time, the facts, testimony, records, witnesses, and indeed, the only person charged with the criminal acts perpetrated for his own benefit – Michael Lippman – are largely unavailable to Respondent. Forcing Respondent to defend

himself against these charges while the criminal prosecution of Lippman is still pending, speaks of fundamental unfairness, violates all notions of due process, and elevates prosecutorial expediency over a just and proper disciplinary procedure.

The Formal Written Complaint and Charges

4. Respondent was admitted to practice as an attorney in New York in 1966. He was elected Judge of the Surrogate's Court, Bronx County in 1988.

5. Pursuant to the Commission's authorization, Respondent was served with a Formal Written Complaint ("Complaint"), dated January 4, 2011, Exhibit "A". The Complaint contains four charges. The First Charge alleges that from 1995 to 2009, the Counsel to the Bronx Public Administrator's Office, Michael Lippman, requested fees that failed to comply with the Surrogate's Court Procedure Act ("SCPA"), and that Respondent approved those requests. Annexed to the Complaint is "Schedule A," purportedly listing the case names and case numbers in which the fee requests allegedly violated the SCPA. The Second Charge alleges that in 2005 and 2006 Mr. Lippman took unearned advanced legal fees without the approval of the court and that Respondent failed to report him. The Third Charge alleges that from 1997 to 2005 Respondent failed to adequately supervise the work of Public Administrator Esther Rodriguez. Annexed to the Complaint in Schedule B, is purportedly a list of the case names where Mr. Lippman allegedly took advanced legal fees paid by Ms. Rodriguez. Schedule C purportedly lists the case names where Mr. Lippman did not return money that was allegedly overcharged to estates. Schedule D purportedly lists the case names and numbers where Mr. Lippman refunded money to the allegedly overcharged estates. Schedule E purportedly lists the cases that Respondent allegedly failed to properly supervise. The Fourth Charge alleges that Mr.

Lippman allegedly raised money for Respondent's 2001 campaign for Surrogate and that Respondent failed to disqualify himself from Mr. Lippman's cases in 2001 through 2003.

6. The Complaint charges violations of the Rules of the Chief Administrator of the Courts Governing Judicial Conduct ("Rules"). Specifically, as to Charge I, the Complaint charges violations of Sections 100.1, 100.2(A), 100.2(B), 100.2(C), 100.3(B)(1), and 100.3(C)(3). As to Charge II, the Complaint charges violations of Sections 100.1, 100.2(A), 100.2(B), 100.3(B)(1), and 100.3(D)(2). As to Charge III, the Complaint charges violations of Sections 100.1, 100.2(A), 100.2(B), 100.3(B)(1),100.3(C)(1), and 100.3(C)(2). As to Charge IV, the Complaint charges violations of Sections 100.1, 100.2(B), 100.3(C)(3), and 100.3(E)(1).

7. Respondent served an Answer with Affirmative Defenses dated January 21, 2011, which is annexed hereto as Exhibit "B".

Considerations of Fairness and Due Process Require a Stay of these Proceedings due to the Unavailability of Critical and Material Evidence for Respondent's Defense.

8. Michael Lippman served as a Counsel to the Public Administrator of Bronx County for more than 30 years before he was relieved of his duties by Respondent in April of 2009. The Complaint alleges various acts of alleged misconduct by Michael Lippman ("Lippman") between the years of 1995 and April 2009.

9. For certain years in the above-referenced period, the Public Administrator was Esther Rodriguez. It is alleged in the Complaint that Ms. Rodriguez advanced certain monies and legal fees to Lippman in violation of certain fee and Surrogate's Court guidelines ("Guidelines").

10. At some point, Lippman (and, perhaps, Ms. Rodriguez) came under the investigation of the Bronx District Attorney's Office and the Department of Investigation. A multi-year

investigation culminated in the indictment of Michael Lippman. A copy of the Indictment in *People of the State of New York v. Michael Lippman,* Ind. No. 02280-2010 is annexed hereto as Exhibit "C".

11. In a press release, the Bronx District Attorney's Office noted that Lippman took certain actions, including filing fraudulent documents, in order to conceal criminal acts from the Surrogate's Court. The statement also notes that Lippman undertook other fraudulent actions in an effort to conceal or hide any excessive fees he derived from the estates. A copy of the February 5, 2010 Bronx District Attorney's Press Release is annexed hereto as Exhibit "D".[1]

12. The Indictment (Exhibit "C") alleges that Lippman committed the following criminal actions:

- Between February 5, 2002 and March 31, 2009, Lipppman engaged "in a scheme constituting a systematic ongoing course of conduct with intent to defraud more than one person and so obtained property...that being, a sum of United States Currency from the Bronx Public Administrator" as the Administrator of various estates.
- On June 10, 2004 and March 1, 2005, Lippman filed accountings and affidavits of legal services that were knowingly false, contained false statements and/or entries, and were done for the purpose of defrauding the State.
- Between the dates of March 5, 2002 and July 7, 2010, Lippman stole amounts of money ranging from in excess of $3,000 to in excess of $50,000 held by the Public Administrator for a certain estates.

[1] A New York Law Journal article on the Lippman Indictment and Press Release noted "There is no suggestion in the indictment that Surrogate Holzman was aware that Mr. Lippman had charged excessive fees. In fact, in a statement distributed by the Bronx District Attorney's Office, prosecutors said that "in some instances" Mr. Lippman underreported his fees "in reports filed with the court to hide the excessive fees." (N.Y.L.J., July 9, 2010).

- Lippman is also charged with multiple acts of scheming to defraud, falsifying business records, filing false instruments, and committing larcenies.

13. The relief sought by this motion is necessitated by the simple fact that the public servant who was deceived by and a victim of Lippman's despicable acts is being forced to defend his own actions and knowledge **before** the criminal himself is tried and the acts and evidence attendant to Lippman's actions are fully known to Respondent and his attorneys. A "tail wagging the dog" approach to a disciplinary investigation and prosecution of a sitting Surrogate Judge is not only inappropriate, we respectfully submit, it is wholly unnecessary. The proper (and usual) course is to simply allow the criminal matter to run its course and then, if warranted, institute or resume the disciplinary proceeding against the relevant judges or attorneys.

14. Annexed hereto is an affidavit by Lippman's criminal defense attorney, Murray Richman, Esq., as Exhibit "E". Mr. Richman attests to the pendency of the criminal action and that while such action is pending, should his client be compelled by subpoena to appear at a hearing in this matter, he would advise his client to refuse to answer questions or give testimony pursuant to his rights under the Fifth Amendment of the United States Constitution. Accordingly, it is clear that should this matter proceed prior to the conclusion of the criminal prosecution of Lippman, Respondent would be forced to defend his actions, indeed his very career, without being able to examine and present the one person that the Department of Investigation and the District Attorney's Office have

concluded is responsible and criminally liable for the fraudulent scheme that was perpetrated.[2]

15. It is patently unfair for Respondent to be forced to mount a defense when the key witness – who is uniquely aware of the facts underlying the charges against Respondent – will refuse to answer any questions if called to testify prior to resolution of his criminal case. More importantly, upon information and belief, a multitude of witnesses have provided statements and/or testimony to the District Attorney's Office and the Grand Jury, with the identity of such persons as well as the substance of their statements largely undiscoverable to Respondent.

16. Indisputably, the vast trove of investigative materials in the criminal prosecutor's possession (that will, at some point, be provided to the criminal defendant) is beyond the reach of Respondent while the criminal prosecution remains active.

17. Although the pendency of a criminal proceeding does not give rise to an absolute right under the United States or New York State Constitutions to a stay of a related civil proceeding, "[t]here is no question that the court may exercise its discretion to stay proceedings in a civil action until a related criminal dispute is resolved." DeSiervi v. Liverzani, 136 A.D.2d 527 (2nd Dept. 1988) (citing United States v. Kordel, 397 U.S. 1 (1969); Klitzman, Klitzman & Gallagher v. Krut, 591 F.Supp. 258, 269-270, n. 7, affd. 744 F.2d 955 (3rd Cir. 1984)). Courts will often exercise their discretion to grant a stay in order to avoid the risk of inconsistent adjudications, application of proof, and potential waste of judicial resources. Zonghetti v. Jeromack, 150 A.D.2d 561, 562 (2nd Dept. 1989). Another instance when a stay will be deemed necessary, which is relevant to the

[2] The prejudice to Respondent is compounded should it be determined that Lippman provided testimony to the Commission during the investigative phase, allowing inquiry by Staff Counsel and investigators but depriving Respondent of any similar opportunity.

present proceedings, is when relevant and necessary evidence is within the control of the criminal investigation/trial. See J.P. Morgan Chase Bank v. Pelosi, N.Y.L.J., Dec. 26, 2003, at 19, col. 3[Supreme Court, Suffolk County, Jones, J].

18. In addition, courts are apt to exercise this discretion when issues of fairness predominate. In particular, courts have consistently held that when a party faces prejudice that would result from the assertion of the privilege against self-incrimination by a non-party witness who is a defendant in a related criminal matter, a stay is appropriate so as to protect the party's right to mount a competent defense. See Access Capital, Inc. v. DeCicco, 302 A.D.2d 48, 52 (1st Dept. 2002) ("a discretionary stay is appropriate to avoid prejudice to another party that would result from the assertion of the privilege against self-incrimination by a witness"); Walden Marine, Inc. v. Walden, 266 A.D.2d 933, 933-34 (4th Dept. 1999) (finding that a stay is appropriate to protect the rights of a party to assert a competent defense when an essential non-party witness intended to invoke the privilege); Graffagnino v. Lower Manhattan Dev. Corp., 910 N.Y.S.2d 762 (N.Y. Sup. Ct. 2010) ("[Defendant] has not shown that absent that person's testimony, it will be unable to defend itself properly."); Allen v. Rosenblatt, 5 Misc. 3d 1014(A), 798 N.Y.S.2d 707 (N.Y. Civ. Ct. 2004). See also, *infra*, Britt v. Int'l Bus Services, Inc., 255 A.D.2d 143, 143-44 (1st Dept. 1998); Stolowski v. 234 E. 178th St. LLC, 819 N.Y.S.2d 213 (N.Y. Sup. Ct. Bronx 2006).[3]

19. Similarly, in Britt, the Appellate Division granted the defendant's motion for a stay of a civil action pending the resolution of a criminal action involving a co-defendant. The defendant contended that because of the unresolved criminal proceedings, the co-

[3] While the above cases deal with the right to mount a defense pending the outcome of a criminal trial, this is not dissimilar to the Sixth Amendment right of confrontation, which is applicable to administrative proceedings. See Gordon v. Brown, 84 N.Y.2d 574, 578 (1994).

defendant intended to assert his Fifth Amendment privilege against self-incrimination in the civil action, and that his testimony was both necessary and critical to a competent defense of the civil action. The co-defendant's counsel had indicated that his client clearly intended to invoke his right against self-incrimination. The court found that without the co-defendant's critical and necessary testimony in the civil action, the petitioner would be unable to assert a competent defense. Further, any prejudice to plaintiff by the delay, was not as severe as the prejudice defendant would suffer without a stay. Britt, 255 A.D.2d at 143-44.

20. Similarly, in Stolowski, the defendant argued that due to the anticipated assertion of the Fifth Amendment by all of the witnesses during the pendency of the related criminal proceedings, the defendant would be unable to assert a competent defense in the civil action. The court acknowledged that cases dealing with stays in civil cases, pending the outcome of a related criminal proceeding, are not entirely uniform or consistent. Despite that inconsistency, "trial courts have nevertheless rather consistently found the privilege against self-incrimination to be a compelling factor and therefore found it appropriate to stay related civil cases during the pendency of criminal prosecutions." Id. Furthermore, when there are non-party witnesses who are expected to exercise their Fifth Amendment rights and will refuse to give testimony, it hampers the defendant from preparing a competent defense. The court explained that "the exercise of discretion in granting a stay appears to be more liberal when the witnesses invoking the 5th Amendment privilege are unrelated non-party witnesses. **Thus, the fact that discovery from these unrelated persons will be unavailable in this action provides an independent basis for, and augers in favor of, a limited stay**." Id. (Emphasis added).

21. This is precisely the scenario at hand in this case. If a stay is not granted in this proceeding, key non-party witnesses will assuredly refuse to testify, greatly prejudicing Respondent's right to mount a competent defense. Because Mr. Lippman will be available to testify upon completion of his criminal trial, as the issue of self-incrimination will no longer apply, there is no rational explanation for denying Respondent's request for a stay.

22. Even if the Commission were to argue that Respondent could proceed without this highly relevant, probative, and presently unavailable testimony and proof and mount a defense, it is inarguable that Respondent would be unfairly penalized in the presentation of a defense as to sanction. The indictment itself makes no suggestion of any proof that Respondent was aware during the relevant period that Lippman was engaging in fraudulent and criminal conduct. By its very nature, the acts perpetrated by Lippman were undertaken with the express goal of hiding his misconduct from Respondent. The measures taken by Lippman in this regard, and the extent to which such subterfuge was successful, is clearly a critical component of any sanction that would be considered against Respondent were any charges of misconduct sustained. Again, to deprive Respondent of such evidence in defending his life's work and reputation were he to face sanctions in this matter is unacceptable. To prosecute Respondent now and only later learn the full extent of the actions of an accused criminal and rogue actor – proof which may well serve to mitigate Respondent's responsibility or knowledge of such acts – leaves the realm of the reasonable and enters a "shoot 'em first, ask questions later" style of prosecution. "The rules governing judicial conduct are rules of reason." (The Rules

Governing Judicial Conduct, *Preamble*). The manner in which they are applied must be governed by reason as well, not simply dictated by the age of the Respondent.

The Factual Allegations in the Complaint Lack Specificity and Are Unconstitutionally Vague

23. The Complaint against Respondent is vague and its factual deficiencies render it nearly impossible to defend against. The Complaint provides gaping time periods in which other individuals allegedly engaged in certain alleged activities that the Respondent allegedly endorsed or failed to properly supervise, prevent from occurring, or failed to turn over to the authorities. The Complaint fails to actually delineate with any specificity the methods by which the actions of Lippman were carried out, what cases were actually delayed, and how and why any of this amounts to a violation by Respondent. This lack of specificity is patently insufficient and wholly violative of Respondent's constitutional right to due process, and as such, should be dismissed.

24. Disciplinary proceedings are considered to be quasi-criminal in nature. Accordingly, individuals subject to such proceedings are entitled to the elements of procedural due process, including the entitlement of having notice of the charges against him. Javits v. Stevens, 382 F. Supp. 131, 138-39 (S.D.N.Y. 1974). Because "valuable rights of the accused official are at stake, as well as his good name, the same safeguards that are used to protect good name, fame, property, or person, in courts of justice, should in substance be observed in these proceedings." People ex rel. Miller v. Elmendorf, 42 A.D. 306, 309 (3rd Dept. 1899). It is necessary that the person accused is sufficiently apprised of the charges against him so that he is able to prepare his defense. The charge needs to be definite, and "where it consists in an act done or omitted to be done, the time and place of

such act or omission to act should be stated with sufficient certainty to enable the party charged to be prepared to meet it." Id. at 309. The Complaint against Respondent fails to meet these requirements of due process.

25. Wolfe v. Kelly evaluates the level of specificity constitutionally required. The petitioner in that case, a police officer, challenged an employment termination proceeding based on charges that he stopped unidentified individuals in unspecified locations and confiscated unspecified amounts of narcotics and cash on four occasions that occurred on unspecified dates at some time during a 24-month period. The petitioner asserted that the vagueness of the charges denied him due process because he was prevented from preparing a defense. The Appellate Division agreed. The court found that chief among the principles of Due Process is notice of the charges. In the context of an administrative hearing, the charges need to be "reasonably specific, in light of all the relevant circumstances, to apprise the party whose rights are being determined of the charges against him...and to allow for the preparation of an adequate defense." Furthermore, stating general time frames in the complaint is not reasonably specific so as to satisfy due process requirements. Wolfe v. Kelly, 911 N.Y.S.2d 362, 363 (1st Dept. 2010).

26. The Complaint against Respondent fails to specify the particular facts underlying the charged violations. The First Charge alleges "[f]rom in or about 1995 to in or about April 2009," Mr. Lippman submitted affirmations of legal services that did not comply with the SPCA and requested the maximum fees allowable under the SCPA, and that Respondent, "in numerous cases including but not limited to those set forth in Schedule A," awarded Mr. Lippman's requests. That the first charge provides a *fourteen year time span* in which Lippman had on certain occasions violated the SCPA, without further

factual support other than an annexed list of cases naming when one or more of these violations allegedly occurred, is constitutionally deficient. It is impossible for Respondent to defend himself against allegations – spanning over a fourteen-year time period – that are so completely devoid of factual support.

27. The Second Charge alleges that "in or about late 2005," Respondent learned in "numerous cases," that Mr. Lippman had taken advance legal fees equal to the maximum legal fee recommended in the Guidelines without the approval of the court and that "in numerous cases," had taken fees in excess of the Guidelines. The Complaint does not specify on how many occasions Mr. Lippman violated the Guidelines nor does it specify on which occasion these violations occurred. The Complaint further alleges that Respondent "did not report Mr. Lippman" and that "[i]n or about 2006 respondent implemented a system by which Mr. Lippman would repay the advance and/or excess legal fees that he had previously collected."

28. The Third Charge provides even less specificity than the previous charge, alleging that "in or about 1997 to in or about 2005" the Public Administrator Rodriguez paid Mr. Lippman, or that Mr. Lippman took, advance legal fees without obtaining the court's approval or requiring affirmations of legal services. The Complaint does not set forth on which occasions these actions occurred, nor does it direct on how many occasions this occurred or the manner in which it occurred throughout the *eight year time period.*

29. Rather, the Complaint states that "[i]n numerous cases including but not limited to those set forth in Schedule C, Mr. Lippman failed to refund money to the overcharged estates" and that "[i]n numerous cases including but not limited to those set forth in Schedule D, Mr. Lippman refunded money to the overcharged estates." Both of the Schedules

provide up to thirty five case names without any other qualifying information. In addition, the Complaint states that "in or about 1997 to in or about 2005, in numerous cases including but not limited to those set forth in Schedule E, respondent failed to properly supervise and/or oversee his appointees with the result that cases were not timely processed and final decrees were not timely filed." The Complaint then directs to Schedule E for a list of twenty six cases where the Respondent's alleged failure to supervise may or may not have "resulted in estates remaining open for periods between five and ten years before issuance of a final decree."

30. The Complaint does not provide any other information nor offer any information as to any individual case or claim. That each case on the Schedules may have been open for a certain period of time (and the exact period claimed is unknown and indiscernible from the Complaint) is woefully insufficient to inform Respondent as what claim is being made as to the specific cause of delay in each case so listed. Either the Commission did not determine the time line for each case (including objections, kinship hearings, etc.) in assessing the "delay" or did not care to do so. In either event, Respondent is entitled to know the claimed breach, misconduct and specific date of same with respect to each case or estate. Respondent should not be forced to initiate an investigation to attempt to determine what period of time the Commission claims constituted "delay" attributable to "misconduct".

31. The Third Charge also alleges, "[f]rom in or about 1997 to in or about 2005, the respondent failed to ensure that the Public Administrator filed adequate monthly statements of accounts that were closed or finally settled and adequately reported of every estate that had not been fully distributed within two years from the date of issuance

of letters of administration or letters testamentary." The Third Charge also alleges that "in or about 1997 to in or about 2005," Respondent received quarterly reports from the accountant that failed to contain information on individual estates holdings and instead contained the aggregate monies held by the Public Administrator's Office in a commingled account. The Complaint fails to mention how many reports were deficient, how they were deficient, and on how many occasions these reports were deficient throughout the eight year time period cited.

32. In addition, the Complaint alleges that "[f]rom in or about 1997 to in or about 2005, respondent failed to properly supervise and/or oversee" the Public Administrator's Office's investment of approximately $20 million of estate monies in risky and imprudent investments. Again, during this vast, eight year time period, Respondent allegedly failed to oversee a nondescript number of investments that were risky and imprudent by the standards of this Complaint.

33. Although the Complaint provides certain information related to the general behavior and activities of individuals working for Respondent, it has failed to provide particular facts pertaining to the acts, occurrences, or transactions allegedly done by those individuals. In fact, the Complaint fails to indicate approximately when any one act, occurrence, or transaction supposedly occurred outside of providing a general time frame of up to fourteen years. And most importantly, the Complaint is utterly devoid of any of these facts related to any acts, occurrences, or transactions done by the Respondent, and thus fails to give Respondent reasonable notice of the charges against him.

34. Furthermore, providing time periods as vast as fourteen years in which supposed violations by Respondent occurred is completely unreasonable. People v. Vogt, 172

A.D.2d 864, 865 (2nd Dept. 1991) (finding ten-month time period for alleged activity unreasonable); People v. Evangelista, 771 N.Y.S.2d 791, 795 (N.Y. Crim. Ct. Bronx 2003) (finding the time interval of six months and eleven days *per se* unreasonable").

35. The lack of specificity in each of the charges and the reliance on annexed case names and nothing more is a clear violation of Respondent's due process right of fair notice and impedes his right to mount a competent defense. Moreover, any information relevant to these charges is not within his area of knowledge as the bulk of the charges are predicated on other individual's conduct, and, for the most part, his alleged failure to supervise. Respondent is being deprived not only of specific facts and notice regarding the underlying claims and case, but will assuredly be denied the right to make inquiry of the person or persons who perpetrated these misdeeds and frauds. Such a situation is abhorrent to notions of fairness and due process and effectively eliminates Respondent's ability to mount a defense.

36. The Complaint issued by the Commission fails to properly delineate the factual charges against Respondent, opting instead for annexed lists coupled with broad allegations and even broader time-periods that lack critical information. Further evidence demonstrating the Commission's overriding concern – expediency – is the Commission's recent letter, annexed hereto as Exhibit "F", which pushes for the "prompt designation of a referee." However, expediency should not be pursued at the expense of fairness. As the Court of Appeals stated in Kelly v. Greason, 23 N.Y.2d 368, 383 (1968), "Disciplinary proceedings are generally pursued at a cautious pace, because of the serious effects upon practitioners." Clearly, obviating prejudice to Respondent outweighs the Commission's desire for a hasty resolution in this matter.

37. For these reasons, it is respectfully requested that the Formal Written Complaint be dismissed in its entirety without prejudice to re-file with greater specificity at such time as the criminal proceeding against Michael Lippman has concluded or that the Commission stay the proceedings pending completion of Mr. Lippman's criminal trial.

Dated: February 2, 2011
New York, New York

David Godosky, Esq.
GODOSKY & GENTILE, P.C.

AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Margaret Lejman, being duly sworn, deposes and says:

Deponent is not a party to the within action, is over eighteen (18) years of age and resides in Kings County, New York.

On February 3, 2011 , deponent served the within **MOTION TO DISMISS FORMAL WRITTEN COMPLAINT,** by personal service upon:

ROBERT H. TEMBECKJIAN
Administrator and Counsel
State Commission on Judicial Conduct
61 Broadway
New York, New York 10006
(646) 386-4800

Jean M. Savanyu, Esq
State Commission on Judicial Conduct
61 Broadway
New York, New York 10006

Margaret Lejman

Sworn to before me this
3rd day of February, 2011

Notary Public

CATHERINE M. MOONEY
Notary Public, State of New York
No.: 01MO4809770
Qualified in Richmond County
Commission Expires May 31, 2014

EXHIBIT

H

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

LEE L. HOLZMAN

a Judge of the Surrogate's Court,
Bronx County.

AFFIRMATION IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS THE FORMAL WRITTEN COMPLAINT AND TO STAY FURTHER PROCEEDINGS

EDWARD LINDNER, an attorney duly admitted to practice in the courts of the State of New York, affirms under the penalties of perjury:

1. I am a Deputy Administrator for respondent New York State Commission on Judicial Conduct. I make this affirmation in opposition to respondent's motion for an order: (1) dismissing the Formal Written Complaint without prejudice to re-file, or in the alternative (2) staying the proceedings pending the disposition of a criminal case against Michael Lippman, the former Counsel to the Public Administrator of Bronx County.

2. Respondent's motion to dismiss the Formal Written Complaint should be denied because the charges, the specifications to the charges, and the accompanying schedules were more than reasonably specific to apprise respondent of the alleged misconduct and allow him to prepare a defense.

3. Respondent's motion for an order staying the proceedings is premature because Lippman has not yet exercised his Fifth Amendment privilege before the Referee and, absent presentation of Commission staff's case in chief at a hearing, it cannot be said that

his testimony will be relevant to respondent's defense, let alone necessary. Nor has it been determined whether Lippman waived his Fifth Amendment privilege by testifying under oath during the Commission's investigation.

4. Respondent's assertion that Lippman's testimony is necessary for his defense is without merit because the allegations in the Formal Written Complaint are tailored to address respondent's conduct, not Lippman's, and the allegations are largely based on documents filed in the Surrogate's Court that have already been turned over to respondent's counsel during discovery. Respondent has not shown how Lippman's alleged criminal conduct could excuse respondent's failure to act based on the documentary evidence in his court and his bald assertion that Lippman's testimony is necessary to his defense is insufficient to stay this proceeding.

5. Respondent's argument that the Formal Written Complaint is vague and lacks specificity is belied by the Complaint itself. The allegations in the Complaint, together with the accompanying schedules and voluminous discovery materials, are more than reasonably specific to apprise respondent of his alleged misconduct.

6. Finally, respondent's motion should be denied as a matter of public policy. The Commission's constitutional and statutory mandate to promote public confidence in the judiciary is best served by a determination on the merits after hearing. Because respondent will reach mandatory retirement age at the end of this year, granting respondent's motion will effectively end this proceeding. This Commission should avoid that result unless and until respondent makes a strong, fact-specific showing that he cannot present an adequate defense.

The Procedural History

7. Respondent has been a Judge of the Surrogate's Court, Bronx County, since 1988. He may serve through December 31, 2011, at which time he will be required to retire because he has reached the mandatory retirement age of 70.

8. Respondent was served with a Formal Written Complaint ("Complaint") dated January 4, 2011, containing four charges.

9. Charge I of the Complaint alleged that from 1995 to 2009, in the cases set forth in Schedule A, respondent approved legal fees for Michael Lippman, Counsel to the Bronx Public Administrator's Office: (1) based on boilerplate affidavits of legal services that did not comply with the requirements of SCPA § 1108(2)(c) and (2) fixed the fees without considering the statutory factors set forth in SCPA § 1108(2)(c).

10. Charge II alleged that in 2005 and 2006, respondent failed to report Michael Lippman to law enforcement authorities or to the Departmental Disciplinary Committee upon learning that Lippman took unearned advance legal fees and/or fees that exceeded the amount prescribed by the Administrative Board Guidelines, and that he continued to award Lippman the maximum legal fee recommended in the Guidelines and/or awarded the fees without considering the statutory factors set forth in SCPA § 1108(2)(c).

11. Charge III alleged that from 1997 to 2005, respondent failed to adequately supervise and/or oversee the work of court staff and appointees, which resulted in: (1) Michael Lippman taking advance fees without filing an affirmation of legal services in the cases set forth in Schedule B, and/or taking advance fees that exceeded the maximum amount recommended in the Administrative Board Guidelines in the cases set

forth in Schedule C and Schedule D, (2) delays in the administration of the estates set forth in Schedule E, (3) individual estates with negative balances, (4) the Public Administrator placing estate funds in imprudent and/or unauthorized investments, and (5) the Public Administrator employing her boyfriend who billed estates for services that were not rendered and/or overbilled estates.

12. Charge IV alleged that in 2001 and 2003, respondent failed to disqualify himself from cases in which Michael Lippman appeared, notwithstanding that Lippman raised more than $125,000 in campaign funds for respondent's 2001 campaign for Surrogate.

13. Respondent filed an Answer dated January 21, 2011, in which he denied the material allegations of the Complaint and asserted three affirmative defenses: (1) that the Complaint failed to state a cause of action, (2) that the factual allegations in the Complaint were unconstitutionally vague, and (3) that the Complaint violated his due process rights.

14. On January 25, 2011, the Commission designated the Honorable Felice K. Shea as referee to hear and report findings of fact and conclusions of law. Judge Shea scheduled a five-day hearing for May 9, 2011.

15. On February 9, 2011, as part of discovery, Commission counsel supplied respondent with copies of the transcripts of eleven witness statements, including that of Michael Lippman. A copy of Alan W. Friedberg's letter to David Godosky, dated February 9, 2011, is attached as Exhibit A.

16. On February 10, 2011, as part of discovery, Commission counsel supplied respondent with copies of other written witness statement and copies of documents that Commission counsel intends to present at the hearing. A copy of Alan W. Friedberg's letter to David Godosky, dated February 10, 2011, is attached as Exhibit B.

17. On February 10, 2011, Commission counsel supplied respondent with copies of relevant documents from the case files of the estates listed in Schedule A through E to the Formal Written Complaint. A copy of Alan W. Friedberg's letter to David Godosky, dated February 10, 2011, is attached as Exhibit C.

WHEREFORE, it is respectfully submitted that the Commission should deny respondent's motion to dismiss the complaint and direct that this matter be set down for hearing to develop a full record.

Dated: February 25, 2011
New York, New York

Edward Lindner
Deputy Administrator for Litigation
State Commission on Judicial Conduct
61 Broadway
New York, New York 10006
(646)386-4800

To: David Godosky, Esq.
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61 Broadway, Suite 2010
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DEPUTY ADMINISTRATOR

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BRENDA CORREA
KELVIN S. DAVIS
STAFF ATTORNEYS

ALAN W. FRIEDBERG
SPECIAL COUNSEL

CONFIDENTIAL

February 9, 2011

Via Hand Delivery

David Godosky, Esq.
Godosky & Gentile, P.C.
61 Broadway, Suite 2010
New York, New York 10006

Re: Matter of Lee L. Holzman

Dear Mr. Godosky:

In preparation for the proceeding in the above-referenced, attached are copies of transcripts:

1.	Lee L. Holzman	August 13, 2010
2.	Mark Levy	June 28, 2010
3.	John Reddy	July 23, 2010
4.	Harry Amer	August 3, 2010
5.	Michael Lippman	September 10, 2009
6.	John Raniolo	September 22, 2009
7.	Michael Lippman	November 4, 2009

8. Steven Alfasi	October 7, 2010
9. Bonnie Brooke Gould	July 21, 2010
10. Paul Rubin	July 20, 2010
11. Lonnie Elson	July 16, 2010

Thank you for your time and attention to this matter.

Very truly yours,

Alan W. Friedberg
Special Counsel

Enclosures

ROBERT H. TEMBECKJIAN
ADMINISTRATOR & COUNSEL

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ALAN W. FRIEDBERG
SPECIAL COUNSEL

CONFIDENTIAL

February 10, 2011

Via Hand Delivery

David Godosky, Esq.
Godosky & Gentile, P.C.
61 Broadway, Suite 2010
New York, New York 10006

Re: Matter of Lee L. Holzman

Dear Mr. Godosky:

In preparation for the proceeding in the above-referenced, attached are copies of materials:

1. Statements of funds held by Esther Rodriguez, Bronx Public Administrator (12/31/05);

2. Complaint, memorandum and notes of interview of Ann Penachio and documents;

3. Memorandum and notes of interview of Bernice Liddie,
Memorandum and notes of interview of Michael Sullivan, Esq.,
Memorandum and notes of interview of Sharon Gentry (2),
Memorandum and notes of interview of Mary Thurber, Esq.,
Memorandum and notes of interview of Robert Southern,
Memorandum and notes of interview of Lorraine Coyle, Esq. (2) and documents;

4. Correspondence of Bonnie Gould (6/9/09),
Memorandum and notes of interview of Charles Ginsberg,
Memorandum and notes of interview of Sanford Glatzer, Esq.,
Memorandum of Ethan Beckett concerning Accounting Department Inquiry (2),
Memorandum and notes of interview of Michelle Scotto, Esq.,
Memorandum and notes of interview of Tom Finnegan,
Memorandum of interview of Regina Rabinoff,
Memorandum of interview of Christina Fremer,
Notes of interview of John Reddy, Esq.
Memorandum of interview of Richard Byrnes,
Memorandum of interview of Brian Cahalane, Esq.,
Memorandum and notes of interview of Jason Lilien, Esq. and Carl Distefano, Esq.
Memorandum of interview of Esther King,
Memorandum of interview of Jason Reback,
Memorandum and notes of interview of Richard Costa,
Memorandum and notes of interview of Joseph Rafalowicz and correspondence (1/18/06);
Memorandum of interview of Hugh Campbell,
Memorandum and notes of interview of Lewis Finkelman, Esq.,
Memorandum and notes of interview of Mary Thurber, Esq.,
Memorandum and notes of interview of Sharon Gentry,
Memorandum and notes of interview of Christina Fremer,
Memorandum of interview of Mark Levy, Esq.,
Memorandum of interview of Tom Finnegan,
Memorandum of interview of Regina Rabinoff,
Memorandum and notes of interview of Jason Reback and documents;

5. Six month report (period ending 6/30/10);

6. Memorandum of interview of Brian Cahalane, Esq.,
Memorandum and notes of interview of John Fisher,
Memorandum and interview of Esther King;

7. Correspondence of Richard Cerbone (10/4/08),
Correspondence of Michelle Scotto, Esq. (11/4/08),

Memorandum and notes of interview of Charles Ginsberg,
Memorandum and notes of interview of Michelle Scotto, Esq.,
Memorandum and notes of interview of Richard Cerbone and
Documents;

8. Correspondence of George Malatesta (4/1/09), memorandum of interview of George Malatesta,
Memorandum of interview of Michael Friedman, Esq. and documents;

9. Correspondence of Bernice Liddie (8/8/08),
Memorandum and notes of interview of Sandra Prowley, Esq. (2),
Memorandum and interview of Bernice Liddie and documents;

10. Various Reports of Public Administrator;

11. Reports of the Commission on Fiduciary Appointments (2/05);

12. Various Financial Disclosure Statements of the Committee to Re-Elect Lee L. Holzman, Surrogate;

13. Audit Report of the NYC Comptroller (3/18/09);

14. Various Trial Balance Reports;

15. Audit Report of the NYC Comptroller (6/24/04);

16. Fax of Mark Levy, Esq. (9/28/08) and documents;

17. Various documents in:
Matter of Eng;
Matter of Demick;
Mater of Patane;
Matter of Schnell;
Matter of Thrash;
Matter of Danziger;
Matter of Glasco;
Matter of Santiago;
Matter of Vasquez;
Matter of Kreisher;

Matter of Cerbone;
Matter of Coakley;
Matter of Waks and Matter of Sinclair.

Very truly yours,

Alan W. Friedberg
Special Counsel

Enclosures

NEW YORK STATE
COMMISSION ON JUDICIAL CONDUCT

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CONFIDENTIAL

February 10, 2011

Via Hand Delivery

David Godosky, Esq.
Godosky & Gentile, P.C.
61 Broadway, Suite 2010
New York, New York 10006

Re: Matter of Lee L. Holzman

Dear Mr. Godosky:

In preparation for the proceeding in the above-referenced, enclosed are copies of the case files in Schedules A-E.

Thank you for your time and attention to this matter.

Very truly yours,

Alan W. Friedberg
Special Counsel

Enclosures

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Proceeding
Pursuant to Section 44, subdivision 4,
of the Judiciary Law in Relation to

LEE L. HOLZMAN,

a Judge of the Surrogate's Court,
Bronx County.

MEMORANDUM BY COUNSEL TO THE COMMISSION IN OPPOSITION TO RESPONDENT'S MOTION TO DISMISS THE FORMAL WRITTEN COMPLAINT AND TO STAY FURTHER PROCEEDINGS

ROBERT H. TEMBECKJIAN, ESQ.
Administrator and Counsel to the State
Commission on Judicial Conduct
61 Broadway, 12th floor
New York, New York 10006
(646) 386-4800

Of Counsel:

Melissa DiPalo
Edward Lindner

PRELIMINARY STATEMENT

This Memorandum is respectfully submitted to the State Commission on Judicial Conduct ("Commission") in opposition to respondent's motion for an order: (1) dismissing the Formal Written Complaint ("Complaint") without prejudice to re-file, or in the alternative (2) staying the proceeding pending the outcome of the criminal case against Michael Lippman, the former Counsel to the Public Administrator.

Respondent's motion is both premature and without merit. Granting it would be contrary to public policy and would effectively end the proceeding, because respondent will leave office at the end of this year, having reached the mandatory retirement age. The matter should proceed in an orderly fashion before the Referee, who promptly set a discovery and hearing schedule, mindful of the constraints associated with respondent's looming retirement.

Respondent's motion for an order staying the proceedings is premature and without merit. A stay of the proceedings would be premature because Lippman has not yet exercised his Fifth Amendment privilege and, absent presentation of Commission staff's case in chief at a hearing, it cannot be said that his testimony will be relevant to respondent's defense, let alone necessary. Nor has it been determined whether Lippman waived his Fifth Amendment privilege by testifying under oath during the Commission's investigation.

The motion is without merit because the allegations in the Formal Written Complaint are tailored to address respondent's conduct, not Lippman's, and the allegations are largely based on documents filed in the Surrogate's Court that have

already been turned over to respondent's counsel during discovery. Respondent has not shown how Lippman's alleged criminal conduct could excuse respondent's failure to act based on the documentary evidence in his court. Respondent's bald assertion that Lippman's testimony is necessary to his defense is insufficient to stay this proceeding.

Respondent's argument that the Formal Written Complaint is vague and lacks specificity is belied by the Complaint itself. The allegations in the Complaint, together with the accompanying schedules and voluminous discovery materials, are more than reasonably specific to apprise respondent of his alleged misconduct.

Finally, respondent's motion should be denied as a matter of public policy. The Commission's constitutional and statutory mandate to promote public confidence in the judiciary is best served by a determination on the merits after hearing. Because respondent will reach mandatory retirement age at the end of this year, granting respondent's motion will effectively end this proceeding. This Commission should avoid that result unless and until respondent makes a strong, fact-specific showing before the referee that he cannot present an adequate defense.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Respondent has been a Judge of the Surrogate's Court, Bronx County, since 1988. He may serve through December 31, 2011, at which time he will be required to retire because he has reached the mandatory retirement age of 70.

Respondent was served with a Formal Written Complaint ("Complaint") dated January 4, 2011, containing four charges. Charge I alleged that from 1995 to 2009, respondent approved legal fees for Michael Lippman, Counsel to the Bronx Public

Administrator's Office, (1) based on boilerplate affidavits of legal services that did not comply with the requirements of SCPA § 1108(2)(c) and (2) fixed the fees without considering the statutory factors set forth in SCPA § 1108(2)(c).

Charge II alleged that in 2005 and 2006, respondent failed to report Michael Lippman to law enforcement authorities or to the Departmental Disciplinary Committee upon learning that Michael Lippman took unearned advance legal fees and/or fees that exceeded the amount prescribed by the Administrative Board Guidelines, and that he continued to award Lippman the maximum legal fee recommended in the Guidelines and/or awarded the fees without considering the statutory factors set forth in SCPA § 1108(2)(c).

Charge III of the Complaint alleged that from 1997 to 2005, respondent failed to adequately supervise and/or oversee the work of Esther Rodgriguez, the Public Administrator and other appointees, which resulted in (1) Michael Lippman taking advance fees without filing an affirmation of legal services and/or taking advance fees that exceeded the maximum amount recommended in the Administrative Board Guidelines, (2) delays in the administration of estates, (3) individual estates with negative balances, (4) the Public Administrator placing estate funds in imprudent and/or unauthorized investments, and (5) the Public Administrator employing her close friend who billed estates for services purportedly rendered.

Charge IV alleged that in 2001 and 2003, respondent failed to disqualify himself from cases in which Michael Lippman appeared, notwithstanding that Lippman raised more than $125,000 in campaign funds for respondent's 2001 campaign for Surrogate.

Respondent filed an Answer dated January 21, 2011, in which he denied the material allegations of the Complaint and asserted three affirmative defenses: (1) that the Complaint failed to state a cause of action, (2) that the factual allegations in the Complaint were unconstitutionally vague, and (3) that the Complaint violated his due process rights.

On January 25, 2011, the Commission designated the Honorable Felice K. Shea as referee to hear and report findings of fact and conclusions of law. Judge Shea has scheduled a five-day hearing to begin May 9, 2011.

As part of discovery, Commission counsel supplied respondent with copies of transcripts of eleven witness statements, including Michael Lippman's witness statement (Lindner Aff. ¶ 15), other written statements made by witnesses (Lindner Aff. ¶ 16), copies of documents that Commission counsel intends to present at the hearing (Lindner Aff. ¶ 16), and copies of relevant documents from the case files of the estates listed in Schedules A through E (Lindner Aff. ¶ 17).

Respondent now moves to dismiss the Formal Written Complaint, without prejudice to re-file, on the ground that it is "vague and its factual deficiencies render it nearly impossible to defend against" (Resp. Aff. ¶ 23).[1] In the alternative, respondent seeks to stay the proceeding pending the outcome of Michael Lippman's criminal case, arguing that a stay is necessary because "the acts and evidence attendant to Lippman's actions" are unavailable and unknown (Resp. Aff. ¶¶ 3, 13).

[1] "Lindner Aff." refers to Commission counsel's affirmation in opposition to respondent's motion to dismiss the Formal Written Complaint and/or to stay the proceedings. "Resp. Aff" refers to respondent's affirmation in support of his motion to dismiss the Formal Written Complain and/or to stay the proceedings.

As is set forth below, respondent's motion must be denied. Respondent's request to stay the proceeding is premature. He cannot show that Michael Lippman's testimony is necessary for his defense. In addition, the charges in the Formal Written Complaint, the specifications to each charge, and the schedules accompanying the charges, were more than reasonably specific to apprise respondent of his alleged misconduct and allow him to prepare a defense.

ARGUMENT

POINT I

RESPONDENT'S MOTION TO STAY THE PROCEEDINGS IS BOTH PREMATURE AND WITHOUT MERIT.

Respondent's motion for an order staying the proceeding pending the outcome of the pending criminal action against former Counsel to the Public Administrator Michael Lippman should be denied because it is both premature and without merit. Respondent's motion is premature because Lippman has not yet asserted his Fifth Amendment privilege, the Referee has not yet ruled that his testimony would be relevant, let alone necessary, and there has been no determination whether Lippman, who previously testified as to these matters during the Commission's investigation, has waived the privilege. Respondent's motion is without merit because the charges set forth in the Formal Written Complaint focus on respondent's conduct, *i.e.* respondent's failure to require affirmations of legal services that comply with statutory requirements, respondent's failure to take appropriate action after he had actual knowledge of

Lippman's unethical conduct and respondent's failure to properly oversee Esther Rodgriguez, the Public Administrator. Respondent has not shown that without Lippman's testimony, he would be unable to assert a competent defense of his own conduct as charged in the Formal Written Complaint.

1. **Respondent's Motion Is Premature.**

Respondent's motion to stay the proceedings is premature. At this point in the proceedings, there is no certainty that Lippman will be called or that he will refuse to testify. In the event Lippman does assert the Fifth Amendment, it is yet to be determined whether he can be compelled to testify.

First, notwithstanding respondent's argument that if "a stay is not granted ... [Lippman] will assuredly refuse to testify," (Resp. Aff. ¶ 21), at the time of this motion Michael Lippman has not been called as a witness and has not yet exercised his Fifth Amendment privilege in connection with the hearing before the Referee. *See Figueroa v. Figueroa,* 160 A.D.2d 390, 391 (1st Dept.1990) (holding that "the privilege against self-incrimination may not be asserted or claimed in advance of questions actually propounded"); *see also* S.*E.C. v. Chakrapani*, 2010 WL 2605819 at 11 (S.D.N.Y. 2010) (refusing to address merits of a stay application where "witnesses have not yet invoked their Fifth Amendment privileges in connection with discovery"). Indeed, it is not yet even certain that respondent would call Lippman as a defense witness. Whatever respondent's present intention in that regard, respondent's counsel cannot decide whether or which witnessed to call until he has seen and evaluated the case that Commission counsel puts in on direct. Balancing the equities, and in particular the

strong public policy in a Commission determination on the merits, any decision as to whether Lippman's testimony is necessary should be deferred until the case in chief has been placed on the record and Lippman has actually refused to testify about facts that might constitute a defense.

Second, in the event that Lippman is eventually called as part of respondent's defense, and he then asserts his Fifth Amendment privilege, a determination must be made at that time whether Lippman can be compelled to testify. As respondent is aware,[2] Lippman testified under oath during the Commission's investigation. The fact that Lippman later asserted his Fifth Amendment privilege when called for a second appearance, or that he might assert the privilege at the hearing, is not dispositive because Lippman's initial testimony may be deemed a waiver.

It is well-settled that "a witness who fails to invoke the Fifth Amendment against questions as to which he could have claimed it is deemed to have waived his privilege respecting all question on the same subject matter." *United States v. O'Henry*, 598 F.2d 313, 317 (2d Cir. 1979). *See also U.S. v. Powers*, 2008 WL 2286270 (W.D.N.Y. 2008); *In re East 51st Street Crane Collapse Litigation*, 30 Misc3d 521, 2010 WL 4608784 at *8 (Sup Ct, NY Co, September 24, 2010). Here, in his first appearance during the Commission's investigation, Lippman answered questions under oath about the affirmations of legal services he

[2] As is set forth in the accompanying affirmation, respondent's counsel has been provided with transcripts of the witness statements taken during the investigation, including Lippman's testimony. (Lindner Aff. ¶ 15).

submitted in respondent's court, when he would collect fees, whether he collected fees before filing an affirmation of legal services, and whether respondent was aware when he collected fees. In the event Lippman asserts his Fifth Amendment privilege at the hearing, respondent can move to compel on the ground that his prior testimony waived the privilege. This proceeding should not be stayed until it is clear the Lippman's testimony will actually be unavailable.

Against this backdrop, respondent's reliance on *Britt v. International Bus. Servs.*, 255 AD2d 143 (1st Dept. 1998), is misplaced. In *Britt*, the Court granted a stay of the civil proceeding pending the disposition of a nonparty witness' criminal case because the witness intended to invoke his Fifth Amendment privilege and had not "given any deposition testimony." *Id.* at 144. Here, by contrast, respondent gave sworn testimony before the Commission, which respondent can use to test whether Lippman waived the privilege.

Finally, in the event the Referee determines that Lippman's testimony is relevent and necessary, and Lippman is indeed called and asserts his Fifth Amendment privilege, Commission Counsel may ask the Commission to grant Lippman immunity pursuant to Judiciary Law § 42(2) and Criminal Procedure Law § 50.20, depending, of course, on the status at that time of the criminal charges against him. Such a determination is not now, and may never be, before the Commission.

2. Respondent Cannot Show that Lippman's Testimony Is Necessary for His Defense.

Respondent's motion to dismiss without prejudice, or for a stay, should also be denied because he cannot show that Lippman's unavailability would prejudice his "right to mount a competent defense" (Resp. Aff. ¶ 21).

The allegations in the Formal Written Complaint concern respondent's conduct, not that of Lippman. The Complaint alleges that respondent: (1) approved fees to Lippman based on "boilerplate" affidavits of legal services and without consideration of statutory factors (FWC ¶ 5), (2) failed to report Lippman to the appropriate authorities and continued to award him the maximum recommended legal fees even after learning that Lippman had taken unearned advance and/or excessive legal fees (FWC ¶ 15), (3) failed to supervise and/or oversee the work of his court staff and appointees (FWC ¶ 25), and (4) failed to disqualify himself in cases in which Lippman appeared (FWC ¶ 38). Given the plain language of the charges, respondent may advance his defense by testifying of his personal knowledge and/or conduct as to each of the allegations above.

As to Charge I, the gravamen of the charge is that the affirmations of legal services submitted by Lippman are insufficient to satisfy SCPA § 1108 and that Lippman failed to consider the statutory factors when he approved legal fees based on those deficient affirmations. All of the affirmations claimed to be insufficient have been turned over to respondent's counsel in discovery.

respondent's review of those individual estate files, Lippman's testimony is wholly irrelevant.

As to Charge II, the gravamen of the charge is that after respondent learned that Lippman had engaged in unethical and/or illegal behavior, he failed to report Lippman to the appropriate authorities. John Raniolo, the Public Administrator and Mark Levy, counsel to the PA, are both available to testify as to what they told respondent about Lippman's activities. Respondent can testify as to what action he took based on those reports. Again, Lippman's testimony would not provide a defense.

Charge III alleges that respondent failed to adequately supervise Esther Rodriguez, the Public Administrator, resulting in numerous enumerated administrative failures. Respondent can testify as the procedures he put in place to oversee the work of Public Administrator – an official whom he appointed – and his defense to the charge will rise or fall based on the sufficiency or insufficiency of those measures. Even assuming that Lippman's testimony might be tangentially relevant to some elements of the charge, respondent has not demonstrated that Lippman's testimony is in any way necessary to his defense.

Finally, respondent's motion should be denied at this juncture for reasons of public policy. A final determination by this Commission whether respondent engaged in acts of misconduct serves to promote public confidence in the judiciary as a whole.

If the Commission grants respondent's motion, it is highly unlikely that such a determination on the merits will ever be made.

A Bronx Grand Jury voted to indict Lippman on July 7, 2010. Respondent's term expires on December 31, 2011. In the event the Commission were to grant respondent's motion, it is exceedingly unlikely that Lippman's criminal trial would be concluded in time to permit resumption of this proceeding before the expiration of respondent's term. Given the considerable uncertainties whether Lippman's testimony will be necessary, public policy dictates that respondent's motion should be denied now, subject to respondent's right to demonstrate the necessity and unavailability of Lippman's testimony during the hearing before the Referee.

POINT II

THE CHARGES IN THE FORMAL WRITTEN COMPLAINT ARE MORE THAN REASONABLY SPECIFIC TO APPRISE RESPONDENT OF THE ALLEGED MISCONDUCT

It is well-settled that in an administrative disciplinary proceeding, "the charges need only be reasonably specific, in light of all of the relevant circumstances, to apprise the party whose rights are being determined of the charge against him and to allow for the preparation of an adequate defense." *Block v. Ambach*, 73 NY2d 323, 333 (1989) (internal citations omitted). *See also D'Ambrosio v. Department of Health of State of New York*, 4 NY3d 133 (2005).

Even where a respondent faces the potential loss of license and livelihood, due process does not require that such charges contain the "specificity of an indictment in a

criminal proceeding." *Ambach*, 73 NY2d at 332. The charges "need not identify each element of the misconduct charged." *Matter of Steckmeyer v. State Bd. for Professional Medical Misconduct*, 295 AD2d 815, 817 (3d Dept. 2002).[3] *See also Board of Educ. of Monticello Cent. School District v. Commissioner of Educ.*, 91 NY2d 133, 139 (1997) (in school disciplinary proceeding, notice need not "need not particularize every single charge against a student").

Against this backdrop, respondent's overall argument that the Formal Written Complaint "fails to properly delineate the factual charges ..., opting instead for annexed lists coupled with broad allegations and even broader-time periods that lack critical information" (Resp. Aff. ¶ 36), and the several different variations on this theme, must fail.

1. The Charges in the Formal Written Complaint Provided Respondent with Adequate Notice of the Allegations.

Contrary to respondent's claim (Resp. Aff. ¶ 26), the specifications set forth in Charge I and Schedule A gave him more than adequate notice of the timing of the alleged misconduct. That is particularly true because respondent has been provided with voluminous discovery, including all relevant documents from Surrogate's Court case files for every case identified in the schedules to the Formal Written Complaint. *See* Lindner Aff. ¶¶ 15-17

[3] The petitioner in *Steckmeyer* had an arguably stronger case for specificity, since his claim was based not only on the due process clause, but the provisions of Public Health Law § 230(10)(b) requiring that disciplinary charges "shall state the substance of the alleged professional misconduct and shall state clearly and concisely the material facts but not the evidence by which the charges are to be proved" (emphasis added).

It is not necessary for the Formal Written Complaint to set forth the specific date on which each instance of judicial misconduct is alleged to have occurred. The Court of Appeals has stated that "a general period of time may be appropriate for an offense which 'by its nature may be committed either by one act or multiple acts and readily permits the characterization as a continuing offense over a period of time.'" *Ambach*, 73 NY2d at 333-34, *citing People v. Keindl*, 68 NY2d 410 (1986); *see Taylor v. Board of Regents of the University of the State of New York*, 208 Ad2d 1056, 1057 (3d Dept. 1994). Thus, respondent's citation to *Wolfe v. Kelly*, 79 AD3d 406 (1st Dept. 2010) is unavailing. The Court in *Wolfe* specifically held that the misconduct alleged there was not an offense of a continuing or ongoing nature.

The charge here clearly alleges that over a 14-year time period, in the 31 cases enumerated in Schedule A, respondent approved legal fees for Michael Lippman based on affidavits of legal services that did not comply with SCPA § 1108(2)(c) and without consideration of the statutory factors set out in SCPA. Respondent can readily identify the specific date on which the alleged misconduct occurred by simply reviewing the affidavits of legal services and the final decrees in the court files of the cases listed in Schedule A, which Commission Counsel turned over to respondent's attorney as part of discovery. *See* Lindner Aff. ¶ 17

Respondent's claim that Charge II of the Formal Written Complaint failed to "specify on how many occasions" and "on which occasions" Lippman took advance fees and fees in excess of the amount prescribed in the Administrative Board Guidelines (Resp. Aff. ¶ 27), mischaracterizes the charge. The language of Charge II

adequately conveys that the misconduct at issue was not that Lippman took the advance and excessive legal fees, but that knowing this, respondent: (1) failed to report this conduct to criminal authorities or the Disciplinary Committee and (2) continued to award Lippman fees without considering the statutory factors set forth in SCPA § 1108(2)(c) (FWC ¶ 15).

It is not necessary for the charge to set out the precise number of times or the specific dates on which Lippman took advance and excessive fees, as the complaint need not "need not identify each element of the misconduct charged." *Matter of Steckmeyer v. State Bd. for Professional Medical Misconduct*, 295 AD2d at 817. Here, the factual allegations in the specifications that in late 2005 or early 2006, respondent learned that Lippman took advance and excessive legal fees (FWC ¶¶ 16, 17), that despite this knowledge he did not report Lippman to the appropriate authorities (FWC ¶ 18), that he implemented a system for Lippman to repay those fees in 2006 (FWC ¶ 19), that Lippman remained on staff and turned over the legal fees he earned to repay the advance and/or excess fees he had earned (FWC ¶¶ 20-21) and that respondent failed to give individual consideration to each estate when awarding these fees to Lippman (FWC ¶ 23), were more than sufficient to apprise respondent of alleged misconduct so as to allow him to prepare a defense.

As was the case with Charge II, respondent's argument that Charge III of the Formal Written Complaint failed to set forth "on which occasions," "on how many occasions" or in the manner in which" Lippman took advance fees (Resp. Aff. ¶ 28) misses the point. Charge III clearly alleges that respondent "failed to adequately

supervise and/or oversee the work of court staff and employee," which resulted in Lippman taking advance and excessive legal fees (FWC ¶ 25). Moreover, the specifications to Charge III plainly state that Schedule B lists those cases in which PA Esther Rodriguez paid Lippman and/or Lippman took advance legal fees without court approval or the requisite affirmations of legal services (FWC ¶ 26).

There is similarly no merit to respondent's argument that Charge III is vague because Schedule C and Schedule D to the Formal Written Complaint provide "cases names without any other qualifying information" (Resp. Aff. ¶ 29). It bears repeating that Charge III turns on whether respondent's failure to supervise his staff and appointees resulted in *inter alia* Lippman taking advance fees that exceeded the maximum amount recommended by the Guidelines. Schedule C provides respondent with 15specific cases in which he took advance legal fees that exceeded the maximum recommended amount and failed to refund the overcharged estates (FWC ¶ 27[a]), and Schedule D specifies the 34cases in which he took advance and excessive fees and refunded the overcharged estates (FWC ¶ 27[b]). The Surrogate's Court case file for each of the cases listed in those schedules was provided to respondent's counsel during discovery. *See* Lindner Aff. ¶ 17. Thus, the language of the charge, the accompanying schedules and the case files provided in discovery are plainly sufficient to inform respondent of the alleged misconduct that will be addressed at the hearing.

Respondent's remaining contentions as to Charge III are all variations of the same argument stated in slightly different terms. The charge itself, when coupled with the specifications and Schedule E, sufficiently advised respondent of his alleged

misconduct: that his failure to supervise or oversee his appointees resulted in the 26 estates listed on the Schedule E remaining open for periods of between five and ten years before issuance of a final decree (FWC ¶ 28). Due process does not require that the charges state the "specific cause of delay in each case" or provide a "time line" of the delay in each case (Resp. Aff. ¶ 30). To the contrary, all that is required is that the charges are "reasonably specific, in light of all of the relevant circumstances, to apprise the party whose rights are being determined of the charges against him ... and to allow for the preparation of an adequate defense." *Ambach*, 73 NY2d at 333. Here, respondent has been charged with misconduct in 26 specific cases, and will have the opportunity to offer an excuse for the alleged delays or present evidence demonstrating that there was no delay.

Contrary to respondent's contentions (Resp. Aff. ¶ 31), the specifications in Charge III gave him more than adequate notice of the claim that his failure to supervise the Public Administrator resulted in numerous estates with negative balances (FWC ¶ 25). The specifications allege that respondent failed to ensure that the PA filed adequate bi-annual reports of estates that had not been fully distributed by the PA within two years (FWC ¶ 30), that the reports were inadequate in that they "did not include every estate" or "approximate amount of gross estate, approximate amount that has been distributed to beneficiaries, approximate amount remaining in fiduciary's hands, and the reason that estate has not yet been fully distributed" (FWC ¶ 30), and that because the reports were inadequate respondent failed to recognize that estates had

negative balances (FWC ¶ 31). These allegations are more than reasonably particular to meet the pleading requirements of *Ambach*.

Finally, respondent's argument that Charge III alleges only "a nondescript number of investments" (Resp. Aff. ¶ 33), should be rejected. The specifications to Charge III adequately conveyed that respondent's failure to supervise the Public Administrator's Office led to the investment of $20 million dollars of estate monies in auction rate securities, which was not authorized by the SCPA (FWC ¶ 33). The specifications also refer to the fact that the New York State Attorney General entered into an agreement with two banks by which the illiquid auction rate securities held by the Public Administrator's Office would be redeemed (FWC ¶ 35). The plain language of the charge and the unique and unusual circumstances surrounding the alleged misconduct provided respondent with sufficient notice of the alleged misconduct to allow him to prepare an adequate defense.

CONCLUSION

The Commission should deny respondent's motion to dismiss, and allow the matter to proceed to a hearing.

Dated: February 25, 2011
New York, New York

Respectfully submitted,

ROBERT H. TEMBECKJIAN
Administrator and Counsel to the
Commission on Judicial Conduct

By: _____

Edward Lindner
Deputy Administrator
61 Broadway
New York, New York 10006
(646) 386-4800

Melissa DiPalo
Edward Lindner

EXHIBIT

I

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Proceedings Pursuant
to Section 44, subdivision 4, of the
Judiciary Law in Relation to

REPLY AFFIRMATION

LEE L. HOLZMAN,

a Judge of the Surrogate's Court,
Bronx County.

DAVID GODOSKY, ESQ., an attorney duly admitted to practice law in the State of New York, does hereby affirm the truth of the following under penalty of perjury:

1. I am a member of the law firm of Godosky & Gentile, P.C., attorneys for the Honorable Lee L. Holzman ("Respondent").
2. This Reply Affirmation is submitted in response to the Counsel to the Commission on Judicial Conduct's ("Counsel") Opposition to Respondent's Motion to Dismiss the Formal Written Complaint without prejudice to re-file or, in the alternative, requesting a stay of the proceedings against Respondent.

Respondent's Motion to Stay the Proceedings is Not Premature

3. Counsel's initial argument that the motion to stay is premature is premised on what is couched as two abstract hypotheticals: Will Mr. Lippman be called to testify? Will he refuse to testify? That both of these questions can be answered with more certainty than Counsel gives credence supports Respondent's request to stay the proceedings.
4. Whether the Counsel actually decides to call or not to call Lippman to testify is only half of the equation, as Respondent will call Lippman to testify, or at the very least should not be left without the option to call Lippman to testify. Further, it is not purely speculative

that Lippman will refuse to testify if called, as the Affidavit by Mr. Lippman's attorney clearly states that he would advise his client to refuse to answer any questions.

5. Therefore, whether to issue a stay is an inquiry ripe for resolution as the attendant factors that are prejudicial to the Respondent are not based on pure speculation as presented in Counsel's Opposition.

6. In addition, Counsel cites to Figueroa v. Figueroa, 160 A.D.2d 390 (1st Dept. 1990) in support of its position that a witness cannot exercise its Fifth Amendment right in advance. However, the court's reasoning in Figueroa actually supports Respondent's position that he will be prejudiced if a stay is not granted. In that case, the Appellate Division held that a witness could not prematurely assert the privilege against self-incrimination because the missing testimony compromised the respondent's right to mount a defense. The court stated that a "respondent brought before the court ... must be afforded a hearing conducted in accordance with due process, including the opportunity to present witnesses in rebuttal to the evidence introduced by petitioner." Figueroa, 160 A.D.2d at 391. Accordingly, if the stay is not granted, respondent will be similarly prejudiced as the respondent in Figueroa.

7. Counsel cites to a second case that also supports granting the stay. In S.E.C. v. Chakrapani, 2010 WL 2605819 (S.D.N.Y. June 29, 2010) the court denied granting the stay, but stated that if any relevant witnesses invoked his Fifth Amendment privilege during discovery, then that would alter the court's analysis regarding the propriety of a discovery stay if "the balance of interests could turn in favor of a discovery stay pending completion of [the witness'] criminal trial." For support, the court cited to S.E.C. v. Saad, 229 F.R.D. 90, 91 (S.D.N.Y. 2005) where the court had granted a stay because of the

"high likelihood" that the witnesses would invoke their Fifth Amendment privilege. Indeed, Lippman did invoke his constitutional right not to testify in discovery proceedings here. Notably, Respondent's counsel in these proceeding is not present during these discovery depositions.

8. Therefore, this is not a question of, as Counsel asserts, whether a witness can invoke the Fifth Amendment in advance of questioning, rather, the inquiry is whether it is likely that the witness will invoke the privilege. And if the likelihood is high, as it is here, then issuing the stay is proper.

9. It is beyond reason that Counsel would suggest that Lippman's earlier testimony before the Commission would be deemed a waiver, and thus incriminatory, given that at that time Lippman had not yet been indicted and, further, he is not governed by the Rules of the Commission on Judicial Conduct. Klein v. Harris, 667 F.2d 274, 287 (2nd Cir.1981).

Respondent Will Be Prejudiced Without Lippman's Testimony

10. While Counsel states that "respondent's counsel cannot decide whether or which witnessed (sic) to call until he has seen and evaluated the case that Commission counsel puts on direct," it is safe to say that Respondent's counsel plans to call Lippman as a defense witness given that four of the charges against Respondent directly address Lippman's activity.

11. In addition, Respondent would be highly prejudiced as to any potential sanctions without Lippman's testimony. Clearly, the means and extent to which Lippman concealed his activity from Respondent is relevant to this issue.

12. Furthermore, issuing the stay will not prejudice the Commission's commitment to the public's right to a final resolution because, in fact, Respondent will not reach the

mandatory retirement age until December of 2012.[1] Annexed hereto is the Affidavit of the Honorable Lee Holzman attesting to the fact that he was born on May 11, 1942, meaning he will be sixty-nine on December 31, 2011. As the Commission is aware, pursuant to N.Y. Judiciary Law § 23, "No person shall hold the office of judge, justice or surrogate of any court...longer than until and including the last day of December next after he shall be seventy years of age." As such, Respondent will not reach the mandatory retirement age until December of 2012.

13. Therefore, Counsel's argument that "[b]alancing the equities, and in particular the strong public policy in a Commission determination on the merits" favors denying the stay is unavailing and wholly without merit. Indeed, once the public policy concern is removed from the balancing of the relevant equities, Respondent is the only one who ultimately faces prejudice.

14. For these reasons, it is respectfully requested that the Formal Written Complaint be dismissed in its entirety without prejudice to re-file with greater specificity at such time as the criminal proceeding against Michael Lippman has concluded or that the Commission stay the proceedings pending completion of Mr. Lippman's criminal trial.

Dated: March 4, 2011
New York, New York

David Godosky, Esq.
GODOSKY & GENTILE, P.C.

[1] However, this is not dispositive on this issue because Respondent's emerging retirement age should not be a proper justification for compromising his rights.

Affidavit

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

In the Matter of the Proceedings Pursuant to Section 44, subdivision 4, of the Judiciary Law in Relation to

LEE L. HOLZMAN,

a Judge of the Surrogate's Court, Bronx County.

AFFIDAVIT OF HONORABLE LEE L. HOLZMAN

STATE OF NEW YORK)
)ss.:
COUNTY OF NEW YORK)

HON. LEE L. HOLZMAN , being duly sworn, deposes and says:

1. I am the Respondent in the above captioned matter, and state that I am 68 years old, being born on May 11, 1942.

Lee L. Holzman
HON. LEE L. HOLZMAN

Sworn to before me this
day of March, 2011

Notary Public

MARGARET B. CZYZEWSKA
NOTARY PUBLIC, State of New York
No. 01CZ6098073
Qualified in Kings County
Commission Expires 09/02/20[illegible]

EXHIBIT C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of
The Honorable Lee L. Holzman,

Petitioner,

-against -

The Commission on Judicial Conduct

Respondent

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

AFFIRMATION IN OPPOSITION

Index No. 108251/11

ROBERT H.TEMBECKJIAN, an attorney duly authorized to practice in the courts of the State of New York, hereby affirms the following to be true under penalty of perjury:

1. I am the Administrator and Counsel for the New York State Commission on Judicial Conduct ("Commission") and am fully familiar with the facts and circumstances herein.

2. The Administrator is an attorney who serves at the pleasure of the Commission and, *inter alia*, hires and supervises staff, and manages the agency's day-to-day activities (e.g., conducting investigations authorized by the Commission and prosecuting formal disciplinary charges authorized by the Commission). See Judiciary Law § 41 (7). The Administrator also represents the Commission as its Counsel before the Court of Appeals when the Commission's disciplinary determinations are appealed, and in certain outside litigation.

3. I make this affirmation in opposition to Petitioner's application for a Temporary Restraining order and/or a Preliminary Injunction.

THE COMMISSION'S CREATION AND AUTHORITY

4. The Commission was created in 1978 by amendment of the New York State Constitution, Article VI, § 22. Its enabling statute is Judiciary Law, Article 2-A, §§ 40-48.

5. The Commission is the sole state agency responsible for receiving, initiating and investigating complaints of misconduct or disability against the approximately 3,500 judges and justices of the New York State Unified Court System. The Commission is comprised of 11 members appointed for fixed terms by the Chief Judge, the Governor and Legislative leaders as defined in the Constitution.

6. The current members of the Commission are: Hon. Thomas A. Klonick, Chair; Hon. Terry Jane Ruderman, Vice-Chair; Hon. Rolando T. Acosta; Joseph, W. Belluck, Esq.; Joel Cohen, Esq.; Richard D. Emery, Esq.; Paul B. Harding, Esq.; Professor Nina M. Moore; Hon. Karen K. Peters and Richard A. Stoloff, Esq. One position is currently vacant, pending a gubernatorial appointment.

7. All complaints received from the public or otherwise brought to Commission staff's attention by newspaper articles or other sources are referred to the full Commission for an initial determination of whether the complaint should be dismissed or investigated. Commission staff may not investigate a complaint absent authorization of the Commission itself. 22 NYCRR § 7000.3(b).

8. After investigation, when warranted, the Commission may authorize a Formal Written Complaint against a judge and direct, after receipt of the judge's Answer, that a full evidentiary hearing be held. Judiciary Law § 44(4); 22 NYCRR § 7000.6. In the alternative, the Commission may consider an agreed statement of facts submitted by its Administrator and the respondent-judge, or a motion for summary determination where there are no material

facts in dispute. Judiciary Law §§ 44(4), 44(5); 22 NYCRR 7000.6(c); Matter of Petrie v State Commn on Judicial Conduct, 54 NY2d 807, 808 (1981).

9. After the Commission votes to authorize a Formal Written Complaint, the Commission and its Administrator play separate and distinct roles in judicial disciplinary proceedings. Judiciary Law §§ 41(7), 44(4); 22 NYCRR 7000.6. The Administrator prosecutes the case. An independent Referee appointed by the Commission hears the matter and reports proposed findings of fact and conclusions of law to the Commission. Judiciary Law § 43(2); 22 NYCRR §§ 7000.1(o), 7000.6(l).

10. The Commission then considers the report and makes a final determination as to whether misconduct has occurred. Judiciary Law § 44(7); 22 NYCRR § 7000.7. The Commission has sole authority to render determinations of confidential caution, public admonition, public censure, removal or retirement from office. Judiciary Law § 44; 22 NYCRR §§ 7000.1(m), 7000.7(d).

11. Where the Commission determines to admonish, censure, remove or retire a judge, the determination and the record on review are transmitted to the Court of Appeals and, after service on the judge, are made public. Judiciary Law § 44(7). Any judge who is the subject of a Commission determination may request review as of right in the Court of Appeals. NY Const art VI, § 22(a); Judiciary Law § 44 (7). See also Matter of Raab, 100 NY2d 305, 311 (2003). The Court of Appeals has plenary power to review the legal and factual findings of the Commission, as well as the recommended sanction. Matter of Gilpatric, 13 NY3d 586 (2009).

PROCEDURAL HISTORY OF THE COMMISSION'S DISCIPLINARY PROCEEDING

12. Petitioner has been a Judge of the Surrogate's Court, Bronx County, since 1988. He may serve through December 31, 2012, at which time he will be required to retire because he will have reached the mandatory retirement age of 70.[1]

13. Petitioner was served with a Formal Written Complaint ("Complaint") dated January 4, 2011, containing four charges. The Complaint is attached as Exhibit B to Petitioner's Verified Petition. The Commission opened its investigation into petitioner's conduct based on newspaper reports and the complaints of six individuals who alleged undue delays, excessive legal fees or irregularities in procedure in matters pending in petitioner's court.

14. Charge I alleged that from 1995 to 2009, in specific cases set forth in Schedule A of the Complaint, Petitioner approved legal fees for Michael Lippman, Counsel to the Bronx Public Administrator's Office: (1) based on boilerplate affidavits of legal services that did not comply with the requirements of SCPA § 1108(2)(c) and (2) fixed the fees without considering the statutory factors set forth in SCPA § 1108(2)(c).

15. Charge II alleged that in 2005 and 2006, Petitioner failed to report Michael Lippman to law enforcement authorities or to the Departmental Disciplinary Committee upon learning that Lippman took unearned advance legal fees and/or fees that exceeded the amount prescribed by the Administrative Board Guidelines, and that he continued to award Lippman the maximum legal fee recommended in the Guidelines and/or awarded the fees without considering the statutory factors set forth in SCPA § 1108(2)(c).

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1. When the Commission is unable to render a final determination in a pending matter before a judge's term expires, both the Commission and the Court of Appeals lose jurisdiction. Matter of Scacchetti v. New York State Commission on Judicial Conduct, 56 NY2d 98 (1982).

16. Charge III alleged that from 1997 to 2005, Petitioner failed to adequately supervise and/or oversee the work of court staff and appointees, which resulted in: (1) Michael Lippman taking advance fees without filing an affirmation of legal services in the cases set forth in Schedule B of the Complaint, and/or taking advance fees that exceeded the maximum amount recommended in the Administrative Board Guidelines in the cases set forth in Schedule C and Schedule D of the Complaint, (2) delays in the administration of the estates set forth in Schedule E of the Complaint, (3) individual estates with negative balances, (4) the Public Administrator placing estate funds in imprudent and/or unauthorized investments, and (5) the Public Administrator employing her boyfriend who billed estates for services that were not rendered and/or overbilled estates.

17. Charge IV alleged that in 2001 and 2003, Petitioner failed to disqualify himself from cases in which Michael Lippman appeared, notwithstanding that Lippman raised more than $125,000 in campaign funds for Petitioner's 2001 campaign for Surrogate.

18. Petitioner filed an Answer dated January 21, 2011, in which he denied the material allegations of the Complaint and asserted three affirmative defenses: (1) that the Complaint failed to state a cause of action, (2) that the factual allegations in the Complaint were unconstitutionally vague, and (3) that the Complaint violated his due process rights.

19. On January 25, 2011, the Commission designated the Honorable Felice K. Shea as Referee to hear and report findings of fact and conclusions of law. Judge Shea scheduled a five-day hearing for May 9, 2011.

20. Pursuant to Judiciary Law § 44(4) and 22 NYCRR § 7000.6(h), Commission staff was required to provide Petitioner discovery at least ten days prior to the hearing, including a list of witnesses the Commission intended to call, copies of any written statements

made by those witnesses, copies of any documents the Commission intended to introduce at the hearing and any exculpatory material. As a matter of practice, discovery schedules are set in a conference call with the Referee and discovery materials are generally exchanged earlier than the statute and regulations require.

21. In this case, Commission counsel supplied Petitioner with copies of the transcripts of eleven witness statements, including that of Michael Lippman, on February 9, 2011. On February 10, 2011, Commission counsel supplied Petitioner with copies of other written witness statement and copies of documents that Commission counsel intends to present at the hearing.

22. On February 10, 2011, Commission counsel also supplied Petitioner with copies of relevant documents from the case files of every estate listed in Schedules A through E to the Formal Written Complaint.

23. On March 7, 2011, Petitioner wrote to the Referee and requested an adjournment of the hearing until January 2012 in order to permit him sufficient time to review the discovery materials. On or about March 18, 2011, after conferring with counsel, the Referee adjourned the hearing until the week of September 12, 2011.

PETITIONER'S MOTION TO THE FULL COMMISSION SEEKING DISMISSAL OF THE FORMAL WRITTEN COMPLAINT OR A STAY OF THE HEARING.

24. On February 2, 2011, Petitioner made a motion to the full Commission seeking the same relief requested in this proceeding: dismissal of the Formal Written Complaint without prejudice to re-file or, in the alternative, for a stay of the Commission's proceeding.

25. Petitioner argued, as he does again here, that he could not get a fair hearing without calling Michael Lippman, former counsel to the Bronx Public Administrator.

Lippman is currently under indictment and Petitioner provided a letter from Lippman's counsel stating he had advised his client, if called, to assert his Fifth Amendment privilege against self-incrimination.

26. Petitioner also argued that the Formal Written Complaint was vague and lacked specificity. Petitioner has abandoned that argument in this proceeding.

27. On February 25, 2011, Commission staff filed a memorandum in opposition to the motion, arguing that the motion was premature because: (1) Lippman could not exercise his Fifth Amendment privilege in advance, (2) the Referee had not yet had a chance to hear the Commission's case and to rule on whether Lippman's testimony would be relevant to Petitioner's case and (3) it had not yet been determined whether Lippman waived his privilege by testifying under oath during the Commission's investigation.

28. Commission staff also argued that Lippman's testimony was irrelevant to the Commission's proceeding because the allegations in the Formal Written Complaint were tailored to address Petitioner's conduct, not Lippman's, and the allegations are largely based on documents filed in the Surrogate's Court that had already been turned over to respondent's counsel during discovery. Commission staff maintained that Petitioner had failed to show how Lippman's alleged criminal conduct could excuse Petitioner's own failure to act based on statutory requirements and the documentary evidence before him in his court.

29. On March 21, 2011, the Commission denied Petitioner's motion and referred the matter back to the Referee for the hearing. A copy of the Commission's determination is attached to the Verified Petition as Exhibit A.

30. On July 13, 2011, Mark Levine, Deputy Administrator for the Commission's New York office and Alan Friedberg, Special Counsel to the Commission, participated in a

pre-hearing telephone conference with Petitioner's counsel and the Honorable Felice K. Shea, Referee in the Commission proceeding. During that conference, when the 5th Amendment issue was raised, Judge Shea stated and Petitioner's counsel concurred that: (1) the 5th Amendment issue was premature, (2) she would deal with it at the hearing if Lippman were called and asserted the privilege, and (3) a ruling on the relevancy of Lippman's testimony was also premature and she would consider it after Commission counsel had presented its case during the September hearing.

ADDITIONAL MATTERS

31. I respectfully refer the Court to the accompanying Memorandum of Law for the Commission's argument that this Court should deny Petitioner's application for a stay and dismiss the Verified Petition on the merits. I wish only to comment on three factual matters raised in the petition.

32. First, contrary to Petitioner's assertion (Petition, ¶ 45), nothing prohibits him from discussing the issues raised in his disciplinary proceeding with Mr. Lippman or any other potential witness who has knowledge regarding the operation of the Bronx Surrogate's Court, in advance of the hearing before the Referee. Even assuming that Mr. Lippman would assert his privilege if subpoenaed to testify, it does not follow that he would refuse to speak voluntarily with Petitioner for pre-hearing preparation purposes. Commission staff never instructs witnesses not to cooperate with the attorneys for a judge going to a hearing; whether they choose or decline to do so is their own decision to make.

33. Second, with respect to the scurrilous, vague and unsupportable allegations in paragraphs 33-37, I state affirmatively to this Court that I never discussed the Petitioner, nor the Commission proceedings against him, nor the workings of the Bronx Surrogate's Court

since Petitioner became Surrogate, with my wife, Barbara Ross, or anyone else at the Daily News.

34. Finally, in the event petitioner is granted a stay of the Commission's disciplinary proceeding, there is significant danger that petitioner will leave the bench before the proceeding can be completed. Petitioner will turn 70 next year and thus face mandatory retirement by December 31, 2012. Unless the Commission has transmitted a final determination to the Court of Appeals by that date, the Commission's jurisdiction and that of the Court of Appeals will end when petitioner leaves the bench.

35. Given the amount of time needed to complete the disciplinary process-which involves the hearing, post hearing briefs, the Referee's report, briefs to the Commission, oral argument and finally a determination by the Commission-delaying the process for any length of time increases the risk that the disciplinary proceeding cannot be concluded. That result would undermine the strong public policy interest in resolving complaints of judicial misconduct on the merits, thereby assuring that public confidence in the integrity and impartiality of this State's judiciary is preserved.

Dated: New York, New York
July 28, 2011

ROBERT H. TEMBECKJIAN

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The Commission on Judicial Conduct,

Respondent.

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

:

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MEMORANDUM OF LAW ON BEHALF OF THE COMMISSION ON JUDICIAL CONDUCT IN OPPOSITION TO THE ORDER TO SHOW CAUSE

Preliminary Statement

Petitioner the Honorable Lee L. Holzman ("Petitioner" or "Judge Holzman") brings this petition for a writ of prohibition, by order to show cause, pursuant to Article 78 of the Civil Practice Laws and Rules of the State of New York ("State"). Petitioner seeks an order from this court:1) directing the New York State Commission on Judicial Conduct ("Commission") to dismiss the formal written complaint ("Complaint" or "FWC") against him, without prejudice to re-file upon the conclusion of a separate criminal trial in which Petitioner is not a party or, in the alternative, directing a stay of the disciplinary hearing against petitioner pending the conclusion of the criminal trial; 2) enjoining the Commission from proceeding with the disciplinary hearing pending the determination of this application for relief; 3) sealing the court records in this matter pursuant to § 216.1 of the Uniform Rules

for New York State Trial Courts and Judiciary Law § 44(4); and 4) any other such relief the Court may deem proper. See Petition, Wherefore Clause.

The Commission submits this memorandum of law in opposition to the order to show cause. As set forth below, Petitioner has failed to establish that a writ of prohibition is warranted nor established an entitlement to emergency relief. As a result, Petitioner's order to show cause should be denied and this proceeding should be dismissed.

STATEMENT OF THE CASE

The relevant statutory and factual background of this case are set forth in the accompanying affirmation of Robert H.Tembeckjian ("Tembeckjian Aff."). For the Court's convenience, they are summarized herein.

Statutory Background

The Commission is authorized by the New York State Constitution to "receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the Unified Court System." See Article 6, § 22. The Commission's enabling statute is Judiciary Law, Article 2-A, §§ 40-48. The Commission is the sole state agency responsible for receiving, initiating and investigating complaints of misconduct or disability against the approximately 3,500 judges and justices of the New York State Unified Court System. See Tembeckjian Aff. ¶ 5.

When warranted, the Commission may initiate an accusatory instrument ("formal written complaint") against a judge and direct that a full evidentiary hearing be held or, in lieu of a hearing, it may consider an agreed statement of facts submitted by its Administrator and the respondent-judge. See Judiciary Law §§ 44(4), 44(5), 44(6). During a hearing, the Administrator prosecutes the case and an independent Referee, appointed by the

Commission, hears the matter and reports proposed findings of fact and conclusions of law to the Commission. See Judiciary Law § 43(2); 22 NYCRR §§ 7000.1(o); 7000.6(l).The Commission then considers the report and makes a final determination as to whether misconduct has occurred. See Judiciary Law § 44(7); 22 NYCRR § 7000.7. The Commission then considers the report and makes a final determination as to whether misconduct has occurred. See Judiciary Law § 44(7); 22 NYCRR § 7000.7.

At the end of such proceedings, the Commission has authority to render determinations of confidential caution, public admonition, public censure, removal or retirement from office. See Judiciary Law § 44; 22 NYCRR §§ 7000.1(m), 7000.7(d). Any judge or justice who is the subject of a public determination is entitled to review in the Court of Appeals. See Judiciary Law § 44 (7). Where the Commission determines to admonish, censure, remove or retire a judge, the determination and the record on review are transmitted to the Court of Appeals and, after service on the judge, are made public. See Judiciary Law § 44(7).

Underlying Proceedings Before the Commission on Judicial Conduct

All complaints received from the public or otherwise brought to the attention of the Commission by newspaper articles or other sources are referred to the full Commission for an initial determination of whether the complaint should be dismissed or investigated. See Tembeckjian Aff. ¶ 7. Petitioner Lee L. Holzman has been a Judge of the Surrogate's Court, Bronx County, since 1988. Based on newspaper reports and the complaints of six individuals, the Commission opened an investigation into Petitioner's conduct regarding irregularities in procedure in matters pending before Petitioner's court. See Tembeckjian Aff. ¶ 13.

On January 4, 2011, the Commission served a formal written complaint ("Complaint") upon Petitioner, alleging four separate charges against him. A copy of the Complaint is attached to the Verified Petition as Exhibit B. The nature of those charges is set forth at greater length in the accompanying affidavit of Robert H. Tembeckjian ("Tembeckjian Aff."). In brief, the Complaint alleged that:

- from 1995 to 2009, in specified cases then before the Surrogate's Court, Petitioner approved legal fee applications submitted by attorney Michael Lippman, Counsel to the Bronx Public Administrator's Office in violation of the requirements of the Surrogates Court Procedures Act § 1108(2)(c);

- in 2005 and 2006, Petitioner failed to report Michael Lippman to law enforcement authorities or to the Departmental Disciplinary Committee upon learning that Lippman took unearned advance legal fees and/or excessive fees;

- from 1997 to 2005, Petitioner failed to adequately supervise and/or oversee the work of court staff and appointees, which resulted in fee abuses by Michael Lippman, delays in the administration of certain specified estates, individual estates with negative balances, the Public Administrator placing estate funds in imprudent and/or unauthorized investments, and the Public Administrator employing her boyfriend who billed estates for services that were not rendered and/or overbilled estates;

- in 2001 and 2003, Petitioner failed to disqualify himself from cases in which Michael Lippman appeared, notwithstanding that Lippman raised more than $125,000 in campaign funds for Petitioner's 2001 campaign for Surrogate.

On or about January 21, 2011, Petitioner answered the charges, denied the substance of the Complaint, and asserted three affirmative defenses: 1) that the Complaint failed to state a cause of action, 2) that the factual allegations in the Complaint were unconstitutionally vague, and 3) that the Complaint violated his due process rights. See Tembeckjian Aff., ¶ 18. The Commission assigned the Honorable Felice K. Shea as Referee to hear and report findings of fact and conclusions of law. Judge Shea scheduled a five-day hearing for May 9, 2011. See Tembeckjian Aff., ¶ 19.

In the course of the proceeding, and in compliance with Judiciary Law § 44(4) and 22 NYCRR § 7000.6(h), the Commission provided discovery to Petitioner, including a list of witnesses the Commission intended to call, copies of any written statements made by those witnesses, copies of any documents the Commission intended to introduce at the hearing and any material that would be exculpatory. Petitioner was also given copies of relevant documents from the case files of every estate included in the charges in the Complaint. Among the witness statements Petitioner was given was the transcript of the statement given to the Commission by Michael Lippman. See Tembeckjian Aff., ¶ 21.

Michael Lippman ("Lippman") is currently facing criminal charges in New York Supreme Court, Bronx County. Lippman was indicted on July 7, 2010 on charges of fraud and grand larceny. His next appearance in Criminal Court is on September 20, 2011. See Petition, ¶ 2.

On February 2, 2011, Petitioner made a motion before the full Commission which sought the same relief requested in this proceeding: dismissal of the Complaint without prejudice to re-file or, in the alternative, for a stay of the Commission's proceeding. Petitioner argued, as he does again here, that he cannot defend himself against the charges without the testimony of Michael Lippman and provided a letter from Lippman's counsel stating he had advised his client, if called to testify, to assert his Fifth Amendment privilege against self-incrimination. See Tembeckjian Aff., ¶ ¶ 24-26.

By a memorandum of law, dated February 25, 2011, Commission staff opposed Petitioner's motion, arguing that the motion was premature for the following reasons:1) Lippman could not exercise his Fifth Amendment privilege in advance; 2) the Referee had not yet had a chance to hear the Commission's case and to rule on whether Lippman's

testimony would be relevant to Petitioner's case; and 3) it had not yet been determined whether Lippman waived his privilege by testifying under oath during the Commission's investigation. Commission staff also argued that Lippman's testimony was irrelevant to the proceeding because the allegations in the Complaint addressed Petitioner's conduct, not Lippman's. They further argued that the allegations at issue were largely based on documents filed in the Surrogate's Court which had been provided to Petitioner, and that Petitioner had failed to show why it was that Lippman's alleged criminal conduct could excuse Petitioner's own failure to act based on statutory requirements and the documentary evidence before him in Surrogate's Court. See Tembeckjian Aff., ¶ ¶ 27-28.

On March 7, 2011, Petitioner requested an adjournment of the hearing until January 2012 in order to permit him sufficient time to review the discovery materials. The Referee adjourned the hearing until the week of September 12, 2011.

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a list of witnesses the Commission intended to call, copies of any written statements made by those witnesses, copies of any documents the Commission intended to introduce at the hearing and any material that would be exculpatory. Petitioner was also given copies of relevant documents from the case files of every estate included in the charges in the Complaint. Among the witness statements Petitioner was given was the transcript of the statement given to the Commission by Michael Lippman. See Tembeckjian Aff., ¶ 21.

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investigation. Commission staff also argued that Lippman's testimony was irrelevant to the proceeding because the allegations in the Complaint addressed Petitioner's conduct, not Lippman's. They further argued that the allegations at issue were largely based on documents filed in the Surrogate's Court which had been provided to Petitioner, and that Petitioner had failed to show why it was that Lippman's alleged criminal conduct could excuse Petitioner's own failure to act based on statutory requirements and the documentary evidence before him in Surrogate's Court. See Tembeckjian Aff., ¶ ¶ 27-28.

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Petitioner is currently a sitting judge in the Surrogate's Court. He may serve through December 31, 2012, at which time he will be required to retire because he will have reached the mandatory retirement age of 70.See Tembeckjian Aff., ¶ 12.When the Commission is unable to render a final determination in a pending matter before a judge's term expires, both the Commission and the Court of Appeals lose jurisdiction. Matter of Scacchetti v. New York State Commission on Judicial Conduct, 56 N.Y.2d 98 (1982).Thus, if the pending proceedings are dismissed or stayed, the Commission may be rendered unable to proceed on the charges against the Petitioner.

The Instant Application

By order to show cause, dated July 19, 2011, Petitioner now seeks to stay or dismiss the pending charges against him, alleging that if subpoenaed to testify at Petitioner's disciplinary hearing, Lippman will assert his Fifth Amendment privilege and refuse to testify. Petitioner contends that Lippman is a critical witness to the disciplinary hearing and under these circumstances proceeding with the disciplinary hearing deprives Petitioner of the ability to mount a defense as to the charges against him in violation of Petitioner's constitutional right to due process.

ARGUMENT

POINT I

PETITIONER HAS FAILED TO STATE A CAUSE OF ACTION UPON WHICH RELIEF CAN BE GRANTED AS HIS CLAIM IS NOT JUSTICIABLE.

A. Standard of Review

Petitioner has filed this petition pursuant to CPLR article 78, seeking the extraordinary remedy of a writ of prohibition. Matter of Doe v. Axelrod, 71 N.Y.2d 484, 490 (1988). In order to obtain a writ of prohibition, Petitioner must demonstrate that he has a clear legal right to the relief he seeks. Id. Additionally, even where Petitioner has a clear legal right to relief, a writ of prohibition is only available when an agency acts or threatens to act either without jurisdiction or in excess of its authorized powers such that the actions of the agency "implicate the legality of the entire proceeding." See Id.; see also Matter of Nicholson v. State Commission on Judicial conduct, 50 N.Y.2d 597 (1980); Neal v. White, 46 A.D.3d 156, 159 (1st Dep't 2007). Even if the remedy of prohibition would otherwise properly lie, the writ does not issue as of right, but only in the sound discretion of the court. Jacobs v. Altman, 69 N.Y.2d 733, 735 (1987); Matter of Rush v. Mordue, 68 N.Y.2d 348, 354 (1986). In deciding whether to exercise its discretion in issuance of a writ, the court should consider the gravity of the harm at issue and "whether the excess of power can be adequately corrected on appeal or by other ordinary proceedings at law or in equity." LaRocca v. Lane, 37 N.Y.2d 575, 579-580 (1975).

Here, the Commission has statutory authority to commence disciplinary proceedings against the Petitioner. See N.Y. Const. Article 6, § 22; see also Judiciary Law, Article 2-A, §§ 40-48. Yet, Petitioner seeks to prohibit the Commission from acting pending the

resolution of a potential witness' criminal matter on the speculation that, until the end of the criminal matter, Petitioner's ability to call the witness will be impaired if the witness asserts his Fifth Amendment right not to testify at the disciplinary hearing.

Petitioner has no clear legal right to the relief he is seeking because, as a general principle, "...courts are constrained not to interject themselves into ongoing administrative proceedings until final resolution of those proceedings before the agency." See Galin v. Chassin, 217 A.D.2d 446, 447 (1st Dep't 1995). At most, Petitioner alleges an error of law and he has an adequate remedy in his ability to appeal the administrative determination. See Doe, 71 N.Y.2d at 490. Consequently, as set forth below, the extraordinary remedy of prohibition is not available in this case.

B. Petitioner's Claim Is Not Ripe for Review

Administrative actions are not ripe for judicial review unless and until they impose an obligation or deny a right as a result of the administrative process. See Gordon v. Rush, 100 N.Y.2d 236, 242 (2003); see also Essex County v. Zagata, 91 N.Y.2d 447, 453 (1998). This occurs only when the decision maker arrives at a final and definitive position-on the relevant issue-that inflicts an actual, concrete harm to the Petitioner. See Gordon, 100 N.Y.2d at 242. Further, judicial review can only take place when this harm cannot be "prevented or significantly ameliorated by further administrative action ... available to the [Petitioner]." See id. (internal quotation marks and citation omitted).

Petitioner's challenge to the proceeding is both premature and without merit. His claim essentially rests on his assertion that Lippman's assertion of his Fifth Amendment privilege will deny Petitioner the ability to mount a defense to the charges against him. See Petition, ¶ 45. However, the disciplinary hearing before the Referee is set to begin on

September 12, 2011. See Petition, ¶ 2. At the time of this petition, Lippman has not been called as a witness and thus has not yet asserted his Fifth Amendment privilege. Therefore, the issue of whether the Petitioner will be able to mount a defense is not yet ripe for judicial review. See Matter of Tahmisyan v. Stony Brook University, 74 A.D.3d 829, 831 (2d Dep't 2010)(holding that an Article 78 proceeding, before the commencement of a disciplinary hearing, to prohibit the introduction of certain audiotape recordings into evidence was premature).

Furthermore, Petitioner's request for relief rests upon numerous assumptions. First, that Lippman will be called as a witness by the Commission's staff or that his testimony will be necessary for Petitioner to defend himself against the charges. Second, that Lippman will assert the Fifth Amendment privilege in response to the particular questions asked of him on the stand. Third, that in the event Lippman is called and does refuse to testify, the Referee will not properly rule on any applications that Petitioner may make at that time. Fourth, that Petitioner's rights of appeal within the administrative scheme established by the Legislature, which includes a review as of right to the Court of Appeals, will not be sufficient to vindicate his rights; and finally that there will be some time in the future wherein Lippman will not assert his Fifth Amendment rights when questioned about his conduct before the Surrogate's Court. These assumptions are highly speculative and demonstrate that Petitioner's claim is not justiciable because it is not yet ripe.

Petitioner has not been denied a clear legal right as a result of the administrative process. While Lippman's attorney has stated that he will advise his client to assert the Fifth Amendment if Lippman is called to testify in the disciplinary hearing, see Petition, Exhibit E, it is not yet certain that Petitioner will call Lippman as a witness for the defense. Further,

should Lippman testify, it is not clear that he will take the Fifth for every question posed of him. See Figueroa v. Figueroa, 160 A.D.2d 390, 391 (1st Dep't 1990)(noting that the privilege against self-incrimination may not be asserted or claimed in advance of questions actually propounded). In fact, Lippman, in his first appearance during the Commission's investigation, "answered questions under oath about the affirmations of [the] legal services he submitted in [Petitioner's] court, when he collected fees, whether he collected fees before filling an affirmation of legal services, and whether [Petitioner] was aware when he collected fees." See Petition, Exhibit H, Memo in Opposition, 8-9. Therefore, it is unclear what questions, if any, Lippman will refuse to answer and Petitioner does not have a right to delay the administrative process due to his speculative beliefs.

Moreover, the Referee, the decision maker for the disciplinary hearing, has not made a final, determinative decision on this issue. Although a witness may invoke his Fifth Amendment right, a decision maker has wide discretion in fashioning the appropriate corrective response once this right is invoked. See People v. Visich, 57 A.D.3d 804, 805-06 (2d Dep't 2008). As Lippman has yet to invoke his Fifth Amendment privilege and the Referee has yet to rule on the issue, the decision maker in the administrative process has not inflicted any actual or concrete harm to the Petitioner. Furthermore, Petitioner has not submitted any affidavits to advise the Commission as to the substance of Lippman's testimony and how that testimony is critical or necessary to his defense. See Allen v. Rosenblatt, 2004 WL 2589739 * 2 (Civ. Ct. N.Y. Co. 2004) (holding that, absent an affidavit in support of what the witness' testimony might be, the court could not determine whether the witness' testimony is critical or necessary). At most, the Petitioner is being forced to begin the disciplinary hearing without knowing if he will ultimately be able to call Lippman as a

witness and, outside of Petitioner's bald assertion, it is not clear that he has suffered a concrete harm from this uncertainty.

Aside from allowing the Referee to rule on this issue during the disciplinary hearing, Petitioner has the additional option of arguing his position to the full Commission at the completion of the hearing. Thus, in the event that Petitioner disagrees with any ruling the Referee makes with regard to Lippman, Petitioner can make his arguments to the full Commission. The Commission may agree and remand the matter to the Referee, or it may decide that Petitioner has not committed judicial misconduct. In either of those situations, Petitioner's claim would become moot. In the event that Petitioner disagreed with the Commission's determination and that determination imposed any public discipline, Petitioner would have a review, or appeal, as of right in the Court of Appeals. See Judiciary Law § 44(7). So in the event Petitioner is aggrieved by the Commission's final determination, he has the right to plenary review in the Court of Appeals. See Judiciary Law § 44(7); Matter of Gilpatric, 13 N.Y.3d 586 (2009).

Thus, not only is Petitioner's claim not ripe for review, Petitioner's alleged harm can be ameliorated by further administrative action and this article 78 petition should be dismissed.

C. Petitioner Must Exhaust All Available Administrative Remedies before Seeking Judicial Review of Administrative Determinations

It is a well settled principle of administrative law that Petitioner must exhaust all available administrative remedies before obtaining judicial review of this agency's actions. See e.g., Doe, 71 N.Y.2d at 490; DiBlasio v. Novello, 28 A.D.3d 339, 341 (1st Dep't 2006); Galin, 217 A.D.2d at 447. The focus of the exhaustion doctrine is not on the administrative action itself, but on whether administrative procedures are in place to review the action and

whether Petitioner has exhausted these procedures. Church of St. Paul and St. Andrew v. Barwick, 67 N.Y. 2d 510, 521 (1986). Because the application of the exhaustion doctrine furthers the goal of preventing incessant judicial interruption of the administrative process, exceptions to the doctrine are limited to when resort to an administrative remedy would be futile, an agency's action is challenged as unconstitutional or pursuit of an administrative remedy would cause irreparable injury. See Connerton v. Ryan, 2011 WL 2637500 *1 (3d Dep't 2011). Petitioner's claim fails to fall within any of these exceptions.

As set forth above, it is undisputed that even if the Referee ultimately rules adversely as to Petitioner's Fifth Amendment argument, there are several administrative procedures in place to review that decision, including a legal right to a review of the Commission's decision before the Court of Appeals. Furthermore, Prohibition does not and cannot lie as a means of seeking collateral review for errors of law in the administrative process, however grievous and "however cleverly the error may be characterized by counsel as an excess of jurisdiction or power." See Doe, 71 N.Y.2d at 490.

The mere allegation of a constitutional due process violation does not excuse the Petitioner from pursuing the administrative remedies available to him. See Connerton, 2011 WL 2637500 *2. For example, in Allen v. Rosenblatt, respondents sought to stay their contempt hearings for allegedly failing to carry out a court order to correct certain violations. 2004 WL 2589739 * 1. In that case, respondents argued that their key witness would plead the Fifth Amendment if he was called to testify due to his pending criminal cases for unlawful eviction. Id. The court, unpersuaded by respondents' argument, denied the stay, finding that the witness' guilt in the criminal proceedings was irrelevant to whether the respondents failed to carry out the court order. Id.

Here, Petitioner contends that Lippman's assertion of his Fifth Amendment privilege hampers his ability to put on a defense at the disciplinary hearing. As in Allen, Lippman's guilt in his criminal proceedings is irrelevant to whether Petitioner failed to comply with the statutory mandate for approving Lippman's affirmations. Given the charges, Petitioner may put forth a defense without Mr. Lippman's testimony by testifying to his own conduct regarding each specific charge. Petitioner certainly has not made any offer of proof as to the testimony he would reasonably expect Lippman to offer to refute the charges against Petitioner.

The Complaint against the Petitioner properly focuses on Petitioner's own conduct rather than that of Lippman. For example, the Complaint charges Petitioner with conduct such as his approval of fees based on a "boilerplate" affidavits of legal services without consideration of statutory factors, failure to report Lippman to the appropriate authorities, approval of Lippman's fee requests even after learning that Lippman had taken unearned advance and/or excessive legal fees, and failure to disqualify himself in cases in which Lippman appeared. See Tembeckjian Aff. ¶¶ 14-17. The Commission provided Petitioner with the documents he needs to establish an adequate defense to the charges including a list of any witnesses the Commission intends to call, copies of any written statements made by those witnesses, copies of any documents the Commission intends to introduce at the hearing and any material that would be exculpatory. See Tembeckjian Aff. ¶20. Thus, the Commission has provided Petitioner with the "basic requisites" of due process: notice and an opportunity to be heard. See Velella v. New York City Conditional Release Com'n, 13 A.D.3d 201, 202 (1st Dep't 2004)(noting that there is no constitutional guarantee of any particular form of procedure).

Against this backdrop, Petitioner's reliance on Britt v. International Bus. Servs., 255 A.D.2d 143 (1st Dep't 1998) and Stolowski v. 234 East 178th Street LLC, 2006 WL 1408410 (Sup. Ct. Bx. Co. 2006) is misplaced. Both of these cases involved tort actions where the testimony of the witness asserting the Fifth Amendment privilege was essential and would in whole or in part reduce the liability of the defendant. See Stolowski, 2006 WL 1408410 * 7 (noting that the resolution of a criminal case may result in the civil case either not requiring discovery or a trial). In the present case, the opposite is true since even if Lippman were to testify that the Petitioner had no knowledge of his wrongdoings, this testimony would not excuse Petitioner's liability for failing to abide by the statutory requirements. Moreover, "[a] constitutional claim that may require the resolution of factual issues reviewable at the administrative level should not be maintained without exhausting administrative remedies." See Schulz v. State, 86 N.Y.2d 225, 232 (1995); Town of Oyster Bay v. Kirkland, 81 A.D. 3d 812, 816 (2d Dep't 2011). Petitioner's constitutional claim does not involve a purely legal question. Instead, Petitioner's challenge focuses on the resolution of a factual issue, specifically what Lippman will testify to and how that testimony can aid in his defense at the disciplinary hearing. See Matter of East 51st Street Crane Collapse Litigation, 30 Misc.3d 521, 530-31 (Sup. Ct. N.Y. Co.)("determining whether the [Fifth Amendment] privilege is available in given circumstances ... involves a factual inquiry). This issue is reviewable at the administrative level and judicial intervention should not be maintained before Petitioner exhausts all of the remedies available to him.

The Appellate Division has recognized that there is "no legal cognizable injury to be suffered from being subjected to [a] disciplinary hearing with the possibility of a subsequent finding of professional misconduct." See Galin, 217 A.D.2d at 447; see also Doe, 71 N.Y.2d

at 491(Simons, J., concurring)(noting that an agency's decision that ultimately affects the permissible scope of cross-examination in a hearing does not implicate the exception to the exhaustion doctrine). In light of the foregoing, Petitioner has not demonstrated that he will suffer an irreparable injury that warrants court intervention. Nor has Petitioner demonstrated that he is entitled to the extraordinary remedy of the issuance of a writ of prohibition.

POINT II

PETITIONER HAS NOT MET THE STANDARD FOR THE IMPOSITION OF A PRELIMINARY INJUNCTION.

Petitioner also seeks to enjoin the Commission from proceeding with the disciplinary hearing against him pending the resolution of this petition. However, the Court of Appeals has long held that the granting of injunctive relief is also an extraordinary remedy. Kane v. Walsh, 295 N.Y. 198, 205 (1946). Consequently, the elements for preliminary injunctive relief parallel the standard for an article 78 writ of prohibition in many aspects. See generally id. In order to obtain preliminary injunctive relief, the Petitioner must demonstrate that he has a clear likelihood of ultimate success on the merits, that he will suffer irreparable injury unless the injunction is granted, and that the balancing of the equities lies in his favor. See e.g., See e.g., Scotto v. Mei, 219 A.D.2d 181, (1st Dept't 1996); Faberge International, Inc. v. DiPino, 109 A.D.2d 235, (1st Dep't 1985); Kurzban & Sons, Inc. v. Bd. of Ed. of The City of NY, 129 A.D. 756, (2d Dept't 1987). Petitioner has failed to meet this three pronged test.

The first prong-demonstration of a clear likelihood of success-requires the Petitioner to establish that has a clear right to relief, in evidentiary detail. See Little India Stores v. Singh, 101 A.D.2d 727 (1st Dep't 1984); Faberge, 109 A.D2d at 240. As discussed earlier, Petitioner does not have a clear legal right to stall this administrative process. Indeed, Petitioner offers no evidence to establish that he has a clear right to injunctive relief. Aside

from speculative belief, Petitioner proffers no affidavits with evidentiary detail as to what Lippman may say to aid Petitioner in his defense of the disciplinary charges against him and whether Lippman's testimony will aid the Petitioner involves a factual dispute that favors denying Petitioner's request for injunctive relief. See Faberge, 109 A.D2d at 240 (explaining that when facts are in dispute, the court will deny the request for injunctive relief).

Petitioner also fails to establish the second prong, in that he fails to demonstrate that he will suffer "irreparable harm" from proceeding with the hearing. Petitioner suffers no irreparable harm from being subjected to a disciplinary hearing. See Galin, 217 A.D.2d at 447; see also Newfield Central School District v. N.Y.S. Division of Homan Rights, 66 A.D.3d 1314, 1316 (3d Dep't 2009)(finding no irreparable harm from proceeding with a hearing prior to a judicial determination on the agency's jurisdictional authority to adjudicate the matter); Ashe v. Enlarged City School District, 233 A.D.2d 571, 573 (3d Dep't 1996). The law affords the Petitioner several adequate remedies for the wrong he contends he will suffer and as such he suffers no irreparable harm from the Commission's determination to proceed with the disciplinary hearing. See Kane, 295 N.Y. at 205-06 (denying injunctive relief when there are adequate legal remedies for the contemplated wrong).

As for the third prong, the balancing of the equities does not favor Petitioner. It should be noted, in weighing the equities here, that a preliminary injunction would cause the People of the State of New York irreparable harm because they are entitled to a judiciary devoid of corruption and a stay would almost certainly mean that the inquiry into the Petitioner's judicial conduct will end. Petitioner will turn 70 next year and will face mandatory retirement by December 31, 2012. Given the amount of time needed to complete the disciplinary process, which involves the hearing, post hearing briefs, the Referee's report,

briefs to the Commission, oral argument and finally a determination by the Commission, see Tembeckjian Aff., ¶ 35, delaying the process for any length of time increases the risk that the disciplinary proceeding will be rendered moot as it may not conclude before Petitioner leaves his position on the bench.

Furthermore, although Petitioner argues that once Lippman's criminal matter is settled he will be available to testify, this assertion is based on speculative belief. Petitioner cannot assert with Certainty that Lippman will not attempt to assert his Fifth Amendment right indefinitely in fear of additional criminal prosecution. See Matter of East 51st Street Crane Collapse Litigation, 30 Misc.3d at 530-31(noting that the right to assert one's Fifth Amendment privilege only depends on the *possibility* of prosecution). "Administrative proceedings are mandated to proceed expeditiously to protect ... public interest." (emphasis added). See Galin, 217 A.D.2d at 447. Thus, the balancing of equities lies in favor of the respondent. Petitioner cannot be allowed to stall disciplinary proceedings against him until the matter is rendered moot based on a speculative belief as to what a potential witness may or may not say and when he will or will not say it.

POINT III

PETITIONER IS NOT ENTITLED TO HAVE THE RECORD OF THIS PROCEEDING SEALED

There is a strong presumption in favor of public access to court proceedings as a matter of public policy. Matter of Westchester Rockland Newspapers v. Leggett, 48 NY2d 430, 437-438 (1979). Section 4 of the Judiciary Law states that the "sittings of every court within this state shall be public," with limited exceptions inapplicable here. The Uniform Rules for Trial Courts states: "Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in

whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as the parties." See 22 NYCRR § 216.1(a). "Confidentiality is clearly the exception, not the rule." In re Will of Hoffman, 284 AD2d 92, 93-94 (1st Dept. 2001).

Most significantly, for purposes of this Court's analysis, the Court of Appeals has specifically rejected the sealing of records where the Commission is subjected to an Article 78 proceeding, holding that the strict rules of confidentiality imposed on the Commission by Judiciary Law §§ 44 and 45 "appl[y] only to matters before the commission," not to matters before a court. Nicholson v. State Commission on Judicial Conduct, 50 NY2d 597, 612-13 1980.1. This Court should follow the precedent set forth in Nicholson and allow the records of this proceeding to remain unsealed.

Petitioner has shown no reasonable basis for making an extraordinary exception to the Nicholson doctrine in this case. As Justice Madden held when denying a similar application from a judge seeking to seal her Article 78 petition for a writ of prohibition

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2. In fact, as the captions reveal, most Article 78 proceedings involving the Commission have been public proceedings. See Spargo v. New York State Commission on Judicial Conduct, 23 AD3d 808 (3d Dept 2005); Saferstein v. New York State Commission on Judicial Conduct, 298 AD2d 589 (2d Dept 2002); Sassower v. Commission on Judicial Conduct, 289 AD2d 119 (1st Dept 2001); Mantell v. New York State Commission on Judicial Conduct, 277 AD2d 96 (1st Dept 2000); Montaneli v. New York State Commission on Judicial Conduct, 133 Misc 2d 526 (Sup Ct NY County 1986); Wilk v. New York State Commission on Judicial Conduct, 97 AD2d 716 (1st Dept 1983); Sims v. New York State Commission on Judicial Conduct, 94 AD2d 946 (4th Dept 1983); Richter v. State Commission on Judicial Conduct, 85 AD2d 790 (3d Dept 1981); Darrigo v. State Commission on Judicial Conduct, 74 AD2d 801 (1st Dept 1980); Raysor v. Stern, 68 AD2d 786 (4th Dept 1979); Matter of Owen, 413 NYS2d 815 (NY Ct Jud, May 4, 1978) *with* Doe v. Commission on Judicial Conduct, 246 AD2d 409 (1st Dept 1998); Doe v. State Commission On Judicial Conduct, 137 Misc 2d 268 (Sup Ct NY County 1987); Doe v. Commission on Judicial Conduct, 124 AD2d 1067 (4th Dept 1986); Anonymous Town Justice v. State Commission on Judicial Conduct, 96 Misc 2d 541(Sup Ct NY County 1978); Cunningham ex rel. Unnamed Town and Village Justices of Erie County v. Stern, 93 Misc 2d 516 (Sup Ct NY County 1978).

against the Commission, "[t]he investigation of a judge necessarily implicates the integrity of public confidence in the judiciary, and is a matter of legitimate public concern." Shelton v. New York State Commission on Judicial Conduct, Sup Ct, New York County, February 8, 2007, Index No. 118283/06 at 17 (unreported decision, attached hereto). Petitioner's request to seal the record here should thus be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully requested that Petitioner's request for emergency injunctive relief be denied; the petition be denied and dismissed in its entirety; and that the Court issue such other and further relief as may be just, proper and appropriate.

Dated: New York, New York
July 28, 2011

Respectfully submitted,

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

In the Matter of the Application of
The Honorable Lee L. Holzman

Petitioner,

-against-

VERIFIED ANSWER AND RETURN

Index No. 108251/2011

The Commission on Judicial Conduct,

Respondent.

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules.

Respondent, by its attorney, ERIC T. SCHNEIDERMAN, Attorney General of the State of New York, Assistant Attorney General Monica Connell, of Counsel, answering the verified petition in the above-entitled proceeding alleges as follows:

1. Denies each and every allegation contained in the petition that alleges or tends to allege that the challenged action is in any way contrary to constitutional, statutory, regulatory or case law.

2. Admits the allegations contained in paragraphs 3, 8, and 44 of the petition.

3. Denies the allegations contained in paragraph 42 of the petition.

4. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraphs 9, 23, and 32 of the petition.

5. Affirmatively states that no response is necessary to paragraphs 1, 5, 6, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 59, 60, 61, 62, 63 and 64 of the petition, because these paragraphs contain no allegations, but legal argument or a prayer for relief and to the extent that

they may be construed as containing allegations said allegations are denied.

6. Admits the allegations contained in paragraph 2 of the petition insofar as they allege that Michael Lippmann was indicted in Bronx County and that the matter is next on before the Hon. Steven Barrett, in Supreme Court, Bronx County, on September 20, 2011, and otherwise affirmatively states that no response is necessary to the remainder of that paragraph because it contain no allegations, but legal argument or a prayer for relief and to the extent that it may be construed as containing allegations said allegations are denied.

7. Denies the allegations contained in paragraph 4 of the petition except admits that Mr. Lippman's attorney has provided an affidavit to the Petitioner and refers the Court to the affidavit for the contents thereof.

8. Admits the allegations contained in paragraph 7 of the petition insofar as they allege that Petitioner was admitted to the practice of law in 1966 and elected Judge of the Surrogate's Court, Bronx County and affirmatively states that Petitioner took the bench on Bronx Surrogate's Court in 1988.

9. Admits the allegations contained in paragraph 10 of the petition insofar as they allege that Petitioner appointed Esther Rodriguez and John Raniolo as Public Administrators and otherwise denies information sufficient to form a belief as to the exact dates of their respective appointments.

10. Admits the allegations contained in paragraph 11 of the petition, except the allegation that Petitioner became Surrogate in 1998, and affirmatively states that Petitioner became Surrogate in 1988.

11. Admits the allegations contained in paragraph 12 of the petition insofar as they allege that Petitioner appointed Mark Levy as Counsel to the Public Administrator in April 2006 and that Mr. Lippman continued to serve as counsel to the Public Administrator for a period of time, but denies information sufficient to form a belief as to the exact date that Mr. Lippman's services were terminated.

12. Denies the allegations contained in paragraphs 13 except admits that in numerous cases over a period of years, Petitioner approved legal fees applications made by Michael Lippman.

13. Affirmatively states that no response is necessary to paragraphs 14 and 15 of the petition because these paragraphs contain no allegations, but legal argument and to the extent that they may be construed as containing allegations, said allegations are denied. To the extent these paragraphs seek to construe provisions of the Surrogate's Court Procedure Act, respondent respectfully refers the Court to and relies upon the full text of that statute for a more complete and accurate statement and as the best evidence of what is contained therein.

14. Admits the allegations contained in paragraph 16 of the petition insofar as they allege that in 2002 the Administrative Board for the Offices of the Public Administrators issued guidelines pursuant to section 1128 of the Surrogate's Court Procedure Act and denies information sufficient to form a belief as to the extent of Petitioner's involvement therein.

15. Affirmatively states that no response is necessary to paragraphs 17 and 18 of the petition because these paragraphs contain no allegations, but legal argument and to the extent that they may be construed as containing allegations, said allegations are denied. To the extent these paragraphs seek to construe provisions of the 2002 Guidelines of the Administrative Board for

the Offices of the Public Administrators, respondent respectfully refers the Court to and relies upon the full text of those guidelines for a more complete and accurate statement and as the best evidence of what is contained therein.

16. Admits the allegations contained in paragraph 19 of the petition insofar as they allege that in numerous cases over a period of years, Petitioner approved legal fees for Mr. Lippman based on affirmations of legal services that included general descriptions of the services that Mr. Lippman might have performed, but did not contain contemporaneous time records or an itemization of the time actually spent on particular tasks, and otherwise denies the allegations as inaccurate or incomplete and respectfully refers the Court to and relies upon the full text of the Formal Written Complaint, paragraphs 5 through 14, set forth as Exhibit A in the Return, which is annexed hereto, for a more complete and accurate statement.

17. Admits the allegations contained in paragraph 20 of the petition insofar as they allege that in numerous cases over a period of years, Petitioner awarded Mr. Lippman the maximum fee recommended by the Administrative Board Guidelines, regardless of the size or complexity of the estate, and otherwise denies the allegations as inaccurate or incomplete and respectfully refers the Court to and relies upon the full text of the Formal Written Complaint, paragraphs 5 through 14, set forth in the Return, for a more complete and accurate statement.

18. Denies information sufficient to form a belief as to the truth of the allegation in paragraph 21 that there has been no appeal of any legal fee fixed by the Petitioner and otherwise affirmatively states that no response is necessary to the remainder of paragraph 21 because it contains no additional allegations, but legal argument and to the extent that it may be construed as containing additional allegations, said allegations are denied.

19. Denies information sufficient to form a belief as to the truth of the allegation in paragraph 22 that Petitioner has never been advised that the affidavits of legal services submitted by Counsel to the Public Administrator were insufficient, and otherwise affirmatively states that no response is necessary to the remainder of paragraph 22 because it contains no additional allegations, but legal argument and to the extent that it may be construed as containing additional allegations, said allegations are denied.

20. Denies the allegations contained in paragraph 24 of the petition with respect to the "legal fee protocol" as inaccurate or incomplete and respectfully refers the Court to and relies upon the full text of the Formal Written Complaint, paragraphs 15 through 37, set forth in the Return, for a more complete and accurate statement, and otherwise affirmatively states that no response is necessary to the remainder of paragraph 24 because it contains no additional allegations, but legal argument and to the extent that it may be construed as containing additional allegations, said allegations are denied.

21. Admits the allegations contained in paragraph 25 of the petition insofar as they allege that Esther Rodriguez resigned from her position as Bronx Public Administrator and otherwise denies information sufficient to form a belief as to the remaining allegations, including the exact date of her resignation or the exact date Petitioner became aware that Mr. Lippman had taken advance legal fees.

22. Denies the allegations contained in paragraphs 26, 27, 28, 29 and 30 of the petition as inaccurate or incomplete and further respectfully refers the Court to and relies upon the full text of the Formal Written Complaint, paragraphs 15 through 24, set forth in the Return, for a more complete and accurate statement.

23. Admits the allegations contained in paragraph 31 of the petition insofar as they allege that Mr. Lippman was indicted in Bronx County, and, to the extent this paragraph seeks to characterize the Indictment, denies the allegations as incomplete and/or inaccurate and respectfully refers the Court to and relies upon the full text of the Indictment, attached to the Petition as Exhibit C, for a more complete and accurate statement and as the best evidence of what is contained therein.

24. Admits the allegations contained in paragraph 33 of the petition insofar as they allege that Mr. Lippman was subpoenaed to testify under oath during the Commission's investigation, that Mr. Lippman answered questions under oath and thereafter asserted his Fifth Amendment privilege, and otherwise denies information sufficient to form a belief as to Petitioner's "investigation," any alleged conversations between Mr. Lippman and Ms. Ross and/or the contents of an unspecified newspaper article.

25. Admits the allegations contained in paragraphs 34, 35, 36 and 37 of the petition insofar as they allege that Commission Administrator Robert H. Tembeckjian is married to Barbara Ross, who is a reporter for the New York Daily News, and admits that the Commission served a Formal Written Complaint upon Petitioner, affirmatively states that the Administrator never discussed the Petitioner, nor the Commission proceedings against him, nor the workings of the Bronx Surrogate's Court since Petitioner became Surrogate, with Barbara Ross, or anyone else at the Daily News. The Commission further admits that Nancie Katz has written articles on Petitioner and Mr. Lippman. The Commission affirmatively states that it commenced its investigation of the Petitioner based upon newspaper reports and the complaints of six individuals. To the extent that the remainder of these paragraphs contains allegations rather than

argument, denies those allegations. To the extent that the remainder of these paragraphs contain legal argument or Petitioner's characterization, no response is required and to the extent that a response may be deemed required, the Commission denies the same.

26. Admits the allegations contained in paragraph 38 of the petition insofar as they allege that Petitioner was served with a Formal Written Complaint dated January 4, 2011, and, to the extent this paragraph seeks to characterize the charges contained in the Formal Written Complaint, denies the allegations as incomplete and/or inaccurate and respectfully refers the Court to and relies upon the full text of the Formal Written Complaint, set forth in the Return, for a more complete and accurate statement and as the best evidence of what is contained therein.

27. Admits the allegations contained in paragraphs 39 and 40 of the petition insofar as they allege that on or about July 7, 2011, Michael Lippman was indicted in Bronx County and, to the extent this paragraph seeks to characterize the Indictment, denies the allegations as incomplete and/or inaccurate and respectfully refers the Court to and relies upon the full text of the Indictment, attached to the Petition as Exhibit C, for a more complete and accurate statement and as the best evidence of what is contained therein.

28. Denies knowledge and information sufficient to form a belief as to the truth of the allegations contained in paragraph 41 of the petition except refers the Court to the press release document, attached to the petition as Exhibit D, for a more complete and accurate statement and as the best evidence of what is contained therein.

29. Admits the allegations contained in paragraph 43 of the petition insofar as they allege that Mr. Lippman invoked his Fifth Amendment right while giving sworn testimony during the Commission's investigation, affirmatively states that Mr. Lippman answered

numerous questions about the issues raised in the Formal Written Complaint before invoking the privilege, and otherwise denies information sufficient to form a belief as to the truth of the remaining allegations in that paragraph.

30. Denies any and all other numbered or unnumbered paragraphs of the petition and denies each and every allegation of the petition except to the extent addressed herein.

31. Attached hereto for the Court's reference, and incorporated herein, are the affirmation of Robert H. Tembeckjian, dated July 28, 2011 ("Tembeckjian Aff."), and the Memorandum of Law on Behalf of the Commission in Opposition to Order to show Cause, dated July 28, 2011, which were previously filed in this action and which set forth the statutory, legal and factual background of this action.

Statutory and Regulatory Framework

32. The Commission is authorized by the New York State Constitution to "receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the Unified Court System." See Article 6, § 22.

33. The Commission's enabling statute is Judiciary Law, Article 2-A, §§ 40-48. The Commission is the sole state agency responsible for receiving, initiating and investigating complaints of misconduct or disability against the approximately 3,500 judges and justices of the New York State Unified Court System. See Tembeckjian Aff. ¶ 5. Commission staff may not investigate a complaint absent authorization of the Commission itself. See Tembeckjian Aff. ¶ 7.

34. After an investigation, when warranted, the Commission may initiate an accusatory instrument ("formal written complaint") against a judge and direct that a full

evidentiary hearing be held or, in lieu of a hearing, it may consider an agreed statement of facts submitted by its Administrator and the respondent-judge. See Judiciary Law §§ 44(4), 44(5), 44(6). During a hearing, the Administrator prosecutes the case and an independent Referee, appointed by the Commission, hears the matter and reports proposed findings of fact and conclusions of law to the Commission. See Judiciary Law § 43(2); 22 NYCRR §§ 7000.1(o); 7000.6(l).The Commission then considers the report and makes a final determination as to whether misconduct has occurred. See Judiciary Law § 44(7); 22 NYCRR § 7000.7.

35. At the end of such proceedings, the Commission has authority to render determinations of confidential caution, public admonition, public censure, removal or retirement from office. See Judiciary Law § 44; 22 NYCRR §§ 7000.1(m), 7000.7(d). Any judge or justice who is the subject of a public determination is entitled to review in the Court of Appeals. See Judiciary Law § 44 (7). Where the Commission determines to admonish, censure, remove or retire a judge, the determination and the record on review are transmitted to the Court of Appeals and, after service on the judge, are made public. See Judiciary Law § 44(7). Any judge who is the subject of a Commission determination may request review as of right in the Court of Appeals. See NY Const art VI, § 22(a); Judiciary Law § 44(7). The Court of Appeals has plenary power to review the legal and factual findings of the Commission. See Tembeckjian Aff. ¶ 11.

FOR A STATEMENT OF THE CASE,
RESPONDENT RESPECTFULLY ALLEGES:

36. All complaints received from the public or otherwise brought to the attention of the Commission by newspaper articles or other sources are referred to the full Commission for an initial determination of whether the complaint should be dismissed or investigated. See Tembeckjian Aff. ¶ 7.

37. Petitioner Lee L. Holzman has been a Judge of the Surrogate's Court, Bronx County, since 1988. Based on newspaper reports and the complaints of six individuals, the Commission opened an investigation into Petitioner's conduct regarding irregularities in procedure in matters pending before Petitioner's court.1 See Tembeckjian Aff. ¶ 13.

38. On January 4, 2011, the Commission served a formal written complaint ("Complaint") upon Petitioner, alleging four separate charges against him. A copy of the Complaint is annexed hereto as Exhibit A in the Return. In brief, the Complaint alleged that:

- from 1995 to 2009, in the specific cases listed in Schedule A of the Complaint, Petitioner approved legal fee applications, submitted by attorney Michael Lippman ("Lippman"), Counsel to the Bronx Public Administrator's Office, that were based on Lippman's boilerplate affidavits of legal service in violation of the requirements and statutory factors set forth in the Surrogates Court Procedures Act § 1108(2)(c);

- in 2005 and 2006, Petitioner failed to report Michael Lippman to law enforcement authorities or to the Departmental Disciplinary Committee upon learning that Lippman took unearned advance legal fees and/or excessive fees;

- from 1997 to 2005, Petitioner failed to adequately supervise and/or oversee the work of court staff and appointees, which resulted in fee abuses by Michael Lippman in the cases listed in Schedule B, C and D of the Complaint, delays in the administration of the specified estates listed in Schedule E of the Complaint, individual estates with negative balances, the Public Administrator placing estate funds in imprudent and/or unauthorized investments, and the Public Administrator employing her boyfriend who billed estates for services that were not rendered and/or overbilled estates;

- in 2001 and 2003, Petitioner failed to disqualify himself from cases in which Michael Lippman appeared, notwithstanding that Lippman raised more than $125,000 in campaign funds for Petitioner's 2001 campaign for Surrogate.

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1 Petitioner is currently a sitting judge. He may serve through December 31, 2012, at which time he will be required to retire because he will have reached the mandatory retirement age of 70.See Tembeckjian Aff., ¶ 12.When the Commission is unable to render a final determination in a pending matter before a judge's term expires, both the Commission and the Court of Appeals lose jurisdiction. Matter of Scacchetti v. New York State Commission on Judicial Conduct, 56 N.Y.2d 98 (1982).Thus, if the pending proceedings are dismissed or stayed indefinitely, the Commission may be deprived of jurisdiction on the charges against the Petitioner, and the public may thus denied a determination of matters of significant public concern.

39. On or about January 21, 2011, Petitioner answered the charges, denied the substance of the Complaint, and asserted three affirmative defenses: 1) that the Complaint failed to state a cause of action, 2) that the factual allegations in the Complaint were unconstitutionally vague, and 3) that the Complaint violated his due process rights. See Tembeckjian Aff., ¶ 18. The Commission assigned the Honorable Felice K. Shea as Referee to hear and report findings of fact and conclusions of law. Judge Shea is a former justice of the New York State Supreme Court and served as a judge for twenty-five years prior to her retirement.

40. Judge Shea scheduled a five-day hearing to commence on May 9, 2011. See Tembeckjian Aff., ¶ 19. In the course of this administrative proceeding, and in compliance with Judiciary Law § 44(4) and 22 NYCRR § 7000.6(h), the Commission provided discovery to Petitioner of all the relevant material the Commission intended to introduce at the hearing. The Commission supplied the Petitioner with copies of relevant documents from the case files of every estate included in the charges of the complaint. See Tembeckjian Aff., ¶ 22. Petitioner was also given the list of witnesses the Commission intended to call, copies of any written statements made by those witnesses and copies of any documents the Commission intended to introduce at the hearing and any material that would be exculpatory. See Tembeckjian Aff., ¶ 20. Among the witness statements Petitioner was given was the transcript of the statement given to the Commission by Michael Lippman. See Tembeckjian Aff., ¶ 21.

41. Michael Lippman ("Lippman") is currently facing criminal charges in Supreme Court, Bronx County. Lippman was indicted on July 7, 2010 on charges of fraud and grand larceny. His next appearance in Criminal Court is on September 20, 2011. See Petition, ¶ 2.

42. On February 2, 2011, Petitioner made a motion before the full Commission which sought the same relief requested in this proceeding: dismissal of the Complaint without prejudice to re-file or, in the alternative, for a stay of the Commission's proceeding. A copy of Petitioner's motion is annexed hereto as Exhibit C to the Return. Petitioner argued, as he does again here, that he cannot defend himself against the charges without the testimony of Michael Lippman and provided a letter from Lippman's counsel stating he had advised his client, if called to testify, to assert his Fifth Amendment privilege against self-incrimination. See Tembeckjian Aff., ¶¶ 24-25.

43. By a memorandum of law, dated February 25, 2011, Commission staff opposed Petitioner's motion, arguing that the motion was premature for the following reasons:1) Lippman could not exercise his Fifth Amendment privilege in advance; 2) the Referee had not yet had a chance to hear the Commission's case and to rule on whether Lippman's testimony would be relevant to Petitioner's case; and 3) it had not yet been determined whether Lippman waived his privilege by testifying under oath during the Commission's investigation. A copy of the Commission staff's opposition to Petitioner's motion to dismiss is annexed as Exhibit C to the accompanying Return. Commission staff also argued that Lippman's testimony was irrelevant to the proceeding because the allegations in the Complaint addressed Petitioner's conduct, not Lippman's. They further argued that the allegations at issue were largely based on documents filed in the Surrogate's Court which had been provided to Petitioner, and that Petitioner had failed to show why it was that Lippman's alleged criminal conduct could excuse Petitioner's own failure to act based on statutory requirements and the documentary evidence before him in Surrogate's Court. See Tembeckjian Aff., ¶ ¶ 27-28.

44. In addition to the motion, Petitioner, on March 7, 2011, wrote to the referee and requested an adjournment of the hearing until January 2012 in order to permit him sufficient time to review the discovery materials. The Referee adjourned the hearing until the week of September 12, 2011. See Tembeckjian Aff., ¶ 23.

45. On March 21, 2011, the Commission denied Petitioner's motion and referred the matter back to the Referee for the hearing. A copy of the Commission's determination is attached to the as Exhibit F to the Return. See Tembeckjian Aff., ¶ 29.

46. On July 13, 2011, Mark Levine, Deputy Administrator for the Commission's New York office and Alan Friedberg, Special Counsel to the Commission, participated in a pre-hearing telephone conference with Petitioner's counsel and the Honorable Felice K. Shea, Referee in the Commission proceeding. During that conference, when the Fifth Amendment issue was raised, Referee Shea stated and Petitioner's counsel concurred that:1) the Fifth Amendment issue was premature, 2) she would deal with it at the hearing if Lippman were called and asserted the privilege, and 3) a ruling on the relevancy of Lippman's testimony was also premature and would be considered after Commission counsel had presented its case during the September hearing. See Tembeckjian Aff., ¶ 30.

47. Petitioner is currently a sitting judge in the Surrogate's Court. He may serve through December 31, 2012, at which time he will be required to retire because he will have reached the mandatory retirement age of 70.See Tembeckjian Aff., ¶ 12.When the Commission is unable to render a final determination in a pending matter before a judge's term expires, both the Commission and the Court of Appeals lose jurisdiction. Matter of Scacchetti v. New York State Commission on Judicial Conduct, 56 N.Y.2d 98 (1982).Thus, if the pending proceedings are

dismissed or stayed, the Commission may be rendered unable to proceed on the charges against the Petitioner.

48. By order to show cause, dated July 19, 2011, Petitioner brought this Article 78 proceeding, seeking to stay or dismiss the pending charges against him, alleging that if subpoenaed to testify at Petitioner's disciplinary hearing, Lippman will assert his Fifth Amendment privilege and refuse to testify. Petitioner contends that Lippman is a critical witness to the disciplinary hearing and under these circumstances proceeding with the disciplinary hearing deprives Petitioner of the ability to mount a defense as to the charges against him in violation of Petitioner's constitutional right to due process.

49. The Commission opposes Petitioner's application as set forth in the Tembeckjian Affidavit, its accompanying memorandum of law, and as set forth below.

AS AND FOR A FIRST OBJECTION IN POINT OF LAW:

50. Petitioner has not established an entitlement to the issuance of a writ of prohibition. In order to obtain a writ of prohibition, Petitioner must demonstrate that he has a clear legal right to the relief he seeks. See Matter of Doe v Axelrod, 71 N.Y.2d 484, 490 (1988).

51. Additionally, even where a Petitioner has a clear legal right to relief, a writ of prohibition is only available when an agency acts or threatens to act either without jurisdiction or in excess of its authorized powers such that the actions of the agency "implicate the legality of the entire proceeding." See See Id.; see also Matter of Nicholson v. State Commission on Judicial conduct, 50 N.Y.2d 597 (1980); Neal v. White, 46 A.D.3d 156, 159 (1st Dep't 2007).

52. A writ of prohibition does not lie here because the Commission has full statutory authority to commence and proceed with disciplinary proceedings against Petitioner pursuant to

Judiciary Law, Article 2-A, §§ 40-48, and Petitioner has administrative and judicial remedies available to him within the context of those proceedings. See also N.Y. Const. Article 6, § 22.

53. Thus, Petitioner fails to meet the standard for the extraordinary relief he seeks because he has no clear right to have this Court interject itself into an ongoing administrative proceeding where, pursuant to Judiciary Law § 44(7), Petitioner has an adequate remedy in his ability to appeal the final administrative determination to the Court of Appeals.

AS AND FOR A SECOND OBJECTION IN POINT OF LAW:

54. Petitioner's claim for relief is not ripe for this Court's review. Administrative actions are not ripe for judicial review unless and until they impose or deny a right as a result of the administrative process. See Gordon v. Rush, 100 N.Y.2d 236, 242 (2003); see also Essex County v. Zagata, 91 N.Y.2d 447, 453 (1998). Additionally, judicial review of administrative decisions require that the decision maker arrive at a final and definitive position, on the relevant issue, that inflicts an actual concrete harm to the Petitioner. See Gordon,100 N.Y.2d at 242.

55. Here, Petitioner's challenge is not yet ripe for judicial review because at the time of this Petition, the disciplinary hearing has not commenced, the witness in question has not been called to testify and there is uncertainty as to whether his testimony will be necessary, which questions, if any, he will refuse to answer, whether the witness may have waived certain Fifth Amendment claims by virtue of his prior testimony before the Commission, and whether the Referee will grant any applicable motion Petitioner may make should the witness properly invoke his Fifth Amendment privilege. See Figueroa v. Figueroa, 160 A.D.2d 390, 391 (1st Dep't 1990)(noting that the privilege against self-incrimination may not be asserted or claimed in advance of questions actually propounded). Petitioner's claim, at this point, is speculative and

hypothetical and thus not ripe for review. See Matter of Tahmisyan v. Stony Brook University, 74 A.D.3d 829, 831 (2d Dep't 2010)(holding that an Article 78 proceeding, before the commencement of a disciplinary hearing, to prohibit the introduction of certain audiotape recordings into evidence was premature).

56. Moreover, the referee in this instance, the Honorable Felice K. Shea, an experienced jurist, has not made a final, determinative decision on this issue. Although a witness may invoke his Fifth Amendment right, a decision maker has wide discretion in fashioning the appropriate corrective response once this right is invoked. See People v. Visich, 57 A.D.3d 804, 805-06 (2d Dep't 2008); Allen v. Rosenblatt, 2004 WL 2589739 * 2 (Civ. Ct. N.Y. Co. 2004) (holding that, absent an affidavit in support of what the witness' testimony might be, the court could not determine whether the witness' testimony is critical or necessary).

AS AND FOR A THIRD OBJECTION IN POINT OF LAW:

57. A writ of prohibition does not lie here because Petitioner has an adequate alternative remedy in direct review by the Court of Appeals pursuant to Judiciary Law § 44(7).

58. Petitioner must exhaust all available administrative remedies before obtaining judicial review of this agency's actions. See e.g., Doe, 71 N.Y.2d at 490; DiBlasio v. Novello, 28 A.D.3d 339, 341 (1st Dep't 2006); Galin, 217 A.D.2d at 447.

59. Here, even if the Referee ultimately rules against Petitioner on his Fifth Amendment argument, there are several administrative procedures in place to review that decision, ultimately including a legal right to a review of the Commission's decision before the State's highest court. In the event that Petitioner disagreed with any Commission determination to impose public discipline, Petitioner would have a review, or appeal, as of right in the Court of

Appeals. See Judiciary Law § 44(7); Matter of Gilpatric, 13 N.Y.3d 586 (2009). Thus, because prohibition does not and cannot lie as a means of seeking collateral review for errors of law in the administrative process, the Petition must be denied. See Doe, 71 N.Y.2d at 490; Mulgrew v. Board of Educ. of City School Dist. of City of New York, 2011 WL 3189775 (1 Dep't July 28, 2011)(Under doctrine of exhaustion of administrative remedies, Article 78 petitioners should be compelled to utilize regulatory process to obtain a final administrative determination before seeking judicial review).

AS AND FOR A FOURTH OBJECTION IN POINT OF LAW:

60. The mere allegation of a constitutional due process violation does not excuse the Petitioner from pursuing the administrative remedies available to him. See Connerton v. Ryan, 2011 WL 2637500 *2 (3d Dep't 2011).

61. Furthermore, Petitioner has not and cannot set forth allegations demonstrating a due process violation. Petitioner has been provided with a list of all witnesses the Commission intends to call, copies of all written statements made by those witnesses, copies of any documents the Commission intends to introduce at the hearing and all material that would be exculpatory. Thus, the Commission has provided Petitioner with the "basic requisites" of due process: notice and an opportunity to be heard. See Velella v. New York City Conditional Release Com'n, 13 A.D.3d 201, 202 (1st Dep't 2004)(noting that there is no constitutional guarantee of any particular form of procedure).

62. Moreover, "[a] constitutional claim that may require the resolution of factual issues reviewable at the administrative level should not be maintained without exhausting administrative remedies." See Schulz v. State, 86 N.Y.2d 225, 232 (1995); Town of Oyster Bay

v. Kirkland, 81 A.D. 3d 812, 816 (2d Dep't 2011). Here, Petitioner's constitutional claim does not involve a purely legal question. Instead, Petitioner's challenge focuses on the resolution of a factual issue, specifically whether Lippman's testimony will be necessary, what Lippman will testify to, whether Lippman may assert a privilege and how the Referee will rule on any applications by the Petitioner. See Matter of East 51st Street Crane Collapse Litigation, 30 Misc.3d 521, 530-31 (Sup. Ct. N.Y. Co.)("determining whether the [Fifth Amendment] privilege is available in given circumstances ... involves a factual inquiry). This issue is reviewable at the administrative level and judicial intervention should not be maintained before Petitioner exhausts all of the remedies available to him.

63. Further, for due process purposes, there is "no legal cognizable injury to be suffered from being subjected to [a] disciplinary hearing with the possibility of a subsequent finding of professional misconduct." See Galin, 217 A.D.2d at 447; see also Doe, 71 N.Y.2d at 491(Simons, J., concurring)(noting that an agency's decision that ultimately affects the permissible scope of cross-examination in a hearing does not implicate the exception to the exhaustion doctrine). In light of the foregoing, Petitioner has not demonstrated that he is entitled to the extraordinary remedy of the issuance of a writ of prohibition.

AS AND FOR A FIFTH OBJECTION IN POINT OF LAW:

64. Petitioner fails to establish a reasonable basis for sealing the records of this Article 78 proceeding.

65. There is a strong presumption in favor of public access to court proceedings as a matter of public policy. Matter of Westchester Rockland Newspapers v. Leggett, 48 NY2d 430, 437-438 (1979). See also 22 NYCRR § 216.1(a). "Confidentiality is clearly the exception, not

the rule." In re Will of Hoffman, 284 AD2d 92, 93-94 (1st Dept. 2001).

66. Because the investigation of a judge is a matter of legitimate public concern, it necessary implicates the strong presumption in favor of public access to court proceedings See Nicholson v. State Commission on Judicial Conduct, 50 N.Y.2d 597, 612-13 (1980)(holding that the strict rules of confidentiality imposed on the Commission by Judiciary Law §§ 44 and 45 "appl[y] only to matters before the commission," not to Article 78 proceedings arising therefrom); see also Shelton v. New York State Commission on Judicial Conduct, Sup Ct, New York County, February 8, 2007, Index No. 118283/06 at 17.

AS AND FOR THE RETURN HEREIN:

67. Respondent sets forth as and for the return herein:

A. Notice of Formal Written Complaint and Formal Written Complaint dated January 4, 2011.

B. Verified Answer to the Formal Written Complaint dated January 21, 2011.

C. Petitioner's Motion to the Commission to Dismiss Formal Written Complaint dated February 2, 2011.

D. Commission staff's Affirmation and Memorandum of Law in Opposition to Petitioner's Motion to Dismiss dated February 25, 2011.

E. Petitioner's reply affirmation dated March 4, 2011.

F. Decision of the New York State Commission on Judicial Conduct dated March 21, 2011.

WHEREFORE, the Respondent respectfully requests judgment denying the relief requested by Petitioner in its entirety and dismissing the Petition.

DATED: August 10, 2011
New York, New York

ERIC T. SCHNEIDERMAN
Attorney General of the
State of New York
Attorney for Respondents

BY: _____
Monica Connell
Assistant Attorney General
of Counsel
120 Broadway, 24th Floor
New York, New York 10271
Telephone: (212) 416-8965/8552

TO: David Godosky, Esq.
Godosky & Gentile, P.C.
Attorneys for Petitioner
61 Broadway, Suite 2010
New York, New York 10006

EXHIBIT D

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 5

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In the Matter of the Application of
The Honorable Lee L. Holtzman.

Index No. 108251/11

Petitioner,

Mot. Subm.: 8/12/11
Mot. Seq. No.: 001

- against -

The Commission on Judicial Conduct.

Respondent.

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

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BARBARA JAFFE, JSC:

For petitioner:
David Godosky, Esq.
Godosky & Gentile, P.C.
61 Broadway
New York, NY 10006
212-742-9700

For respondent:
Monica Connell, AAG
Michael Siuczinski, AAG
Eric T. Schneiderman
Attorney General of the State of NY
120 Broadway, 24th Fl.
New York, NY 10271
212-416-8965/8552

By order to show cause dated July 29, 2011, petitioner brings this Article 78 proceeding seeking an order directing respondent to dismiss the complaint filed against him without prejudice to re-filing it upon the conclusion of a related criminal trial or, in the alternative, directing a stay of the disciplinary proceeding against him pending the conclusion of the trial. Respondent opposes.

I. BACKGROUND

By Notice of Formal Written Complaint dated January 4, 2011, respondent charged petitioner, Judge of the Surrogate's Court, Bronx County, with judicial misconduct as follows: (1) from 1995 to April 2009, petitioner approved legal fees payable to Michael Lippman,

Counsel to the Bronx Public Administrator's Office, in numerous cases based on insufficient boilerplate affidavits of legal services and without consideration of statutory factors; (2) in 2005 and 2006, despite knowing that Lippman had taken unearned advance legal fees without court approval and/or excessive fees, petitioner failed to report Lippman to law enforcement authorities or the Appellate Division, First Department Disciplinary Committee and continued to award Lippman legal fees; and (3) from 1997 to 2005, petitioner failed to supervise the work of court staff and appointees adequately, including but not limited to Public Administrator Esther Rodriguez, resulting in (a) Lippman improperly taking advance legal fees, (b) delays in the administration of estates, (c) numerous individual estates with negative balances, (d) estate funds being placed in imprudent and/or unauthorized investments, and (e) the Public Administrator's employment of a close acquaintance who billed estates for services that were not rendered and/or overbilled estates. (Petition, dated July 19, 2011 [Pet.]).

Lippman was indicted on criminal charges related to the allegations against petitioner. The criminal matter against Lippman will next be heard on September 20, 2011 in Supreme Court, Bronx County. (*Id.*, Exh. C).

By decision and order dated March 21, 2011, respondent denied petitioner's motion to dismiss the disciplinary proceeding against him or stay it pending Lippman's criminal matter. (*Id.*, Exh. A). A disciplinary hearing is scheduled for September 12, 2011. (*Id.*).

II. CONTENTIONS

Petitioner alleges that respondent's decision to proceed with the disciplinary hearing against him notwithstanding the pendency of the criminal action against Lippman deprives him of his constitutional right to mount a defense, as he is unable to access documents and evidence

within the control of the prosecution in the criminal action, and to confront or cross-examine Lippman, who he alleges is the actual wrongdoer. According to petitioner, Lippman will invoke his right against self-incrimination if called as a witness in the disciplinary proceeding, as evidenced by the affidavit of Lippman's attorney, who states that if Lippman is called to testify in the disciplinary proceeding, he "would advise [Lippman] to exercise his constitutional rights to refuse to answer any such questions under the Fifth Amendment." (Pet., Exh. E). Petitioner also asserts that as his term will not expire until December 2012, respondent will have ample time to conclude the proceeding and will thus not be prejudiced by a limited stay, whereas he will be severely prejudiced if the disciplinary proceeding is not stayed. (*Id.*).

Respondent maintains that petitioner's claim is premature as it has made no decision that actually harms him; that Lippman may not assert his fifth amendment right before he is called as a witness, and that in the event Lippman refuses to testify, respondent will then be able to fashion an appropriate remedy to protect petitioner's rights. It denies that petitioner will be unable to present a defense absent Lippman's testimony as the charges against petitioner relate to his conduct and not Lippman's. (Mem. of Law, dated July 28, 2011).

III. ANALYSIS

Generally, a witness may only invoke the privilege against self-incrimination when asked a potentially incriminating question, and thus the privilege may not be invoked in advance. (*People v Laino*, 10 NY2d 161 [1961], *lv denied and cert denied* 374 US 104 [1963]; *Application of Waterfront Commn. of New York Harbor*, 245 AD2d 63 [1st Dept 1997], *lv denied* 93 NY2d 931 [1999]; *Figueroa v Figueroa*, 160 AD2d 390 [1st Dept 1990]).

In Britt v Intl. Bus Servs., Inc., the court observed that a compelling factor in determining whether to stay a civil action pending the resolution of a related criminal action is where a defendant in the civil action will invoke his or her right against self-incrimination. (255 AD2d 143 [1st Dept 1998]). There, a bus passenger sued the bus owner and bus driver for negligence. Criminal charges pended against the driver, and the driver's attorney "indicated that [the driver] clearly intends to invoke his right against self incrimination given the severity of the pending criminal charges against him." Based on the affirmation, the court found that the defendant bus owner demonstrated that without the driver's "critical and necessary" testimony, he would be unable to present an adequate defense, and thus a stay of the civil action was warranted.

Here, petitioner has not shown that Lippman will refuse to testify if called as a witness absent an affidavit from Lippman and given Lippman's attorney's affirmation in which he states only that he will advise Lippman not to testify, not that Lippman will in fact refuse to testify. Thus, petitioner's application is premature.

Moreover, it has been held that a disciplinary or administrative proceeding need not be stayed pending the conclusion of a related criminal proceeding. (*See Chaplin v New York City Dept. of Educ.*, 48 AD3d 226 [1st Dept 2008]; *Matter of Watson v City of Jamestown*, 27 AD3d 1183 [4th Dept 2006]; *Matter of Mountain*, 89 AD2d 632 [3rd Dept 1982]; *Espada 2001 v New York City Campaign Fin. Bd.*, 15 Misc 3d 647 [Sup Ct, New York County 2007], *affd* 59 AD3d 57 [1st Dept 2008]; *In re Geary*, 80 Misc 2d 963 [Sup Ct, Westchester County 1975]).

While petitioner relies on *Access Capital, Inc. v DeCicco*, for the proposition that "[i]n the context of civil litigation, a discretionary stay is appropriate to avoid prejudice to another party that would result from the assertion of the privilege against self-incrimination by a

witness," the proposition constituted only dicta as the issue decided therein was whether the defendant was entitled to a stay of the plaintiff's motion for summary judgment against him while criminal proceedings pended against him. (302 AD2d 48 [1st Dept 2002]).

In light of this result, I need not consider the parties' remaining arguments.

IV. CONCLUSION

Accordingly, it is hereby

ADJUDGED and ORDERED, that the petition is denied and the proceeding is dismissed.

ENTER:

Barbara Jaffe, JSC

BARBARA JAFFE
J.S.C.

DATED: September 8, 2011
New York, New York

SEP 08 2011

EXHIBIT E

[redacted]

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ALIAS

At Part 5 of the Supreme Court of the State of New York, held in and for the County of New York, on the 12th day of September, 2011

121803

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

BARBARA JAFFE J.S.C.

Hon. Barbara Jaffe

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Index No. 108251/11

In the Matter of the Application of
The Honorable Lee L. Holzman,

FEE PAID SEP 12 2011 NEW YORK COUNTY CLERK'S OFFICE

Petitioner,

-against-

The Commission on Judicial Conduct,

Respondent.

ORDER TO SHOW CAUSE

FEE PAID SEP 12 2011 NEW YORK COUNTY CLERK'S OFFICE

Oral Argument is Requested

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

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UPON, the annexed affirmation of David Godosky, Esq., dated September 9, 2011, and the affidavit of Michael Lippman, sworn to on September 9, 2011 and, the proceedings had herein,

IT IS HEREBY ORDERED, that the Respondent, The Commission on Judicial Conduct (hereinafter "Commission") or counsel, appear and Show Cause at the Part 5 of the Supreme Court, New York County, located at 80 Centre Street, New York, New York, on the 21st day of September 2011, at 9:30 o'clock in the forenoon of that day, or as soon as thereafter the matter may be heard why an Order should not be entered granting Petitioner's application:

1. Pursuant to Article 78, directing the State Commission on Judicial Conduct to Dismiss the Complaint filed against Petitioner, without prejudice to re-file upon the conclusion of a related criminal trial or, in the alternative, directing a stay of the disciplinary proceedings against Petitioner pending the conclusion of a related criminal trial;

2. That pending the hearing and determination of this application, the Respondent, The Commission on Judicial Conduct be enjoined from proceeding with the prosecution of the Petitioner;

3. That the papers in this matter be sealed pursuant to §216.1 of the Uniform Rules for New York State Trial Courts and Judiciary Law §44(4).

4. For such other, further and different relief as this Court may seem just, proper and equitable.

BARBARA JAFFE J.S.C.

IT IS FURTHER ORDERED, that pending a hearing on this application for a stay of the proceedings before the Commission that a temporary stay of the proceedings set to commence on Monday, September 12, 2011 is issued until ~~such time as this application is fully and finally determined;~~ Sept 20, 2011 and

BARBARA JAFFE J.S.C.

J.S.C.

II IT IS FURTHER ORDERED that the Respondent be enjoined and restrained from proceeding with the matter before the Commission against the Petitioner, and, Pending the hearing of this motion

J.S.C.

III IT IS FURTHER ORDERED that this proceeding and all papers submitted for the court's consideration be permanently sealed as it relates directly to a matter before the Commission which is sealed unless a finding against the Petitioner is made therein. That the Clerk of the Court is to restrict the Court file to everyone except the parties, their attorneys and Court personnel.

BARBARA JAFFE J.S.C.

on consent

J.S.C.

Responsive papers to be filed served on or before Sept 16 2011;

This is a special proceeding for a Writ of Mandamus and/or a Writ of Prohibition.

LET service of a copy of the Order, the Petition and Supporting documents upon which it is granted by ___ Return date Sept 21 at 2:30 _____, upon the Commission On Judicial Conduct at 61 Broadway, New York, NY, and Eric Schneiderman, The Attorney General at 120 Broadway, New York, NY, on or before September 13, 2011 be deemed good and sufficient service.

A previous application for the relief demanded herein has been made to this court and Judge who determined that said application was premature. It is no longer premature as per the Order of Judge Barbara Jaffe annexed hereto.

J.S.C.

BARBARA JAFFE
J.S.C.

SEP 1 2 2011

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

----------X Index No. 108251/11

In the Matter of the Application of
The Honorable Lee L. Holzman,

Petitioner,

-against-

The Commission on Judicial Conduct,

Respondent.

For a Judgment Pursuant to Article 78
of the Civil Practice Law and Rules

----------X

DAVID GODOSKY, an attorney duly admitted to the practice of law in the courts of the State of New York, affirms the following under the penalties of perjury:

1. I am an attorney associated with the firm of Godosky & Gentile, P.C., attorneys for the petitioner herein. I submit this affirmation in support of the Order to Show Cause seeking a temporary stay of the matter pending in the Commission.

2. As per this Court's Order dated September 8, 2011, (attached hereto as Exhibit "A") the application made in the initial petition was premature in that Michael Lippman had not as of then invoked his Fifth Amendment right not to testify on matters that might tend to incriminate himself.

3. In following the Court's decision, it would appear that Mr. Lippman's attorney's affirmation does not suffice to meet the standard necessary to establish that Mr. Lippman would in fact assert his Fifth Amendment rights at the hearing before the commission.

4. As such, rather than wait until Mr. Lippman actually takes the stand at which time the prejudice to the petitioner would have already occurred, I have followed the Court's prior

Order and I am submitting an affidavit of Mr. Lippman.

5. I am submitting herewith and annexed hereto, an affidavit of Michael Lippman indicating that he has, in fact, elected to assert his Fifth Amendment right not to incriminate himself at the hearing conducted by the Commission. Exhibit "B".

6. Under these circumstances and in conformity with this Court's decision, it is respectfully submitted that the issue is now ripe for determination by the Court.

7. Attached hereto as Exhibit "C" is the initial Petition and supporting documentation.

8. Attached hereto as Exhibit "D" is the opposition submitted on behalf of the Respondent.

9. For the reasons set forth in the Petition and consistent with this Court's Order of September 8, 2011, this application is ripe and ought to be heard. Additionally, a temporary injunction restraining the commission from proceeding with the hearing on Monday, September 12, 2011, should be issued.

WHEREFORE, it is respectfully submitted that the application be granted, that a temporary stay be Ordered enjoining and restraining the hearing from proceeding and that a briefing schedule on a permanent stay be issued.

Dated: New York, New York
September 9, 2011

DAVID GODOSKY

EXHIBIT F

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT
----------X

In the Matter of the Proceedings Pursuant
to Section 44, subdivision 4, of the
Judiciary Law in Relation to

LEE L. HOLZMAN,

a Judge of the Surrogate's Court,
Bronx County.

----------X

AFFIDAVIT OF
MICHAEL LIPPMAN

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

MICHAEL LIPPMAN, being duly sworn, deposes and says:

1. I have been subpoenaed by counsel to Surrogate Holzman to testify in the above-captioned matter.

2. I am electing to and will assert my constitutional rights to remain silent and not answer questions under the Fifth Amendment to the United States Constitution and under the relevant provisions of the Constitution of the State of New York.

MICHAEL LIPPMAN

Sworn to before me this
9th day of September 2011

Notary Public

MICHAEL S. ROSS
NOTARY PUBLIC-STATE OF NEW YORK
No. 02RO4796233
Qualified in Nassau County
My Commission Expires January 08, 2014

EXHIBIT G

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. BARBARA JAFFE PART 5

Justice

In the Matter of the Application of the Honorable Lee L. Holtzman,

Petitioner,

-v-

The Commission on Judicial Conduct,

Respondent.

For a Judgment Pursuant to Article 78 of the Civil Practice Law and Rules.

INDEX NO. 108251/11

MOTION DATE 9/21/11

MOTION SEQ. NO. 002

The following papers, numbered , were read on this motion to renew:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause -- Affidavits — Exhibits ...	1
Answer — Affidavits — Exhibits	2, 3
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

By order to show cause dated September 12, 2011, petitioner moves for an order staying the disciplinary proceeding presently pending. Respondent opposes.

Although petitioner now offers the affidavit of Michael Lippman, who attests that he will invoke his fifth amendment right against self-incrimination if called as a witness in petitioner's disciplinary proceeding given the criminal case presently pending against him in Supreme Court, Bronx County, the absence of the affidavit was not the sole ground for the denial of petitioner's motion for a stay. Moreover, having temporarily stayed the instant matter on September 12, 2011 for 10 days given the parties' representation that the criminal trial of Michael Lippman was scheduled to commence on September 20, 2011, and as the criminal case was not scheduled for trial but for a decision on the omnibus motion, and as the criminal trial will not go forward until November 1, 2011 at the earliest, and likely not until January 2012, it is hereby

ORDERED that petitioner's motion for a stay of the disciplinary proceeding is denied.

Dated: 9/21/11

J.S.C. BARBARA JAFFE J.S.C.

Check one: ☑ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

DATED: J.S.C.

GODOSKY & GENTILE, P.C.

Index No. 108251/2011 *Year 20*

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FIRST DEPARTMENT

In the Matter of the Application of THE HONORABLE LEE L. HOLZMAN,

Petitioner-Appellant,

-against-

THE COMMISSION ON JUDICIAL CONDUCT,

Respondent-Respondent.

NOTICE OF MOTION; AFFIRMATION IN SUPPORT

Attorney for

LAW OFFICES
GODOSKY & GENTILE, P.C.
Petitioner-Appellant
61 BROADWAY
NEW YORK, NEW YORK 10006
(212) 742-9700

Pursuant to 22 NYCRR 130-1.1-a, the undersigned, an attorney admitted to practice in the courts of New York State, certifies that, upon information and belief and reasonable inquiry, (1) the contentions contained in the annexed document are not frivolous and that (2) if the annexed document is an initiating pleading, (i) the matter was not obtained through illegal conduct, or that if it was, the attorney or other persons responsible for the illegal conduct are not participating in the matter or sharing in any fee earned therefrom and that (ii) if the matter involves potential claims for personal injury or wrongful death, the matter was not obtained in violation of 22 NYCRR 1200.41-a.

Dated: ..... Signature .....

Print Signer's Name .....

Service of a copy of the within *is hereby admitted.*

Dated:

Attorney(s) for

PLEASE TAKE NOTICE

Check Applicable Box

☐ NOTICE OF ENTRY *that the within is a (certified) true copy of a entered in the office of the clerk of the within-named Court on* *20*

☐ NOTICE OF SETTLEMENT *that an Order of which the within is a true copy will be presented for settlement to the Hon. , one of the judges of the within-named Court, at on 20 , at M.*

Dated:

LAW OFFICES
GODOSKY & GENTILE, P.C.

Attorney for

To:

61 BROADWAY
NEW YORK, NEW YORK 10006
(212) 742-9700

Attorney(s) for

STATE OF NEW YORK, COUNTY OF ss:

I, the undersigned, am an attorney admitted to practice in the courts of New York, and

Check Applicable Box

☐ Attorney's Certification — certify that the annexed has been compared by me with the original and found to be a true and complete copy thereof.

☐ Attorney's Verification by Affirmation — say that: I am the attorney of record, or of counsel with the attorney(s) of record, for . I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true. My belief, as to those matters therein not stated upon knowledge, is based upon the following.

The reason I make this affirmation instead of is

I affirm that the foregoing statements are true under penalties of perjury.
Dated:

.....
(Print signer's name below signature)

STATE OF NEW YORK, COUNTY OF ss:

being sworn says: I am

Check Applicable Box

☐ Individual Verification — in the action herein; I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

☐ Corporate Verification — the of a corporation, one of the parties to the action; I have read the annexed know the contents thereof and the same are true to my knowledge, except those matters therein which are stated to be alleged on information and belief, and as to those matters I believe them to be true.

My belief, as to those matters therein not stated upon knowledge, is based upon the following:

Sworn to before me on , 20

.....
(Print signer's name below signature)

.....

STATE OF NEW YORK, COUNTY OF ss:

being sworn says: I am not a party to the action, am over 18 years of age and reside at

On , 20 , I served a true copy of the annexed in the following manner:

Check Applicable Box

☐ Service by Mail — by mailing the same in a sealed envelope, with postage prepaid thereon, in a post-office or official depository of the U.S. Postal Service, addressed to the address of the addressee(s) indicated below, which has been designated for service by the addressee(s) or, if no such address has been designated, is the last-known address of the addressee(s):

☐ Personal Service — by delivering the same personally to the persons at the address indicated below:

☐ Service by Facsimile — by transmitting the same to the attorney by facsimile transmission to the facsimile telephone number designated by the attorney for that purpose. In doing so, I received a signal from the equipment of the attorney served indicating that the transmission was received, and mailed a copy of same to that attorney, in a sealed envelope, with postage prepaid thereon, in a post office or official depository of the U.S. Postal Service, addressed to the address of the addressee(s) as indicated below, which has been designated for service by the addressee(s) or, if no such address has been designated, is the last-known address of the addressee(s):

☐ Service by Electronic Means — by transmitting the same to the attorney by electronic means upon the party's written consent. In doing so, I indicated in the subject matter heading that the matter being transmitted electronically is related to a court proceeding:

☐ Overnight Delivery Service — by depositing the same with an overnight delivery service in a wrapper properly addressed, the address having been designated by the addressee(s) for that purpose or, if none is designated, to the last-known address of addressee(s). Said delivery was made prior to the latest time designated by the overnight delivery service for overnight delivery. The address and delivery service are indicated below:

Sworn to before me on , 20

.....

.....
(Print signer's name below signature)