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

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

Petitioner,

-against-

Index No. 108251/2011

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 PETITIONER'S SECOND ORDER TO SHOW CAUSE

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
(212) 416-8965/8552

MONICA CONNELL
Assistant Attorney General

MICHAEL SIUDZINSKI
Assistant Attorney General
of Counsel

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Preliminary Statement

Petitioner the Honorable Lee L. Holzman ("Petitioner") brings this motion to renew by order to show cause seeking reconsideration of this Court's September 8, 2011 Order which dismissed Petitioner's Article 78 petition which sought a writ of prohibition: 1) directing the New York State Commission on Judicial Conduct ("Commission") to dismiss the formal written complaint ("Complaint") 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 the application for relief; and 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).[1] See Petition, Wherefore Clause.

In support of this extraordinary re-application for the identical relief previous denied to him, Petitioner has provided a two paragraph affidavit from attorney Michael Lippman which petitioner claims requires this Court to vacate to modify its September 8th Order. Petitioner is mistaken.

The Commission submits this memorandum of law in opposition to the order to show cause. Because petitioner provides no justification for failing to present this evidence to the courts on his prior motion, his application must be denied as a matter of law. CPLR Rule 2221(e). Furthermore, the affidavit neither renders his claims ripe nor entitles him to relief pursuant to CPLR Article 78 and thus his renewal application must be dismissed pursuant to CPLR Rule 2221(e). Additionally, to the extent that Petitioner seeks a stay of the disciplinary proceedings beyond the September 20, 2011 temporary stay imposed by this Court, he is not entitled to such injunctive relief because he cannot show irreparable injury; a likelihood of success on the merits of either his renewal application or his already-dismissed Article 78 proceeding; or a balancing of the equities in his favor. As a result, Petitioner's renewal application should be denied.

STATEMENT OF THE CASE

The relevant legal and factual background of this case are set forth in the papers previously filed by the Commission in opposition to Petitioner's first order to show cause which are annexed as Exhibit 1 to the accompanying Affidavit of Mark Levine, Deputy Administrator for the New York State Commission on Judicial Conduct ("Levine Aff."), including the affirmation of Robert H. Tembeckjian ("Tembeckjian Aff.") dated July 28, 2011, and the accompanying Memorandum of Law dated July 28, 2011. For the Court's

1 Petitioner has withdrawn his request for sealing of these records.

convenience, however, 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 New York State Constitution, art. 6, § 22; see also Judiciary Law, article 2-A, §§ 40-48.

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.

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

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. 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. On July 7, 2010, Lippman was indicted on charges of fraud and grand larceny. Upon information and belief, his criminal case is next scheduled on the calendar in Supreme Court, Bronx County, Part 60, on September 20, 2011, for

decision on omnibus motions filed by the parties and no trial date has been set. See Petition, ¶ 2; Levine Aff., ¶ 3.

On February 2, 2011, Petitioner made a motion before the 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 did in the instant Article 78 proceeding, that he cannot defend himself against the disciplinary 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 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. 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. By determination dated March 21, 2011, the Commission denied Petitioner's motion and referred the matter back to the Referee for the hearing. See Verified Petition, Exhibit A.

On July 13, 2011, Deputy Administrator Mark Levine and Alan Friedberg, Special Counsel to the Commission, participated in a pre-hearing telephone conference with Petitioner's counsel and the Referee Shea. 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 review and rule on the matter 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.

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.

Petitioner's Previous Application

By order to show cause dated July 19, 2011 and petition, Petitioner sought to stay or dismiss the pending charges against him. Petitioner alleged, based upon a statement from Lippman's attorney, that if subpoenaed to testify at Petitioner's disciplinary hearing, attorney Michael Lippman will assert his Fifth Amendment privilege and refuse to testify. Petitioner contended that Lippman is a critical witness to the disciplinary hearing and under these circumstances proceeding with the disciplinary hearing would deprive Petitioner of the ability to mount a defense in violation of Petitioner's constitutional right to due process. See Petition ¶¶ 2, 61-63.

The Commission opposed Petitioner's application. See Levine Aff., Exhibit 1. The Commission argued that the Petitioner's claims were not ripe for review; that the Petitioner had not set forth basis for the issuance of a stay because he could not demonstrate irreparable injury or likelihood of success on the merits; and that there was no basis for sealing the court records. See Levine Aff., Exhibit 1 (The Commission's papers in opposition to the Petition).

By decision and order dated September 8, 2011, this Court denied Petitioner's request for emergency injunctive relief and dismissed Petitioner's special proceeding, holding, inter alia, that "[g]enerally, 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". See Exhibit A to the Affirmation of Godosky in Support of Petitioner's Second Order to Show Cause, at p. 3. The Court noted that Petitioner had not shown that Lippman will refuse to testify when called, "absent an affidavit from Lippman" and thus the application was premature. Id. at p. 4. The Court noted, citing precedent, that a disciplinary or administrative hearing need not be stayed pending the conclusion of even a related

criminal proceeding and held that in light of the foregoing, it need not reach the parties' remaining arguments. See Id. at pp. 4-5.

Following dismissal of the Petitioner's Article 78 proceeding, the disciplinary proceedings against Judge Holzman commenced as scheduled on September 12, 2011.

Petitioner's Instant Order to Show Seeking to Renew His Prior Motion

By order to show cause dated September 12, 2011, Petitioner now seeks to renew his prior claims. Although not specifically entitled a renewal motion, Petitioner's application asks the court to reconsider, vacate or modify its order dismissing the proceeding based entirely upon a two paragraph affidavit from Michael Lippman which states "I have been subpoenaed by counsel to Surrogate Holzman to testify in [the disciplinary proceedings]....I am electing to and will assert my constitutional right 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." See Exhibit B to the Affirmation of Godosky in Support of Petitioner's Second Order to Show Cause.

Petitioner argues, without citation, that this summary affidavit is sufficient to render Petitioner's dismissed Article 78 petition ripe for review and presumably to entitle him to relief. See Affirmation of David Godosky date September 9, 2011. Pursuant to this Court's September 12, 2011 order, the disciplinary proceedings have been stayed until September 20, 2011.

For the reasons set forth below, Petitioner's motion to renew must be denied and therefore the stay should not be either continued or extended.

ARGUMENT

POINT I

PETITIONER'S APPLICATION MUST BE DENIED BECAUSE HE FAILS TO COMPLY WITH THE STATUTORY REQUIREMENTS FOR A RENEWAL APPLICATION.

A motion to renew a previous application is "granted sparingly" and is not "a second chance freely given to parties who have not exercised due diligence in making their first factual presentation." Henry v. Puero, 72 A.D.3d 600 (1st Dep't 2010)(Internal quotations and citations omitted). Pursuant to CPLR Rule 2221(e), in order to seek reconsideration of an order "based upon new facts not offered on the prior motion that would change the prior determination", as Petitioner does here, the Petitioner must specifically identify the motion as such and must provide a "reasonable justification for the failure to present such facts on the prior motion."

Where a party fails to provide a reasonable justification for its failure to present the "new" evidence in its prior motion, an application for renewal is properly denied. See Gassab v. R.T.R.L.L.C., 69 A.D.3d 511 (1st Dep't 2010); Mount Sinai Hosp. v. Country Wide Insurance, 85 A.D.3d 1136 (2d Dep't 2011). For example, in Henry v. Puero, the Appellate Division, First Department reversed the Supreme Court's grant of a motion to renew and reargue where the basis for a reconsideration was an affidavit which could have been part of the original motion, finding that the granting of renewal contravened the Court's "policy of confining motion practice to the limits imposed by the CPLR." 72 A.D.3d at 602-03. Generally, a deficiency in a motion papers may not be cured or a motion re-litigated matter re-litigated through the submission of a renewal motion because the consideration of "new" evidence is available only in rare instances. Henry v.

Puero, 72 A.D.3d at 602. This is not such a rare instance. Here, Petitioner's failure to obtain an affidavit he alleges entitles him to relief as part of his prior motion practice is unexplained and must result in the denial of his motion.

POINT II

THE NEWLY-PROFFERED AFFIDAVIT OF MICHAEL LIPPMAN DOES NOT PROVIDE A BASIS FOR A CHANGE IN THIS COURT'S PRIOR DETERMINATION.

A. Standard of Review

In order to be entitled to renew his application for a dismissal or stay of the disciplinary proceedings, Petitioner must establish that the new evidence he offers would have changed the Court's prior determination had it been offered as part of the earlier application. See CPLR Rule 2221 (e)(2); Henry v. Puero, 72 A.D.3d at 603. Here, the Court's September 8th decision noted that Petitioner's application lacked even an affidavit from Lippman stating that he would assert his Fifth Amendment privilege. However, the provision of the brief Lippman affidavit now, even if Petitioner could explain the delay, does not remedy the defects in his previous application or provide a basis for this Court to modify its September 8th decision.

Petitioner asks this Court to revive and grant his Article 78 petition which sought the issuance of a writ of prohibition. In order to obtain the extraordinary relief of a writ of prohibition, Petitioner must demonstrate that he has a clear legal right to the relief he seeks. Matter of Doe v. Axelrod, 71 N.Y.2d 484, 490 (1988). 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).

B. Lippman's Affidavit Does Not Render Petitioner's Claim 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). Here, the Commission has statutory authority to commence disciplinary proceedings against the Petitioner. See N.Y. Const. art. 6, § 22; see also Judiciary Law §§ 40-48; Galin v. Chassin, 217 A.D.2d 446, 447 (1st Dep't 1995)("courts are constrained not to interject themselves into ongoing administrative proceedings until final resolution of those proceedings before the agency.")

Here, there has been no final agency action. Instead, Petitioner's renewal application, like his previous application, rests upon numerous assumptions and hypothetical situations.

The Commission's staff has only initiated and not completed its case against Petitioner. Petitioner assumes that when that is done, he will need to mount a defense and will need to call Lippman to testify on his behalf. He assumes that Lippman will be asked questions to which he could properly assert his Fifth Amendment privilege and that Lippman's refusal to testify in regard to these hypothetical matters would be so substantive that they would justify the dismissal or a stay the proceedings. Petitioner assumes that if this occurs, the Referee will not rule in his favor on any applications that Petitioner may make at that time. Petitioner assumes that if dissatisfied with the proceedings before the Referee, his rights of appeal within the administrative scheme established by the Legislature, which includes a review as of right to the Court of Appeals, will be insufficient to vindicate his rights.

Most incredibly, Petitioner asks this court to indefinitely stay the proceedings because there may be some unspecified time in the future wherein Lippman will not assert his Fifth Amendment rights when questioned about his conduct before the Surrogate's Court. It is respectfully submitted that this, alone is an insupportable assumption. The resolution of the criminal proceedings before the Supreme Court, Bronx County at the present time will not preclude Lippman from asserting the Fifth Amendment privilege because his testimony could theoretically implicate himself in other or further criminal charges arising out of his conduct.[2] 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

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2 As set forth in the accompanying affirmation of Mark Levine, a trial date how apparently not even been set in Michael Lippman's criminal case. It appears that the case of People v. Michael Lippman is next on the calendar in Supreme Court, Bronx County, Part 60, on September 20, 2011, for a decision on omnibus motions filed by the parties. There is no evidence that this criminal case is almost over, or that if it ended in a conviction, an appeal would not ensue. Furthermore, even if the current pending prosecution ended, if Lippman's proposed testimony before the Commission is likely to incriminate him, there is no evidence that Lippman would not assert his Fifth Amendment privilege out of concern of other or further prosecution.

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). In fact, as demonstrated by a copy of Lippman's indictment included in Exhibit C to Petitioner's First Order to Shoe Cause, the pending charges against Lippman only relate to five of the estates he handled. Notably, Lippman's affidavit does not state when he will be willing to testify without asserting a privilege.

These assumptions are highly speculative and demonstrate that Petitioner's claim is not justiciable because it is not yet ripe. 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).

The Lippman affidavit stating that he will assert his Fifth Amendment privilege does not render Petitioner's claims ripe because the privilege cannot properly be asserted until a question has been asked. 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. Therefore, it is unclear what questions, if any, Lippman would refuse to answer. 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).

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. At most, the disciplinary hearing has been commenced without Petitioner knowing if he will ultimately be able to call Lippman as a witness at the time when he will be required to present his defense.

In light of the foregoing, Petitioner's election to belatedly submit an affidavit from Lippman stating that he will not testify does not in any way render his claims ripe.

C. Lippman's Affidavit Does Not Permit Petitioner to Evade the Requirement that He Exhaust All Available Administrative Remedies before Seeking Judicial Review of Administrative Determinations

Nor does Lippman's affidavit remedy Petitioner's failure to exhaust his administrative remedies. 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. See Judiciary Law § 44. 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.

Lippman's statement that he will not testify does not exempt Petitioner from the exhaustion requirement. 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's election to provide a brief and conclusory affidavit from Lippman does not establish that he is entitled to an order either dismissing ot indefinitely

staying the disciplinary proceedings. 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. The charges 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. Even if Lippman were to testify that the Petitioner had no knowledge of his wrongdoings, this testimony would not excuse Petitioner's possible liability for failing to abide by the statutory requirements. Given the charges, Petitioner may put forth a defense without 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. Petitioner's rights would be fully protected because RefereeShea, a former justice of the Supreme Court, is present to hear and rule on any application Petitioner may make.

Even if Petitioner disagreed with any ruling by the Referee relating to Lippman's testimony, he has ample recourse to remedies, rendering Article 78 relief inappropriate.[3]

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3 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

Matter of Veloz v. Rothwax, 65 N.Y.2d 902, 903 (1985); State v. King, 36 N.Y.2d 59, 65 (1975). Petitioner's argument that he would be harmed merely by being subject to proceedings wherein a witness he may wish to call may refuse to testify is meritless because 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).

POINT III

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

By this order to show cause, Petitioner again asks that the Court dismiss the disciplinary proceedings or stay them until an unstated time in the future. It is respectfully submitted that he again fails to set forth a basis for such relief.

The granting of injunctive relief is also an extraordinary remedy. Kane v. Walsh, 295 N.Y. 198, 205 (1946). In order to obtain preliminary injunctive relief, 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., 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 test.

The first prong -demonstration of a clear likelihood of success- requires the Petitioner

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Judiciary Law § 44(7); Matter of Gilpatric, 13 N.Y.3d 586 (2009).

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. Petitioner has established neither a right to obtain reconsideration of his claims nor a clear legal right to stop the disciplinary 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 meet the second prong of the test for injunctive relief, 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 from the Commission's determination to proceed with the disciplinary hearing and thus he cannot demonstrate irreparable harm. See pp. 3-4, 17, supra; 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 both to finality of decisions (subject only to appeals therefrom) as well as to a judiciary devoid of corruption since an indefinite 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.

"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.

CONCLUSION

For all the foregoing reasons, it is respectfully requested that Petitioner's order to show cause and motion to renew be denied and that the Court issue such other and further relief as may be just, proper and appropriate.

Dated: New York, New York
September 16, 2011

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Respondent
By:

MONICA CONNELL
MICHAEL SIUDZINSKI
Assistant Attorney General
120 Broadway, 24th Floor
New York, New York 10271
(212) 416-8965/8552

MONICA CONNELL
Assistant Attorney General
MICHAEL SIUDZINSKI
Assistant Attorney General
of Counsel