

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,

**AFFIRMATION IN  
OPPOSITION**

-against -

Index No. 108251/11

The Commission on Judicial Conduct

Respondent

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

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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.<sup>1</sup>

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 5<sup>th</sup> Amendment issue was raised, Judge Shea stated and Petitioner's counsel concurred that: (1) the 5<sup>th</sup> 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

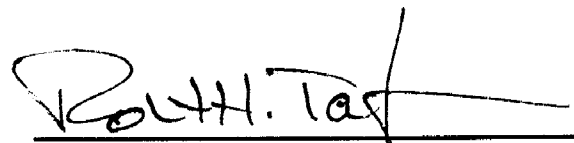


since Petitioner became Surrogate, with my wife, Barbara Ross, or anyone else at the Daily News.

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

  
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ROBERT H. TEMBECKJIAN