STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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

DETERMINATION

LEE L. HOLZMAN,

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

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THE COMMISSION:

Honorable Thomas A. Klonick, Chair
Honorable Terry Jane Ruderman, Vice Chair
Honorable Rolando T. Acosta
Joseph W. Belluck, Esq.
Joel Cohen, Esq.
Richard D. Emery, Esq.
Paul B. Harding, Esq.
Nina M. Moore
Honorable Karen K. Peters[1]
Richard A. Stoloff, Esq.
Honorable David A. Weinstein

APPEARANCES:

Robert H. Tembeckjian (Mark Levine and Brenda Correa, Of Counsel)
for the Commission

Godosky and Gentile, P.C. (by David Godosky) for the Respondent

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[1] Judge Peters resigned from the Commission effective October 15, 2012, and Judge Weinstein was appointed to the Commission on that date. The vote in this matter was taken on September 19, 2012.

The respondent, Lee L. Holzman, a Judge of the Surrogate's Court, Bronx County, was served with a Formal Written Complaint dated January 4, 2011, containing four charges. The Formal Written Complaint alleges that: (i) over a 14-year period respondent approved legal fees to Michael Lippman, counsel to the Public Administrator, based on affidavits of legal services that did not comply with the Surrogate's Court Procedure Act ("SCPA") and without consideration of the specified statutory factors (Charge I); (ii) despite knowing that Mr. Lippman had taken advance legal fees without court approval and/or fees in excess of Administrative Board Guidelines ("Guidelines"), respondent failed to report Mr. Lippman to law enforcement and disciplinary authorities and continued to award Mr. Lippman legal fees at the maximum amount recommended by the Guidelines and/or without considering the statutory factors (Charge II); (iii) respondent failed to adequately supervise court staff (Charge III); and (iv) respondent failed to disqualify himself from Mr. Lippman's cases notwithstanding that Mr. Lippman had raised campaign funds for respondent (Charge IV). Respondent filed a verified answer dated January 21, 2011.

By Order dated January 25, 2011, the Commission designated Honorable Felice K. Shea as referee to hear and report proposed findings of fact and conclusions of law. On February 2, 2011, respondent filed a motion to dismiss the Formal Written Complaint and to stay further proceedings. Commission counsel filed papers dated February 25, 2011, in opposition to the motion, and respondent filed a reply dated March 4, 2011. By order dated March 21, 2011, the Commission denied respondent's motion in

all respects.

By letter dated September 12, 2011, respondent waived confidentiality of the Commission proceedings pursuant to Section 44, subdivision 4, of the Judiciary Law. A public hearing was held in New York City on September 12[2] and December 14-16 and 19, 2011, and January 3-6, 9-13 and 17, 2012. The Referee filed a report dated July 18, 2012.

The parties submitted briefs with respect to the Referee's report and the issue of sanctions. Counsel to the Commission recommended the sanction of removal, and respondent's counsel recommended dismissal. On September 19, 2012, the Commission heard oral argument and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been Surrogate of Bronx County since 1988. His current term expires on December 31, 2012.

2. In 1974 respondent was appointed law secretary to the then Bronx County Surrogate. He served as head of the Surrogate Court's law department until 1988.

3. As surrogate, respondent has jurisdiction over all proceedings and actions "relating to the affairs of decedents, probate of wills, [and] administration of estates" (NY Const Art 6, §12[d]). In New York City, the surrogate appoints a public

[2] The hearing was stayed by order of the Supreme Court on September 12, 2011, and further stayed by the Appellate Division, First Department, on October 5, 2011. The stay was lifted on December 6, 2011.

administrator ("PA") to administer the estates of persons who die intestate without an heir willing and able to do so (SCPA §1102). Pursuant to SCPA §1108(2)(a), New York City surrogates also appoint counsel to the PA to represent intestate decedents' estates where no individual is available to file letters of administration. The PA is paid a salary by the City of New York (SCPA §1105), and counsel is paid "reasonable compensation" out of the administered estate (SCPA §1108[2][b]). At any one time during the years encompassed by the complaint, the Bronx PA's office handled between $30 million and $57 million in estate funds.

4. Michael Lippman began working as counsel to the Bronx County PA in 1970. During the years respondent served as law secretary to the Bronx Surrogate and later as head of the Surrogate Court's law department, he knew Mr. Lippman, who worked in the same courthouse. When respondent was elected surrogate, he retained Mr. Lippman as counsel to the PA. Mr. Lippman served as counsel or associate counsel to the PA until April 2009, while also maintaining a private practice of law.

5. Mr. Lippman was indicted in Bronx County on July 7, 2010, on charges of Scheme to Defraud 1st degree (1 count), Offering a False Instrument for Filing 1st degree (4 counts), Falsifying Business Records 1st degree (4 counts), Grand Larceny 2nd degree (2 counts), Grand Larceny 3rd degree (3 counts) and Conflict of Interest (1 count). The charges were based on five cases in which Mr. Lippman represented the Bronx PA's office.

As to Charge I of the Formal Written Complaint:

6. The charge is not sustained and therefore is dismissed.

As to Charge II of the Formal Written Complaint:

7. In early 2006 respondent asked for the resignation of PA Esther Rodriguez after learning that she had violated respondent's order not to use a particular vendor, who was under investigation by the Department of Investigation ("DOI") and was about to be indicted.

8. Shortly after the PA's resignation in January 2006, respondent asked Deputy PA Steven Alfasi about problems in the PA's office. Mr. Alfasi told respondent that Mr. Lippman was "problematic" and "was running the office or trying to run the office as if it was his own." Mr. Alfasi also advised respondent that: (i) Mr. Lippman had requested and been paid legal fees before accountings were filed, and (ii) the PA's accountant, Paul Rubin, had reported that there were negative estate balances totaling $300,000 to $400,000 as a result of advance legal fees paid to Mr. Lippman.

9. During the time period relevant to the Formal Written Complaint, it had been a longstanding policy in the Bronx PA's office, pursuant to a directive of the surrogate, that 75% of the legal fee could be paid when the accounting was filed (generally at least seven months after letters of administration issued) and the remaining 25% would be held in escrow until the decree. This policy had been followed by respondent's predecessor, and respondent continued the policy upon becoming surrogate. The purpose of the protocol was to give counsel an incentive to act expeditiously in

handling estates and, further, to ensure that in the event that counsel failed to complete the work on an estate, funds would be available for another attorney to do so. Legal fees were paid by check issued by the PA.

10. Under guidelines promulgated in 2002 by the Administrative Board for the Offices of the Public Administrators pursuant to SCPA §1128, fee requests by PA counsel in New York City, in the absence of extraordinary circumstances, are limited to a maximum of 6% of the gross value of an estate, with decreasing percentages for estates larger than $750,000. Pre-2002 guidelines had provided a 6% maximum fee for all estates regardless of size.

11. After hearing Mr. Alfasi's reports, respondent asked his chief court attorney, Mark Levy, to investigate the PA's office. Initially, in reviewing the trial balance reports of estates, Mr. Levy ascertained that Mr. Lippman was commingling 17 to 29 privately retained legal matters with PA estates – *i.e.*, using the facilities of the PA's office to service his private clients. Respondent directed Mr. Lippman to take his private matters out of the system and Mr. Lippman agreed to do so.

12. In examining trial balance reports of estates with negative balances, Mr. Levy found cases where the negative balances were caused by legal fees paid to Mr. Lippman in advance of the accounting. Based on his review of the matters, Mr. Levy told respondent that the 75/25 protocol had been violated "at least to the extent of $100,000." Respondent questioned Mr. Lippman, who admitted that he had not followed respondent's directions with regard to the timing of legal fees but told respondent, "I

didn't think you would mind." Respondent did not accept this explanation and believed that Mr. Lippman knew that respondent would not approve his behavior. Respondent considered Mr. Lippman's violation of the fee protocol to be "a betrayal of trust."

13. Consequently, respondent determined that he no longer wanted Mr. Lippman to serve as chief counsel to the PA, and in late January 2006, he offered the position to Mr. Levy. Mr. Levy assumed that position in April 2006, and Mr. Lippman remained as associate counsel. For a time, Mr. Lippman continued to be assigned new cases, albeit in reduced numbers.

14. At respondent's request, Mr. Lippman prepared three lists of pending estates: one showed estates in which he had been paid legal fees consistent with the guideline amounts; one showed estates in which he had received less than the guideline amounts; and one showed estates in which he had received excess legal fees – *i.e.*, fees larger than the amount provided by the guidelines. Mr. Lippman gave the lists to respondent and Mr. Levy sometime before mid-April 2006. Mr. Levy had questions about the accuracy of the lists, but because of the backlog he inherited as counsel, he did not have time to analyze the case files and independently compute the extent of what Mr. Lippman owed. Mr. Lippman amended the lists within a month or so.

15. When respondent asked Mr. Lippman to explain the list of estates in which the legal fees he had taken exceeded the guideline amounts, Mr. Lippman said that in some estates his fees were based on the gross value of real estate without consideration of the mortgage (respondent generally took a mortgage into account in awarding legal

fees); some cases involved real estate that had title problems or a sale that had not closed; and some matters were large estates predating 2002 in which he believed he was entitled to the 6% fee authorized by the earlier guidelines rather than the lower percentage authorized by the 2002 guidelines.

16. In May 2006 respondent appointed John Raniolo as PA. At the same time, respondent implemented a remedial system/repayment plan under which Mr. Lippman would repay the excess legal fees he had received by transferring all fees that he earned going forward to estates he had previously overcharged. The calculations of overcharges and repayments during this period were made using the guideline amount of 6%. Respondent instructed Mr. Raniolo that when Mr. Lippman gave him an accounting for an estate in which he was entitled to a fee, Mr. Lippman would also tell him which estate or estates the fee should be deposited into, pursuant to the lists Mr. Lippman had prepared. Except for $6,000 that Mr. Lippman was allowed to keep in order to pay a health insurance premium, all legal fees earned by Mr. Lippman from April 2006 until April 2009, when he was fired, were transferred to estates to which he owed money.

17. In June 2006 Mr. Levy and Mr. Raniolo suggested to respondent that Mr. Lippman's employment be terminated. Mr. Raniolo explained that he was having trouble getting along with Mr. Lippman and had to redo a lot of his accounts, and Mr. Levy suggested that the open cases could be completed without Mr. Lippman. In 2007 or early 2008, Mr. Levy again raised the issue of discontinuing Mr. Lippman as counsel. Respondent rejected the suggestions on the ground that as long as Mr. Lippman's work

was "satisfactory," he could continue to work to repay the money he owed to estates in the PA's office. After that point, Mr. Lippman was not assigned any new cases.

18. As counsel, Mr. Levy operated on a crisis basis, giving priority to individuals who clamored to have their cases addressed. As cases of fee overcharges not on Mr. Lippman's lists came to their attention, respondent and Mr. Levy became aware that Mr. Lippman "probably was more over extended than we thought."

19. At some point, concerned about the number of Mr. Lippman's cases that remained open, respondent concluded that more help was needed. In the fall of 2008, he asked John J. Reddy, Jr., who had been counsel to the PA in New York County for 23 years, to take that position in the Bronx. Before Mr. Reddy agreed to accept the position, Mr. Levy advised him of the disarray in the PA's office and that there had been visits by the DOI and FBI. Mr. Reddy asked for more information so that he could assess the situation, and Mr. Levy gave him the three lists Mr. Lippman had prepared and 250 trial balance reports of Mr. Lippman's open cases. Mr. Levy told Mr. Reddy that respondent's goal was to make sure that by the end of respondent's term, no person or estate had been prejudiced by Mr. Lippman's conduct.

20. After analyzing the records for several weeks with his staff, Mr. Reddy found that the PA had paid Mr. Lippman "haphazardly," that fees were frequently transferred in and out of estates and returned "when it was clear that money had to be returned," and that in 60 cases Mr. Lippman had overcharged estates. Mr. Reddy also ascertained that in numerous cases Mr. Lippman took legal fees before doing any legal

work, causing estates to incur negative balances, and that in 15 to 20% of the cases the entire legal fee was paid before an accounting was filed. While it would be normal for about 10% of open cases to have negative balances from such items as the payment of taxes or the purchase of a death certificate, about 40% of the estates had negative balances as a result of advance payments to Mr. Lippman. According to Mr. Reddy's analysis, Mr. Lippman had received over $450,000 in legal fees in excess of the guideline amounts, but, based on the guideline figure of 6% of the value of each estate's gross assets, net fees totaling $149,000 could still be earned by those estates. None of these calculations included interest.

21. Mr. Reddy began work as counsel to the PA in the spring of 2009, and respondent gave him permission to fire or retain personnel. In April 2009 Mr. Reddy fired Mr. Lippman. Mr. Rubin, the PA's accountant, was also terminated.

22. Mr. Reddy planned to finish the work on the estates Mr. Lippman had overcharged and to look to Mr. Lippman for repayment. As he and his staff worked on the estates, they found more open cases than they had anticipated. They also found many inaccuracies and omissions in Mr. Lippman's files and ascertained that Mr. Lippman "almost regularly" had misstated his legal fees in the accountings. Mr. Reddy's office prepared affidavits amending the accountings to reflect the correct amounts and the dates legal fees were paid. In every case, the parties to the proceedings were notified of the misrepresentations.

23. As of January 6, 2012, when Mr. Reddy testified at the hearing, all

but 19 of Mr. Lippman's cases had been closed. Mr. Reddy estimated that his office had performed legal services with a value of $500,000 to $1,000,000 on cases for which Mr. Lippman had been paid. In addition, Mr. Lippman still owed between $125,000 and $150,000 to overcharged estates. None of these figures included interest.

24. In 2006 the FBI questioned respondent about the timing of the legal fees paid to Mr. Lippman. Respondent told the FBI that Mr. Lippman had violated the protocol by taking advance fees but that he did not think that Lippman had violated any law.

25. In 2006, at the time respondent implemented the remedial system/repayment plan, he knew that Mr. Lippman had been paid excessive fees as well as unauthorized advance fees, that the advance fees and excessive fees were a large sum, and that the number of overcharged estates was significant. Respondent was aware of the following in 2006:

(a) From his conversation with Deputy PA Alfasi, respondent knew that Mr. Lippman was a problem in the PA's office.

(b) Respondent knew from Mr. Alfasi that Mr. Lippman was being paid legal fees in advance of accountings in violation of respondent's protocol, a court directive.

(c) Respondent knew from Mr. Alfasi that, according to the PA's accountant, there were negative balances in estates totaling $300,000 to $400,000 caused by advance legal fees paid to Mr. Lippman.

(d) Respondent knew from his chief court attorney Mark Levy that Mr. Lippman had commingled his retained matters with the PA's estates.

(e) Mr. Levy's investigations, reported to respondent in early 2006, showed an estimated $100,000 in unauthorized advance fees.

(f) When respondent confronted Mr. Lippman with accusations of unauthorized legal fees, Mr. Lippman gave respondent an explanation which respondent did not believe, *i.e.*, Mr. Lippman said he thought that respondent would not mind his violation of the 75/25 protocol. Thus, he knew that Mr. Lippman had lied to him, and he felt his trust had been betrayed.

(g) From the lists Mr. Lippman had provided to respondent, respondent knew that there were numerous estates in which the fee paid Mr. Lippman was in excess of the Guideline amount.

(h) Respondent knew that law enforcement entities were investigating payments of Mr. Lippman's legal fees.

(i) Respondent knew that Mr. Lippman liked to gamble and frequented gambling establishments.

26. Notwithstanding that respondent had evidence in 2006 that there was a substantial likelihood that Mr. Lippman had committed substantial violations of the Code of Professional Responsibility, respondent failed to report Mr. Lippman to disciplinary authorities. Based on the knowledge respondent had in 2006, the probability and egregiousness of substantial misconduct by Mr. Lippman was so high that it seriously

called into question Mr. Lippman's honesty, trustworthiness and fitness to practice law. Respondent had a duty to report Mr. Lippman to disciplinary authorities in order to protect the estates in respondent's court from an attorney whose conduct put estates at risk.

27. The information in respondent's possession in 2006 also strongly pointed to larcenous conduct on the part of Mr. Lippman. Respondent was aware that law enforcement entities were investigating the PA's office and had performed audits of the office. He had a duty to share the information he had with law enforcement authorities.

28. Respondent did not share information with law enforcement entities. Mr. Levy testified that he gave Mr. Lippman's lists to the DOI, the FBI and the Bronx District Attorney's office.

29. The remedial system/repayment plan implemented by respondent in 2006 was not an appropriate response to Mr. Lippman's large scale taking of advance and excess fees. By allowing a lawyer who had cheated the PA's office, overcharged estates, lied to him and breached his trust to continue to represent the PA in the administration of estates, respondent put at further risk the estates under his care.

30. Respondent's mistake was compounded by the details of the system he set up whereby he directed that Mr. Lippman would decide which overcharged estates to repay and which cases were to be closed out on a "matching basis" – *i.e.*, Mr. Lippman's new fee would be matched to an amount that had been overcharged on a case on the list. Although some overcharged estates were repaid, new cases of overcharged

estates were discovered, and progress in clearing the backlog was slow.

31. Respondent and Mr. Lippman had a long professional relationship. When Mr. Lippman served as counsel to the PA, they worked closely together, and they saw each other on social occasions. Mr. Lippman gave a party at his home to celebrate respondent's re-election and attended the wedding of respondent's daughter.

32. The long and close professional relationship between respondent and Mr. Lippman influenced respondent's decisions in 2006 not to report Mr. Lippman to disciplinary and law enforcement authorities and not to fire Mr. Lippman but instead to set up a repayment plan.

As to Charge III of the Formal Written Complaint:

33. The charge is not sustained and therefore is dismissed.

As to Charge IV of the Formal Written Complaint:

34. The charge is not sustained and therefore is dismissed.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.1, 100.2(A), 100.3(B)(1) and 100.3(D)(2) of the Rules Governing Judicial Conduct ("Rules") and should be disciplined for cause, pursuant to Article 6, Section 22, subdivision a, of the New York State Constitution and Section 44, subdivision 1, of the Judiciary Law. Charge II is sustained insofar as it is consistent with the above findings and conclusions, and respondent's misconduct is

established. Charges I, III and IV are not sustained and therefore are dismissed.[3]

Under well-established ethical guidelines, a judge "who receives information indicating a substantial likelihood that a lawyer has committed a substantial violation of the Code of Professional Responsibility shall take appropriate action" (Rules, §100.3[D][2]). As the Referee found, with the knowledge respondent had in 2006 that Michael Lippman, his appointee as counsel to the public administrator, had committed acts that "strongly pointed to larcenous conduct" and had "overcharged estates, cheated the PA's office, lied to him and breached his trust" (Rep. 42, 44), the appropriate action for respondent, under Rule 100.3(D)(2), was to fire Mr. Lippman and report him to

[3] In view of the dissenter's comments as to Charge I, it seems appropriate to comment on the dismissal of the charge. While we share the Referee's concerns that Mr. Lippman's affirmations of legal services provide insufficient detail as to the services rendered in each case, we cannot conclude, in the circumstances presented, that approving legal fees based on such affirmations constitutes judicial misconduct. We note that all of Mr. Lippman's fee requests were supported by affirmations of legal services, in sharp contrast to the facts established in *Matter of Feinberg*, 5 NY3d 206 (2005), involving a surrogate who awarded excessive legal fees to his long-time close friend in the absence of affidavits. Mr. Lippman's affirmations, though largely consisting of "boilerplate" description of customary procedures, contain some case specific information, including a statement of estate assets and the hours he claimed to have worked. The record before us indicates that other New York City surrogates during this period accepted affidavits that were "similar in essence" or contained "even less detail" (Rep. 26, 18). To a significant extent, as the Referee concluded, the Administrative Board Guidelines give shelter to the use of such affidavits concomitant with the entrenched practice of awarding legal fees as a uniform percentage of estate assets. A "rule of thumb" fee (which takes into account the costs of administering smaller, less profitable estates), applied uniformly, effectively diminishes the importance of knowing the details of the work done in a particular case. Nevertheless, we believe that the statutory requirement of affidavits "setting forth in detail the services rendered" (SCPA §1108[2][c]) necessarily means that meaningful, specific information should be provided, rather than a generalized description of customary practices. In this regard, we note that the revised Guidelines, effective May 2012, require counsel to maintain contemporaneous time records, which "shall be provided upon request to any party to the proceeding," a requirement that should encourage appropriate documentation and reporting of the legal services performed.

disciplinary and law enforcement authorities. Instead, respondent failed to report Mr. Lippman's misconduct and permitted him to remain in a position of public trust for three years under an ill-conceived plan to repay the unauthorized monies he had collected, thereby putting the estates under his care at further risk and conveying the appearance of favoritism. Respondent's abdication of his ethical responsibilities, which was influenced by his long and close professional relationship with Mr. Lippman, constitutes serious misconduct.

As the Referee concluded in her cogent, comprehensive report, in 2006 respondent had evidence that Mr. Lippman had engaged in gross misconduct in several respects, triggering a duty to take appropriate disciplinary action (Rep. 36-43). From the lists Mr. Lippman himself had prepared, respondent knew that Mr. Lippman had taken legal fees in numerous estates that exceeded the amounts that would ultimately be permitted under Administrative Board Guidelines. Significantly, notwithstanding that Mr. Lippman had offered generalized, plausible explanations for the excess fees, respondent had ample information that should have made him skeptical of the information Mr. Lippman provided. Indeed, respondent has acknowledged that at that point he no longer had confidence in Mr. Lippman, knew that Mr. Lippman had lied to him, and viewed his actions as "a betrayal of trust." Respondent also knew, from information provided to him by his chief court attorney and by the deputy PA, that Mr. Lippman had frequently taken advance fees from estates at a time when he was not entitled to do so, resulting in substantial negative balances in the affected estates. Such advance fees

violated respondent's longstanding policy that no legal fees could be paid prior to the accounting, that 75% of the fee could be paid at the accounting, and the remainder would be paid upon the decree. This was also gross misconduct by Mr. Lippman, even when the fees might ultimately be within the guideline recommendations, since it not only violated the court's specific directive but eliminated any incentive for the attorney to complete the legal work in a timely manner and put the affected estates at risk.

While the full extent of Mr. Lippman's malfeasance did not become evident until several years later, the record clearly supports the Referee's conclusion that in 2006 "respondent had evidence that there was a substantial likelihood that Mr. Lippman had committed substantial violations of the Code of Professional Responsibility" (Rep. 81). (*See*, under the Disciplinary Rules in effect in 2006, DR 2-106[A] [prohibiting an attorney from charging an excessive fee] and DR 7-106[A] [prohibiting an attorney from "disregard[ing]...a standing rule of a tribunal or a ruling of a tribunal"].)

While it is generally within a judge's discretion, after assessing all the relevant, known circumstances, to determine what "appropriate action" is required by Rule 100.3(D)(2), the Advisory Committee on Judicial Ethics has held that a judge *must* report a lawyer's alleged misconduct to a disciplinary authority when "the alleged substantial misconduct rose to such an egregious level that it seriously called into question the attorney's honesty, trustworthiness or fitness as a lawyer" (Adv Op 10-85; *see also* Op 07-129). The purpose of the reporting requirement "is not to punish attorneys for the slightest deviation from perfection, but to protect the public from attorneys who

are unfit to practice law" (Adv Op 10-85, as amended 12/9/11). We agree with the Referee that under the circumstances presented, "the probability and egregiousness of substantial misconduct by Mr. Lippman was so high that it seriously called into question Mr. Lippman's honesty, trustworthiness and fitness to practice law" and thus, in order to protect the estates in his court, respondent had a duty to terminate Mr. Lippman's employment and report him to the disciplinary committee (Rep. 42).

As a judge, respondent also had an obligation to be forthcoming and cooperative with law enforcement entities. Every judge is obliged to act at all times in a manner that promotes public confidence in the integrity of the judiciary (Rules, §100.2[A]). In 2006 respondent knew that the FBI was investigating the PA's office; indeed, the FBI had specifically questioned him about the timing of the payment of Mr. Lippman's legal fees. Respondent was also aware that other law enforcement entities had been investigating the PA's office and had conducted numerous audits. With the information he had that implicated Mr. Lippman's honesty and integrity, respondent had a duty to share the information he had with law enforcement entities, consistent with the ethical requirement that he take "appropriate action" under the circumstances presented. Respondent's failure to do so was inconsistent with his ethical responsibilities and, moreover, created an appearance that he was attempting to conceal the malfeasance in the PA's office in order to protect his longtime colleague, and himself, from the consequences of exposure.

Respondent's various explanations for his failure to share information with

law enforcement are unconvincing. Even if, as he maintains, he sincerely believed that Mr. Lippman's conduct, insofar as he was aware at the time, was not contrary to law and also believed that law enforcement entities probably had more information than he did, that would not excuse respondent's failure to share information in his possession that strongly hinted at serious wrongdoing (*i.e.*, Mr. Lippman's admission that he had taken excessive fees in substantial amounts from numerous estates). Nor are we persuaded by respondent's explanation that he did not contact other agencies so as not to interfere with ongoing investigations and to avoid the appearance that he was misusing his judicial prestige in order to obtain information. Respondent should have recognized that his failure to act not only was a dereliction of his ethical responsibilities, but conveyed the appearance of impropriety and favoritism.

Despite having evidence in 2006 casting doubt on Mr. Lippman's integrity and fitness to practice law, respondent permitted him to remain as associate counsel representing estates for three more years, under an unorthodox repayment plan in which Lippman continued to earn fees that were used to make refunds to overcharged estates. Indeed, for three years Mr. Lippman himself was entrusted with the sole responsibility for designating which estates should receive the repayments, and though the lists he had prepared supposedly showed all the estates that required reimbursement, additional cases in which he owed money were continually being discovered. The beneficiaries of the depleted, at-risk estates were never informed that Mr. Lippman had effectively "borrowed" substantial, interest-free sums from the estates by taking unauthorized

advance payments. Moreover, for at least a year after he had notice of Mr. Lippman's misconduct, respondent continued to assign him new cases in the PA's office, generating new fees which were used in the repayment process; yet even after three years, when Mr. Lippman's employment was finally terminated, he still owed substantial sums to estates he had overcharged.[4] Throughout this period, respondent resisted several suggestions that Mr. Lippman be fired, insisting that the attorney could continue to work to repay the monies he owed as long as his performance was "satisfactory." Respondent's notably lenient treatment of Mr. Lippman, which permitted him to continue to work in a position of public trust in order to repay the monies he owed, conveyed the appearance that respondent was motivated by favoritism arising out of their long professional relationship.

It is no defense that the information disclosing the full extent of Mr. Lippman's malfeasance was not developed until several years later, after Mr. Reddy and his firm were brought in and conducted an exhaustive examination of the records. Surrogates have enormous discretion and responsibility, but with that authority comes the responsibility to act. With the knowledge he had in 2006, respondent had a duty to ascertain the actual damage as expeditiously as possible and to take appropriate action to alert disciplinary authorities and law enforcement officials of the situation. This is particularly so since respondent's chief court attorney, who replaced Lippman as chief counsel, readily admitted that he had questions about the accuracy of Mr. Lippman's

[4] As of January 2012, according to Mr. Reddy, Mr. Lippman still owed between $125,000 and $150,000 to overcharged estates.

lists but did not have the time to verify the calculations.

In sum, we believe that respondent's response to Mr. Lippman's wrongdoing was plainly inadequate and inconsistent with his ethical responsibilities and, thus, warrants public discipline.

While we recognize the issues presented by the surrogate's involvement in the internal operations of the PA office under the present system (insofar as the public administrator is a party appearing before the surrogate in the matters at issue), we note that respondent's conduct in hiring Mr. Reddy in 2009 – three years after he first had notice of the significant problems involving Mr. Lippman's conduct – finally set in motion a process to determine the full scope of the damage caused by Lippman and to ensure that the overcharged estates were made whole and that appropriate procedures were followed. That was an important but insufficient step, as the proper functioning of that important office should not depend on the integrity of one individual. We also note that the facts presented in this record may indicate the need for consideration of appropriate measures to regulate the conduct of PA counsel and clarify the responsibility for the oversight and operations of the PA office, which has been described as "a municipal agency whose relationship to the City is akin to that of a neglected stepchild" (*Matter of Alayon*, 28 Misc3d 311, 320 [Surr Ct Kings Co 2010], *aff'd* 86 AD3d 644 [2d Dept 2011]).

In determining that the sanction of censure, rather than removal, is appropriate, we find support in the interplay of several factors. First and foremost, we are

persuaded by the record before us that respondent's repayment plan, while misguided and ill-conceived, was motivated by a sincere desire to ensure that the estates under his care were made whole by the individual who had already been paid and who was perhaps in the best position to complete the work expeditiously. Thus, contrary to the dissent, we are unable to find by a preponderance of the evidence that respondent intentionally put estates at risk in order to "cover up...the criminal acts of his appointee" and to advance his own interests (Emery Dissent, p. 1). For example, we note the testimony of court staff about respondent's ongoing concern to make sure that by the end of respondent's term, "no person or estate had been in any way prejudiced" by Mr. Lippman's conduct (Tr. 1102), and respondent's affirmative actions in demoting Mr. Lippman, appointing his chief court attorney to assess the damage and ultimately to replace Mr. Lippman as counsel, and, finally, bringing in Mr. Reddy to remedy the situation when previous remedial measures proved too slow and ineffective. We find that respondent's wrongdoing reflects poor judgment, rather than knowing concealment of criminal behavior or intent to deceive.

Regrettably, in the decision to retain Mr. Lippman as counsel, respondent's judgment was clouded by his long professional association with an attorney who had served as counsel for several decades and whom he regarded as competent, prompting respondent too readily to accord him the benefit of a doubt. (*See*, *Matter of Edwards*, 67 NY2d 153, 155 [1986].) However, respondent's conduct stands in sharp contrast to that in *Matter of Feinberg*, in which the judge appointed as counsel his long-time close personal friend, who had limited experience in Surrogate's Court, and routinely awarded

him excess fees without requiring affidavits and without reviewing the court files, thereby showing "a shocking disregard for the very law that imbued him with judicial authority," "an unacceptable incompetence in the law," and "indifference if not cynicism toward his judicial office" (*supra*, 5 NY3d at 214, 215, 216).

We also note, with respect to respondent's cooperation with law enforcement entities, respondent's testimony that he instructed the PA's office to cooperate in providing information, and the testimony of his chief court attorney that he gave the Lippman lists of overcharged estates to the FBI, DOI and the district attorney's office. Finally, we are mindful of respondent's lengthy and unblemished tenure as a judge and his impending departure from the bench at the end of this year, upon reaching the mandatory retirement age.

As the Court of Appeals has stated, "[r]emoval is an extreme sanction and should be imposed only in the event of truly egregious circumstances" (*Matter of Cunningham*, 57 NY2d 270, 275 [1982], citing *Matter of Steinberg*, 51 NY2d 74, 83 [1980]). "[R]emoval should not be ordered for conduct that amounts simply to poor judgment, or even extremely poor judgment" (*Matter of Shilling*, 51 NY2d 397, 403 [1980], citing *Matter of Steinberg, supra*, at p 81) (*Id.*). After a careful review of the entire record, we thus conclude that censure is the appropriate sanction.

By reason of the foregoing, the Commission determines that the appropriate disposition is censure.

Judge Ruderman, Judge Acosta, Mr. Belluck, Mr. Cohen, Mr. Harding,

Judge Peters and Mr. Stoloff concur.

Judge Klonick and Ms. Moore dissent as to Charge I and vote to sustain the charge, and dissent as to the sanction and vote that respondent be removed from office. Ms. Moore files an opinion, which Judge Klonick joins.

Mr. Emery dissents as to the sanction and votes that respondent be removed from office. Mr. Emery files an opinion.

Judge Weinstein did not participate in the matter.

CERTIFICATION

It is certified that the foregoing is the determination of the State Commission on Judicial Conduct.

Dated: December 13, 2012

Jean M. Savanyu

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

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.

OPINION BY MS. MOORE, WHICH JUDGE KLONICK JOINS, DISSENTING AS TO THE SANCTION AND THE DISMISSAL OF CHARGE I

- -

While I concur with the majority's decision that respondent's grossly inadequate response to his appointee's malfeasance warrants a severe sanction, I respectfully dissent from the decision to dismiss Charge I, and from the determined sanction of censure. Because respondent routinely failed to follow a plainly-worded state law over the course of fourteen years and because he failed to take appropriate action despite overwhelming evidence of his appointee's wrongdoing, I believe that removal from office, the most severe sanction available to us under the constitutionally-created disciplinary scheme, is warranted.

I. Respondent Failed To Comply with the Surrogate's Court Procedure Act

The gravamen of Charge I is that in hundreds of cases respondent awarded legal fees to Michael Lippman, counsel to the Bronx Public Administrator, based on "boilerplate" affirmations of legal services that did not contain detailed information as to

the actual services rendered to estates and, thus, did not comply with Surrogate's Court Procedure Act ("SCPA") §1108(2)(c). That respondent failed to conduct the review mandated by SCPA §1108(2)(c) is established unequivocally by the evidentiary record before us.

SCPA §1108(2)(c) requires that:

> "Any legal fees allowed by the court [to counsel to Public Administrators within the City of New York] shall be supported by an affidavit of legal services *setting forth in detail the services rendered*, the time spent, and the method or basis by which requested compensation was determined. In fixing counsel fees, the court shall consider the time and labor required, *the difficulty of the questions involved*, the skill required to handle *the problems presented*, the lawyer's experience, ability and reputation, the amount involved and benefit resulting to the estate from the services, the customary fee charged by the bar from similar services, the contingency or certainty of compensation, the results obtained, and *the responsibility involved*." (Emphasis added.)

The Referee found, following extensive hearings and review of 177 exhibits totaling more than 14,000 pages:

> "A preponderance of the evidence shows that in hundreds of cases, between 1995 and April 2009, respondent approved legal fees for Michael Lippman based on affirmations that did not set forth in detail the services rendered as required by statute." (Rep. 19)

Instead of adhering to the plainly-worded dictates of SCPA§1108(2)(c), respondent routinely ignored those requirements and approved fees based on deficient affidavits that did not enable him to consider the statutorily mandated factors. The "boilerplate" affirmations he reviewed contain many paragraphs of non-estate specific information and generalities about procedures which do, in fact, supply some of the

information required by the SCPA. The majority is satisfied that Mr. Lippman's affirmations include a statement of estate assets and "the hours he claimed to have worked" (Determination, p. 15, n. 3). Significantly, however, as the Referee found, "Mr. Lippman's affirmations of legal services contain *no details* (emphasis added) as to the legal services performed" (Rep. 17). More precisely:

> "They do not document what actual work was done in the particular case. There is no indication of what legal issues were involved, how complex they were, or what was done to resolve them. There is no information showing how the hours claimed were spent with regard to the specific estate." (Rep. 17-18)

Accordingly, the Referee concluded that the affirmations of legal services reviewed by respondent did not give him all of the information needed to make individualized fee judgments for the estates he was charged with protecting.

Coupled with the Referee's cogent analysis and conclusion is, in essence, respondent's own admission that in the years encompassed by the Formal Written Complaint he awarded millions of dollars in legal fees to Mr. Lippman based on affirmations that were in substantial part the same in every case (Tr. 2016). Notwithstanding respondent's claim that Commission counsel "cherry-picked" the cases cited in support of Charge I, he conceded that in fact *all* of Mr. Lippman's affirmations were substantially similar. Respondent had routinized his approval of legal fees to Mr. Lippman to the point that the affirmations in the 30 cases set forth in Schedule A of the Formal Written Complaint are so strikingly similar that they contain the same typographical errors (see Rep. 14, n. 7).

Unsurprisingly, then, when asked at the hearing about the extent and nature of the legal work done in the *Diane Glasco* case, respondent could not describe with any specificity how Mr. Lippman had spent the 56 hours he claimed to have worked; nor could he offer any specifics as to the 400 hours of legal work allegedly done in the *Estate of Helen Marks*, other than that the case involved a complicated kinship issue (Tr. 2343). Yet, respondent awarded Mr. Lippman more than $100,000 in legal fees in the *Marks* case (Rep. 21).

It bears emphasizing that respondent was thoroughly familiar with the SCPA and the statutory requirements. According to the Referee's report, respondent testified with a copy of the SCPA at his side and "alluded many times to sections of the statute from memory" (Rep. 20). There is no doubt whatsoever that respondent was fully aware of the requirements at issue here. It should be noted also that no one has argued that the statutory requirement is either onerous or unreasonable. Clearly, it is not. While there is no impropriety in using a template with some boilerplate language as the starting point for an affidavit, surely it would require no great effort for a lawyer to include a few sentences or paragraphs describing the specific work that was done in a particular case – especially when such an affidavit is the basis for a fee request of many thousands of dollars. Certainly the judge approving the request should demand more specificity and detail.

Systematic approval of deficient affidavits thwarts the important purpose for which the statutory requirements of SCPA §1108(2)(c) were established. As the Court of Appeals stated in *Matter of Feinberg*, 5 NY3d 206, 214 (2005), the purpose of

the requirements is to ensure that beneficiaries of estates "are paying only for the actual cost of administering the estates." The legislative history and background of SCPA §1108(2)(c) detailed in *Feinberg* underscored the need to assure that legal fees are commensurate with the services provided. *See*, *Matter of Alayon*, 28 Misc3d 311, 318 (Surr Ct Kings Co 2010) ("[I]f legal fees are not fixed based on the actual work performed, there is no question that an injustice results, as the subject estates have been diminished without regard to the benefits conferred upon them by [counsel's] legal services"), *aff'd*, 86 AD3d 644 (2d Dept 2011). Boilerplate affidavits necessarily disguise any differences between the services provided in a relatively simple case and one with complex issues. By describing in general terms both the services provided in every case and those that would have been provided if needed, the template affidavits obscure the actual work that was done in a particular case. As such, they not only fail to achieve, but actually undermine the objectives of SCPA §1108(2)(c).

II. The Administrative Board Guidelines Call for Compliance with SCPA §1108(2)(c)

Just as the Surrogate's Court Procedure Act imposed on respondent the duty to give individualized consideration to the statutory factors before setting counsel fees, so too do the Administrative Board Guidelines authorized by SCPA §1128 to structure compensation of counsel to public administrators. The Guidelines do so explicitly. Thus, I find unpersuasive the Referee's conclusion, which the majority accepts, that misconduct should not be found because the Guidelines effectively "enable[ ] legal fees to be awarded without relationship to legal work done" in that they

instruct compliance with the SCPA but also recommend a "rule of thumb" legal fee of 6% of estate assets (Rep. 24).

The establishment by the Administrative Board for the Offices of the Public Administrators of monetary parameters within which surrogates are to set legal fees did not eliminate the requirement that surrogates consider the factors prescribed in SCPA §1108(2)(c) when setting fees. The Guidelines state that 6% is the *maximum* fee that should be requested, not that that amount must be awarded in every case, with no showing of the work that was actually done. Indeed the majority's own opinion straddles the fence with respect to the requirements imposed on surrogates. It asserts, on the one hand, that the Guidelines diminish the importance of knowing the details of the work done in a particular case yet concedes, on the other hand, that the statutory requirement of affidavits "setting forth in detail the services rendered" demands "meaningful, specific information" (Determination, p. 15, n. 3). The practical difference between "details" and "specificity" in this context is a difference without a distinction. What is in fact meaningfully specific is the ten-point list of statutory factors carefully delineated in SCPA §1108(2)(c) that are required to be considered in awarding fees. Critically, moreover, the Referee's report itself concedes that the 2002 Amended Guidelines explicitly direct public administrators in New York to "require counsel to support their request for compensation with *an affidavit complying with SCPA §1108(2)(c)*" (Emphasis added) (Rep. 63). The Referee further observed that the Interim Report accompanying the 2002 Guidelines underscores that "the Surrogate retains complete discretion to fix reasonable counsel fees *in accordance with the factors listed in SCPA §1108(2)(c)*"

(Emphasis added) (Rep. 63). In view of the fact that the Referee herself acknowledges that the Guidelines expressly call for compliance with SCPA §1108(2)(c), it is odd the majority nonetheless accepts the rationale that the Guidelines somehow excuse respondent's failure to comply with SCPA §1108(2)(c).

It is interesting to note that respondent played a central role in devising the very Guidelines by which the majority now intimates he is sheltered from accountability. Respondent was Chair of the Administrative Board for the Offices of the Public Administrators that enacted the 2002 Guidelines and was a member of the Board that enacted the May 2012 Guidelines (Rep. 23-24, n.11). As such, the majority's decision effectively permits respondent to take cover under the so-called "internal inconsistency" he himself played a role in authoring.

Finally, even if there were sufficient grounds upon which to conclude that the Administrative Guidelines are faulty, it should go without saying that a state law is superior to any administrative guidelines promulgated in furtherance of the law. The Administrative Board for the Offices of the Public Administrators owes its existence and its authority to Surrogate's Court Procedure Act §1128. It cannot, therefore, supersede its institutional capacity and eviscerate core provisions of the very Act it is charged to help execute. The Guidelines do not, nor can they "give shelter" to respondent's failure to comply with SCPA §1108(2)(c).

III. The "Everybody Does It" Defense Lacks Supporting Evidence

Equally unpersuasive is the notion that respondent's transgression should

be excused by the fact that, during this time period, other New York City surrogates also accepted similarly deficient affidavits (Rep. 18). The majority's implicit endorsement of respondent's defense that, in essence, "everybody does it" lacks a viable evidentiary base. More precisely, the record before us is insufficient to demonstrate an entrenched pattern of non-compliance with SCPA §1108(2)(c) in the years at issue. No testimony was elicited at the hearing with respect to the format of affidavits generally accepted by surrogates of New York, Queens, and Kings counties. Nor was there testimony regarding the circumstances under which the fees were approved in the out-of-county cases that were introduced into evidence by respondent. And, although some of those out-of-county affidavits contained an offer to submit additional details upon request, there was no testimony as to whether additional details were in fact requested and received by surrogates in the other counties.

Juxtaposed to the 30 affirmations introduced as proof of respondent's practice in Bronx County alone during 1995 to April 2009 along with the extensive testimony surrounding those affirmations, only 14 affidavits of legal services from attorneys who served as counsel to the Public Administrator in other counties constitute enough proof for the majority of a so-called widespread, longstanding practice.[1] The surrogates in other counties were not given an opportunity to explain whether the affidavits the respondent chose to present as evidence were representative of the affidavits they required in their courts. Moreover, it is important to highlight that eleven

[1] *See* the affidavits in evidence from New York County, Kings County and Queens County (Ex. Q, R, S, T, V, W, EE, FF, GG, HH, II, JJ, KK). At least one (Ex. U) was deemed by the Referee an exception.

of the 14 out-of-county affidavits offered by respondent were submitted before the 2005 *Feinberg* decision that underscored the requirement of affidavits of legal services. That leaves a grand total of three pertinent deficient affidavits in evidence submitted in other counties of New York City post-*Feinberg*. Only in a make-believe world does N = 3 constitute a representative subset of the thousands of affidavits approved by New York City surrogates in the years following the 2005 *Feinberg* ruling. Neither does the larger N = 14 satisfy a common sense, let alone a legal threshold for what constitutes proof of a widespread pattern in the context of tens of thousands of affidavits approved in New York City counties in the nearly 20 years since enactment of SPCA §1108(2)(c) in 1993.

Even assuming the roughly three to 14 out-of-county affidavits presented by the respondent are more than a cherry-picked, biased sample of surrogate decision-making in New York City, such evidence would not excuse respondent's misconduct. In *Matter of Sardino*, 58 NY2d 286, 291 (1983), the Court of Appeals explained that similar misconduct of other judges does not provide a defense to a finding of judicial misconduct:

> "Each Judge is personally obligated to act in accordance with the law and the standards of judicial conduct. If a Judge disregards or fails to meet these obligations the fact that others may be similarly derelict can provide no defense. Indeed one of the obvious reasons for establishing a permanent Commission on Judicial Conduct is to elevate judicial performance by insuring that the practices in the various courts comply with the high standards required of judicial officers."

This principle was reaffirmed in *Matter of Duckman*, 92 NY2d 141, 154 (1998) and again in *Matter of Feinberg*, 5 NY3d 206, 215 (n. 4) (2005). It is time to change the practice if

it is a practice.

IV. Proper Commission Response to Widespread Pattern of Problematic Judicial Behavior

Our response should not be to turn a blind eye to conduct that is clearly contrary to the law, nor to excuse judges who fail to follow the law. The proper Commission response to a *bona fide* widespread pattern of problematic judicial behavior is to confront, rather than excuse the behavior. Past instances of widespread lapses in judgment by judges prompted the Commission to do more than look the other way. In March 2012 the Commission issued a public report and recommended a set of reforms in response to complaints brought against the Presiding Justice of the Appellate Division, First Department, alleging that the judge engaged in inappropriate hiring practices. No state laws were proven to have been violated following extensive investigation of the complaints in that case, unlike in the instant case. The system-wide hiring-related reforms recommended by the Commission were subsequently adopted.

In 1977 the Commission issued a public report in addition to, not in lieu of, formal disciplinary charges against more than 200 judges found to have "fixed" traffic tickets. The Commission opted to both sanction the judges involved as well as use a public report as a mechanism for redressing the widespread problem of ticket-fixing. The latter is the proper course of action were the Commission actually provided with concrete evidence of a widespread pattern of disregarding SPCA §1108(2)(c) on the part of New York City surrogates.

Today's decision is instead grounded in the hope that the revised May 2012

Guidelines will somehow induce compliance on the part of respondent and others similarly situated, where extant mandates obviously failed to do so. It is important to note that the majority asserts the new requirement that counsel maintain contemporaneous time records "*should encourage*" appropriate documentation and reporting of the legal services performed (Determination, p. 15, n. 3; emphasis added). It is my view that SCPA §1108(2)(c), the previously existing Guidelines, and *Feinberg* also *should* have encouraged appropriate documentation. They did not, because respondent chose to ignore them, even though he should have complied with them.

The negative repercussions that potentially flow from the majority's decision to not sanction respondent for systematically failing to abide by a state law are many. First and foremost, the determination potentially undermines public trust in the judiciary and legal process. There is reasonable cause for concern whenever a judge rests his or her non-compliance with a state law on a claim that other judges are equally non-compliant. This is especially so when that judge's credentials include more than forty years of experience as an attorney and nearly 25 years of service on the bench. Rarely can the typical respondent or defendant in a legal proceeding expect a court of law to accept the "everybody does it" defense as exculpatory. The public will likely find little solace in knowing that the Commission on Judicial Conduct has given a New York State judge a special pass to ignore a state law that is directed squarely at his office.

The majority's decision also gives a blank check to counsels to the Public Administrators. It is in all likelihood a big blank check. In general, the upper limits of the Public Administrators' counsels' fees are considerable. During the years

encompassed by the instant complaint, the Bronx Public Administrator's office at any one time handled between $30 million and $57 million in estate funds. Between 2001 and 2005 alone, Mr. Lippman's annual earnings from Public Administrator legal fees ranged from $768,500 to $1,496,140 (Ex. 93). (In *Matter of Feinberg*, as much as $9.5 million in legal fees from estate funds, over a period of five and a half years, were at stake.) Indicted in July 2010 in Bronx County of scheme to defraud, offering a false instrument for filing, falsifying business records, grand larceny and conflict of interest, Mr. Lippman profited enormously, in part, from respondent's failure to perform his judicial duties. Moreover, the Referee found that, as of the January 6, 2012 hearing date, a total of 19 Lippman cases remained open and Mr. Lippman still owed between $125,000 and $150,000 to overcharged estates, not including interest. In addition, Mr. Reddy's office had performed legal services with an estimated value of $500,000 to $1,000,000 on cases for which Mr. Lippman had been paid.

Where the Court of Appeals decision in *Matter of Feinberg* affirms the requirements of SCPA §1108(2)(c) and, thus, provides clarity, the majority's decision in this case stands to impart confusion. Although the question of the sufficiency of the affidavits of legal services was not before the Court in *Feinberg*, the holding nonetheless underscored the purpose and practical necessity of the statutory requirements that respondent failed to meet. The financial interests of the family members and other survivors of intestate decedents are potentially jeopardized by the majority's decision not to insist that surrogates comply with the statutory requirements designed to protect those interests. That these individuals consist of vulnerable segments – namely, "beneficiaries

of estates that, by definition, lack interested parties capable of offering independent review" – makes the majority's weakening of the force of those requirements all the more troubling (Rep. 62).

Implicit in the majority's decision is an expectation that the state legislature may ultimately accept the virtually impossible mission of writing a law that is even clearer than the Surrogate's Court Procedure Act, or that the Administrative Board will explain why its directive to comply with SCPA §1108(2)(c) is not inconsistent with the Guidelines imposed.[2] Absent either of these outcomes, we can reasonably expect, at best, confusion as to the precise requirements imposed on surrogates and, at worst, actualization of the widespread pattern the majority now theorizes to exist.

V. Commission Enforcement of the Rules of Judicial Conduct

Instead of turning a blind eye and passing the buck, the Commission should instead fulfill its duty to enforce the existing Rules Governing Judicial Conduct in this case. The buck should stop here. The New York State Constitution authorizes the Commission to "determine that a judge or justice be admonished, censured or removed from office for cause, including, but not limited to, misconduct in office" (Art 6, §22[a]). Section 100.2 of the Rules of the Chief Administrator of the Courts Governing Judicial Conduct requires a judge to "respect and comply with the law" and "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." By definition, failure to follow a state law constitutes judicial misconduct. The

[2] The Referee opined that the so-called disconnect between the Administrative Guidelines and its authorizing statute "might be addressed by the Legislature" (Rep. 25).

majority's own opinion acknowledges that the responsibility for the estates in question was ultimately rested in respondent's hands insofar as it notes, one, that respondent "had a duty to report Mr. Lippman to disciplinary authorities in order to protect the estates in *respondent's court* ..." and, two, that by failing to do so respondent "put at further risk the estates under *his care* ..." (Determination, p. 13; emphasis added). The statutorily required oversight on respondent's part was made all the more necessary in this case because he was well aware Mr. Lippman "liked to gamble and frequented gambling establishments" (Determination, p. 12). In my view, respondent effectively abdicated his duties under state law not at the point at which he failed to report Mr. Lippman after the fact, but at the point at which he failed to maintain the watchful eye envisaged by SCPA §1108(2)(c) before the fact.

By dismissing Charge I of the Formal Written Complaint, the majority effectively holds that even though Section 100.2 of the Rules requires respondent to comply with the statutory requirements of SCPA §1108(2)(c), and even though respondent systematically failed to abide by those requirements, he did not violate the Rules Governing Judicial Conduct. I respectfully disagree, and vote to sustain Charge I.

VI. The Sanction of Removal Is Appropriate

While I cannot agree with some of the characterizations contained in Mr. Emery's dissent, I share his view that based on the record before us, the sanction of censure is unduly lenient. Although "the ultimate sanction of removal is not normally to be imposed for poor judgment, even extremely poor judgment" (*Matter of Shilling*, 51

NY2d 397, 403 [1980]), respondent's demonstrated dereliction of his ethical responsibilities, both in his systematic disregard of an important statutory mandate and in his unacceptable response to his appointee's malfeasance, compels the conclusion that he is unfit for judicial office.

Dated: December 13, 2012

Nina M. Moore, Member
New York State
Commission on Judicial Conduct

STATE OF NEW YORK
COMMISSION ON JUDICIAL CONDUCT

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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.

OPINION BY MR. EMERY
DISSENTING AS TO
THE SANCTION

- -

It is hard to disagree with any aspect of the majority's decision except its obtuse attempt to justify the sanction of censure as a response to this dissent. This is clearly a removal case. The notion that the majority can say what it does about Surrogate Holzman's misconduct and then censure him defies logic, precedent and common sense. Removal is the only sanction which is commensurate with respondent's uncontroverted, sustained, self-aggrandizing misconduct. And that is because it is clear that respondent's three-year cover-up of the criminal acts of his appointee and long-time colleague was actually an attempt to protect himself from scandal and cover up his own misconduct.

Cover-ups, as we have come to learn, in many walks of life are often more egregious than the substantive offenses being concealed. But for a judge to protect himself by covering for an appointee he supervised is a particularly grievous assault on the majesty of the judiciary. It is equivalent, in my view, to corruption.

In this case, respondent's misconduct was worse than a simple cover-up. It was compounded by his bizarre scheme to have Lippman handle estate funds after 2006, when it was discovered that he had systematically taken fees that he had not earned. By constructing this scheme that allowed Lippman to continue earning fees for years – ostensibly to pay back what he had stolen but really to avoid the scandal of thefts by *his* appointee on *his* watch – respondent enabled a continuing fraud. It is as if the United States attorney's office told Madoff when his Ponzi scheme was discovered, "Keep the investments going so that what you make in the market can be returned to your victims." Remember, even if Lippman had been fired in 2006, he would have been responsible for repaying the monies he owed. Respondent has no excuse or justification for secretly helping him repay those monies – especially by retaining him in a position of trust. In effect, respondent was imposing on future estates a person whom he knew could not be trusted. And he told no one other than his trusted insiders, even while he knew law enforcement agencies were breathing down Lippman's proverbial neck.

Respondent knew that as long as he kept his secret scheme in-house, the scandal in his court would not be revealed. He knew better than anyone that Lippman's victims were virtually all intestate estates where the beneficiaries had no one to look to for oversight other than the judge (respondent) who is the sole "disinterested" repository of trust and accountability in the system of public administration. Instead of carrying out his sworn duty, he hid the truth from the victims by not disclosing Lippman's dishonesty and not reporting Lippman to the law enforcement agencies that were engaged in ongoing active investigations, or to disciplinary authorities with oversight over attorney

malfeasance. As we all know, it is all too common for disciplinary committees to disbar attorneys for misuse of client funds.[1] Knowingly enabling that conduct is no less culpable.

As the trenchant Referee's report (to which both the majority and I appropriately defer) explains, as of 2006 when Lippman's thefts were first discovered:

> "Mr. Levy's investigations, reported to respondent in early 2006, showed an estimated $100,000 in unauthorized advance fees. When respondent confronted Mr. Lippman, Mr. Lippman gave respondent an explanation which respondent did not believe. *He felt his trust had been betrayed...* Respondent knew that law enforcement authorities were investigating payments of Mr. Lippman's legal fees ... and he knew 'for a long period of time that Mr. Lippman liked to gamble' and frequented gambling establishments."
>
> (Rep. 39) (Citations omitted; emphasis added)

Respondent testified: "I certainly felt that what he did was a betrayal of trust *to me*" (Tr. 2549; emphasis added). A "betrayal of trust to me" might seem a somewhat displaced concern. What about the trust of the beneficiaries of the estates for which respondent was responsible? Nowhere in his testimony is this concern expressed. Any of his concerns for the victims were, apparently, subsumed by his concern for himself. So the repayment scheme on which the majority determination so heavily relies to mitigate respondent's misconduct seems *not* to have had the primary purpose of helping the victims; rather, the evidence supports the conclusion that it was, as I have

[1] In 2011, the Lawyers Fund for Public Protection determined that the dishonest conduct of 46 disbarred, suspended or deceased lawyers in New York State was responsible for documented client losses totaling $9.9 million (2011 Annual Report of the Lawyers Fund for Public Protection, pp. 14, 22).

concluded, animated by respondent's solipsism. As such, any mitigation on this basis is indulging unsupported, *post hoc* spin of the facts and is plain error.

Respondent also learned that Lippman had commingled his personal law practice funds with those of estates administered by the Public Administrator (Rep. 28). Over the next three years, he learned that Lippman had under-reported both the amounts he owed and the number of estates he had overcharged. Nevertheless, respondent did not report or fire Lippman, and he allowed Lippman to continue to represent estates and collect fees. Notably, the Referee finds that respondent's motivation for this egregious judicial misconduct was based, in significant part, on his long *personal* and professional relationship with Lippman:

> "Michael Lippman started work as counsel to the Bronx County PA in 1970. In 1974, respondent came to work in the Bronx County courthouse as Law Secretary to the then Bronx County Surrogate and later was appointed head of the Surrogate Court's Law Department where he served until he became Surrogate in 1988. During the years that the two men worked in the same courthouse, they saw each other frequently on court business. When respondent was elected Surrogate, he retained Mr. Lippman as counsel to the PA.
>
> During the ensuing years, respondent and Michael Lippman had a close working relationship. In addition to appointing Mr. Lippman as chief counsel to the PA, respondent conferred with him about the staffing needs of the PA's office and, in consultation with Mr. Lippman, selected the attorneys who served as associate counsels... Mark Levy, respondent's Chief Court Attorney, testified that in January 2006, while Mr. Levy was working in respondent's chambers, 'Mr. Lippman came in and said to the Surrogate, "Do I still have a job?"' This incident bespeaks Mr. Lippman's familiarity with the Surrogate and his chambers.

> On occasion, respondent and Michael Lippman saw each other outside the courthouse as well. Respondent knew that Mr. Lippman had season's tickets to Yankee Stadium, and testified that 'over the years there were at least three or four years that I went to Opening Day games with Mr. Lippman.' Respondent could recall at least twice when the two men had lunch together with other parties present. Mr. Lippman attended the wedding of respondent's eldest daughter. Mr. Lippman gave a party at his upstate home for more than 100 people to celebrate respondent's re-election. Mr. Lippman also made telephone calls 'for a couple of months' in an effort to raise money for respondent's 2001 re-election.
>
> When respondent learned that Esther Rodriguez [the Public Administrator] had disobeyed his direction to stop using John Rivera as a vendor, he summarily fired her. When respondent learned that Michael Lippman had taken excess and advance fees and had disobeyed a direction of the court, respondent retained his services as associate counsel and permitted him to represent estates for three more years, albeit Mr. Lippman's fees were used to make refunds. The damage to the estates from the pilfering of Mr. Rivera was miniscule compared to the damage to the estates by Mr. Lippman as it was known to respondent in 2006.
>
> I conclude there was proof by a preponderance of the evidence that the long and close relationship between respondent and Michael Lippman influenced respondent's decision in 2006 not to fire Michael Lippman and his decision not to report Michael Lippman to the DDC and to law enforcement, and instead to set up a repayment plan."
>
> (Rep. 45-47) (Citations omitted.)

Perhaps most revealing of respondent's personal interest, the Referee quoted Mark Levy, respondent's chief court attorney, as stating in 2008 that "the goal 'was to make sure that *by the time the judge's term was completed* [December 31, 2012] that absolutely no person or estate had been in any way prejudiced by...[Mr. Lippman's] conduct'" (Rep. 32-33 [emphasis added]). While the majority seems to view this *goal* as

entirely altruistic (*i.e.*, respondent wanted to ensure that every estate was made whole and no beneficiary was prejudiced), I think it is more to the point that respondent's goal was self-serving: if respondent's plan was successful, he would leave office without anyone ever knowing of Lippman's misdeeds, and the perfidy of respondent's role in enabling them would not come to light.

The majority concludes, as did the Referee, that respondent's cover-up "conveyed the appearance that respondent was motivated by favoritism arising out of their long professional relationship" (Determination, p. 20). My view is that the record shows that his motivation was both professional and personal. However, that conclusion is not necessary to the result I advocate.

I am unpersuaded by the rationale – which the majority seems to swallow hook, line and sinker – that when respondent confronted Lippman over his admission that he had overcharged numerous estates, Lippman "offered generalized, plausible explanations for the excess fees" (Determination, p. 16), such as that his fee estimates had been based on faulty assessments of real estate. As the majority is constrained to acknowledge, albeit in a substantial understatement, "respondent had ample information that should have made him skeptical of [this] information" (*Id.*). Certainly the Referee did not make any finding that his "explanations" were "plausible." Even if, at that point, respondent did not know with 100% certainty that Lippman was a thief, he had more than enough information to know beyond any doubt that Lippman was neither ethical nor trustworthy. Moreover, by his own testimony, he felt "betrayed."

Nor am I persuaded by any argument that it took several years before the magnitude of Lippman's misconduct was discovered. In fact, it is clear that between 2006 and 2009 the onion of Lippman's dishonesty unpeeled even in the face of his attempts to minimize it. Respondent's claim that he was unaware of the extent of Lippman's theft is not a defense because when the circumstances cried out for a thorough, independent assessment of the damage, respondent ignored the cacophony of warning bells and whistles. His only response was to demote Lippman as chief counsel (while allowing him to keep working on cases and even assigning him new cases) and to institute the repayment plan – a scheme that continued for three years, even as respondent continued to learn new details of his appointee's unethical and, likely, criminal behavior.

On this record, respondent's offenses are removable taken separately, let alone combined. They include:

1. Failure to fire an employee known to have engaged in mishandling court monies. We have regularly disciplined town justices for this violation, standing alone (*Matter of Jarosz*; *Matter of Burin*), notwithstanding that the amounts at issue were nowhere near the six-figure totals in this case.
2. Failure to report serious attorney misconduct and evidence of criminal activity that would likely result in disbarment and/or prosecution (see Adv Ops 10-85 [requiring a judge to report a lawyer to a disciplinary authority when the lawyer's alleged substantial misconduct "seriously calls into question the attorney's honesty, trustworthiness or fitness as a lawyer"], 07-129 [judge should report attorney, who admitted that

he/she committed perjury, to disciplinary authority]; 09-142 [judge should report attorney who, the judge concluded, had sought to deceive the court and "repeatedly acted in an extremely unprofessional manner in defiance of court directives"]).

3. Cover-up to benefit a colleague and/or friend (*Matter of Schilling* [judge engineered a scheme to fix a Speeding ticket issued to the wife of a colleague by effectively erasing all copies of the ticket from the system] [removal]).

4. Cover-up to conceal wrongdoing and avoid public exposure and embarrassment (*Matter of Marshall* [judge altered court calendar to conceal that she had disposed of four cases prior to the scheduled court date] [removal]; *Matter of Kadur* [judge made false entries in court documents, deliberately misspelling her son's name in order to conceal that she had presided over her son's cases] [removal]).

5. Using judicial office in a manner that undermines confidence in the judiciary (*Matter of Gelfand*, 70 NY2d 211, 216 [1987] [judge based staffing decisions in his court to further his interests in maintaining a personal relationship with a court employee; his "repeated misuse of his judicial powers...[was] inimical to his role as a judge"] [removal]).

In the determination finding censure appropriate, the majority agrees with each finding by the Referee and adds to the culpability of respondent by essentially concluding that he lied to the Commission about the motives for his misconduct.

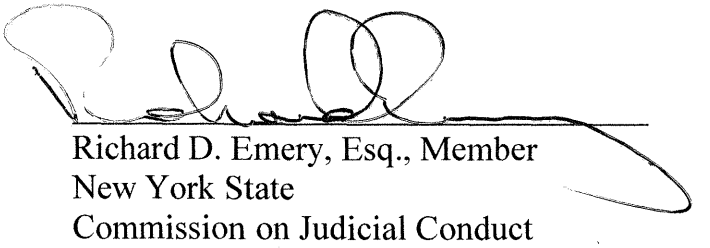
Without using that inflammatory term, the majority states that respondent's "explanations for his failure to share information with law enforcement are unconvincing" (Determination, p. 19). And the majority finds: "Nor are we persuaded by respondent's explanation that he did not contact other agencies so as not to interfere with ongoing investigations and to avoid the appearance that he was misusing his judicial prestige in order to obtain information" (Determination, p. 19). Usually, when we conclude that a respondent has not told us the truth, even about his motives, we do not indulge mitigation. *E.g.*, *Matter of Marshall*, 8 NY3d 741 (2008); *Matter of Mason*, 100 NY2d 56 (2003); *Matter of Gelfand*, 70 NY2d 211 (1987). I recognize that the Court of Appeals has warned us that lack of candor as an aggravating factor should be used cautiously when applied to testimony regarding a judge's subjective intentions (*Matter of Kiley*, 74 NY2d 364, 370-71 [1989]). But when the record compels us to reject the judge's testimony about his motivations, it is certainly proper to note our concerns and test any claimed mitigation against those credibility issues.

In asserting that mitigation supports censure rather than removal, the best the majority can muster is the very essence of respondent's misconduct – that "respondent's judgment was clouded by his long professional association with an attorney who had served as counsel for several decades" (Determination, p. 22). Why the majority has lost its bearings in this case is a total mystery to me. Perhaps it is unduly influenced by the impending end of respondent's term (Determination, p. 23). If so, say so. Perhaps the dismissal of several other charges based on the Referee's findings influenced my colleagues. Perhaps respondent's engaging personality at our hearing

clouded clear judgment. Or perhaps excellent lawyering on his behalf led the majority astray. I am perplexed and disappointed in the lack of accountability this case will convey to others.

What I do know is that this is one of the most egregious cases that has ever been litigated before this Commission during the nine years that I have served. To allow respondent to escape removal on these undisputed facts out of deference or undue leniency towards a retiring judge degrades our function to a degree I have not yet witnessed. Respondent's favoritism towards Lippman should not be compounded by our favoritism towards him.

Dated: December 13, 2012



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