

STATE OF NEW YORK  
COMMISSION ON JUDICIAL CONDUCT

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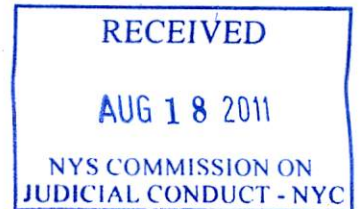
In the Matter of the Proceeding  
Pursuant to Section 44, subdivision 4,  
of the Judiciary Law in Relation to

LEE L. HOLZMAN,

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

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DECISION/ORDER



FELICE K. SHEA, REFEREE

Petitioner, the State Commission on Judicial Conduct (“Commission”), moved by letter for an order precluding respondent from requesting the issuance of subpoenas duces tecum. Respondent seeks the subpoenas so that he may obtain, and offer in evidence at the hearing to start on September 12, 2011, copies of affidavits of legal services approved by Surrogate’s Courts outside of Bronx County. Respondent, by letter, opposed the motion. Petitioner submitted a reply letter and respondent submitted a sur-reply letter.

Petitioner argues that Respondent has failed to meet his burden of showing that the documents in issue are relevant to the subject matter of the investigation. The Commission also contends that the proposed subpoenas could produce a flood of papers and are aimed at delaying commencement of the hearing. Respondent answers that the documents are relevant, that Petitioner has the burden of proving the documents are not

relevant, that Petitioner lacks standing, that the motion is premature, and that the granting of the motion would not prejudice Petitioner.

The parties agree that the subpoenas requested relate only to those parts of Charge I of the Commission's Formal Written Complaint alleging that from 1995 to 2009 Respondent approved legal fees for Counsel to the Bronx Public Administrator based on affidavits of legal services that did not comply with section 1108(2)(c) of the Surrogate's Court Procedure Act ("SCPA").

The critical issue is whether the affidavits approved by other Surrogates could be relevant to this proceeding. Petitioner argues from the premise that Respondent has approved boilerplate affidavits and that he intends to introduce the affidavits approved by other Surrogates to show that the forbidden conduct was widespread. Respondent asserts that the affidavits he approved complied with the SCPA and that the affidavits approved by other Surrogates, also compliant, are relevant to show the applicable standard for statutory compliance.

At this stage, the Commission has defined the subject matter of the investigation too narrowly. It is well established that it is not a defense to a charge of judicial misconduct that others may be similarly derelict. *Matter of Sardino v. State Comm. on Jud. Conduct*, 58 NY2d 286, 291 (1983). However, the question of whether the affirmations of legal services approved by Respondent comply with the statute is broad enough to make the practice of other Surrogates possibly relevant. While the issues in *Matter of Feinberg*, 5 NY3d 206 (2005), are not on all fours with the issues raised by the charges here, it is significant that in affirming findings of misconduct by a

Surrogate, the Court of Appeals in *Feinberg* referred several times to the practice in other Surrogate's Courts. The determination of the Commission in *Feinberg*, 2006 Ann Rep 137 (Comm'n on Jud Conduct, February 10, 2005) also discusses practice in other Surrogate's courts. It is undisputed that at the *Feinberg* hearing affidavits of legal services approved by other Surrogates were admitted in evidence. Petitioner maintains that both the Commission and the Court of Appeals in *Feinberg* ruled that such evidence was irrelevant. I disagree. The practice of other judges in some cases was pointed to by way of comparison to highlight the failings of Surrogate Feinberg.

On the procedural questions raised by counsel, we are in uncharted waters. The power of a referee to issue subpoenas in a judicial disciplinary matter stems from Judiciary Law Section 43(2), which provides that the referee designated by the Commission may "subpoena witnesses...and require the production of any...documents that the referee may deem relevant or material to the subject of the hearing." 22 NYCRR Section 7000.6(e) gives a judge who is the subject of a Commission complaint the right to request that the designated referee issue subpoenas, and "[t]he referee shall grant reasonable requests for subpoenas." In the case of a challenge to a non-judicial subpoena, CPLR 2304 requires that a "request to withdraw" be made to the person who issued the subpoena and if that is denied, a motion to quash may be brought in the Supreme Court.

The leading case, and perhaps the only reported case, dealing with a challenge to a subpoena issued by a referee in a judicial disciplinary matter is *Matter of Morgenthau*, 73 AD3d 415 (1<sup>st</sup> Dept. 2010). In *Morgenthau*, the Administrator of the

Commission on Judicial Conduct was an intervenor who joined with former District Attorney Morgenthau in moving to quash a witness subpoena. On a well developed record that included a hearing, the Supreme Court quashed the subpoena. The Appellate Division affirmed, holding at p. 419: “Where the proponent of the subpoena fails to establish a factual basis that shows the relevancy to the subject matter of the investigation...the subpoena must be quashed...” Here, of course, no subpoenas have as yet been presented and this motion was invented in order to save time and labor. Nonetheless, the *Morgenthau* decision teaches that Respondent bears the burden of coming forward with facts to show that the affidavits of services whose production he seeks will bear the indicia of relevance and materiality and that his requests will be reasonable. I find that at this juncture he has met his burden.

The *Morgenthau* decision also serves as authority for permitting Petitioner to assert standing. See also CPLR 3103. As Petitioner points out, in a confidential proceeding such as this one, subpoenaed entities will have no knowledge of the complaint and it is particularly important to have input from an affected party. The Commission is deemed to have standing to bring this motion.

Respondent has waived any claim of prematurity by agreeing in a telephone conference call on July 13, 2011 to have the issue herein presented by motion in the form of letters before requesting subpoenas.

Respondent is correct in his assertion that Petitioner will not be prejudiced by the issuance of the subpoenas objected to herein to the extent that Petitioner will retain its right to object to the documents subpoenaed when and if they are offered in evidence

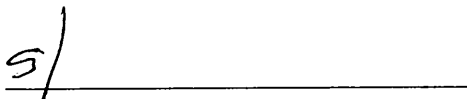
at the scheduled hearing. The fear expressed by Petitioner of “open-ended” subpoenas is unwarranted. To be “reasonable”, as mandated, any subpoena requested must be specific and limited to what is needed.

I note that CPLR 3120(3) was amended in 2002 to provide that “The party issuing a subpoena duces tecum...shall at the same time serve a copy of the subpoena upon all other parties...” The statute goes on to require that the items produced in response to the subpoena be made available to other parties. I ask that all subpoenas be requested on notice.

Petitioner’s motion is denied.

Dated: August 15, 2011  
New York, New York

ENTER



Hon. Felice K. Shea