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**CONFIDENTIAL**

August 12, 2011

Via email & USPS

The Honorable Felice K. Shea  
32 Washington Square West  
New York, NY 10011

Re: *Matter of Lee L. Holzman*

Dear Judge Shea:

This letter is respectfully submitted in reply to respondent's August 5, 2011, letter regarding his request for the issuance of subpoenas duces tecum to obtain documents from Surrogate's Courts outside of Bronx County.

The cases cited by respondent involving the broad investigatory powers of the Attorney General and the wide latitude granted in civil discovery (Resp's letter, p 1) have only limited application here. As demonstrated in our letter of July 26, 2011, the proponent of a Commission subpoena must, in the first instance, show that the documents sought are material and relevant to the subject matter of the Commission's investigation. See *In re Morgenthau*, 73 AD3d 415, 419 (1st Dept 2010). The *Morgenthau* court found,

[t]he Court of Appeals has recognized that the "materiality and relevancy requirements were included in section 42 of the Judiciary Law to prevent investigatory fishing expeditions" (*Matter of New York State Comm. on Jud. Conduct v. Doe*, 61 N.Y.2d 56, 60, 471 N.Y.S.2d 557, 459 N.E.2d 850 [1984]).

*In re Morgenthau*, 73 AD3d at 419. Respondent's request for subpoenas seeking affidavits of legal service from other Surrogate's Court is just such an impermissible "fishing expedition" here.

Significantly, respondent's submission in support of his application for these subpoenas does not establish, nor even allege, a factual basis for his request. Even conceding, *arguendo*, that the practices of other Surrogates could somehow be relevant, *cf. Matter of Sardino v New York State Commission on Judicial Conduct*, 58 NY2d 286, 291 (1983), respondent offers no proof that Surrogates in other counties routinely approved applications for legal fees based on affidavits of legal service as bereft of detail as those submitted to respondent by Michael Lippman.<sup>1</sup> As the First Department held in *Morgenthau*,

[i]t is simply not enough that the proponent merely hopes or suspects that relevant information will develop.

...

Where the proponent of the subpoena fails to establish a factual basis that shows the relevancy to the subject matter of the investigation, the referee issuing the subpoena has exceeded his or her power under Judiciary Law § 43(2) and § 44(4) ...

*In re Morgenthau*, 73 AD3d at 419 (citations omitted).

Respondent's reliance on *Matter of Feinberg v New York State Commission on Judicial Conduct*, 5 NY3d 206 (2005), to support his position is completely misplaced. While it is true that affidavits of legal service approved by other judges were admitted into evidence in *Feinberg*, both the Commission and the Court of Appeals ultimately ruled that such evidence was irrelevant. The Commission, quoting *Sardino*, expressly stated: "even if true, 'the fact that others may be similarly derelict can provide no defense.'" 2006 Ann Rep 137 (Comm on Jud Conduct, February 10, 2005). The Court of Appeals similarly noted that "even the fact that petitioner inherited a lax culture from a predecessor would not excuse such misconduct" (5 NY2d at 215, n.4). Thus, *Feinberg* does not support respondent's claim.

Finally, respondent's argument that the Commission has no standing to move to quash subpoenas to third parties (Resp's letter, p 3) misses the mark.

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<sup>1</sup> To the extent respondent claims he needs these documents to show how trial and appellate judges have interpreted the SCPA (Resp's letter, p 2), he is free to cite reported decisions on that point.

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Commission rules require the Referee to make a threshold finding of relevance before subpoenas can be issued. Judiciary Law § 42(1); 22 NYCRR § 7000.6(e). Commission counsel's opposition to the issuance of the subpoenas is not a motion to quash, but an opportunity to be heard on the Referee's determination.

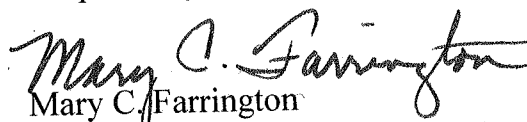
Commission counsel's participation is particularly critical because there are no other parties who can bring relevant information to the Referee's attention. Commission proceedings are confidential and, as result, subpoenaed parties will have no information about the charges in the Formal Written Complaint and little chance to assess whether their evidence might be relevant to the proceeding.

Given that Commission counsel's opposition to the issuance of the subpoenas is not a motion to quash, respondent's standing argument is a red herring. But, even if it were not, the Commission should be deemed to have standing. Commission counsel notes that the Administrator was granted intervenor status in the District Attorney's proceeding seeking to quash the subpoena in *Morgenthau*.

Respondent has repeatedly attempted to delay the hearing because of his impending retirement, which would moot the proceedings. His open-ended subpoenas, which could result in the production of thousands of pages of documents, is just another effort to delay the commencement of the hearing. The Commission has a legitimate interest in preventing undue delay by opposing the issuance of subpoenas for documents that are clearly irrelevant.

For these reasons and those stated in our July 26, 2011, letter, we respectfully request that respondent's request for these subpoenas be denied.

Respectfully submitted,

  
Mary C. Farrington  
Administrative Counsel

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