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

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

Petitioner,

-against-

Index No. 108251/2011

The Commission on Judicial Conduct,

Respondent.

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

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MEMORANDUM OF LAW ON BEHALF OF THE COMMISSION ON JUDICIAL CONDUCT IN OPPOSITION TO THE ORDER TO SHOW CAUSE

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for The Commission on Judicial Conduct
120 Broadway, 24th Floor
New York, New York 10271
(212) 416-8965/8552

MONICA CONNELL
Assistant Attorney General

MICHAEL SIUDZINSKI
Assistant Attorney General

DAPHNEY GACHETTE
Legal Intern
of Counsel

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Preliminary Statement

Petitioner the Honorable Lee L. Holzman ("Petitioner" or "Judge Holzman") brings this petition for a writ of prohibition, by order to show cause, pursuant to Article 78 of the Civil Practice Laws and Rules of the State of New York ("State"). Petitioner seeks an order from this court:1) directing the New York State Commission on Judicial Conduct ("Commission") to dismiss the formal written complaint ("Complaint" or "FWC") against him, without prejudice to re-file upon the conclusion of a separate criminal trial in which Petitioner is not a party or, in the alternative, directing a stay of the disciplinary hearing against petitioner pending the conclusion of the criminal trial; 2) enjoining the Commission from proceeding with the disciplinary hearing pending the determination of this application for relief; 3) sealing the court records in this matter pursuant to § 216.1 of the Uniform Rules

for New York State Trial Courts and Judiciary Law § 44(4); and 4) any other such relief the Court may deem proper. See Petition, Wherefore Clause.

The Commission submits this memorandum of law in opposition to the order to show cause. As set forth below, Petitioner has failed to establish that a writ of prohibition is warranted nor established an entitlement to emergency relief. As a result, Petitioner's order to show cause should be denied and this proceeding should be dismissed.

STATEMENT OF THE CASE

The relevant statutory and factual background of this case are set forth in the accompanying affirmation of Robert H.Tembeckjian ("Tembeckjian Aff."). For the Court's convenience, they are summarized herein.

Statutory Background

The Commission is authorized by the New York State Constitution to "receive, initiate, investigate and hear complaints with respect to the conduct, qualifications, fitness to perform or performance of official duties of any judge or justice of the Unified Court System." See Article 6, § 22. The Commission's enabling statute is Judiciary Law, Article 2-A, §§ 40-48. The Commission is the sole state agency responsible for receiving, initiating and investigating complaints of misconduct or disability against the approximately 3,500 judges and justices of the New York State Unified Court System. See Tembeckjian Aff. ¶ 5.

When warranted, the Commission may initiate an accusatory instrument ("formal written complaint") against a judge and direct that a full evidentiary hearing be held or, in lieu of a hearing, it may consider an agreed statement of facts submitted by its Administrator and the respondent-judge. See Judiciary Law §§ 44(4), 44(5), 44(6). During a hearing, the Administrator prosecutes the case and an independent Referee, appointed by the

Commission, hears the matter and reports proposed findings of fact and conclusions of law to the Commission. See Judiciary Law § 43(2); 22 NYCRR §§ 7000.1(o); 7000.6(l).The Commission then considers the report and makes a final determination as to whether misconduct has occurred. See Judiciary Law § 44(7); 22 NYCRR § 7000.7. The Commission then considers the report and makes a final determination as to whether misconduct has occurred. See Judiciary Law § 44(7); 22 NYCRR § 7000.7.

At the end of such proceedings, the Commission has authority to render determinations of confidential caution, public admonition, public censure, removal or retirement from office. See Judiciary Law § 44; 22 NYCRR §§ 7000.1(m), 7000.7(d). Any judge or justice who is the subject of a public determination is entitled to review in the Court of Appeals. See Judiciary Law § 44 (7). Where the Commission determines to admonish, censure, remove or retire a judge, the determination and the record on review are transmitted to the Court of Appeals and, after service on the judge, are made public. See Judiciary Law § 44(7).

Underlying Proceedings Before the Commission on Judicial Conduct

All complaints received from the public or otherwise brought to the attention of the Commission by newspaper articles or other sources are referred to the full Commission for an initial determination of whether the complaint should be dismissed or investigated. See Tembeckjian Aff. ¶ 7. Petitioner Lee L. Holzman has been a Judge of the Surrogate's Court, Bronx County, since 1988. Based on newspaper reports and the complaints of six individuals, the Commission opened an investigation into Petitioner's conduct regarding irregularities in procedure in matters pending before Petitioner's court. See Tembeckjian Aff. ¶ 13.

On January 4, 2011, the Commission served a formal written complaint ("Complaint") upon Petitioner, alleging four separate charges against him. A copy of the Complaint is attached to the Verified Petition as Exhibit B. The nature of those charges is set forth at greater length in the accompanying affidavit of Robert H. Tembeckjian ("Tembeckjian Aff."). In brief, the Complaint alleged that:

- from 1995 to 2009, in specified cases then before the Surrogate's Court, Petitioner approved legal fee applications submitted by attorney Michael Lippman, Counsel to the Bronx Public Administrator's Office in violation of the requirements of the Surrogates Court Procedures Act § 1108(2)(c);

- in 2005 and 2006, Petitioner failed to report Michael Lippman to law enforcement authorities or to the Departmental Disciplinary Committee upon learning that Lippman took unearned advance legal fees and/or excessive fees;

- from 1997 to 2005, Petitioner failed to adequately supervise and/or oversee the work of court staff and appointees, which resulted in fee abuses by Michael Lippman, delays in the administration of certain specified estates, individual estates with negative balances, the Public Administrator placing estate funds in imprudent and/or unauthorized investments, and the Public Administrator employing her boyfriend who billed estates for services that were not rendered and/or overbilled estates;

- in 2001 and 2003, Petitioner failed to disqualify himself from cases in which Michael Lippman appeared, notwithstanding that Lippman raised more than $125,000 in campaign funds for Petitioner's 2001 campaign for Surrogate.

On or about January 21, 2011, Petitioner answered the charges, denied the substance of the Complaint, and asserted three affirmative defenses: 1) that the Complaint failed to state a cause of action, 2) that the factual allegations in the Complaint were unconstitutionally vague, and 3) that the Complaint violated his due process rights. See Tembeckjian Aff., ¶ 18. The Commission assigned the Honorable Felice K. Shea as Referee to hear and report findings of fact and conclusions of law. Judge Shea scheduled a five-day hearing for May 9, 2011. See Tembeckjian Aff., ¶ 19.

In the course of the proceeding, and in compliance with Judiciary Law § 44(4) and 22 NYCRR § 7000.6(h), the Commission provided discovery to Petitioner, including a list of witnesses the Commission intended to call, copies of any written statements made by those witnesses, copies of any documents the Commission intended to introduce at the hearing and any material that would be exculpatory. Petitioner was also given copies of relevant documents from the case files of every estate included in the charges in the Complaint. Among the witness statements Petitioner was given was the transcript of the statement given to the Commission by Michael Lippman. See Tembeckjian Aff., ¶ 21.

Michael Lippman ("Lippman") is currently facing criminal charges in New York Supreme Court, Bronx County. Lippman was indicted on July 7, 2010 on charges of fraud and grand larceny. His next appearance in Criminal Court is on September 20, 2011. See Petition, ¶ 2.

On February 2, 2011, Petitioner made a motion before the full Commission which sought the same relief requested in this proceeding: dismissal of the Complaint without prejudice to re-file or, in the alternative, for a stay of the Commission's proceeding. Petitioner argued, as he does again here, that he cannot defend himself against the charges without the testimony of Michael Lippman and provided a letter from Lippman's counsel stating he had advised his client, if called to testify, to assert his Fifth Amendment privilege against self-incrimination. See Tembeckjian Aff., ¶ ¶ 24-26.

By a memorandum of law, dated February 25, 2011, Commission staff opposed Petitioner's motion, arguing that the motion was premature for the following reasons:1) Lippman could not exercise his Fifth Amendment privilege in advance; 2) the Referee had not yet had a chance to hear the Commission's case and to rule on whether Lippman's

testimony would be relevant to Petitioner's case; and 3) it had not yet been determined whether Lippman waived his privilege by testifying under oath during the Commission's investigation. Commission staff also argued that Lippman's testimony was irrelevant to the proceeding because the allegations in the Complaint addressed Petitioner's conduct, not Lippman's. They further argued that the allegations at issue were largely based on documents filed in the Surrogate's Court which had been provided to Petitioner, and that Petitioner had failed to show why it was that Lippman's alleged criminal conduct could excuse Petitioner's own failure to act based on statutory requirements and the documentary evidence before him in Surrogate's Court. See Tembeckjian Aff., ¶ ¶ 27-28.

On March 7, 2011, Petitioner requested an adjournment of the hearing until January 2012 in order to permit him sufficient time to review the discovery materials. The Referee adjourned the hearing until the week of September 12, 2011.

On March 21, 2011, the Commission denied Petitioner's motion and referred the matter back to the Referee for the hearing. A copy of the Commission's determination is attached to the Verified Petition as Exhibit A.

On July 13, 2011, Mark Levine, Deputy Administrator for the Commission's New York office and Alan Friedberg, Special Counsel to the Commission, participated in a pre-hearing telephone conference with Petitioner's counsel and the Honorable Felice K. Shea, Referee in the Commission proceeding. During that conference, when the Fifth Amendment issue was raised, Referee Shea stated and Petitioner's counsel concurred that:1) the Fifth Amendment issue was premature, 2) she would deal with it at the hearing if Lippman were called and asserted the privilege, and 3) a ruling on the relevancy of Lippman's testimony

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a list of witnesses the Commission intended to call, copies of any written statements made by those witnesses, copies of any documents the Commission intended to introduce at the hearing and any material that would be exculpatory. Petitioner was also given copies of relevant documents from the case files of every estate included in the charges in the Complaint. Among the witness statements Petitioner was given was the transcript of the statement given to the Commission by Michael Lippman. See Tembeckjian Aff., ¶ 21.

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Petitioner is currently a sitting judge in the Surrogate's Court. He may serve through December 31, 2012, at which time he will be required to retire because he will have reached the mandatory retirement age of 70.See Tembeckjian Aff., ¶ 12.When the Commission is unable to render a final determination in a pending matter before a judge's term expires, both the Commission and the Court of Appeals lose jurisdiction. Matter of Scacchetti v. New York State Commission on Judicial Conduct, 56 N.Y.2d 98 (1982).Thus, if the pending proceedings are dismissed or stayed, the Commission may be rendered unable to proceed on the charges against the Petitioner.

The Instant Application

By order to show cause, dated July 19, 2011, Petitioner now seeks to stay or dismiss the pending charges against him, alleging that if subpoenaed to testify at Petitioner's disciplinary hearing, Lippman will assert his Fifth Amendment privilege and refuse to testify. Petitioner contends that Lippman is a critical witness to the disciplinary hearing and under these circumstances proceeding with the disciplinary hearing deprives Petitioner of the ability to mount a defense as to the charges against him in violation of Petitioner's constitutional right to due process.

ARGUMENT

POINT I

PETITIONER HAS FAILED TO STATE A CAUSE OF ACTION UPON WHICH RELIEF CAN BE GRANTED AS HIS CLAIM IS NOT JUSTICIABLE.

A. Standard of Review

Petitioner has filed this petition pursuant to CPLR article 78, seeking the extraordinary remedy of a writ of prohibition. Matter of Doe v. Axelrod, 71 N.Y.2d 484, 490 (1988). In order to obtain a writ of prohibition, Petitioner must demonstrate that he has a clear legal right to the relief he seeks. Id. Additionally, even where Petitioner has a clear legal right to relief, a writ of prohibition is only available when an agency acts or threatens to act either without jurisdiction or in excess of its authorized powers such that the actions of the agency "implicate the legality of the entire proceeding." See Id.; see also Matter of Nicholson v. State Commission on Judicial conduct, 50 N.Y.2d 597 (1980); Neal v. White, 46 A.D.3d 156, 159 (1st Dep't 2007). Even if the remedy of prohibition would otherwise properly lie, the writ does not issue as of right, but only in the sound discretion of the court. Jacobs v. Altman, 69 N.Y.2d 733, 735 (1987); Matter of Rush v. Mordue, 68 N.Y.2d 348, 354 (1986). In deciding whether to exercise its discretion in issuance of a writ, the court should consider the gravity of the harm at issue and "whether the excess of power can be adequately corrected on appeal or by other ordinary proceedings at law or in equity." LaRocca v. Lane, 37 N.Y.2d 575, 579-580 (1975).

Here, the Commission has statutory authority to commence disciplinary proceedings against the Petitioner. See N.Y. Const. Article 6, § 22; see also Judiciary Law, Article 2-A, §§ 40-48. Yet, Petitioner seeks to prohibit the Commission from acting pending the

resolution of a potential witness' criminal matter on the speculation that, until the end of the criminal matter, Petitioner's ability to call the witness will be impaired if the witness asserts his Fifth Amendment right not to testify at the disciplinary hearing.

Petitioner has no clear legal right to the relief he is seeking because, as a general principle, "...courts are constrained not to interject themselves into ongoing administrative proceedings until final resolution of those proceedings before the agency." See Galin v. Chassin, 217 A.D.2d 446, 447 (1st Dep't 1995). At most, Petitioner alleges an error of law and he has an adequate remedy in his ability to appeal the administrative determination. See Doe, 71 N.Y.2d at 490. Consequently, as set forth below, the extraordinary remedy of prohibition is not available in this case.

B. Petitioner's Claim Is Not Ripe for Review

Administrative actions are not ripe for judicial review unless and until they impose an obligation or deny a right as a result of the administrative process. See Gordon v. Rush, 100 N.Y.2d 236, 242 (2003); see also Essex County v. Zagata, 91 N.Y.2d 447, 453 (1998). This occurs only when the decision maker arrives at a final and definitive position-on the relevant issue-that inflicts an actual, concrete harm to the Petitioner. See Gordon,100 N.Y.2d at 242. Further, judicial review can only take place when this harm cannot be "prevented or significantly ameliorated by further administrative action ... available to the [Petitioner]." See id. (internal quotation marks and citation omitted).

Petitioner's challenge to the proceeding is both premature and without merit. His claim essentially rests on his assertion that Lippman's assertion of his Fifth Amendment privilege will deny Petitioner the ability to mount a defense to the charges against him. See Petition, ¶ 45. However, the disciplinary hearing before the Referee is set to begin on

September 12, 2011. See Petition, ¶ 2. At the time of this petition, Lippman has not been called as a witness and thus has not yet asserted his Fifth Amendment privilege. Therefore, the issue of whether the Petitioner will be able to mount a defense is not yet ripe for judicial review. See Matter of Tahmisyan v. Stony Brook University, 74 A.D.3d 829, 831 (2d Dep't 2010)(holding that an Article 78 proceeding, before the commencement of a disciplinary hearing, to prohibit the introduction of certain audiotape recordings into evidence was premature).

Furthermore, Petitioner's request for relief rests upon numerous assumptions. First, that Lippman will be called as a witness by the Commission's staff or that his testimony will be necessary for Petitioner to defend himself against the charges. Second, that Lippman will assert the Fifth Amendment privilege in response to the particular questions asked of him on the stand. Third, that in the event Lippman is called and does refuse to testify, the Referee will not properly rule on any applications that Petitioner may make at that time. Fourth, that Petitioner's rights of appeal within the administrative scheme established by the Legislature, which includes a review as of right to the Court of Appeals, will not be sufficient to vindicate his rights; and finally that there will be some time in the future wherein Lippman will not assert his Fifth Amendment rights when questioned about his conduct before the Surrogate's Court. These assumptions are highly speculative and demonstrate that Petitioner's claim is not justiciable because it is not yet ripe.

Petitioner has not been denied a clear legal right as a result of the administrative process. While Lippman's attorney has stated that he will advise his client to assert the Fifth Amendment if Lippman is called to testify in the disciplinary hearing, see Petition, Exhibit E, it is not yet certain that Petitioner will call Lippman as a witness for the defense. Further,

should Lippman testify, it is not clear that he will take the Fifth for every question posed of him. See Figueroa v. Figueroa, 160 A.D.2d 390, 391 (1st Dep't 1990)(noting that the privilege against self-incrimination may not be asserted or claimed in advance of questions actually propounded). In fact, Lippman, in his first appearance during the Commission's investigation, "answered questions under oath about the affirmations of [the] legal services he submitted in [Petitioner's] court, when he collected fees, whether he collected fees before filling an affirmation of legal services, and whether [Petitioner] was aware when he collected fees." See Petition, Exhibit H, Memo in Opposition, 8-9. Therefore, it is unclear what questions, if any, Lippman will refuse to answer and Petitioner does not have a right to delay the administrative process due to his speculative beliefs.

Moreover, the Referee, the decision maker for the disciplinary hearing, has not made a final, determinative decision on this issue. Although a witness may invoke his Fifth Amendment right, a decision maker has wide discretion in fashioning the appropriate corrective response once this right is invoked. See People v. Visich, 57 A.D.3d 804, 805-06 (2d Dep't 2008). As Lippman has yet to invoke his Fifth Amendment privilege and the Referee has yet to rule on the issue, the decision maker in the administrative process has not inflicted any actual or concrete harm to the Petitioner. Furthermore, Petitioner has not submitted any affidavits to advise the Commission as to the substance of Lippman's testimony and how that testimony is critical or necessary to his defense. See Allen v. Rosenblatt, 2004 WL 2589739 * 2 (Civ. Ct. N.Y. Co. 2004) (holding that, absent an affidavit in support of what the witness' testimony might be, the court could not determine whether the witness' testimony is critical or necessary). At most, the Petitioner is being forced to begin the disciplinary hearing without knowing if he will ultimately be able to call Lippman as a

witness and, outside of Petitioner's bald assertion, it is not clear that he has suffered a concrete harm from this uncertainty.

Aside from allowing the Referee to rule on this issue during the disciplinary hearing, Petitioner has the additional option of arguing his position to the full Commission at the completion of the hearing. Thus, in the event that Petitioner disagrees with any ruling the Referee makes with regard to Lippman, Petitioner can make his arguments to the full Commission. The Commission may agree and remand the matter to the Referee, or it may decide that Petitioner has not committed judicial misconduct. In either of those situations, Petitioner's claim would become moot. In the event that Petitioner disagreed with the Commission's determination and that determination imposed any public discipline, Petitioner would have a review, or appeal, as of right in the Court of Appeals. See Judiciary Law § 44(7). So in the event Petitioner is aggrieved by the Commission's final determination, he has the right to plenary review in the Court of Appeals. See Judiciary Law § 44(7); Matter of Gilpatric, 13 N.Y.3d 586 (2009).

Thus, not only is Petitioner's claim not ripe for review, Petitioner's alleged harm can be ameliorated by further administrative action and this article 78 petition should be dismissed.

C. Petitioner Must Exhaust All Available Administrative Remedies before Seeking Judicial Review of Administrative Determinations

It is a well settled principle of administrative law that Petitioner must exhaust all available administrative remedies before obtaining judicial review of this agency's actions. See e.g., Doe, 71 N.Y.2d at 490; DiBlasio v. Novello, 28 A.D.3d 339, 341 (1st Dep't 2006); Galin, 217 A.D.2d at 447. The focus of the exhaustion doctrine is not on the administrative action itself, but on whether administrative procedures are in place to review the action and

whether Petitioner has exhausted these procedures. Church of St. Paul and St. Andrew v. Barwick, 67 N.Y. 2d 510, 521 (1986). Because the application of the exhaustion doctrine furthers the goal of preventing incessant judicial interruption of the administrative process, exceptions to the doctrine are limited to when resort to an administrative remedy would be futile, an agency's action is challenged as unconstitutional or pursuit of an administrative remedy would cause irreparable injury. See Connerton v. Ryan, 2011 WL 2637500 *1 (3d Dep't 2011). Petitioner's claim fails to fall within any of these exceptions.

As set forth above, it is undisputed that even if the Referee ultimately rules adversely as to Petitioner's Fifth Amendment argument, there are several administrative procedures in place to review that decision, including a legal right to a review of the Commission's decision before the Court of Appeals. Furthermore, Prohibition does not and cannot lie as a means of seeking collateral review for errors of law in the administrative process, however grievous and "however cleverly the error may be characterized by counsel as an excess of jurisdiction or power." See Doe, 71 N.Y.2d at 490.

The mere allegation of a constitutional due process violation does not excuse the Petitioner from pursuing the administrative remedies available to him. See Connerton, 2011 WL 2637500 *2. For example, in Allen v. Rosenblatt, respondents sought to stay their contempt hearings for allegedly failing to carry out a court order to correct certain violations. 2004 WL 2589739 * 1. In that case, respondents argued that their key witness would plead the Fifth Amendment if he was called to testify due to his pending criminal cases for unlawful eviction. Id. The court, unpersuaded by respondents' argument, denied the stay, finding that the witness' guilt in the criminal proceedings was irrelevant to whether the respondents failed to carry out the court order. Id.

Here, Petitioner contends that Lippman's assertion of his Fifth Amendment privilege hampers his ability to put on a defense at the disciplinary hearing. As in Allen, Lippman's guilt in his criminal proceedings is irrelevant to whether Petitioner failed to comply with the statutory mandate for approving Lippman's affirmations. Given the charges, Petitioner may put forth a defense without Mr. Lippman's testimony by testifying to his own conduct regarding each specific charge. Petitioner certainly has not made any offer of proof as to the testimony he would reasonably expect Lippman to offer to refute the charges against Petitioner.

The Complaint against the Petitioner properly focuses on Petitioner's own conduct rather than that of Lippman. For example, the Complaint charges Petitioner with conduct such as his approval of fees based on a "boilerplate" affidavits of legal services without consideration of statutory factors, failure to report Lippman to the appropriate authorities, approval of Lippman's fee requests even after learning that Lippman had taken unearned advance and/or excessive legal fees, and failure to disqualify himself in cases in which Lippman appeared. See Tembeckjian Aff. ¶¶ 14-17. The Commission provided Petitioner with the documents he needs to establish an adequate defense to the charges including a list of any witnesses the Commission intends to call, copies of any written statements made by those witnesses, copies of any documents the Commission intends to introduce at the hearing and any material that would be exculpatory. See Tembeckjian Aff. ¶20. Thus, the Commission has provided Petitioner with the "basic requisites" of due process: notice and an opportunity to be heard. See Velella v. New York City Conditional Release Com'n, 13 A.D.3d 201, 202 (1st Dep't 2004)(noting that there is no constitutional guarantee of any particular form of procedure).

Against this backdrop, Petitioner's reliance on Britt v. International Bus. Servs., 255 A.D.2d 143 (1st Dep't 1998) and Stolowski v. 234 East 178th Street LLC, 2006 WL 1408410 (Sup. Ct. Bx. Co. 2006) is misplaced. Both of these cases involved tort actions where the testimony of the witness asserting the Fifth Amendment privilege was essential and would in whole or in part reduce the liability of the defendant. See Stolowski, 2006 WL 1408410 * 7 (noting that the resolution of a criminal case may result in the civil case either not requiring discovery or a trial). In the present case, the opposite is true since even if Lippman were to testify that the Petitioner had no knowledge of his wrongdoings, this testimony would not excuse Petitioner's liability for failing to abide by the statutory requirements. Moreover, "[a] constitutional claim that may require the resolution of factual issues reviewable at the administrative level should not be maintained without exhausting administrative remedies." See Schulz v. State, 86 N.Y.2d 225, 232 (1995); Town of Oyster Bay v. Kirkland, 81 A.D. 3d 812, 816 (2d Dep't 2011). Petitioner's constitutional claim does not involve a purely legal question. Instead, Petitioner's challenge focuses on the resolution of a factual issue, specifically what Lippman will testify to and how that testimony can aid in his defense at the disciplinary hearing. See Matter of East 51st Street Crane Collapse Litigation, 30 Misc.3d 521, 530-31 (Sup. Ct. N.Y. Co.)("determining whether the [Fifth Amendment] privilege is available in given circumstances ... involves a factual inquiry). This issue is reviewable at the administrative level and judicial intervention should not be maintained before Petitioner exhausts all of the remedies available to him.

The Appellate Division has recognized that there is "no legal cognizable injury to be suffered from being subjected to [a] disciplinary hearing with the possibility of a subsequent finding of professional misconduct." See Galin, 217 A.D.2d at 447; see also Doe, 71 N.Y.2d

at 491(Simons, J., concurring)(noting that an agency's decision that ultimately affects the permissible scope of cross-examination in a hearing does not implicate the exception to the exhaustion doctrine). In light of the foregoing, Petitioner has not demonstrated that he will suffer an irreparable injury that warrants court intervention. Nor has Petitioner demonstrated that he is entitled to the extraordinary remedy of the issuance of a writ of prohibition.

POINT II

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

Petitioner also seeks to enjoin the Commission from proceeding with the disciplinary hearing against him pending the resolution of this petition. However, the Court of Appeals has long held that the granting of injunctive relief is also an extraordinary remedy. Kane v. Walsh, 295 N.Y. 198, 205 (1946). Consequently, the elements for preliminary injunctive relief parallel the standard for an article 78 writ of prohibition in many aspects. See generally id. In order to obtain preliminary injunctive relief, the Petitioner must demonstrate that he has a clear likelihood of ultimate success on the merits, that he will suffer irreparable injury unless the injunction is granted, and that the balancing of the equities lies in his favor. See e.g., See e.g., Scotto v. Mei, 219 A.D.2d 181, (1st Dept't 1996); Faberge International, Inc. v. DiPino,109 A.D.2d 235, (1st Dep't 1985); Kurzban & Sons, Inc. v. Bd. of Ed. of The City of NY, 129 A.D. 756, (2d Dept't 1987). Petitioner has failed to meet this three pronged test.

The first prong-demonstration of a clear likelihood of success-requires the Petitioner to establish that has a clear right to relief, in evidentiary detail. See Little India Stores v. Singh, 101 A.D.2d 727 (1st Dep't 1984); Faberge, 109 A.D2d at 240. As discussed earlier, Petitioner does not have a clear legal right to stall this administrative process. Indeed, Petitioner offers no evidence to establish that he has a clear right to injunctive relief. Aside

from speculative belief, Petitioner proffers no affidavits with evidentiary detail as to what Lippman may say to aid Petitioner in his defense of the disciplinary charges against him and whether Lippman's testimony will aid the Petitioner involves a factual dispute that favors denying Petitioner's request for injunctive relief. See Faberge, 109 A.D2d at 240 (explaining that when facts are in dispute, the court will deny the request for injunctive relief).

Petitioner also fails to establish the second prong, in that he fails to demonstrate that he will suffer "irreparable harm" from proceeding with the hearing. Petitioner suffers no irreparable harm from being subjected to a disciplinary hearing. See Galin, 217 A.D.2d at 447; see also Newfield Central School District v. N.Y.S. Division of Homan Rights, 66 A.D.3d 1314, 1316 (3d Dep't 2009)(finding no irreparable harm from proceeding with a hearing prior to a judicial determination on the agency's jurisdictional authority to adjudicate the matter); Ashe v. Enlarged City School District, 233 A.D.2d 571, 573 (3d Dep't 1996). The law affords the Petitioner several adequate remedies for the wrong he contends he will suffer and as such he suffers no irreparable harm from the Commission's determination to proceed with the disciplinary hearing. See Kane, 295 N.Y. at 205-06 (denying injunctive relief when there are adequate legal remedies for the contemplated wrong).

As for the third prong, the balancing of the equities does not favor Petitioner. It should be noted, in weighing the equities here, that a preliminary injunction would cause the People of the State of New York irreparable harm because they are entitled to a judiciary devoid of corruption and a stay would almost certainly mean that the inquiry into the Petitioner's judicial conduct will end. Petitioner will turn 70 next year and will face mandatory retirement by December 31, 2012. Given the amount of time needed to complete the disciplinary process, which involves the hearing, post hearing briefs, the Referee's report,

briefs to the Commission, oral argument and finally a determination by the Commission, see Tembeckjian Aff., ¶ 35, delaying the process for any length of time increases the risk that the disciplinary proceeding will be rendered moot as it may not conclude before Petitioner leaves his position on the bench.

Furthermore, although Petitioner argues that once Lippman's criminal matter is settled he will be available to testify, this assertion is based on speculative belief. Petitioner cannot assert with Certainty that Lippman will not attempt to assert his Fifth Amendment right indefinitely in fear of additional criminal prosecution. See Matter of East 51st Street Crane Collapse Litigation, 30 Misc.3d at 530-31(noting that the right to assert one's Fifth Amendment privilege only depends on the *possibility* of prosecution). "Administrative proceedings are mandated to proceed expeditiously to protect ... public interest." (emphasis added). See Galin, 217 A.D.2d at 447. Thus, the balancing of equities lies in favor of the respondent. Petitioner cannot be allowed to stall disciplinary proceedings against him until the matter is rendered moot based on a speculative belief as to what a potential witness may or may not say and when he will or will not say it.

POINT III

PETITIONER IS NOT ENTITLED TO HAVE THE RECORD OF THIS PROCEEDING SEALED

There is a strong presumption in favor of public access to court proceedings as a matter of public policy. Matter of Westchester Rockland Newspapers v. Leggett, 48 NY2d 430, 437-438 (1979). Section 4 of the Judiciary Law states that the "sittings of every court within this state shall be public," with limited exceptions inapplicable here. The Uniform Rules for Trial Courts states: "Except where otherwise provided by statute or rule, a court shall not enter an order in any action or proceeding sealing the court records, whether in

whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as the parties." See 22 NYCRR § 216.1(a). "Confidentiality is clearly the exception, not the rule." In re Will of Hoffman, 284 AD2d 92, 93-94 (1st Dept. 2001).

Most significantly, for purposes of this Court's analysis, the Court of Appeals has specifically rejected the sealing of records where the Commission is subjected to an Article 78 proceeding, holding that the strict rules of confidentiality imposed on the Commission by Judiciary Law §§ 44 and 45 "appl[y] only to matters before the commission," not to matters before a court. Nicholson v. State Commission on Judicial Conduct, 50 NY2d 597, 612-13 1980.1. This Court should follow the precedent set forth in Nicholson and allow the records of this proceeding to remain unsealed.

Petitioner has shown no reasonable basis for making an extraordinary exception to the Nicholson doctrine in this case. As Justice Madden held when denying a similar application from a judge seeking to seal her Article 78 petition for a writ of prohibition

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2. In fact, as the captions reveal, most Article 78 proceedings involving the Commission have been public proceedings. See Spargo v. New York State Commission on Judicial Conduct, 23 AD3d 808 (3d Dept 2005); Saferstein v. New York State Commission on Judicial Conduct, 298 AD2d 589 (2d Dept 2002); Sassower v. Commission on Judicial Conduct, 289 AD2d 119 (1st Dept 2001); Mantell v. New York State Commission on Judicial Conduct, 277 AD2d 96 (1st Dept 2000); Montaneli v. New York State Commission on Judicial Conduct, 133 Misc 2d 526 (Sup Ct NY County 1986); Wilk v. New York State Commission on Judicial Conduct, 97 AD2d 716 (1st Dept 1983); Sims v. New York State Commission on Judicial Conduct, 94 AD2d 946 (4th Dept 1983); Richter v. State Commission on Judicial Conduct, 85 AD2d 790 (3d Dept 1981); Darrigo v. State Commission on Judicial Conduct, 74 AD2d 801 (1st Dept 1980); Raysor v. Stern, 68 AD2d 786 (4th Dept 1979); Matter of Owen, 413 NYS2d 815 (NY Ct Jud, May 4, 1978) *with* Doe v. Commission on Judicial Conduct, 246 AD2d 409 (1st Dept 1998); Doe v. State Commission On Judicial Conduct, 137 Misc 2d 268 (Sup Ct NY County 1987); Doe v. Commission on Judicial Conduct, 124 AD2d 1067 (4th Dept 1986); Anonymous Town Justice v. State Commission on Judicial Conduct, 96 Misc 2d 541(Sup Ct NY County 1978); Cunningham ex rel. Unnamed Town and Village Justices of Erie County v. Stern, 93 Misc 2d 516 (Sup Ct NY County 1978).

against the Commission, "[t]he investigation of a judge necessarily implicates the integrity of public confidence in the judiciary, and is a matter of legitimate public concern." Shelton v. New York State Commission on Judicial Conduct, Sup Ct, New York County, February 8, 2007, Index No. 118283/06 at 17 (unreported decision, attached hereto). Petitioner's request to seal the record here should thus be denied.

CONCLUSION

For all the foregoing reasons, it is respectfully requested that Petitioner's request for emergency injunctive relief be denied; the petition be denied and dismissed in its entirety; and that the Court issue such other and further relief as may be just, proper and appropriate.

Dated: New York, New York
July 28, 2011

Respectfully submitted,

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Respondent DHCR
By: _____
MONICA CONNELL
MICHAEL SIUDZINSKI
Assistant Attorney General
120 Broadway, 24th Floor
New York, New York 10271
(212) 416-8965/8552

MONICA CONNELL
Assistant Attorney General
MICHAEL SIUDZINSKI
Assistant Attorney General
DAPHNEY GACHETTE
Legal Intern
of Counsel