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

MICHAEL H. FEINBERG,

Surrogate, Kings County.

- -

THE COMMISSION:

Lawrence S. Goldman, Esq., Chair
Honorable Frances A. Ciardullo, Vice Chair
Stephen R. Coffey, Esq.
Colleen C. DiPirro
Richard D. Emery, Esq.
Raoul Lionel Felder, Esq.
Christina Hernandez, M.S.W.
Honorable Daniel F. Luciano
Honorable Karen K. Peters
Alan J. Pope, Esq.
Honorable Terry Jane Ruderman

APPEARANCES:

Robert H. Tembeckjian (Alan W. Friedberg, Melissa DiPalo and Jennifer Tsai, Of Counsel) for the Commission

Harvey L. Greenberg for Respondent

The respondent, Michael H. Feinberg, Surrogate of Kings County, was served with a Formal Written Complaint dated March 18, 2003, containing one charge.

Respondent filed a verified answer dated August 12, 2003.

By Order dated May 22, 2003, the Commission designated Honorable Felice K. Shea as referee to hear and report proposed findings of fact and conclusions of law. A hearing was held on January 5 to 9, 26 and 27, 2004, in New York City, and the referee filed a report dated July 13, 2004.

The parties submitted briefs and replies with respect to the referee's report. On September 23, 2004, the Commission heard oral argument, at which respondent and his counsel appeared, and thereafter considered the record of the proceeding and made the following findings of fact.

1. Respondent has been the Surrogate of Kings County since January 1, 1997. Prior to that, he served as a Civil Court judge from 1981 to 1990 and as a Supreme Court justice from 1990 through 1996.

2. Louis R. Rosenthal, an attorney, is a former Civil Court judge, Criminal Court judge and assistant United States attorney, and holds a Master of Laws degree. Mr. Rosenthal's father had been the Public Administrator of Kings County from 1958 to 1964. While Mr. Rosenthal was in private practice from 1982 to 1997, approximately 5% of his work was in the field of Surrogate's Court litigation.

3. Respondent and Mr. Rosenthal met while they were students at Brooklyn Law School from 1964 to 1967. Over the years they maintained a friendly relationship. From 1981 to 2001 they lived five blocks away from each other. Occasionally they lunched together, dined together and drove to work together.

Respondent attended Mr. Rosenthal's daughter's wedding and the bar mitzvahs of Mr. Rosenthal's sons, and they celebrated other family milestones together, such as housewarming and birthday parties.

4. Mr. Rosenthal supported respondent's campaign for election to the Surrogate's Court. He gave respondent advice and solicited political support, votes and money for respondent's candidacy.

5. After respondent won the Democratic Party primary election for Surrogate in 1996, Mr. Rosenthal told respondent that he would like to be Counsel to the Public Administrator ("Counsel"), an office which the Surrogate fills by appointment pursuant to Section 1108(2)(a) of the Surrogate's Court Procedure Act ("SCPA").

6. Sometime after Mr. Rosenthal made this request and shortly after respondent took office as Surrogate, respondent discharged the longtime prior Counsel, the law firm of Hesterberg and Keller, and appointed Mr. Rosenthal as Counsel. Before appointing Mr. Rosenthal, respondent did not interview any candidates for the position. Mr. Rosenthal has served as Counsel since that time and, as of the date of this determination, continues to serve in that position. In addition to serving as Counsel, Mr. Rosenthal maintains a private practice of law.

7. The Public Administrator administers the estates of decedents who die without a will or where there is no qualified individual who has petitioned to administer the estate. Counsel's duties include petitioning for letters of administration, marshaling the estate assets, searching for heirs, conducting kinship hearings, disposing

of real property, filing tax returns, and generally representing the interests of the Public Administrator in all aspects of administration of estates. Counsel's compensation is paid from the assets of the estate and approved by the Surrogate (SCPA §1108[2][b], [c]).

8. Respondent testified that, shortly after his election as Surrogate, he "skimmed through" the SCPA. He further testified that he "overlooked" and "missed" Section 1108(2)(c), which provides that any legal fee allowed by the Surrogate to Counsel:

> ...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 the legal 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 for similar services, the contingency or certainty of compensation, the results obtained, and the responsibility involved.

9. From January 1997 to May 2002, notwithstanding that Mr. Rosenthal did not file any affidavit of legal services when requesting a fee, respondent awarded legal fees to Mr. Rosenthal in hundreds of Public Administrator cases without an affidavit of legal services.

10. From September 9, 1993, the effective date of Section 1108(2)(c), the fee applications of Hesterberg and Keller to respondent's predecessor, Surrogate Bernard M. Bloom, were supported by affidavits of legal services in all Public Administrator matters where the fee request exceeded $5,000. These affidavits contained

information about the legal and non-legal work performed by Hesterberg and Keller in each case.

11. From January 1997 to May 2002, in the other four counties of New York City, the Surrogates required affidavits of legal services submitted by Counsel before awarding fees in Public Administrator matters.

12. After an article in the *Daily News* raising the issue of the affidavit requirement came to respondent's attention in May 2002, respondent ordered that all future requests for fees from Counsel be accompanied by an affidavit of legal services. Respondent also ordered that Mr. Rosenthal file *nunc pro tunc* affidavits of legal services in all previous matters in which a fee had been awarded, and Mr. Rosenthal did so. As a result of such affidavits, no fee awards were repaid or otherwise changed.

13. From January 1997 to May 2002, on Public Administrator matters for which he was to be compensated, Mr. Rosenthal regularly requested and received a legal fee of 6% of the gross value of the estate when he filed an initial accounting with the court. Often, Mr. Rosenthal requested and obtained advance payments of a portion of his fee from the Public Administrator during the pendency of a matter before the filing of an initial accounting.

14. When he submitted the final decree to the Court, Mr. Rosenthal regularly requested and received an additional 2% fee with no submission specifying legal services performed to justify the additional amount. The fee request was for a dollar amount that would make the total fee equal 8% of the appreciated gross value of the

estate at the time of the decree. For estates valued at less than $25,000, there was a minimum fee of $1,500.

15. After receiving Mr. Rosenthal's requests for fees, the Chief Clerk of the Surrogate's Court regularly reviewed the files and calculated the value of the estate, the fee paid to Mr. Rosenthal at the time of the initial accounting, and the dollar amount and percentage needed to make Mr. Rosenthal's fee equal to 8% of the value of the gross estate. The Clerk brought the files to respondent's chambers with a Post-It note attached to each file showing the calculations made by the Clerk or Mr. Rosenthal. The Post-It note was prepared sometimes by Mr. Rosenthal's office, sometimes by the Clerk, and sometimes by both. The Clerk summarized each case and answered any questions respondent asked.

16. Respondent customarily adopted the figures on the Post-It notes and awarded a legal fee to Mr. Rosenthal totaling 8% of the total value of the gross estate, or very close to that amount. (Often the figures were rounded off.)

17. Respondent did not examine individual files before he signed the decrees. The files were on respondent's desk, with the decree on the outside ready to be signed.

18. In awarding legal fees to Mr. Rosenthal from January 1997 to May 2002, respondent did not give individualized consideration to each request for fees from Mr. Rosenthal and failed to weigh the factors set forth in SCPA Section 1108(2)(c). He did not weigh the time and labor expended, the difficulty of the questions involved, the

degree of skill required to handle the problems presented, the amount involved and the benefit to the estate from the legal services, the customary fee charged by the bar for similar services, the contingency or certainty of compensation, the results obtained and the responsibility involved in each case, as specifically required by Section 1108(2)(c).

19. From January 1997 to May 2002, respondent awarded fees to Mr. Rosenthal totaling approximately $9,000,000, which were paid from estate assets in Public Administrator matters.

20. In addition to the legal fees respondent awarded to Mr. Rosenthal, Mr. Rosenthal received compensation for representing estates at real estate closings. He also received referral fees from wrongful death cases he referred to other attorneys. For example, in the *Estate of Bertha Kallman*, Mr. Rosenthal received a referral fee in a wrongful death action of approximately $33,000 in addition to a fee of approximately $70,000 for legal services. The referral fees were not paid from estate assets, but rather from the attorney's fee in the wrongful death cases. The amount of additional compensation for real estate closings and the total net value of the wrongful death proceeds were not included in the value of the estate for purposes of computing Mr. Rosenthal's 8% legal fee award.

21. Unlike Counsel in Kings County, Counsel in New York County do not receive any such additional fees. The record does not indicate whether Counsel in other counties receive such additional fees.

22. The Attorney General of the State of New York has an interest in

estates handled by the Public Administrator and in the fees awarded to Counsel because the value of an estate may be transferred to the State if heirs are not located.

23. The Attorney General attempted to place a cap of 6% on the fees of Counsel in Kings County in order to conform the fees in Brooklyn with the fees awarded by Surrogates to Counsel in the other counties of New York City. On January 13, 1988, respondent's predecessor, Surrogate Bloom, approved an agreement between Hesterberg and Keller and the Office of the Attorney General limiting Counsel's fees to 6% of the gross estate in estates over $7,500, but permitting Counsel to request an additional fee for specified "litigation or special services" such as kinship hearings.

24. By letter to the Attorney General dated August 4, 1994, Hesterberg and Keller confirmed its agreement with the Attorney General's office to limit Counsel's fees to 6% of the first $300,000 of estate assets and 5% of the excess over $300,000. The agreement permitted Hesterberg and Keller to request an additional fee for additional legal services performed after the accounting.

25. In both the 1988 and the 1994 agreements, the maximum fee was set at 6%, although Hesterberg and Keller negotiated a proviso under which they could apply for additional fees under some circumstances. In practice, an additional 2% fee was regularly applied for. Surrogate Bloom generally granted the requests and set total fees in most fee-generating cases at 8%, but did not grant 8% automatically.

26. Although the Attorney General was served in all fee-generating Public Administrator matters with notice of the accounting and of the decree showing the

amount of Counsel's fees, there is no evidence in the record that the Attorney General's office objected to any fees awarded to Counsel by respondent.

27. Although respondent was not a party to the 1988 and 1994 agreements with the Attorney General's office, he knew of the 1988 agreement and should have known of the 1994 agreement, and he should have considered the agreements when awarding legal fees to Mr. Rosenthal.

28. In the other four counties of New York City, the legal fees awarded to Counsel by the Surrogates did not exceed 6% during the period from January 1997 to May 2002.

29. Respondent's fees of 8% to Mr. Rosenthal from January 1997 to May 2002 (a) exceeded the percentage awarded to Counsel in the other New York City counties during that period, (b) exceeded the guidelines outlined in the 1988 and 1994 agreements with the Attorney General, and (c) were not tailored in each case to the factors enumerated in SCPA Section 1108(2)(c).

30. According to respondent, the fees of 8% were intended in part to compensate Counsel for administrative work that the government-funded Public Administrator's office should have done. Respondent, who appointed the Public Administrator, did not require the Public Administrator's office to do this work. Counsel in New York County also performed non-legal administrative tasks.

31. The additional 2% in fees from estate assets that respondent awarded to Mr. Rosenthal from January 1997 to May 2002 amounted to over $2,000,000.

32. Respondent's conduct in routinely awarding Counsel an 8% legal fee (6% at the time of the initial accounting and 2% at the time of the final decree), in addition to closing and referral fees, circumvented the 1988 and 1994 agreements with the Attorney General's office.

33. In October 2002, The Interim Report and Guidelines of the Administrative Board for the Offices of the Public Administrators Pursuant to SCPA Section 1128 imposed a 6% cap on the legal fees requested by Counsel, with smaller percentages for larger estates. Since that date, the fees awarded by respondent to Mr. Rosenthal have not exceeded 6%.

34. Respondent gave testimony at the hearing that was incredible, evasive and unreliable, including the following:

(a) Respondent's testimony that during the period covered by the Formal Written Complaint he was not aware that SCPA required the filing of affidavits of legal services by Counsel was not credible;

(b) Respondent's testimony that in awarding fees to Counsel in every Public Administrator case he considered the factors enumerated in SCPA Section 1108(2)(c) was not credible, and his specific testimony, when questioned about dozens of individual cases in which he awarded fees of 8%, that in each case he evaluated each of the statutory factors in determining the fee was not credible;

(c) Respondent denied that he ever saw a Post-It note from Mr. Rosenthal attached to a final decree, yet Mr. Rosenthal regularly attached a Post-It note to

the final decree indicating the fee he requested, and when respondent examined a file he had brought to the hearing, a Post-It note from Mr. Rosenthal was affixed to the decree (Comm. Ex. 485);

(d) Respondent initially testified that, as stated in his Answer, he had no knowledge of the 1988 agreement with the Attorney General, then testified that the agreement "may have come up in a conversation" with his Chief Clerk, then testified that the Clerk told him of the agreement early in his tenure as Surrogate, and testified further that the agreement permitted him to set fees at 6% plus 2%.

Upon the foregoing findings of fact, the Commission concludes as a matter of law that respondent violated Sections 100.2(B), 100.3(B)(1) and 100.3(C)(3) of the Rules Governing Judicial Conduct 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 I of the Formal Written Complaint is sustained insofar as it is consistent with the above findings and conclusions, and respondent's misconduct is established.

In awarding fees to his long-time friend whom he had appointed to the lucrative position of Counsel to the Public Administrator, respondent had a responsibility to make sure that the fees were appropriate and untainted by an appearance of favoritism. Respondent had a duty to give individualized consideration to each case based on statutorily-mandated factors, to make sure that Counsel's fees were supported by

affidavits of legal services as required by law, and to set reasonable fees that were within the existing standards in New York City. By violating those duties, respondent committed a gross dereliction of his duties to be faithful to the law and maintain professional competence in it, and he conveyed an appearance that his actions were affected by favoritism and friendship, in violation of well-established ethical standards (Rules Governing Judicial Conduct §100.2[B], 100.3[B][1] and 100.3[C][3]). We reject respondent's excuses that he was unfamiliar with the statutory requirement of affidavits and with the agreements of his predecessor setting guidelines for Counsel's fees, and we find his testimony in that regard incredible and unconvincing.

The statutory framework of the Surrogate's Court Procedure Act makes clear that detailed, sworn statements of legal services are required in order to ensure that the fees awarded are appropriate. Thus, we agree with the referee that respondent's failure to require such affidavits by Counsel constitutes judicial misconduct. As the referee stated:

> Legal error and judicial misconduct are not mutually exclusive. *Matter of Reeves*, 63 NY2d 105, 110 (1984). The error was repeated in hundreds of cases over a period of more than five years. The SCPA is not an obscure piece of legislation but rather the primary legal guide in the practice of the Surrogate's Court, a statute with which a Surrogate is presumed to be familiar.
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> (Referee's report, p. 8)

In *Reeves*, a Family Court judge was removed for, among other conduct, disregarding "important statutory procedures," including requiring litigants to submit sworn financial disclosure statements as required by law (63 NY2d at 110).

Respondent's professed ignorance of the statutory requirement of affidavits (SCPA §1108[2][c]) is unconvincing and, if true, inexcusable. Every judge is required to "be faithful to the law and maintain professional competence in it" (Section 100.3[B][1] of the Rules), and it is incredible for respondent to claim, in defense of his misconduct, that he was unfamiliar with Section 1108(2)(c) because he "missed" it when he "skimmed through" the Surrogate's Court Procedure Act early in his career as Surrogate. The provision is part of an important statute which, as a Surrogate, he was required to interpret and apply. Respondent acknowledged seeing Section 1108, as well as subdivision (2)(b), when he read the statute (Tr. 73, 74). Moreover, as an experienced lawyer and judge, respondent would be expected to know that fiduciaries and other judicial appointees are generally required to submit affidavits and related written submissions to justify fee requests. A judge's misconduct cannot be excused by inattention or oversight. As the Court of Appeals has stated, "[i]gnorance and lack of competence do not excuse violations of ethical standards," even for a lay justice who claimed his lapses were due to a lack of training (*Matter of VonderHeide*, 72 NY2d 658, 660 [1988]). For a law-trained Surrogate with a long record of judicial service, it is inexcusable. *See also, Matter of Reeves, supra* (63 NY2d at 111) (Court rejected the claim of a Family Court judge that his errors were attributable in part to "inexperience").

It is readily apparent that, as long as respondent continued to award generous fees to Counsel without requiring the filing of supporting affidavits, there was no incentive for Counsel to file them. Respondent's legal error resulted in a flagrant violation of the statutory requirement in hundreds of cases over more than five years.

We find no mitigation in respondent's testimony that when he learned of his error, he required Counsel to file affidavits in all cases *nunc pro tunc*. This was apparently a meaningless exercise since, as a result of such affidavits, there was no change or repayment of any of the fees respondent had awarded, *i.e.*, a flat fee of 8%, regardless of the services actually performed.

The evidence establishes that in almost every matter in which fees were awarded, no matter how simple or complicated, respondent gave Counsel a fee equal to 8% of the gross estate (or very close to that amount), adopting the calculations of his Chief Clerk and Mr. Rosenthal which appeared on a "Post-It" note placed on the file. Those awards, based on a percentage that respondent testified had been the customary fee awarded in Kings County for 30 years or more, belie respondent's testimony that he gave each case individualized consideration in setting Mr. Rosenthal's fees. Although respondent testified, in case after case, that he specifically considered the individual enumerated statutory factors, in each case the result was the same fee equaling 8% of the gross estate. The results of such rote calculations were at times perverse. For example, in the *Estate of Pettit*, Mr. Rosenthal's fee of $16,000 was actually more than the total amount distributed to the decedent's heirs.

Notably, one of the statutory factors to be considered in the setting of fees is "the customary fee charged by the bar for similar services." While respondent argues that 8% was the customary award in Kings County, it was not established that respondent's predecessor always awarded fees of 8%; and, even if it were established, we are not bound to conclude that such fees were appropriate. The existing standard elsewhere in New York City during the same period was a *maximum* of 6%, the amount awarded to Counsel by the other New York City Surrogates. That amount was presumably sufficient to attract capable individuals to serve in that position.[1] Moreover, unlike the New York County Counsel, Mr. Rosenthal also received additional fees for real estate closings and referral fees for wrongful death actions arising from the estates assigned to him.

We further reject respondent's contention that 8% was justified in Kings County because Counsel provided additional administrative services to assist the Public Administrator. There is evidence in the record that Counsel in other counties also performed administrative duties. And, as the referee observed, if it is true that Mr. Rosenthal received an additional 2% of each estate to do work that the government-financed Public Administrator's office should have done, we cannot condone a practice where "the estates of intestate decedents were paying for work that was the responsibility of salaried public employees" (Referee's report, p. 18). Moreover, as the individual empowered to appoint and remove the Public Administrator (SCPA §1102), respondent

[1] We note that following the adoption of the Interim Guidelines in October 2002, setting fees at a maximum of 6%, Mr. Rosenthal has continued to serve as Counsel.

bears responsibility for the operation of the Public Administrator's office.

Respondent's award of 8% to Mr. Rosenthal also exceeded the guidelines outlined in the 1988 and 1994 agreements between prior Counsel and the Attorney General's office. Respondent had a duty to be aware of the agreements signed or endorsed by his predecessor on behalf of the Surrogate's Court. Those agreements, which provided for a maximum 6% fee at the accounting and additional fees only under certain specified circumstances, are relevant in establishing the standard for fee awards. By routinely awarding Counsel 6% upon the filing of the initial accounting and an additional 2% upon the final decree, respondent conveyed the appearance that he was complying with the terms of the agreements while, in fact, he was flouting the agreements by awarding fees that exceeded the specified limits. While the agreements permitted Counsel to request fees above 6% in limited, specified circumstances, here an additional 2% was awarded in every case without individualized consideration or any submission justifying the additional amount.

The inescapable conclusion is that respondent's awards of 8% to Mr. Rosenthal were excessive and overly generous in that they exceeded the existing standard awarded to Counsel in the other New York City counties, exceeded the guidelines outlined in the 1988 and 1994 agreements between Counsel and the Attorney General's office, were derived from a flat formula without individualized consideration of the statutory factors and were given without the required affidavits of legal services.

The net result of respondent's largesse to Mr. Rosenthal is far from insignificant. The additional 2% that respondent awarded meant, in actual dollars, more than $2,000,000 from estate assets paid to Mr. Rosenthal, rather than to the decedents' heirs (or, in cases with no heirs, to the State). These excessive fees came from the pockets of beneficiaries of estates that respondent had a duty to protect.

Respondent should have realized that under the circumstances here, the excessive fees he approved for Mr. Rosenthal, without consideration of the statutory factors and without the required affidavits supporting fee requests, conveyed the appearance of favoritism. This appearance of impropriety, created by respondent's glaring inattentiveness to his obligations as a judge, undermines the public's confidence in the objectivity of our judiciary. While there is no evidence that Mr. Rosenthal did not perform his duties in a competent manner, the fact that for five and a half years he was compensated so generously for performing his duties without having filed the required, sworn documentation casts a serious pall over respondent's role in this unseemly affair. Every judge must be held to the highest standards of probity in order to maintain public confidence in the integrity of the judiciary as a whole. For a Surrogate, entrusted with enormous power over the lives and fortunes of many, the ethical transgressions revealed in this record are simply intolerable.

In imposing sanction, we recognize that "the purpose of judicial disciplinary proceedings is 'not punishment but the imposition of sanctions where necessary to safeguard the Bench from unfit incumbents'" (*Matter of Waltemade*, 37 NY2d [a], [lll]

[Ct. on the Judiciary 1979]). While removal from office is "rarely warranted...[i]n cases involving [only] the appearance of impropriety," it may be necessary in egregious circumstances when "[such] an appearance diminishes public confidence in the integrity of the judiciary and destroys [the judge's] usefulness on the bench" (*Matter of Cohen*, 74 NY2d 272, 278 (1989). *See also, Matter of Sims*, 61 NY2d 349, 358 (1984) ("When a judge acts in such a way that she appears to have used the prestige and authority of judicial office to enhance personal relationships, or for purely selfish reasons, or to bestow favors, that conduct is to be condemned whether or not the Judge acted deliberately and overtly..."). Moreover, in this case there is far more than appearance at issue.

Respondent's fundamental failure to attend to his judicial responsibilities permitted the appearance that his actions as a judge were influenced by favoritism, for which he bears responsibility. And his failure to attend to his responsibilities cost certain Brooklyn beneficiaries a total of at least $2,000,000. Such conduct seriously erodes public confidence in the integrity of the judiciary as a whole. As the Court of Appeals has stated:

> Reluctance to impose a sanction in this case would be taken as reflecting an attitude of tolerance of judicial misconduct which is all too often popularly attributed to the judiciary. To characterize the canonical injunction against the appearance of impropriety as involving a concern with what could be a very subjective and often faulty public perception would be to fail to comprehend the principle. The community, and surely the judges themselves, are entitled to insist on a more demanding standard. As Chief Judge Cardozo wrote in *Meinhard v Salmon* (249 NY 458, 464): "A trustee is held to

> something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior." And there is no higher order of fiduciary responsibility than that assumed by a Judge.

Matter of Spector, 47 NY2d 462, 468 (1980).

Respondent's conduct is aggravated by his lack of candor at the hearing in this proceeding. *Matter of Intemann*, 73 NY2d 580 (1989); *Matter of Mason*, 100 NY2d 56 (2003). We agree with the referee's conclusion that respondent's testimony in certain respects was "not credible," "inconsistent and evasive." In case after case respondent testified that in setting fees he gave individualized consideration to the statutory factors, although the evidence shows that he set fees by rubber-stamping the amounts set forth on Post-It notes provided by Mr. Rosenthal's office and respondent's Chief Clerk, who calculated the amounts based on a fixed percentage of the estate. The referee found, in essence, that respondent testified untruthfully each time he claimed he considered the statutory factors, and we agree. As we have also noted, respondent's professed ignorance of the statutory requirement of affidavits was not credible, and his testimony about his knowledge of the 1988 Attorney General agreement was contradictory and evasive.

While we recognize that lack of candor as an aggravating circumstance "should be approached cautiously" so as not to "unfairly deprive [ ] an investigated Judge of the opportunity to advance a legitimate defense" (*Matter of Kiley*, 74 NY2d 364, 371 [1989]), this is not such a case. We are constrained to conclude that much of respondent's testimony was part of a calculated, sustained effort, over several days as a

witness, to avoid responsibility for his malfeasance by evasiveness, lack of candor, and professing ignorance of the standards he violated. Respondent's dereliction of his duties as a judge and his subsequent failure to be candid in this proceeding were in conflict with the standards of integrity and propriety required of members of the judiciary, and inimical to his role as a judge (*see, Matter of Gelfand,* 70 NY2d 211, 216 [1987]).

We reject respondent's assertions that his conduct should be excused because it is not significantly different from that of other judges and because his fee awards followed a practice started 30 years ago by a respected Surrogate. It has not been established that other judges follow respondent's practices, and even if true, "the fact that others may be similarly derelict can provide no defense" (*Matter of Sardino*, 58 NY2d 286, 291 [1983]). Further, while respondent relies on the practice of the former Kings County Surrogates in awarding Counsel fees of 8%, he professes a total unawareness that his predecessor required affidavits before setting fees.

We are mindful that within the existing system there has been too much opportunity for lucrative fees to be doled out by judges to their friends and political associates. However, the conduct of other judges is not before us. We note that the court system has focused on patronage-related problems, initiated certain reforms and appointed an Inspector General to investigate abuses. These efforts are continuing. In our view, respondent's failure to observe even the formalities required by law constitutes an extreme dereliction of his duties of a judge.

In sum, we believe that respondent's actions have "irredeemably damaged

public confidence in the integrity of his court" (*see, Matter of Steinberg*, 51 NY2d 74, 84 [1980]). By awarding fees to his appointee in hundreds of cases totaling millions of dollars while ignoring statutory mandates that go to the core of his judicial role, respondent engaged in misconduct that cannot be countenanced. A public sanction less than removal for such egregious misconduct would be wholly inadequate. The public deserves more from its judges, and we believe that the only disciplinary sanction that demonstrates the seriousness of respondent's misconduct is his removal from office.

By reason of the foregoing, the Commission determines that the appropriate sanction is removal.

As to respondent's misconduct, Judge Ciardullo, Mr. Coffey, Ms. DiPirro, Mr. Emery, Mr. Felder, Judge Luciano, Judge Peters and Judge Ruderman concur. Mr. Goldman concurs in part and dissents in part.

As to sanction, Judge Ciardullo, Mr. Coffey, Ms. DiPirro, Mr. Emery, Judge Peters and Judge Ruderman concur. Mr. Goldman, Mr. Felder and Judge Luciano dissent and vote that the appropriate disposition is censure.

Mr. Goldman and Mr. Felder file separate opinions, in which Judge Luciano concurs to the extent of the censure.

Ms. Hernandez and Mr. Pope were not present.

CERTIFICATION

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

Dated: February 10, 2005

Lawrence S. Goldman, Esq., Chair
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

MICHAEL H. FEINBERG,

Surrogate, Kings County.

OPINION BY
MR. GOLDMAN,
CONCURRING IN PART AND
DISSENTING IN PART

- -

I agree with the majority on the basic facts in this matter: respondent, the Surrogate of Kings County, for a period of over five years awarded the Counsel to the Public Administrator ("Counsel"), his friend and appointee Louis R. Rosenthal, legal fees equal or virtually equal to 8% of the adjusted gross value of estates Mr. Rosenthal handled -- 2% more than the maximum paid in the other counties of New York City -- without receiving from Mr. Rosenthal the affidavit of legal services required by statute and without considering the various criteria for payment set forth in the statute. I disagree with the majority, however, over the extent of respondent's misconduct and the appropriate sanction for his misconduct.

The referee, in a thorough report, found that respondent committed judicial misconduct by awarding fees without receiving the mandated affidavits, by failing to consider the statutory factors, and by awarding excessive fees. The referee specifically found that those allegations in the Complaint which charged favoritism and the

appearance of favoritism had not been proven. The majority, although its opinion does not track the Complaint or the referee's decision by specification, apparently agrees with the referee in her findings of misconduct but does not accept her findings of lack of misconduct based on favoritism or the appearance of favoritism.

I agree that respondent's award of fees without the supporting affidavits was such a fundamental legal error that it constitutes judicial misconduct. I agree with the factual finding that respondent did not consider the statutory criteria in determining fees and instead set a uniform fee. I do not agree, however, that such a practice – a prevalent (but not universal) practice in the Surrogate's Courts of New York City – constitutes judicial misconduct. I am troubled by respondent's awarding higher fees than the other Surrogates in New York City, but do not find judicial misconduct because there is no specification in the Complaint that respondent awarded excessive fees, and, therefore, such a finding would violate basic notions of fair notice and due process. Even if respondent had been charged with awarding excessive fees, however, I would find that the evidence was insufficient to sustain such a charge.

I disagree with the majority's determination that respondent should be removed. I believe the extent of his proven misconduct neither requires nor justifies a sanction greater than censure. Even if I were to agree with the extent of the misconduct found by the majority, I believe removal is unnecessary and unwarranted in view of respondent's reformation of his prior practices and harsh in view of respondent's virtually

blemishless 24-year judicial career.[1]

FAILURE TO REQUIRE AFFIDAVITS

I agree with the majority that respondent's awarding fees without supporting affidavits, in clear violation of SCPA §1108(2)(c) and general principles relating to court awards of legal fees, was such a fundamental legal error that it constitutes judicial misconduct. As Surrogate, he certainly should have been aware of this basic requirement.[2] While I do not accept respondent's professed ignorance of such a basic statute as justification or mitigation for his failure to require the affidavits, I do not, however, find respondent's testimony that he was not aware of the SCPA provision "incredible," as does the referee, or "not credible," as does the majority.

FAILURE TO CONSIDER STATUTORY FACTORS

I agree with the referee's and majority's factual determinations that respondent failed to consider the statutory criteria for compensation and thus failed to give individualized consideration to the fee requests. Respondent, not having received affidavits from Counsel, was unaware of at least the first listed factor in the statute, "the

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[1] In 1984 respondent received a confidential Letter of Dismissal and Caution because of his failure to obtain an accounting of money he contributed to the Kings County Democratic Party for his own political campaign.

[2] Although I am troubled by the amorphous and expansive scope of the prohibition on the "appearance" of impropriety, as opposed to actual impropriety, I concur with the majority's determination to the extent it finds an appearance of favoritism. Respondent's failure to require affidavits mandated by statute from a friend and political appointee, and his awarding a higher fee than other Surrogates, even if, as I believe, not motivated by friendship, does give an appearance of favoritism. I also do not believe that respondent's fee awards would have been any different if he had required, and had received, the supporting affidavits. I do not find actual favoritism.

time and labor required."[3] Further, his uniformly setting a rate of 8% of the gross value of the estate belies any contention that he gave each request "individualized consideration." I do not, however, find that the failure to consider the statutory factors and the grant of a uniform fee, while seemingly in violation of SCPA §1108(2)(c), constitute judicial misconduct.

Respondent's conduct in not evaluating the factors particular to each case and instead setting a uniform fee during the relevant period appears to have been the prevalent (but not unvarying) practice in the Surrogate's Courts of New York City, at least in Manhattan.[4] The fee schedule in New York County, for instance, according to testimony by John Reddy, Counsel to the Public Administrator there, was "six percent standard, across the board" (with deviations when the beneficiaries were charitable institutions) (Tr. 1070, *see also* 1061-62, 1085-86). The purpose of such an "across the board" practice, as indicated in the 2002 Interim Report, was that in recognition that most estates administered by the Public Administrator were too modest to provide sufficient fees to retain counsel, the "more significant compensation in the more substantial estates" was necessary to induce counsel to accept the position of Counsel.[5]

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[3] The time spent, a standard basis for legal billing, is not viewed as the definitive criterion in Surrogate's Court billing. According to the Interim Report of the Administrative Board for the Public Administrator ("Interim Report"), "in some instances, time might be the least important factor to be considered."

[4] Except with respect to New York County, the record as to the practices of the other Surrogates in New York City is limited and not totally clear, other than a stipulation between respondent and the Commission that 6% was the maximum fee given in New York City by the other Surrogates.

[5] Since in the ordinary course, legal fees based on time spent on a smaller estate would be a higher percentage of the value of the estate than fees based on time on a larger estate, the flat fee

Even if respondent's failure to consider the statutory criteria and his imposition of a uniform across the board percentage compensation rate violated the statute, I do not find that such conduct, which was consistent with a customary practice of other judges and established for a reasonable purpose, constituted judicial misconduct.

AWARDING ALLEGEDLY EXCESSIVE FEES

I disagree with the referee's finding, apparently accepted by the majority, that respondent awarded Counsel excessive fees. I disagree, first, because respondent was not charged in the Complaint with setting excessive fees and, second, because the evidence that respondent set excessive fees is insufficient to sustain such a finding.

The Complaint, as relevant here, charged that respondent "failed to avoid favoritism by approving compensation without ascertaining the fair value of services rendered." Since the factual underpinning of the Complaint was that respondent failed to require supporting affidavits from Counsel and set uniform fees without consideration of the statutory criteria, this charge clearly related to respondent's procedural failure to make a case-by-case determination of the proper value of Counsel's services, not to the substantive issue whether Counsel was paid an excessive fee. The Code of Judicial Conduct has a clear and direct injunction against awarding excessive fees: "A judge shall not approve compensation of appointees beyond the fair value of services rendered." Code of Judicial Conduct, Canon 3 (22 NYCRR §100.3[C][3]). There was no specific

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practice has a Robin Hood effect of distributing more funds to beneficiaries of smaller estates at the expense of beneficiaries of larger estates.

allegation in the Complaint that respondent violated that proscription. Nonetheless, the referee found misconduct under that provision. I believe that finding violated respondent's right to fair notice of the charges against him and due process.

In any case, in my view, the evidence is insufficient to justify a finding that respondent awarded excessive fees. The majority cites four factors to justify its "inescapable conclusion" that respondent's fee awards were excessive: that they were given without the required affidavits; that they were derived from a flat formula without individualized consideration of the statutory factors; that they exceeded the guidelines in the 1988 and 1994 agreements involving the prior Counsel to the Public Administrator and the then Attorney General; and that they exceeded the existing standard in other New York City counties.

First, while I agree that respondent failed to require the affidavits mandated by statute and that such a failure constituted misconduct, this failure provides no proof at all that the legal fees awarded to Mr. Rosenthal were excessive. There is no evidence that this failure was part of any scheme to conceal the extent of Counsel's fees. The amount of counsel fees was apparent from the accountings, which were available to the beneficiaries, the Attorney General and the public.

Second, while I agree that respondent's fees were awarded without case-by-case consideration of the statutory factors, even if such a practice constituted misconduct, it is no proof that the fees were excessive. Indeed, as discussed above, in the Surrogate's Court of New York County, used by the majority as a lodestar with respect to the

appropriate amount of compensation, the judges also set fees according to a standard percentage.

Third, respondent's standard 8% award was little different in actuality from that given by the prior Surrogate under the 1988 and 1994 agreements – in which neither respondent nor Mr. Rosenthal was involved and to which respondent was not bound. The 1988 agreement was between the Attorney General and the then Counsel to the Public Administrator, the law firm of Hesterberg and Keller, and approved by Surrogate Bloom. The 1994 "agreement" consisted of a letter from the law firm to the Attorney General reiterating, with certain modifications, the provisions of the 1988 agreement. Both called for a maximum fee of 6% but with the right for Counsel to seek additional fees for special services. Additional fees of 2% were routinely sought, even in the absence of special circumstances. As the hearing testimony revealed, and as the majority found, under those agreements Surrogate Bloom generally (but not automatically) awarded fees of 8%. Thus, the prior "agreements," apparently honored more in the breach than the observance, provide little proof that there was an accepted 6% standard. To the contrary, the practice under the "agreements" actually lends support to respondent's contention that 8% fees were customary in Kings County and therefore not excessive.[6]

Fourth, while respondent's fee awards of 8% did exceed the existing standards in the other counties of New York City[7], and in my view were certainly

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[6] The referee apparently accepted that the 8% rule had been the general practice in Kings County Surrogate's Court for 30 years.

[7] *See* fn. 4 herein.

generous, I find this single factor insufficient to sustain a finding of awarding excessive fees and judicial misconduct. That one judge pays higher fees to counsel than others is scant proof that the fees are excessive. In 2002 and 2003, when the statutory hourly rates for the representation of indigents in the Criminal and Family Courts were $40 for in-court work and $25 for out-of-court, a small minority of judges awarded counsel fees of $75 per hour. *See, Levenson v. Lippman*, 5 AD3d 86 (1st Dept. 2004). Surely, those judges cannot be considered to have set excessive fees.[8]

The 6% standard was never enacted by statute, court rule or appellate decision. In fact, no authority had ever contended that respondent's fees were excessive. Indeed, there is no indication in the record that the Attorney General, who was involved in the attempt to cap fees in 1988 and 1994 and who received notice of the accountings and amount of Counsel fees awarded by respondent in every case, ever lodged any objection.

The factors listed in SCPA §1108(2)(c) – the factors the majority finds respondent committed misconduct by not considering -- include the time and labor spent, the difficulty of the questions involved, the skill required to handle the problems, the

[8] In the *Levenson* situation, the administrative judge determined that the $75 hourly fees were excessive under the statutory scheme and reinstated the $40/$25 scale set by the Legsilature. *See, Levenson v. Lippman, supra* (holding administrative judge's determination was beyond her authority). At the other extreme, in the State tobacco litigation case, an arbitration panel awarded legal fees equivalent to $13,000 per hour. *See, State v. Philip Morris*, 308 AD2d 57 (1st Dept 2003) (holding courts lack authority to overturn arbitration panel award). It is difficult to find excessiveness here when an arbitration panel awards $13,000 per hour fees and an appellate court determines that it cannot upset such an award. While the record does not reveal what Mr. Rosenthal's fees were if calculated by hour, they were no doubt a very small fraction of $13,000.

benefit resulting to the estate from the services, the results obtained and the responsibility involved.[9] Presumably, if a Surrogate's determination of the appropriate fees must consider these factors, so should a Commission determination whether the fees are excessive. Yet, neither the majority nor the referee apparently considered any of these factors. They could not because the record provides no evidence about them.[10] The only real evidence of excessiveness is the lower fee schedule in the other Surrogate's Courts in New York City. That is too thin a reed to support a finding of judicial misconduct.

RESPONDENT'S LACK OF CANDOR

I agree with the referee and the majority that respondent's testimony was not convincing, occasionally erroneous, and sometimes inconsistent – although I do not find it incredible. The phrase "lack of candor" is often a euphemism for perjury, and I do not find respondent's testimony to be perjurious or deliberately false. However, I do find that when respondent's testimony contained a mixed statement of fact and conclusion, such as his insistence that he considered the statutory factors for awarding fees in every case, it was sometimes at the least inaccurate.

I am mindful of the admonition of the Court of Appeals in *Matter of Kiley*, 74 NY2d 364, 370-71 (1989), that the Commission should hesitate to use lack of candor as an aggravating factor for fear that a judge will be reluctant to defend his conduct. This

[9] DR 2-106(B) [22 NYCRR §1200.11(B)], the Disciplinary Rules for attorneys, sets forth criteria to be considered in determining whether a fee is excessive. The time and labor involved, difficulty of the questions, skill required and result obtained are among them.

[10] Neither counsel for the Commission nor respondent presented such evidence, I assume, because they did not believe actual excessiveness had been charged.

is not a case such as *Matter of Gelfand*, 70 NY2d 211 (1987), in which a judge gave patently false explanations to the Commission in the face of objective proof, nor is it a case like *Matter of Mason*, 100 NY2d 56 (2003) or *Kiley*, where the charges included lack of candor. Nonetheless, I believe that the Commission may in determining sanction give some consideration to the inaccuracy, whether deliberate or careless, of a judge's testimony and his demeanor and attitude during the proceeding, always bearing in mind that the judge has not been charged with misconduct in this regard and therefore that its weight should be limited. To the extent that *Kiley* limited the Commission's consideration in this area, this restriction has been eased somewhat by *Matter of Bauer*, 3 NY3d 158 (2004), where the Court of Appeals considered the judge's lack of contrition as an important factor in determining his fitness for office. *Id.* at 165; *see also, id.* at 173 (Smith, R.S., dissenting). In this connection, I found respondent's attitude disdainful and unrepentant. Rather than recognizing, in view of other fee awards in New York City, that he might have been somewhat generous to Mr. Rosenthal, respondent several times injected that he would have given an even higher fee award if he were able.

SANCTION

I believe, based on the misconduct I find, that removal is inappropriate. In reaching this conclusion, I have considered the extent of respondent's misconduct and the generosity of his fee awards and evaluated his testimony and attitude. I consider his largesse to Counsel not as an independent area of judicial misconduct, but as a factor to be considered in determining sanction. Although in the absence of a violation of a clear

standard (as well as for lack of notice), I find no judicial misconduct with regard to excessive fees, I believe respondent's fee awards were certainly generous. I, therefore, believe the appropriate sanction is a censure. Had respondent violated a clear standard for compensation – like the 2002 Interim Guidelines – I would have no hesitancy in voting for his removal. However, had there been such clear guidelines in effect prior to 2002, I doubt that respondent would have violated them.

Even if I were to accept the majority's expansive findings of misconduct, beyond those found by the referee, I would vote for censure. The sanction of removal is reserved for "truly egregious circumstances." *Matter of Steinberg*, 51 NY2d 74, 83 (1980). It is not warranted "for conduct that amounts simply to poor judgment or even extremely poor judgment." *Matter of Kiley, supra*, 74 NY2d at 370. It is "rarely warranted...[i]n cases involving [only] the appearance of impropriety." *Matter of Cohen*, 74 NY2d 272, 278 (1989). While the purpose of judicial disciplinary proceedings "is not punishment" (*Matter of Waltemade*, 37 NY2d [a],[lll] [Ct. on the Judiciary 1979]), the effect of removal on a judge is little different: loss of livelihood, career, reputation and respect. Accordingly, the sanction should not be imposed except in extremely serious cases.

This is a case in which, even under the majority's factual findings, respondent exhibited "poor judgment or even extremely poor judgment" (*Kiley*). He made a serious legal error in not requiring affidavits in support of his request for legal

fees.[11] He failed to consider the statutory factors and set a standard fee based on percentages for compensation, for which practice the majority finds misconduct even though respondent's practice was largely consistent with the prevailing practice in New York City. He failed to change a 30-year practice in Kings County of paying the Counsel to the Public Administrator a fee equal to 8% of the gross estate. As the referee found, "[t]he credible evidence leads to the conclusion that respondent mistakenly and impermissibly thought he was entitled to apply what he understood to be an automatic customary 8% rule in Kings County for awarding legal fees in Public Administrator cases."

The majority fails to accept respondent's defense that the amount of his fee awards was the same as those of the previous Kings County Surrogates. Instead, it condemns respondent largely because his fee awards were not the same as the other New York City Surrogates. Even if the majority does not credit the longstanding Brooklyn practice as a defense, it should at the least consider it a mitigating factor.

Respondent has been a judge for 24 years, and has, with one extremely minor exception over 20 years ago, served without any disciplinary stain. He received no personal benefit from his misconduct here. He has demonstrated that he can, although perhaps unenthusiastically, mend his ways. Once he learned that the *Daily News* was about to report that he had ignored the affidavit requirement, he ordered that all future fee

[11] This statutory requirement in SCPA §1108(2)(c) was enacted in 1993, four years before this misconduct began. Thus, it was not by any means longstanding law. That, of course, does not mean that respondent should not have been aware of it.

requests be accompanied by affidavits and that Counsel file *nunc pro tunc* affidavits justifying the fees Counsel had received. Once the Interim Guidelines[12] reducing the fee schedule for counsels to the Public Administrator were approved, respondent has followed them. Notwithstanding his lack of contrition, I believe that in the future respondent will act properly and competently. This is not a situation where the judge's "failure to recognize and admit wrongdoing strongly suggests that if he is allowed to continue on the bench, we may expect more of the same" (*Matter of Bauer*, *supra*, 3 NY3d at 165).

Further, precedent, ordinarily not critical in Commission cases, which generally are largely dependent on the particular facts, supports the conclusion that censure is the appropriate sanction. In *Matter of Ray*, 2000 Annual Report 145 (Comm. on Judicial Conduct), a case with parallels to this one and arguably more serious, a Family Court judge appointed two attorneys with whom he had a political relationship to a disproportionate number of assignments and certified without adequate examination their grossly inflated fee vouchers so that they were able to overbill thousands of dollars. The judge was censured by the Commission. In this case, there is no claim that respondent approved false vouchers or affidavits.

To be sure, a system in which a judge appoints a friend to a public legal position, solely determines the friend's compensation, and the compensation is hundreds

[12] The Interim Report and Guidelines reduced the fee schedule to a maximum fee of 6%, for estates up to $750,000, tapering down to 1.5% for estates over $5 million.

of thousands of dollars per year[13] – several times the salary, for instance, of the Chief Judge of the Court of Appeals – is anachronistic and cries out for review, if not reform. That, however, does not mean that we must remove a judge who has served for 24 years (*see, Matter of Skinner*, 91 NY2d 142, 144 [1997]).

I believe the appropriate sanction is censure.

Dated: February 10, 2005

Lawrence S. Goldman, Esq., Chair
New York State
Commission on Judicial Conduct

[13] Mr. Rosenthal testified that during the period in question his net compensation as Counsel ranged from approximately $300,000 in 1998 to nearly $700,000 in 2001 (Tr. 666).

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

MICHAEL H. FEINBERG,

Surrogate, Kings County.

OPINION
BY MR. FELDER,
CONCURRING AS TO
MISCONDUCT AND
DISSENTING AS TO
SANCTION

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I agree with each of the majority opinion's conclusions and determinations of fact. I do, however, disagree on the appropriate sanction. This is not to suggest that the conduct of respondent was not seriously improper.

Respondent said that when he became a Surrogate he "skimmed through" the SCPA – the very statute that he was required to administer, interpret and enforce. If a lawyer acted similarly, did not do necessary research, or have a necessary understanding of the statutes which were the subject matter of a proceeding in which he was before a Court, sanctions would be available against the lawyer (22 NYCRR §130-1.1).

A Surrogate has an even greater responsibility, and for respondent to state that he assumed this office having only "skimmed through" the statute is appalling. Mr. Rosenthal, who was appointed as counsel for the Public Administrator by the Surrogate, similarly had little experience in the field, having only 5% of his practice in Surrogate's Court litigation. Apparently, as far as the counsel to the Public Administrator in Kings

County is concerned, being acquainted with the law is less important than being acquainted with the Surrogate.

It is quite clear that basically it was the Clerk, and, in some instances, the counsel for the Public Administrator himself, who ran the Surrogate's Court – at least as far as counsel to the Public Administrator's fees were concerned. Supporting affidavits in request for fees were required by law (SCPA §1108[2][c]). Instead, respondent awarded fees based on the "Post-It" method. The file was handed to him, and the Clerk (and, at times, Mr. Rosenthal's office) wrote the amount to be awarded on a Post-It note placed on the file. The amount awarded exceeded by 2% the proper percentage, that being 6%.

It should not pass unnoticed that the foregoing method of fixing fees must have been known to lawyers who practice in that Court, and to various employees of that Court. It is a sad commentary on events that respondent only learned of his obligation from the *New York Daily News*. The *Daily News* revealed respondent's practices, and it was only ***after*** this that respondent attempted to rectify things by requiring *nunc pro tunc* affidavits. I find this attempt at remedy, at best, disingenuous. Whether affidavits were prepared on the original fee application (which they were not), or *nunc pro tunc*, I believe they were never read or analyzed by the Surrogate. The fact is, the requiring of *nunc pro tunc* affidavits for cosmetic purposes, in my opinion, made matters worse. They were never intended to be read, and represent a cavalier attempt by the Surrogate to meet his lawful obligations while, at the same time, not to meet those obligations. Lest there be any question that these were harmless errors in which there was no victim, there was a

victim in each of these cases since the monies, in effect, came out of beneficiaries' pockets. As the majority opinion pointed out, this additional 2%, over time, added up to $2 million. In the larger picture, Mr. Rosenthal, as counsel to the Public Administrator, from January 1997 to May 2002 received approximately $9 million.

I found it disappointing that when respondent was asked at the oral argument whether he would, after all that has occurred, end his professional relationship with Mr. Rosenthal, he indicated that he would not. Loyalty to friends is admirable. Loyalty to friends taking precedent over a judge's legal obligations is deplorable.

I agree with Judge Shea that, at least as far as many of his answers given, respondent was not truthful. I find a skein of deception and untruthfulness running through respondent's entire testimony. It is not without interest that Judge Shea notes:

> Further bearing on the extent to which respondent's testimony is to be believed were the unfounded representations made by respondent to his attorney which prompted the offering of a stipulation by respondent's attorney on the last day of the hearing with regard to the testimony of Hon. A. Gail Prudenti. (Referee's report, p. 11*fn.*)

I have sought, to the best of my ability, not to be influenced by respondent's – and even his lawyer's – arrogance, including the tone and tenor at the oral argument, which at times were confrontational.

I reject the suggestion that this is a case of selective prosecution. It is the uniqueness of respondent's judicial position, and his actions, that sets this apart from the conduct of other Surrogates. The corollary of this sort of reasoning is that respondent basically inherited a corrupt system. Even if true, this is not a valid excuse for what

occurred here, nor for any type of misconduct.

What respondent did, and caused to happen, is an embarrassment to lawyers, litigants and fellow jurists (who, considering training and responsibility, are among the lowest paid and most overworked civil servants in the State). The residents of Kings County – both living and dead – deserve better in their Surrogates.

Having said all of the above, I find myself voting for censure. It is a censure that trembles on the brink of a finding for removal of respondent. While an argument could be made that under existing precedent, removal is the appropriate remedy, I believe a similar argument could be made for censure. I vote for censure in part because respondent has been a judge for 24 years and will, whether by public censure or removal, be subject to public disgrace. Should he continue to perform his duties in the manner in which he has in the past, I would have no hesitation in voting for removal.

It should not be left unsaid that the Honorable Felice K. Shea, the Referee herein, in a difficult situation, acted admirably, with great legal acumen, insight and skill, and should be commended.

Dated: February 10, 2005

Raoul Lionel Felder, Esq., Member
New York State
Commission on Judicial Conduct