

counsel for the Public Administrator, and conduct that conveyed an appearance of impropriety. We accept the Commission's determined sanction.

Background Law

Article VI, section 12 of the New York State Constitution confers upon the elected Surrogates of each county jurisdiction over all proceedings and actions "relating to the affairs of decedents, probate of wills [and] administration of estates." Most relevant here, the Surrogate's Court Procedure Act (SCPA) -- in an article entitled "Public Administrators of the Counties Within the City of New York" -- provides that each Surrogate within the City's five counties can appoint a Public Administrator to administer the estates of citizens who die intestate without an heir willing and able to do so. The salary of the Public Administrator, paid by the City, is fixed at two-thirds the amount paid to the New York City Surrogates (SCPA 1105).

The statute also allows a New York City Surrogate to appoint one or more counsels to the Public Administrator (SCPA 1108 [2] [a]).¹ While the Public Administrator is a salaried employee paid by the City, counsel is entitled to "reasonable

¹ Outside New York City, Public Administrators can employ counsels of their choice (SCPA 1206). Public Administrators' offices exist in New York City, Erie, Monroe, Nassau, Onondaga, Suffolk and Westchester Counties. Elsewhere, the function of the Public Administrator is undertaken by the county's chief fiscal officer (SCPA 1001).

compensation" paid out of the estate. The Surrogate's Court Procedure Act offers no schedule or guideline as to what compensation is reasonable.

Over the years, excessive, undocumented fee awards to counsels for New York City Public Administrators have been the subject of investigation by the New York State Attorney General and the State Comptroller. Their 1992 joint report suggested that, having unsuccessfully "made repeated attempts to obtain voluntary compliance with our recommendation that legal fees should be charged based on actual services provided for each estate," counsel be required to submit affidavits of legal services performed in each estate to support fee requests (New York State Attorney General and State Comptroller, Estate Assets Continue to be at Risk, p 32 [July 1992]; see also New York State Attorney General and State Comptroller, New York City Public Administrators: An Operational Review, [November 1987]). In addition, the Attorney General twice in the past attempted to rein in counsel fees approved by the Kings County Surrogate, reaching agreements in 1988 and 1994 with then-counsel to limit fee awards to six percent of an estate's value, with additional payment only in special cases (see Record on Appeal, pp 2096-2097, 2105-2107).

Responding to the reports and recommendations, and concerned about "the imposition of questionable fees by the [Public Administrators'] outside counsel," in 1993 the

Legislature amended Surrogate's Court Procedure Act § 1108 (2) to require in each case documentation establishing that fees are commensurate with the legal services provided (Sponsor's Mem, L 1993, ch 655). This requirement was, in part, designed to ensure that the beneficiaries -- often helpless to challenge, or even to know about, excessive legal fees -- were being charged appropriately for work actually done on the estates (id.).

The amendment -- section 1108 (2) (c) of the Surrogate's Court Procedure Act -- applies plainly and pointedly to counsel for the New York City Public Administrators. In its entirety, the subsection reads:

"Any legal fees allowed by the court pursuant to paragraph (b) of this subdivision 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."

The statutory requirements of an affidavit and specification of factors the Surrogate must consider when fixing the fee offer assurance that the amount paid out of an estate -- and therefore not available as a distribution to beneficiaries -- reflects the true and reasonable cost of the services rendered.

In addition, in 1993 the Legislature created an administrative board empowered to "establish guidelines and uniform fee schedules for the operation of the offices of public administrators" (SCPA 1128). While the board has no oversight responsibility with regard to the appointment of counsel or payment of fees for legal services, in October 2002 it recommended a uniform fee schedule for the counsels to the New York City Public Administrators -- setting a sliding scale of maximum legal fees based on six percent of the estate's value for the first \$750,000, with decreasing percentages charged for estates in inverse proportion to the estate's size beyond the initial \$750,000 (Interim Report and Guidelines of the Administrative Board for the Offices of the Public Administrators, October 2002). These guidelines were not binding and apparently have not been followed. Indeed, the parties stipulated that, during the period at issue in this proceeding, the other five New York City Surrogates calculated counsel fees based on a percentage of the total value of the estate -- in nearly every case six percent. It was also stipulated that prior to approving a fee, in each case the other Surrogates reviewed the required affidavits of legal services provided by counsel (Record on Appeal, pp 1026-1029).

Petitioner as Kings County Surrogate

Petitioner was elected Surrogate in 1996, not long after the 1992 joint report, the 1993 statutory amendment and the

Attorney General's 1994 agreement with the Kings County Surrogate, all specifically aimed at ending abuses in documenting fees for counsel to the Public Administrator. Upon taking office in January 1997, petitioner formed a committee that conducted a public search for a new Public Administrator. Petitioner also replaced the firm that had for several decades served as counsel to the Public Administrator, but he did so without any search or interview process, appointing his long-time friend and law school classmate Louis Rosenthal to that lucrative position.² Rosenthal had helped to raise funds for petitioner's election campaign. His experience in Surrogate's Court practice was limited.

As the record reflects, in the years between January 1997 and mid-May 2002, when an estate came within his purview Rosenthal would generally conduct a review of its assets and liabilities, at which point he would file an initial accounting. Upon filing, the Surrogate's Court chief clerk would calculate eight percent of the anticipated final value of the estate, and petitioner would approve 60 percent of that sum. After the accounting, the estate would settle its debts, conduct kinship hearings (if necessary) and make initial distributions to heirs. Counsel would then submit a final decree, which included a line for an additional fee request. That additional fee request was also generally calculated by the Surrogate's Court chief clerk,

² In years prior to Rosenthal's appointment, counsel to the Public Administrator was paid \$1,126,250 (1994) and \$1,482,860 (1995) (Record on Appeal, p 2132).

though on many occasions by Rosenthal himself, frequently worked out on a post-it note attached to the final decree (Record on Appeal, pp 738, 949-956). The additional fee was calculated to bring the total awarded to a percentage -- generally eight percent -- of the total value of the estate.³

From January 1997 until mid-May 2002, petitioner never required Rosenthal to submit an affidavit of legal services before approving a fee request, nor did he determine fees based on consideration of the statutory factors specified in SCPA 1108 (2) (c). While petitioner claimed to have coincidentally considered factors similar to those codified in section 1108, he repeatedly acknowledged during these proceedings that prior to May 2002 he was unaware of the statutory requirements. He testified that he only "skimmed through" the Surrogate's Court Procedure Act, never reading the entire Act -- the statutory basis for his office and jurisdiction -- claiming that it was "quite voluminous" and characterizing his failure to pay greater attention to the statute as an "oversight" (Record on Appeal, pp 154-156). Instead of following the statutory prescription, petitioner relied on the calculations of Rosenthal and the chief clerk as they appeared on the post-it notes. Petitioner did not

³ The parties submitted 475 estate files, of which petitioner himself selected 21 to serve as representative. Fifteen of those estates reflected legal fees of between 7.999 and 8 percent, five were between 7.8 and 7.97 percent and one was 8.27 percent. A few of those fees included payment to the firm that had completed work prior to Rosenthal's appointment.

individually review the estate files himself. In no instance did he reject or reduce a fee request submitted by counsel, and there is no evidence that he ever questioned a request or sought additional information before ruling on it.

As to the application of eight percent, petitioner maintained that he inherited from his predecessor, Surrogate Bernard Bloom, the practice of awarding fees representing a relatively high portion of the estate, because "that was the way it had been done in the Surrogate's Court for 30 plus years" (Record on Appeal, p 169). However, he never discussed counsel fees with the Surrogates of the other New York City counties, nor did he ask any other counsels how their fees were determined. Further, though the chief clerk knew of the 1988 and 1994 agreements with the Attorney General limiting fees, petitioner claimed he did not know the content of those agreements (Record on Appeal, pp 2096-2097, 2105-2107).

Between January 1997 and December 2002, petitioner awarded Rosenthal a total of \$8,613,009.35 in legal fees (Record on Appeal, pp 2100 - 2102). Of that amount, about \$1,935,000 was net income to Rosenthal as counsel to the Public Administrator (Record on Appeal, p 755), apart from other estate-related fees (which totaled \$458,824.66 between 1997 and 2002 [Record on Appeal, p 2104]) and his law firm earnings.

In the spring of 2002, petitioner learned that the New York Daily News was about to run an exposé of the Kings County

Surrogate, revealing petitioner's practice of approving counsel's fee requests without affidavits or individualized review of the cases. In anticipation of the story, petitioner asked Rosenthal to submit affidavits of legal services, retrospectively detailing the work done on each estate. After petitioner received these affidavits, however, not a single fee was adjusted.

Proceedings Below

On March 18, 2003, the State Commission on Judicial Conduct filed a disciplinary complaint against petitioner alleging one charge of misconduct for continuing violations of three Rules of Judicial Conduct: 22 NYCRR 100.3 (B) (1) (a "judge shall be faithful to the law and maintain professional competence in it"); 22 NYCRR 100.2 (B) (to avoid the appearance of impropriety, a "judge shall not allow family, social, political or other relationships to influence the judge's judicial conduct or judgment"); and 22 NYCRR 100.3 (C) (3) (a "judge shall not approve compensation of appointees beyond the fair value of services rendered"). The Commission appointed former Justice Felice K. Shea to hear evidence, report findings of fact and make conclusions of law.

Following a seven-day hearing, the Referee first determined that petitioner violated 22 NYCRR 100.3 (B) (1) by awarding legal fees without affidavits of legal service as required by SCPA 1108 (2) (c) and by failing to consider the enumerated statutory factors when fixing counsel fees. Second,

she concluded that petitioner violated 22 NYCRR 100.3 (C) (3) by awarding a standard eight-percent fee without consideration of the statutory factors when the customary fee in other New York City counties was six percent and when the agreement between prior counsel and the Attorney General set a general limitation on fees of six percent of the estate's value.

The Commission adopted the Referee's findings of fact and conclusions of law, adding the violation of 22 NYCRR 100.2 (B) for conveying an appearance of impropriety and favoritism by awarding fees to his long-time friend without giving each case the statutorily required individualized consideration, failing to ensure that the fee requests were supported by affidavits of legal service and setting fees greater than those granted in the other New York City counties. The Commission determined that removal was the appropriate sanction.

Upon our plenary review of the record and consideration of the evidence and arguments, we agree with the Commission's conclusions that petitioner failed to maintain professional competence in the law and that his conduct conveyed the appearance of impropriety, and we conclude that petitioner's actions constitute misconduct warranting removal.

Analysis

A judge must maintain professional competence in the law (22 NYCRR 100.3 [B] [1]). Petitioner's office and duties are governed by the Surrogate's Court Procedure Act and, whether

voluminous or not, he was under an obligation to familiarize himself with the contents of that legislation, the primary authority for practice in the Surrogate's Court. Petitioner's repeated explanation that he "just read through sections" or "skimmed" the SCPA, and that his failure -- over a period of more than five years -- to know of and adhere to the single paragraph requirement of affidavits of legal services and individualized consideration of fee requests was an "oversight," demonstrate a shocking disregard for the very law that imbued him with judicial authority.

The purpose of the statutory affidavit and individualized consideration requirements is to ensure that beneficiaries of estates that, by definition, lack interested parties capable of offering independent review are paying only for the actual cost of administering the estates. While we recognize a benefit of a fee structure that protects smaller estates from being depleted by hourly legal fees, petitioner's pro forma practice of awarding eight percent of an estate's value, approved without attention to the actual work done and unsupported by affidavits of legal services, provides no assurance that the estates benefitted in proportion to the amounts they were charged and violates the clear legal requirement and legislative intent of SCPA 1108 (2) (c). Had petitioner additionally briefed himself on the agreements with the Attorney General's office, he would have been aware of the

State's concerns about the flat eight percent practice. Disregarding the content of those agreements only further suggests that he did not maintain competence in the responsibilities of his office.

Though petitioner insists that this failure was mere legal error and not misconduct, the two are not necessarily mutually exclusive (see Matter of Reeves, 63 NY2d 105, 110 [1984]). Indeed, a judge's systematic failure to conform to legal requirements may form the basis for removal (see Matter of Bauer, 3 NY3d 158 [2004]). Petitioner disregarded the clear statutory mandates of his office repeatedly over the course of more than five years and 475 proceedings, educating himself on the SCPA requirements only in response to a newspaper's investigatory series. Petitioner's consistent disregard for fundamental statutory requirements of office demonstrates an unacceptable incompetence in the law.⁴

Petitioner's argument that the language of SCPA 1108 (2) (c) stating that a Surrogate "shall consider" the factors set forth therein cannot mean that a Surrogate "must consider" those

⁴ Petitioner's failure to procure any affidavits of legal services was apparently unique to him -- Surrogate Bloom required affidavits starting in 1994, as do the Surrogates in the other four New York City counties (Record on Appeal, pp 997-1000, 1028-1029). Of course, even the fact that petitioner inherited a lax culture from a predecessor would not excuse such misconduct. "Petitioner was responsible for his own conduct in the discharge of his judicial duties" (Matter of Greenfield, 71 NY2d 389, 392 [1988]).

factors is unavailing. While the statute vests discretion in the Surrogate to make legal fee determinations, the plain language of the SCPA 1108 (2) (c) directs a Surrogate to review the statutory factors prior to compensating counsel. "Shall" plainly did not mean "may." Considering the statutory factors does not divest the Surrogate of discretionary authority to award fees, but it does satisfy the concern that fees are justified by the services rendered.

Petitioner's failure was made all the more egregious by his appointment, without considering other candidates, of a close personal friend and political supporter to whom he summarily awarded, between 1997 and 2002, more than \$8.5 million dollars, and who personally took home a substantial portion of that amount without the Surrogate's independent assurance in each case that the compensation was reasonable.

The Rules of Judicial Conduct require that a judge not "allow family, social, political or other relationships to influence the judge's judicial conduct or judgement" (22 NYCRR 100.2 [B]). A judge's conduct is under a sterner microscope than other members of the public, as "there is no higher order of fiduciary responsibility than that assumed by a Judge" (Matter of Spector, 47 NY2d 462, 469 [1979]). While appointment of a friend does not itself convey an appearance of impropriety, when, as here, that appointment is coupled with the unsubstantiated award of several million dollars in fees from estates that, by

definition, lack adversarial parties to challenge the practice, the taint of favoritism is strong. Here, the record reflects not mere lapses or errors in judgment but a wholesale failure of petitioner's duty, reflecting an indifference if not cynicism toward his judicial office. Petitioner's failure to abide by the legal requirements of his office, in a manner that conveyed the appearance of impropriety and favoritism, debased his office and eroded public confidence in the integrity of the judiciary. We conclude that the proper remedy for this misconduct is removal from office.

Accordingly, the determined sanction should be accepted, without costs, and Michael H. Feinberg removed from the office of Surrogate of Kings County.

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Determined sanction accepted, without costs, and Michael H. Feinberg removed from the office of Surrogate of Kings County. Opinion Per Curiam. Chief Judge Kaye and Judges G.B. Smith, Ciparick, Rosenblatt, Graffeo, Read and R.S. Smith concur.

Decided June 29, 2005