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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF NEW YORK STATE COMMISSION
ON JUDICIAL CONDUCT,

Petitioner-Respondent,

-against-

SETH RUBENSTEIN,

No. 99
(Record Sealed)

Respondent-Appellant.

THE PEOPLE OF THE STATE OF NEW YORK

-against-

SETH RUBENSTEIN, et al.,
Defendants.

20 Eagle Street
Albany, New York 12207
April 30, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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1 CHIEF JUDGE LIPPMAN: Matters of New York
2 State Commission on Judicial Conduct, number 99.

3 Hi. What - - -

4 MR. FREIDMAN: Good afternoon, Your Honors.
5 May it please the court. My name is Gary Freidman.
6 I represent Seth Rubenstein.

7 CHIEF JUDGE LIPPMAN: Yeah. Do you want
8 any rebuttal time, counselor?

9 MR. FREIDMAN: Yes, may I reserve two
10 minutes, Your Honor?

11 CHIEF JUDGE LIPPMAN: Two minutes? Sure.

12 MR. FREIDMAN: This court has repeatedly
13 and consistently held that the purpose of the sealing
14 provisions of Criminal Procedure Law 160.50 - - -

15 CHIEF JUDGE LIPPMAN: What about the
16 Judiciary Law?

17 MR. FREIDMAN: 42(3), Your Honor?

18 CHIEF JUDGE LIPPMAN: Yeah.

19 MR. FREIDMAN: Your Honor, our position is
20 that 42(3) is really in the nature of general
21 enabling legislation. It was in existence when CPL
22 160.50 was adopted. It basically says that the
23 Commission can request and receive information, data
24 from courts, administrative agencies, and the like.
25 There are numerous other legislative and - - -

1 CHIEF JUDGE LIPPMAN: We don't have a wide
2 berth based on that statute?

3 MR. FREIDMAN: No, Your Honor, because this
4 court has repeatedly held that 160.50 has six
5 statutory exceptions that it has characterized as
6 narrowly and precisely drawn. And it has only
7 recognized one judicial exception, and that is the
8 authority of the Appellate Division, in attorney
9 disciplinary matters, to order unsealing - - -

10 CHIEF JUDGE LIPPMAN: What's the
11 difference, in theory, between the attorney
12 disciplinary committees and the AD and the Conduct
13 Commission?

14 MR. FREIDMAN: Well, because in that
15 circumstance - - -

16 CHIEF JUDGE LIPPMAN: From a policy
17 perspective.

18 MR. FREIDMAN: Well, from - - - in that
19 circumstance, the court to whom the applica - - - who
20 - - - the court to whom the application to unseal is
21 being made, and who is making that decision, is also
22 the court that's ultimately going to be deciding the
23 attorney disciplinary matter. And it's because the
24 legislature has vested the Appellate Division with
25 the responsibility for disciplining attorneys - - -

1 CHIEF JUDGE LIPPMAN: Don't we ultimately
2 determine what they decide, the Judicial Conduct
3 Commission?

4 MR. FREIDMAN: This court does.

5 CHIEF JUDGE LIPPMAN: Yeah.

6 MR. FREIDMAN: So that perhaps then - - -
7 but also let's remember even in Matter of Dondi v.
8 Jones, where this court recognized the inherent power
9 of the Appellate Division, it required a showing of
10 compelling need. So that perhaps then, Your Honor,
11 applications to unseal under 160.50, by a parity of
12 reasoning, should be made before this court.

13 CHIEF JUDGE LIPPMAN: So even if - - - so
14 your view is that even if we can analogize the
15 Conduct Commission to attorney discipline, they
16 didn't make the showing in your case.

17 MR. FREIDMAN: Absolutely no showing.

18 JUDGE READ: Well, you're talking about the
19 merits. Why isn't this just moot?

20 MR. FREIDMAN: Because it has the - - - the
21 results of what the State Commission did in
22 improperly obtaining Mr. Rubenstein's file has
23 enduring consequences to that.

24 JUDGE READ: Well, what about the evading
25 review thing? It's not going - - - it's not that

1 likely to evade review, is it, if it comes up again?

2 MR. FREIDMAN: It hasn't come up - - - it's
3 never come up before, yet the State Commission has
4 indicated, in Mr. Tembeckjian's affirmation that was
5 submitted to Justice Fisher, that they have done this
6 on numerous prior occasions and that they intend to
7 do it in the future.

8 JUDGE SMITH: When you started to answer
9 Judge Read by saying enduring consequences, were you
10 arguing that it's not moot or that it's within the
11 mootness exception.

12 MR. FREIDMAN: I think it falls in both
13 categories - - -

14 JUDGE RIVERA: So you say - - -

15 MR. FREIDMAN: - - - that it's not moot - -
16 -

17 JUDGE SMITH: You say there are enduring
18 consequences for your client.

19 MR. FREIDMAN: Yes.

20 JUDGE SMITH: And he wants redaction, and
21 therefore - - - they don't want redaction and
22 therefore it's not moot.

23 MR. FREIDMAN: Right, and that even - - -

24 JUDGE SMITH: Okay. I guess then my
25 question is assume you're right on the law, assume

1 that 160.50 does exactly what you say it was and
2 42(3) doesn't do a thing with it; how can redaction
3 possibly be justified on these - - - in this
4 situation with these facts?

5 MR. FREIDMAN: The legislature has said
6 that accu - - - merely because you're accused, that
7 the stigma of the accusation, if the People fail to
8 prove its case, should not - - - remember, Mr.
9 Rubenstein - - -

10 JUDGE SMITH: But isn't - - - but isn't - -
11 -

12 MR. FREIDMAN: - - - was not the subject -
13 - -

14 JUDGE SMITH: I mean, isn't there - - - I
15 mean, if you're asking a court to order the findings
16 of the Commission on Judicial Conduct, the public
17 findings largely stricken to protect your client,
18 even though he slept on his rights for a year; he
19 didn't do anything, even though he knew they were
20 looking for the information.

21 MR. FREIDMAN: We're not asking that the
22 findings be - - - be stricken; we're just asking that
23 a reference to - - - to him be redacted.

24 JUDGE SMITH: So you - - -

25 MR. FREIDMAN: But - - -

1 JUDGE SMITH: - - - in other words, you
2 just want a blank where it says - - - where it says
3 his name.

4 MR. FREIDMAN: Correct, Your Honor.

5 JUDGE SMITH: Okay.

6 MR. FREIDMAN: But - - -

7 JUDGE ABDUS-SALAAM: Is that - - - are you
8 saying that the references to him are based on these
9 sealed records or - - -

10 MR. FREIDMAN: Well - - -

11 JUDGE ABDUS-SALAAM: - - - or is it - - -

12 MR. FREIDMAN: - - - we can't be certain,
13 because we weren't privy to what went on before the
14 State Commission on Judicial Conduct. We know that
15 some of the information that - - - and this is not,
16 strictly speaking, in the record, but some of the
17 information that appears on the State Commission's
18 Web site only could have come from the criminal file,
19 such as the confidential provisions of Mr.
20 Rubenstein's will. But we weren't parties to the
21 agreed statement of facts between Judge Doe and the
22 State Commission.

23 JUDGE RIVERA: You're saying that Judge Doe
24 had - - - did not have this information, is not
25 source of this information at all?

1 MR. FREIDMAN: We don't know. She may have
2 been.

3 JUDGE ABDUS-SALAAM: Well, she entered into
4 an agreed statement of facts, which may have
5 implicated the sealed records, but we don't know, but
6 - - - but that statement of facts is certainly
7 something that the Commission could make its
8 determination upon.

9 MR. FREIDMAN: Well, but somebody had to
10 prepare the agreed statement, and they had to get the
11 information from somewhere and we submit - - -

12 JUDGE ABDUS-SALAAM: And they could have
13 gotten it from - - -

14 MR. FREIDMAN: - - - from - - -

15 JUDGE ABDUS-SALAAM: - - - Judge Doe, as
16 opposed to the seal record.

17 MR. FREIDMAN: They could have got it from
18 Judge Doe. They could have - - - the way - - - you
19 know, obtained it through independent investigation,
20 but we don't know. But because we know - - - but we
21 do know that they improperly, in our view, obtained
22 Mr. Rubenstein's sealed criminal file.

23 JUDGE GRAFFEO: I want to be sure I
24 understand what you're asking us to do. You don't
25 even want the Commission to be able to look at the

1 files? Are you objecting to the fact that they even
2 accessed the information, or do you just not want
3 them, in whatever they publicly release, to set forth
4 any of that information or to indicate the identity?

5 MR. FREIDMAN: No, our position is they're
6 not entitled to access them, because they are not a
7 law enforcement agency, they are not one of the six -
8 - - plus the accused, obviously - - - persons or
9 agencies, within 160.50, that are permitted to access
10 them.

11 JUDGE ABDUS-SALAAM: But if - - -

12 MR. FREIDMAN: And the State Commission is
13 not - - -

14 JUDGE ABDUS-SALAAM: - - - if they showed
15 unusual circumstances you're saying they could?
16 Because the statute only names six agencies, but it
17 leaves a sort of catch-all provision for other
18 agencies if they have good - - - good cause to get
19 those records?

20 MR. FREIDMAN: No - - -

21 JUDGE ABDUS-SALAAM: No?

22 MR. FREIDMAN: - - - it does not. There
23 are six very narrow exceptions in 160.50, Your Honor.
24 And the only one that - - - the only exception, other
25 than the six agencies in 160.50 that this court has

1 recognized, is the power of the Appellate Division in
2 attorney disciplinary matters.

3 In - - - in Matter of Joseph M. - - -

4 JUDGE RIVERA: So I guess we're back - - -
5 we're back to why would this not be an appropriate
6 exception. Is not the integrity of the judiciary as
7 important as the integrity of the bar?

8 MR. FREIDMAN: It's an important public
9 concern, but this court has limited it, and it - - -
10 and it indicated that the limita - - - that it was
11 permitting it in that narrow circumstance because of
12 the attorney - - - the Appellate Division's function
13 as the ultimate arbiter in attorney disciplinary
14 matters. That's not the case with the State
15 Commission, unless this court was to hold that
16 applications to unseal under 160.50 may be made upon
17 a showing of compelling need but only to this court.
18 But in Katherine B. v. Cataldo and in Joseph M., this
19 court has refused to extend the - - - the narrowly
20 drawn exceptions in 160. - - -

21 JUDGE RIVERA: And what would satisfy - - -
22 let's say the - - - the compelling need standard
23 applies, what - - - what would they have to show to
24 satisfy that?

25 MR. FREIDMAN: That - - - that they need

1 the - - - that the information is not attainable
2 elsewhere. You know, a lot of this information is -
3 - - you know, would just require more - - -

4 JUDGE RIVERA: Sealed DA notes, where are
5 you going to get that?

6 MR. FREIDMAN: Excuse me?

7 JUDGE RIVERA: DA notes, the ADA's notes;
8 where are you going to get that information? I mean,
9 that's not - - -

10 MR. FREIDMAN: Same place - - -

11 JUDGE RIVERA: It doesn't strike me that it
12 would be hard - - -

13 MR. FREIDMAN: Well, the same place that -
14 - -

15 JUDGE RIVERA: - - - to meet that standard.

16 MR. FREIDMAN: The same place that the ADA
17 got - - - obtained the notes, doing the legwork. I
18 mean, they could go out, they have a staff, they can
19 do an independent investigation, interview the same
20 witnesses that the DA investigators, the police,
21 whomever, would do it.

22 But this - - - you know, compelling need
23 for it means you have to explain to the judge who's
24 passing upon the application, why it is this
25 information is not attainable elsewhere. And in - -

1 - certainly in Mr. Rubenstein's case, they utterly
2 failed to do it. There's no showing of need
3 whatsoever.

4 CHIEF JUDGE LIPPMAN: Okay, counsel, you'll
5 have rebuttal.

6 MR. FREIDMAN: Thank you, Your Honor.

7 MR. SHIN: May it please the court. Won
8 Shin for the Commission.

9 CHIEF JUDGE LIPPMAN: Counsel, start out
10 with the mootness issue. Is it moot, this whole
11 question?

12 MR. SHIN: Yes, the case is moot, Your
13 Honor.

14 CHIEF JUDGE LIPPMAN: Why is it moot?

15 MR. SHIN: It's moot because any ruling by
16 this court would have no effect on his rights.

17 JUDGE SMITH: He says that if he wins the
18 case you can take his - - - you can take his name out
19 of the opinion.

20 MR. SHIN: That's incorrect, Your Honor.
21 The source of all of the facts in the determination,
22 including his name, is Judge Anderson herself. She
23 stipulated to those facts. She - - - the - - - the -
24 - -

25 JUDGE SMITH: Well, she may have stipulated

1 to them after you got them out of the DA's files.

2 MR. SHIN: That may or may - - - may not be
3 the case. They've made - - - they've made no showing
4 - - -

5 JUDGE SMITH: But if it is - - -

6 MR. SHIN: - - - as to that matter.

7 JUDGE SMITH: If it is the case, and if
8 he's right on the law - - - I realize I'm making a
9 few assumptions, but if it turn - - - that turns out
10 to be true, then he should get redaction, shouldn't
11 he?

12 MR. SHIN: No, Your Honor, because
13 redaction is not a remedy for even a purported
14 violation of 160.50. 160.50 does not call for - - -
15 for - - - for a redaction or any particular remedy
16 along those lines.

17 And again, I - - - I would go back to the
18 fact that here it's - - -

19 JUDGE SMITH: So let me just see what
20 you're saying. You're saying let's - - - I mean, I
21 understand I'm making a lot of assumptions. But
22 let's assume you just have a clear out violation of
23 160.50, you - - - you have no excuse for it, you've
24 got lots of information out of the criminal file.
25 You put - - - you put it in - - - in a public report

1 that you had no business doing, and you're saying the
2 court has no power to - - - to get you to take his
3 name out of the report?

4 MR. SHIN: That remedy would not follow
5 from the violation, and that conclusion flows from
6 this court's decisions in cases like Patterson and
7 Charles Q. Those are cases in which 160.50 was
8 violated, yet the court said evidence didn't have to
9 be excluded from a criminal case as a result; that
10 was Patterson. In the Charles Q. case, the court
11 said a disciplinary determination did not have to be
12 overturned as a result.

13 So again, these sorts of remedies would not
14 follow from any violation. But there's - - - there's
15 been no violation here of what's - - -

16 JUDGE GRAFFEO: Well, how does the
17 Commission's access to these sealed files fall under
18 160.50? How do you square away the six categories in
19 the statute - - -

20 MR. SHIN: Well - - -

21 JUDGE GRAFFEO: - - - with the actions of
22 your Commission?

23 MR. SHIN: The - - - the Commission is not
24 claiming to fall under one of the six exceptions.
25 What - - - our position here is that Judiciary Law

1 42(3) grants us broad investigative authority to,
2 quote, "request and receive" from any court
3 information, assistance - - -

4 CHIEF JUDGE LIPPMAN: Even - - - that
5 trumps 160?

6 MR. SHIN: That's correct, Your Honor. And
7 this court has already recognized, in Matter of
8 Dondi, that exceptions can be read into 160.50 even -
9 - - even if they're not listed in the statute.

10 JUDGE SMITH: But your position is you
11 don't have to read it, that there is a special
12 statutory exception.

13 MR. SHIN: That - - - that's essentially
14 correct.

15 JUDGE SMITH: 42(3) is an exception.

16 MR. SHIN: Correct. The - - - the plain
17 language of 42(3) says that the Commission can
18 request and receive that assistance. Therefore, it -
19 - - it often - - -

20 JUDGE SMITH: And it was enacted after the
21 - - - the CPL section was enacted. So you say,
22 effectively, it amended it?

23 MR. SHIN: That's correct. It was
24 effectively enacted before and after. It was - - -
25 it was initially enacted when the temporary

1 Commission was created, and then it was reenacted.

2 CHIEF JUDGE LIPPMAN: So you don't have to
3 make a compelling case, just the Judiciary Law is
4 sufficient?

5 MR. SHIN: That's - - - that's correct. So
6 42(3) says we can request and receive the
7 information, and then in terms of the particular
8 showing that needs to be made, this court's decisions
9 in cases like Nicholson and Doe says that all that's
10 required is a reasonable relation to the subject of
11 the investigation.

12 JUDGE SMITH: So let me get back to - - - I
13 may be confused. Which statute actually existed
14 first? Forget about all the reenactments.

15 MR. SHIN: 42(3) - - - Judiciary Law 42(3)
16 existed first.

17 JUDGE SMITH: Um-hum.

18 MR. SHIN: It was enacted in 1974 when the
19 temporary Commission was created.

20 JUDGE SMITH: So - - -

21 MR. SHIN: CPL 160.50 was created - - -

22 JUDGE SMITH: So it could be argued the
23 other way, that 160.50 creates an exception to 42(3).

24 MR. SHIN: Except for the fact that 42(3)
25 was then reenacted two years later. The legislature

1 reenacted it when it constituted the present
2 Commission, and it kept - - - it preserved that
3 power.

4 JUDGE SMITH: But isn't that a - - - I
5 mean, I don't know what - - - there's probably some
6 maxim that I don't know, but I would think, in common
7 sense, that when a court - - - when its legislature
8 reenacts, verbatim, language that already exists, it
9 wouldn't be thought to be changing the law.

10 MR. SHIN: That's right. It's - - - it's
11 not changing the law, because the Commission always
12 had that authority; it didn't need to change the law.
13 It wasn't, for example, overruling some other
14 decision.

15 So again, 42(3) - - - the broad language of
16 42(3), request and receive, this court has already
17 acknowledged that sort of investigative power with
18 respect to other bodies. So for example, in the New
19 York City Health & Hospitals Corp. case, this court
20 relied on the request-and-receive provision to
21 authorize the State Commission on Correction to
22 obtain documents that were privileged under the
23 statutory doctor-patient privilege. So that's
24 precisely the - - - the scenario here. Again, a
25 request-and-receive provision is being - - - is being

1 relied on here by - - - by the Commission to obtain
2 statutorily sealed records.

3 And I would point out that there was
4 allusion earlier to all of the other potential bodies
5 that - - - that would benefit from a - - - this
6 court's ruling upholding the request-and-receive
7 authority.

8 Actually, of the twenty statutes that he
9 cites, fourteen of them don't mention requesting and
10 receiving information from courts. So those are
11 simply irrelevant here. The remaining six do ref - -
12 - do reference requesting information from courts,
13 but they actually are - - - they involve bodies such
14 as legislative commissions and the Council On
15 Environmental advisors that are very - - - that are
16 unlikely to - - - to require sealed records and - - -
17 for the purposes of - - -

18 JUDGE SMITH: Suppose they did - - -

19 MR. SHIN: - - - their specific missions.

20 JUDGE SMITH: Suppose they - - - suppose
21 they - - - I can certainly imagine a legislative
22 commission might want to look into some sealed
23 records. Do you think they can?

24 MR. SHIN: It would depend on whether it
25 was in furtherance of - - - of that commission's

1 purpose.

2 JUDGE SMITH: And if it was, the answer is
3 yes?

4 MR. SHIN: It may well be the case, but
5 this court doesn't need to address that here in this
6 case.

7 And so that leaves - - - that leaves, as
8 far as I am aware, two statutes that involve request-
9 and-receive statutes that reach courts. One is
10 42(3), which is the statute in this case. The other
11 is Judiciary Law 212, which authorizes the chief
12 administrator of the courts to likewise request and
13 receive information from the courts. And it - - - it
14 makes perfect sense that the legislature would grant
15 those two government actors, the Commission and the
16 chief administrator, that broad authority. And - - -

17 CHIEF JUDGE LIPPMAN: On what theory?

18 MR. SHIN: On the theory that they're both
19 - - - they're both protecting the integrity of - - -
20 of the courts, and they're both intimately involved
21 with the court system. Therefore, it makes sense
22 that these two actors, who are - - - are both
23 intimately involved in supervising the courts, would
24 have access to those sealed records.

25 With respect to the - - - the standard, so

1 our position, again, is that - - -

2 JUDGE SMITH: And if you have access to
3 sealed records, it is completely up to you whether -
4 - - what you do with them? You have no obligation to
5 keep them confidential?

6 MR. SHIN: We - - - we do, Your Honor.

7 JUDGE SMITH: Oh, you do under your own
8 statute.

9 MR. SHIN: That's correct.

10 JUDGE SMITH: But you have no - - - the
11 160.50 has no impact on you whatever; you can ignore
12 it.

13 MR. SHIN: Well, once we have - - - once we
14 have the records under the valid authority of 42(3),
15 we're permitted to use those records. We're subject
16 to our own confidentiality requirements under the
17 Judiciary Law, and those apply and protect and
18 therefore serve the same interests that 160.50 does.

19 Disclosure would only come in a very narrow
20 set of circumstances. Disclosure would be when
21 there's been a determination that judicial discipline
22 is warranted or when the judge waives
23 confidentiality. That's when the interest in
24 transparency is at its highest, when there's been a
25 judge who's engaged in misconduct.

1 JUDGE SMITH: Your logic would apply even
2 if the judge had not been the defendant in the
3 criminal proceeding, wouldn't it?

4 MR. SHIN: That's correct, Your Honor. In
5 fact - - -

6 JUDGE SMITH: So some ordinary citizen who
7 was wrongly accused and got acquitted and got his
8 file sealed, and nobody knows that he was involved in
9 it, you could - - - if you were proceeding against a
10 judge, and that material is relevant, you can get
11 that material and you can make it public if you think
12 it's - - - if you find that it's appropriate as part
13 of the discipline of the judge?

14 MR. SHIN: That's correct, Your Honor, and
15 this court has already implicitly endorsed that in
16 the Matter of Duckman case. So there the court's - -
17 - the court's opinion explicitly recognized that the
18 Commission obtained sealed records. It's in - - -
19 it's in the dissenting opinion in that case in a
20 footnote. And yet the court upheld the - - - the
21 Commission's determination. And that involves
22 precisely this - - - this category of cases that Your
23 Honor alluded to.

24 JUDGE SMITH: Well, is upholding the
25 determination the same thing as upholding the use of

1 the sealed material?

2 MR. SHIN: Not expressly, but no member of
3 the court expressed any objection to the use of the
4 seal - - - of the sealed material.

5 JUDGE SMITH: Was that issue even raised in
6 that case?

7 MR. SHIN: Not that I'm aware of, Your
8 Honor.

9 And that category of cases - - - in other
10 words, cases in which a judge is alleged to have
11 engaged in misconduct in a case over which he
12 presides, that's a large category of cases that
13 includes cases like Duckman. There are also like
14 Matter of Young, again upheld by this court, Matter
15 of Skinner.

16 And the reason why - - - the reason why
17 it's important that the Commission have access to the
18 sealed records in those cases is that often the
19 records provide the only information about the
20 misconduct. So for example, in those cases, the
21 presiding judges were alleged to have, essentially,
22 favored certain parties in dismissing the criminal
23 charges. They - - - they favored the criminal
24 defendant, but they did so without notice to the
25 prosecutor, so there were no other witnesses present.

1 The only way that the Commission could have proven
2 its - - - investigated and proven the case is to
3 obtain those records.

4 But even - - - even if - - - even if the
5 records do not contain that sort of essential
6 information, it's still important for the Commission
7 to have access to sealed records. One - - -

8 JUDGE RIVERA: Are you subject to the
9 compelling need standard?

10 MR. SHIN: I'm sorry, Your Honor?

11 JUDGE RIVERA: Do you have to show a
12 compelling need?

13 MR. SHIN: We don't, Your Honor.

14 JUDGE RIVERA: Why not?

15 MR. SHIN: Again, under Nicholson and Doe,
16 all that's required for - - - for the Commission to
17 support its investigation is a reasonable relation to
18 the subject of the - - - of the investigation.

19 But even if a compelling need were
20 required, it would be met in the two categories of
21 cases that we've been discussing. Again, one, the
22 category of cases in which the judge presides over
23 the criminal proceeding, and two, the category of
24 cases in which the judge's misconduct is so serious
25 that he or she has already faced criminal charges.

1 Those are two categories of cases in which there is a
2 compelling need for the Commission to have those
3 documents.

4 And it's essential for the court to be able
5 to review those files and to be able to complete its
6 investigation, because it often won't be able to know
7 what's in those files and what's essential until it
8 is able to look at them.

9 JUDGE RIVERA: He's saying you can go and
10 do your own investigation. He says you're avoiding
11 your responsibility and your duty to go out and
12 actually do the legwork.

13 MR. SHIN: Right.

14 JUDGE RIVERA: Why is he wrong?

15 MR. SHIN: A couple of responses to that,
16 Your Honor. He's wrong because, first, going out and
17 doing our own legwork, as he says, that would involve
18 canvassing witnesses, perhaps - - - perhaps bringing
19 in court employees who may have witnessed the
20 behavior. That would conflict with the
21 confidentiality concerns of the Commission. It - - -
22 it would - - - it would endanger the reputation of
23 judges who are being investigated, many of - - - most
24 of whom are ultimately cleared of any wrongdoing.
25 Yet he would have us go and talk to tens, dozens of

1 MR. SHIN: Conversely - - - if I could just
2 finish that thought.

3 CHIEF JUDGE LIPPMAN: Yeah, go ahead,
4 counsel, finish.

5 MR. SHIN: Conversely, if the judge
6 ultimately is cleared, both the State and the judge
7 has an interest in being cleared quickly. So again,
8 at - - - saying that the Commission should recreate -
9 - -

10 CHIEF JUDGE LIPPMAN: Okay.

11 MR. SHIN: - - - its investigation would
12 conflict with - - - with the Commission's purpose.

13 CHIEF JUDGE LIPPMAN: Thank you, counsel.
14 Counselor, rebuttal?

15 MR. FREIDMAN: I'll be brief, Your Honors.
16 I just want to point out, in the cases that the
17 Commission referred to about the compelling need,
18 that involved the actions of a sitting judge and the
19 Commission investigating a sitting judge. That is
20 not our circumstance. Mr. Rubenstein is not a
21 sitting judge, was not subject to discipline by the
22 State Commission.

23 And I would just end, although there may be
24 compelling circumstances where the State Commission
25 needs information, but the remedy is with the

1 legislature. This - - - the legislature's been very
2 careful to set out six exceptions. This court has
3 jealously guarded those exceptions. And as - - - as
4 was indicated in Joseph M., any further exception
5 should come from the legislature - - -

6 JUDGE ABDUS-SALAAM: So counsel - - -

7 MR. FREIDMAN: - - - not from the courts.

8 JUDGE ABDUS-SALAAM: - - - Judge Doe and
9 Mr. Rubenstein were charged or - - - and tried
10 together. So is it your position that - - - well,
11 assuming that the records could have been turned
12 over, that they should have been redacted, everything
13 involving Rubenstein? Is that what you're saying?

14 MR. FREIDMAN: I hadn't said that, but I
15 think that they should have been, Your Honor, because
16 otherwise he would be denied his protection under
17 160.50.

18 Thank you.

19 CHIEF JUDGE LIPPMAN: Okay. Thanks,
20 counselor. Thank you both.

21 (Court is adjourned)

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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of New York State Commission on Judicial Conduct v. Rubenstein, No. 99, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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