December 19, 2010

NEW YORK STATE COURT OF APPEALS
Court of Appeals Hall
20 Eagle Street
Albany, NY 12207-1095
Att.: Andrew W. Klein
Clerk of the Court

Re: *Matter of Cousins, an Attorney*

Dear Mr. Klein:

In response to your December 9, 2010 letter to appellant's counsel, Victor M. Serby (and given the time constraints imposed thereby), appellant respectfully submits the following directly to the Court of Appeals:

DDC's Petition for Collateral Estoppel

DDC's Petition to Confirm
Recommendation of Disbarment

Respondent's Motion for Reargument
or Leave to Appeal to the Court of Appeals

Repondent's disbarment is based on neither: **(1)** proof of conviction of a felony or "serious crime" as that term is defined in Judiciary Law § 90(4)(d)[1] nor **(2)** reciprocal discipline.[2] While either basis for disbarment may satisfy the

[1] Respondent has never been charged with, let alone pled guilty to or been found guilty of committing any felony or misdemeanor. The most serious infraction respondent has been accused of or pled guilty to was a speeding ticket (the most recent being more than 20 years ago).

[2] Respondent has never been admitted to practice law in any State other than New York. Sporadic admissions to practice *pro hac vice* in New Jersey and Pennsylvania have triggered no disciplinary complaints over the years and, *a fortiori,* no disciplinary findings that could possibly support a basis for reciprocal discipline in New York.

constitutionally mandated requirements for procedural due process, misapplication of "collateral estoppel" in the absence of a formal disciplinary proceeding does not.

One of appellant's main arguments is that the DDC's Petition for Collateral Estoppel should have been dismissed without prejudice to renewal, if appropriate, following institution of formal disciplinary proceedings against respondent pursuant to 22 NYCRR 605.12. This argument was preserved for appellate review by respondent's counsel Sarah Jo Hamilton on page 14 of her February 17, 2009 Affirmation in Opposition to the DDC's Petition for Collateral Estoppel in a nonexistent proceeding:

> The dismissal of this Petition would not harm the Committee. The Committee could, should it determine appropriate, serve Mr. Cousins with formal charges of misconduct. Mr. Cousins would then have the full and fair opportunity, denied him in the *Veneski* case, to defend himself against such charges, free of any implication or question of bias by the fact finder.[3]

Petitioner's efforts to avoid complying with Part 605 of the Rules of the Supreme Court, Appellate Division, First Department (Rules and Procedures of the Departmental Disciplinary Committee) (particularly those pertaining to Commencement of Formal Proceedings pursuant to § 605.12 thereof) are based on a DDC petition to the Appellate Division for an Order granting collateral estoppel in a nonexistent disciplinary proceeding under 22 NYCRR 603.4(d). Subparagraph (d) of § 603.4 provides:

> When the Departmental Disciplinary Committee, after investigation, determines that it is appropriate to file a petition against an attorney in this court, the committee shall institute disciplinary proceedings in this court and the court may discipline an attorney on the basis of the record of hearings before such committee, or may appoint a referee, justice or judge to hold hearings.

After completing an 18 month investigation into respondent's handling of the *Veneski* matter, the DDC took no action whatsoever. It did not institute disciplinary proceedings in the Appellate Division pursuant to § 603.4(d) nor did it present the court with a record of hearings before the DDC because the Committee never held any hearings. Both Chief Counsel and Deputy Chief Counsel deposed respondent

[3] Counsel alludes to *Matter of Antoine*, 46 A.D.3d 60 (1st Dept. 2007).

for two days at 61 Broadway, but never once asked respondent to explain his conduct or the knowledge he possessed upon which his actions was based.

A formal disciplinary proceeding is not instituted pursuant to 22 NYCRR 605.12 by petitioning for collateral estoppel in a nonexistent proceeding. Appellant is aware of no statute or court rule in disciplinary matters analogous to CPLR 3213 (Motion for Summary Judgment in Lieu of Complaint). Not even the most liberal reading of CPLR 3213 reveals its application to attorney disciplinary matters. Inasmuch as the DDC presented the Appellate Division with no record of hearings before its Committee, the Appellate Division was required to "appoint a referee, justice or judge to hold hearings" (before whom respondent would have been pleased to testify).

Petitioner makes no claim that its petition for collateral estoppel was based on anything that transpired at the Committee's offices. Indeed, its application was based entirely on a series of Decisions & Orders by a Supreme Court Justice (Hon. Sherry Klein Heitler, J.) who was disqualified from sitting on the *Veneski* case by virtue of having referred respondent to the DDC for investigation, was aware she was required to recuse herself from further involvement in the case because of that referral, and deliberately withheld that information from the parties.

In addition, Justice Heitler held no hearings, heard no testimony and misinformed respondent and respondent's counsel that no decision would be rendered on pending motions until a hearing had been held (which respondent and his attorneys relied upon to their detriment).

The second basis for the DDC's petition for collateral estoppel in a nonexistent disciplinary proceeding is Judiciary Law § 90(2).

Judiciary Law § 90(2) is an enabling statute which empowers the Appellate Divisions to carry out the mandate and authority of the Court of Appeals to admit attorneys and counsellors-at-law to practice and to discipline lawyers found "guilty of professional misconduct, malpractice, fraud, deceit, crime or misdemeanor, or any conduct prejudicial to the administration of justice; and the appellate division of the supreme court is hereby authorized to revoke such admission for any misrepresentation or suppression of any information in connection with the application for admission to practice." (See, 22 NYCRR Part 520 [Rules of the Court of Appeals for the Admission of Attorneys and Counselors at Law]).

The DDC's petition wholly ignores (or, at best, silently implies) that Judiciary Law § 90(2) trumps the mandate of § 6 that "such attorney and counsellor-at-law must be allowed to defend himself against such charges." *A fortiori,* absent emergency suspension, an attorney must be served with a Notice of Charges before he may be