COURT OF APPEALS
State of New York

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In the Matter of Norman Leonard Cousins, an Attorney and Counselor at Law:

Departmental Disciplinary Committee for the First Judicial Department,

NOTICE OF MOTION

Petitioner-Respondent,

Norman Leonard Cousins,

Respondent-Appellant.

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MOTION BY:	Respondent-Appellant
PLACE & DATE OF HEARING:	Court of Appeals Hall 20 Eagle Street Albany, NY 12207 Monday, April 11, 2011
RELIEF SOUGHT:	An Order granting leave to appeal to the Court of Appeals from Final Orders of the Appellate Division, First Department dated October 19, 2010 disbarring Respondent from the practice of law
DATE OF NOTICE OF MOTION:	March 19, 2011

MOTION SERVED BY:

VICTOR M. SERBY
Attorney for Respondent-Appellant
255 Hewlett Neck Road
Woodmere, NY 11598-1452
(516) 374-2455

MOTION ADDRESSED TO: DEPARTMENTAL DISCIPLINARY COMMITTEE
Petitioner-Respondent
Supreme Court, Appellate Division
First Judicial Department
61 Broadway
New York, NY 10006
(212) 401-0800

CLERK OF THE COURT OF APPEALS
Court of Appeals Hall
20 Eagle Street
Albany, NY 12207-1095
(518) 455-7700

COURT OF APPEALS
STATE OF NEW YORK

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In the Matter of Norman Leonard Cousins, an Attorney and Counselor at Law:

Departmental Disciplinary Committee for the First Judicial Department,

AFFIDAVIT

Petitioner-Respondent,

Norman Leonard Cousins,

Respondent-Appellant.

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STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

NORMAN LEONARD COUSINS, being duly sworn, deposes and says:

Your deponent, familiar with all of the facts and proceedings heretofore had herein, respectfully submits this affidavit in support of respondent's motion which seeks an Order pursuant to CPLR 5602(a)(1)(i) or (ii), CPLR 5602(a)(2), and/or Judiciary Law § 90(8) granting respondent leave to appeal to the Court of Appeals from an Order of the Appellate Division, First Department entered February 17, 2011 **(Exhibit "21")** which denied respondent's motion (brought on by Notice of Motion dated November 17, 2010) for reargument of or, in the alternative, for leave to appeal to the Court of Appeals from the Appellate Division's Order entered October 19, 2010 **(Exhibit "19")** which disbarred respondent from the practice of law in the State of New York without being served with a Notice of

Charges, accorded a hearing before a Special Referee, or given the opportunity to defend himself. No witnesses testified against respondent.

What makes this disbarment particularly disturbing (if not outright bizarre) is that disciplinary proceedings have never been instituted against respondent pursuant to 22 NYCRR 605.12 or any other provision of the Rules and Procedures of the Departmental Disciplinary Committee (22 NYCRR Part 605). Respondent has never been charged with, tried for, or pled guilty to any felony or misdemeanor in any court anywhere. The most serious infraction he has ever committed was pleading guilty to a speeding ticket (a moving violation) more than 10 years ago. There is no provision in Judiciary Law § 90 which provides a basis for respondent's disbarment, and the procedure followed by the Departmental Disciplinary Committee was expressly condemned by the First Department in *In re Antoine,* 46 A.D.3d 60 (1st Dept. 2007) in which the DDC sought to revoke the license of a legal consultant without filing formal Disciplinary Charges against him. In denying the motion to revoke the legal consultant's license, the First Dept. stated:

> The Committee now seeks an order to immediately revoke his license to act as a legal consultant. The Committee has not filed any formal charges against respondent or, for that matter, held a hearing. Rather, it contends that under 22 NYCRR 521.5 (a) (1) and 521.8, it may seek the immediate revocation of respondent's license to practice as a legal consultant on the ground that there is uncontested evidence of professional misconduct which reflects adversely upon respondent's moral character and general fitness under 22 NYCRR 521.1 (a) (3). In response, respondent moves to dismiss the motion because it is procedurally defective. While denying that he willfully deceived his clients or the public, respondent consents to an interim suspension of his license pending further proceedings.
>
> In seeking the revocation of respondent's license, this Court's rules clearly state that "[d]isciplinary proceedings and proceedings

> under section 603.16 of this Title against any legal consultant shall be initiated and conducted in the manner and by the same agencies as prescribed by law for disciplinary proceedings against attorneys" (22 NYCRR 610.7; see also 22 NYCRR 521.5). The Committee must follow the same procedures as for attorneys, namely it must file formal disciplinary charges and hold a hearing before a referee on those charges (*Matter of Zakaria,* 39 AD3d 128 [2007]; *Matter of Dhar,* 237 AD2d 74 [1997]).

If legal consultants are entitled to the same procedural safeguards as an attorney, it is difficult to understand why an attorney in good standing at the bar of the State of New York since 1969 should not be entitled to the same procedural safeguards as a legal consultant.

QUESTIONS PRESENTED

1. Were the Orders of the Appellate Division, First Department in this matter entered on October 19, 2010 **(Exhibit "19")** and February 17, 2011 **(Exhibit "21")** properly made?

2. Doesn't collateral estoppel presuppose or require the existence of at least two separate actions or proceedings?

3. Did petitioner's conduct in this matter violate the First Department's holding in *In re Antoine,* 46 A.D.3d 60 (1st Dept. 2007)?

4. Was respondent denied his rights under Judiciary Law § 90(6) by petitioner's failure to serve him with a copy of the charges against him (no charges having ever been proffered against respondent) and denied the opportunity to defend himself against such [nonexistent] charges?

5. Should the Court of Appeals adopt the "clear and convincing evidence standard" in disciplinary matters throughout the State of New York?

6. Does the fact that Respondent's disbarment was predicated *solely* upon the Orders of a Supreme Court Justice who was disqualified from hearing the matter **(Exhibit "10")**, had actual notice of such disqualification **(Exhibit "10")** and deliberately withheld that information from the parties before her **(Exhibit "13")**, suggest collateral estoppel effect should not be given to any Orders of Supreme Court issued subsequent to her disqualification?

7. Does the fact that Respondent's disbarment was predicated solely upon the Orders of a Supreme Court Justice who stated unequivocally she would not decide the motions before her without holding a hearing and proceeded to do so anyway without notifying the parties and according them the opportunity to submit additional papers (which would have been utilized at the hearing) suggest collateral estoppel effect should not be given to Orders emanating therefrom (*cf.* CPLR 3211[c])?

8. Does the fact that Supreme Court engaged in *ex parte* and unauthorized communications with a New Jersey attorney who was not a member of the New York bar on behalf of a client (his own company) who was neither a party to the action nor authorized to do business in the State of New York **(Exhibit "9")**, had been indicted for forgery and real estate fraud by a Bergen County Grand Jury **(Exhibit "3")** and was the subject of a then pending disciplinary complaint in New Jersey involving the same facts as the criminal indictment as well as improper financial dealings with a Superior Court Judge before whom the attorney had pending matters **(Exhibit "4")** **(Exhibit "8")**,

suggest collateral estoppel effect should not be given to Orders contaminated by such conversations (especially when the improper communications were not under oath and respondent was not accorded the opportunity to cross examine)?

9. What provision of law excuses petitioner's noncompliance or dispense with petitioner's compliance with the Rules and Procedures of the First Judicial Department (Part 605 of the Rules of the Supreme Court, Appellate Division, First Department)?

10. If Petitioner's representatives (including its Chief Counsel, Alan W. Friedberg) testified truthfully before the Senate Judiciary Committee on June 8, 2009 **(Exhibit "16")**, then how can any conclusion be drawn other than that respondent was denied due process of law under both the U.S. and New York State Constitutions?

PROCEDURAL HISTORY

The Appellate Division Order herein sought to be appealed was entered on February 17, 2011 **(Exhibit "21")**. The Order was served by petitioner on respondent's counsel by First-Class Mail on February 22, 2011 **(Exhibit "21")**.

The Court of Appeals' Order dismissing respondent's appeal as of right was issued February 22, 2011 and mailed to respondent by the Court that day **(Exhibit "22")**. It has not been served by either party upon the other.

There being 28 days in February of this year, the timeliness chain is intact and the instant motion is timely as a matter of law.

JURISDICTIONAL STATEMENT

The Court of Appeals has jurisdiction of this appeal pursuant to CPLR 5602(a)(1)(i) or (ii), CPLR 5602(a)(2), and/or Judiciary Law § 90(8). It is an appeal from an Order of the Appellate Division which finally determined this matter but is not appealable as of right **(Exhibit "21") (Exhibit "22")**.

Because the Appellate Division in this case was also the court of original instance (respondent having been accorded no hearing in either the Supreme Court or the disciplinary process), respondent is entitled to at least one review of the facts by an appellate court (in this case the Court of Appeals) (*cf., Mildner v. Gulotta,* 405 F.Supp. 182 [E.D.N.Y. 1976]).

THE QUESTIONS PRESENTED BY THIS APPEAL WARRANT REVIEW BY THE COURT OF APPEALS BECAUSE THEY ARE NOVEL AND OF PUBLIC IMPORTANCE AND INVOLVE CONFLICTS WITHIN THE JUDICIAL DEPARTMENTS AS TO THE STANDARD OF PROOF TO BE APPLIED IN ATTORNEY DISCIPLINARY MATTERS AND THE PROPER USE OF COLLATERAL ESTOPPEL IN ATTORNEY DISCIPLINARY MATTERS

In Re Antoine, 46 A.D.3d 60, 844 N.Y.S.2d 221 [1st Dept 2007] was decided on October 23, 2007. Insofar as applicable hereto, it held that, "The Committee must follow the same procedures as for attorneys, namely it must file formal disciplinary charges and hold a hearing before a referee on those charges".

Neither Judiciary Law § 90 nor the Rules and Procedures of the Departmental Disciplinary Committee (22 NYCRR Part 605) have changed since then.

In response to statewide complaints from attorneys both within and without various disciplinary committees of inconsistent policies, unfair treatment, favoritism, self-interest, conflicts of interest, harassment, abusive practices, and ineffectual administration of the attorney disciplinary process, hearings were held before the New York State Standing Committee on [the] Judiciary in Albany, New York on June 8, 2009 and in Manhattan on September 24, 2009.

Testifying on behalf of the Departmental Disciplinary Committee for the First Judicial Department on June 8, 2009, Martin R. Gold and Chief Counsel Alan W. Frieberg provided the following information **(Exhibit "16")**:

10/4[1] Mr. Chairman, distinguished members of
10/5 the committee, my name is Martin R. Gold. I
10/6 am a lawyer in New York City and a partner
10/7 in Sonnenschein, Nath & Rosenthal, a large
10/8 national law firm. I'm a volunteer member
10/9 of the Departmental Disciplinary Committee
10/10 for the First Judicial Department appointed
10/11 by the Appellate Division. I am also a
10/12 senior member of the policy committee of the
10/13 Disciplinary Committee.
10/14 The Chairman of the committee, Mr. Roy
10/15 Reardon, very much wanted to be here today
10/16 and to attend this hearing and participate,
10/17 but another commitment made that impossible.

[1] References are to pages and lines in the witness's testimony.

And he asked me to attend in his place, and it's my pleasure to do so.

With me is our chief counsel, Alan Friedberg. Together we will provide you with a description of the operation of the attorney disciplinary system in the First Department and answer any questions you may have concerning our operation.

The Policy Committee oversees the general functioning of the committee and the staff and also provides direction on pending issues.

Now, the Appellate Division has adopted public rules and procedures governing the Departmental Disciplinary Committee and rules governing the conduct of attorneys.

Generally fee disputes, issues of legal strategy, and single incidents of malpractice that might be addressed in a civil matter do not constitute misconduct. The Appellate Division and the committee must devote its limited resources to the limited remedial options within its jurisdiction.

The Office of the Chief Counsel of the Disciplinary Committee is staffed by 23

13/15 attorneys. The staff attorneys screen
13/16 complaints, investigate allegations of
13/17 misconduct, and prosecute cases at hearings.
13/18 As I have indicated, Mr. Alan Friedberg is
13/19 the chief counsel.

20/2 If two attorney
20/3 members of the Policy Committee, after
20/4 reviewing the file, approve charges, the
20/5 Appellate Division appoints a referee who
20/6 conducts a hearing, which is essentially a
20/7 trial. The rules of evidence apply.

20/8 The referee's recommendation is then
20/9 reviewed by a panel, usually of four members
20/10 of the Disciplinary Committee, who make a
20/11 recommendation to the Appellate Division as
20/12 to misconduct or possible action.

22/6 In 2008, 21 attorneys were disbarred
22/7 after hearings, that's after full hearings.

22/21 MR. GOLD: I think this is typical.

23/11 MR. FRIEDBERG: If there's any
23/12 question that there might be misconduct, we
23/13 would proceed with it.

26/20 Most of the serious cases that result
26/21 in serious charges involved financial
26/22 matters, particularly escrow. Although
26/23 escrow is not the biggest type of complaint,

26/24 it's the biggest type of complaint that

27/1 perhaps results in serious penalty.

In the matter at bar, petitioner violated every statutory and regulatory provision applicable to its operation and functioning.

Respondent was represented during the DDC's investigation of Justice Sherry Klein Heitler's January 31, 2007 complaint **(Exhibit "12")** by Sarah Joe Hamilton, Former First Deputy Chief Counsel to the Departmental Disciplinary Committee **(Exhibit "14")**.

During the course of the DDC's investigation, respondent produced complete copies of his IOLA bank statements for the preceding six (6) years **(Exhibit "14")**. They were complete, in meticulous order, and each one personally reconciled and verified by respondent. No IOLA check had ever been dishonored, nor had any IOLA check been made payable to "Cash". In short, there were no irregularities in respondent's Attorney Special Account whatsoever. Why then did petitioner fail to follow proper statutory and regulatory procedures? No interim order of suspension was sought, so obviously petitioner saw no threat of imminent danger to the public by respondent's continued practice of law.

While failure to cooperate with the Committee can lead to suspension and ultimate disbarment, respondent's cooperation with the Committee's investigation was complete and unstinting. Respondent produced over 1000 pages of documents, including everything the DDC requested and important documents that petitioner didn't even know existed. Respondent even produced answering machine recordings and certified transcripts thereof proving that Harris D. Leinwand - who purported to represent the Veneskis - actually worked for Thomas

A. DeClemente (the indicted and later suspended New Jersey attorney who had sued the Veneskis in New York, New Jersey and Pennsylvania) **(Exhibit " 3")(Exhibit "18")(Exhibit "20")**.

In his capacity as Chief Counsel to the DDC - the same capacity in which he testified before the Senate Judiciary Committee on June 8, 2009 - Alan W. Friedberg and Mady J. Edelstein, Deputy Chief Counsel to the DDC deposed respondent at the offices of the Departmental Disciplinary Committee on May 2 and 23, 2008 **(Exhibit "14")**. Respondent answered hundreds of questions posed by Friedberg and Edelstein truthfully and to the best of his ability. Cognizant that this was a deposition and not a hearing, respondent was nevertheless chagrined by counsels' failure to ask the four (4) most important questions in the case: **(1)** Why did you do what you did when you did it? **(2)** What did you know and when did you learn it? **(3)** Why did you file, voluntarily withdraw, and then refile for Chapter 13? and **(4)** Why did you charge the Chapter 13 filing fees to the *Veneski* case?

If petitioner's purpose in not charging respondent as required by 22 NYCRR 605.12(a) (Commencement of Formal Proceedings) was to prevent respondent from testifying truthfully to Questions (1) thru (4) hereinabove, its purpose may be frustrated. At DeClemente's insistence, Harris D. Leinwand filed a claim with the Lawyer's Fund for Client Protection "on behalf of Mr. & Mrs. Veneski". Respondent has already notified The Fund, in writing, that the claim is a complete fraud and that no portion thereof should be paid **(Exhibit "20")**. Unless Leinwand withdraws the claim, a hearing is mandated by 22 NYCRR 7200.10(f). Even if Leinwand withdraws the claim, the truth will still come out (with all supporting documentation) when respondent testifies against Thomas A.

DeClemente in *Office of Attorney Ethics v. Thomas A. DeClemente*. Had DeClemente been disbarred by the New Jersey Supreme Court on January 19, 2010 - rather than merely suspended **(Exhibit "18")** - respondent would have been denied the opportunity to testify against him. In New Jersey, disbarment is for life. But because DeClemente was suspended rather than disbarred **(Exhibit "18")**, new disciplinary proceedings against him are expected, and respondent will be a key witness in those proceedings.

Respondent was accorded none of the safeguards and protections Friedberg testified to before the Senate Judiciary Committee **(Exhibit "16")** because respondent was never served with a Notice of Charges. No Special Referee was ever appointed to conduct a hearing as to respondent's guilt or innocence. The rules of evidence never applied because there was no hearing to apply them to and petitioner called no witnesses to testify against respondent at any time. There was no recommendation to the Appellate Division following the hearing because no hearing was ever held.

Collateral estoppel was improperly applied to effectuate respondent's disbarment because the Supreme Court Justice whose Order was the sole basis for respondent's disbarment (Hon. Sherry Klein Heitler, J.S.C.) was **(a)** disqualified from sitting on the case **(Exhibit "10")**; **(b)** had actual knowledge of her disqualification **(Exhibit "10")** and willfully concealed it from the parties **(Exhibit "13")**; **(c)** engaged in *ex parte* and other improper communications with Thomas A. DeClemente on July 5, 2006 **(Exhibit "9")** despite the fact that grave disciplinary charges had been pending against him since March 30, 2006 **(Exhibit "8")**, and that the Judge with whom DeClemente had engaged in improper financial transactions without informing his adversary was censured by the

Supreme Court of New Jersey and resigned from the bench **(Exhibit "4")**. Justice Heitler's conduct was in stark contrast to Supreme Court Justice Jane S. Solomon's refusal to permit DeClemente to participate in oral argument of the Liquidation Bureau's motion to disburse its share of the settlement proceeds in the *Veneski* case, represent Legal Asset Funding, LLC; First England Funding, LLC; or DeClemente & Associates. She would not even permit him to remain on the raised platform in front of the bench while the motion was being argued. Justice Solomon was aware that DeClemente was not a member of the New York bar and would only permit Michael R. Perle (who *is* a member of New York bar) to address the Court on Legal Asset Funding, LLC's behalf.

Collateral estoppel was also improperly applied to effectuate respondent's disbarment because the Supreme Court Justice upon which respondent's disbarment was based never held a hearing or conducted a trial or informed the parties that she had changed her mind and decided not to, without affording the parties an opportunity to submit additional evidence that would have been submitted at the hearing Justice Heitler insisted she would conduct before deciding the motions before her.

Collateral estoppel requires that the party against whom it is sought to be imposed be aware that the results of the first proceeding may be conclusive against him in a subsequent proceeding (*Gilberg v. Barbieri,* 53 N.Y.2d 285 [1981]). Respondent's research has failed to uncover a single case where a fee or disbursement dispute gave rise to collateral estoppel against an attorney in a subsequent disciplinary proceeding (which is not to suggest that a disciplinary proceeding was ever commenced against respondent, because it wasn't).

Collateral estoppel also requires that the party against whom collateral estoppel is sought to be imposed have the same or greater incentive to defend the first action as he did the second. Respondent had no such incentive. He could not effectively defend himself until all DeClemente's actions against Mr. & Mrs. Veneski had been dismissed **(Exhibit "15")** and DeClemente had been convicted **(Exhibit "17")** **(Exhibit "18")**. DeClemente made two major blunders in terrorizing the Veneskis and attempting to destroy respondent. He sued the Veneskis in the United States District Court for the Middle District of Pennsylvania where he was not admitted, had no contacts, and was in no position to financially influence the outcome of the case (as he did in Bergen and Hudson Counties) **(Exhibit "1")** **(Exhibit "2")** **(Exhibit "4")** **(Exhibit "17")**. His second major blunder was instructing Leinwand to file a claim on Veneskis' behalf with The Lawyer's Fund for Client Protection. That guarantees there will be a full, complete and open recorded hearing (22 NYCRR 7200.10 [f]) **(Exhibit "20")**.

During the pendency of proceedings before Justice Heitler, respondent was working with (not *for*) the U.S. Attorney's Office for the S.D.N.Y., the U.S. Attorney's Office for the E.D.N.Y., the District Attorney's Office of Bronx County, the Hudson County Prosecutor's Office, and the Office of Attorney Ethics in Trenton **(Exhibit "20")**. He expected to be called by one or more of those agencies in their prosecution of DeClemente and others. Years of experience of working with these agencies (as well as the Attorney General's Office of the State of New York) has taught respondent that to work effectively with these agencies one must never leak or intentionally reveal information that might jeopardize their ongoing investigations or prosecutions. Every moment respondent spent with Harris Leinwand before Justice Heitler, respondent *knew* that Leinwand worked for

DeClemente and was doing everything he was instructed to do to sabotage the Veneskis and destroy respondent's credibility and reputation **(Exhibit "20")**. Anything respondent said in his own defense at that critical hour would only advance DeClemente's objectives.

On February 14, 2005, the Hon. A. Richard Caputo denied DeClemente's motion to stay the Pennsylvania action **(Exhibit "6")**. On September 12, 2006, Judge Caputo granted respondent's motion to dismiss DeClemente's complaint against Juanita Veneski in its entirety and all DeClemente's fraud claims against Kevin Veneski **(Exhibit "11")**. Had DeClemente not instructed Leinwand to have Kevin Veneski withdraw his support for respondent's fee increase application pursuant to Judiciary Law § 474-a(4), DeClemente's complaint against Kevin Veneski would have been dismissed in its entirety. Knowing the truth would eventually come out, DeClemente voluntarily discontinued his remaining claims against Kevin Veneski and, on May 30, 2008, Judge Caputo dismissed the Federal Court action in Pennsylvania with prejudice **(Exhibit "15")**. Based on *res judicata*, DeClemente's state court complaint against the Veneskis in New Jersey was dismissed or withdrawn with prejudice **(Exhibit "15")**. The Veneskis are no longer in harm's way and respondent is free to testify without reservation or concern that anything he might testify to might hurt the Veneskis. While respondent is still working actively with the Office of Attorney Ethics, five days of cross examination of DeClemente over a five month period and a massive ongoing investigation of DeClemente's activities in New York and New Jersey give respondent little cause for concern that anything he might now testify to with respect to his disbarment would impair or defeat DeClemente's further prosecution **(Exhibit "20")**.

Because respondent has personal knowledge of virtually every aspect of DeClemente's forgeries and attempted misappropriation of funds in *Rogovin v. Wasserman,* (Sup.Ct., Bronx Co. Index No. 13282-1984), *Brandes v. North Shore University Hospital* (Sup.Ct., Queens Co. Index No. 5965-1997), and *Veneski v. Queens-Long Island Medical Group, P.C.* (Sup.Ct., New York Co. Index No. 100011-1998), reading the Disciplinary Review Board's 62-page Decision and recommendations to the New Jersey Supreme Court in *Office of Attorney Ethics v. Thomas A. DeClemente* **(Exhibit "17")** is déjà vu. The similarity of the conduct described in the Disciplinary Review Board's 62-page Decision **(Exhibit "17")** and Justice Alan B. Weiss's description of DeClemente's conduct in *Brandes v. North Shore University Hospital* (Sup.Ct., Queens Co. Index No. 5965-1997) and *Veneski v. Queens-Long Island Medical Group, P.C.* (Sup.Ct., New York Co. Index No. 100011-1998) is shocking - almost identical. Forgery, fraud and deceit **(Exhibit "5")**.

New Jersey attorney Thomas A. DeClemente was indicted for forgery and real estate fraud by a Bergen County grand jury on May 26, 2000 **(Exhibit "3")**. He was served with a formal Disciplinary Complaint by the Office of Attorney Ethics on March 30, 2006 **(Exhibit "8")**. He was afforded full discovery during a year long discovery process. He was accorded a full, complete and fair trial that also lasted a year. He appealed all the way to the New Jersey Supreme Court and lost **(Exhibit "18")**. In marked contrast, New Jersey Superior Court Judge Mark A. Baber would not recognize respondent's New York disbarment because of the gross irregularities in which it came about, the New Jersey Court's reading of *In re Antoine,* 46 A.D.3d 60 (1st Dept. 2007), and the fact that respondent's disbarment had not been affirmed by the Court of Appeals of New York.

Respondent has ordered a copy of Judge Baber's decision but has not yet received it. If the Court of Appeals permits, respondent will include Judge Baber's decision in the Record on Appeal should leave to appeal to the Court of Appeals be granted. The standard of proof required in all disciplinary matters in New Jersey is clear & convincing evidence **(Exhibit "17")**.

Judiciary Law § 90(4)(a) provides:

> Any person being an attorney and counsellor-at-law who shall be convicted of a felony as defined in paragraph e of this subdivision, shall upon such conviction, cease to be an attorney and counsellor-at-law, or to be competent to practice law as such.

Various subdivisions of paragraph 4 define the terms "serious crime", and "felony"; but only brief acknowledgment thereof is warranted because respondent has never been charged, convicted, pled guilty, or pled *nolo contendere* to any crime ever, anywhere. This includes but is not limited to interference with the administration of justice, false swearing, misrepresentation, fraud, willful failure to file income tax returns, deceit, bribery, extortion, misappropriation, theft, or an attempt or conspiracy or solicitation of another to commit a serious crime.

The 2nd Circuit confirmed this in *Mildner v. Gulotta,* 405 F.Supp. 182 (E.D.N.Y. 1976):

> Subsection 6 of § 90 makes quite clear the obligation placed upon an Appellate Division to comply with procedural due process by, where possible, requiring personal delivery to the accused attorney of a copy of the charges against him, and allowing him an opportunity to be heard in his defense.

Respondent has never been served with a Statement of Charges, Notice of Charges, or an Indictment regarding any aspect of his professional conduct

anywhere, any time. This includes, but is not limited to a "serious crime" or "felony" as defined in Judiciary Law, § 90(4) (d) and (e) or a Notice of Charges as provided for in 22 NYCRR 605.12(a).

Respondent was denied the opportunity by Justice Heitler to offer anything into evidence; was denied the opportunity to testify, call or cross-examine witnesses, and was denied the opportunity to have his motion for renewal and reargument heard by a fair and impartial Justice who was not disqualified from sitting on the case **(Exhibit "10")**.

Burton v. Kaplan, 184 A.D.2d 408 (1st Dept. 1992) is a classic example of the proper use of reverse collateral estoppel in attorney disciplinary matters. In a disciplinary matter entitled *Matter of Kaplan,* 137 A.D.2d 328 (1st Dept. 1988) attorney Kenneth F. Kaplan was found guilty of converting the proceeds of his client's settlement to his own and his fiancée's use. "[H]earings [were] held before a Panel of the Departmental Disciplinary Committee." Kaplan was accorded and took advantage of "a full and fair opportunity to litigate the issue of whether he failed to segregate funds which belonged to his client and whether he then misappropriated those funds for his personal use for a period of time." Appellate review of the disciplinary proceeding does not indicate the standard of proof applied to the proceeding, but whether it was "clear and convincing evidence" or "a preponderance of the credible evidence", either standard was sufficient for application of collateral estoppel to the subsequent civil litigation between the attorney and his former client over the converted funds, because the burden of proof in civil litigation in the First Department is "a preponderance of the credible evidence", even if the suit involves fraud. In the Second Department, by contrast, an allegation of fraud in the context of civil litigation requires proof thereof by

clear and convincing evidence. In the Second Department, application of collateral estoppel to the subsequent civil litigation would not have been granted unless the standard of proof required at the disciplinary level was by "clear and convincing evidence". It is respondent's firm believe that the standard of proof in disciplinary matters throughout the state (in all judicial departments) involving fraud or dishonesty in any form (including forgery) be by clear and convincing evidence. This is one of the key issues sought to be raised in the Court of Appeals.

Reciprocal disbarment and automatic disbarment under Judiciary Law, § 90 are all premised on the assumption that respondent had already received due process of law in another forum (be it within or without the state, be it federal or state) (*see, e.g., Matter of Lowell,* 14 A.D.3d 41 (1st Dept. 2004)). Additionally, either conviction after trial or acceptance of a guilty plea after allocution involve criminal proceedings requiring proof beyond reasonable doubt. While statutory (or automatic) disbarment has nothing to do with collateral estoppel, aspects thereof are based on the same principle (common sense):

> [A]s a matter of common justice, it cannot be said to be unreasonable or unfair to preclude the attorney from relitigating an issue when precisely the same issue has been resolved against him in another proceeding to which he was a party in which the standard of proof called for the highest quantum — beyond a reasonable doubt * * * and in which rigorous safeguards were imposed to insure against an unjust conviction".

In view of the foregoing, an attorney was automatically disbarred by virtue of his conviction at the moment thereof (*Matter of Mitchell,* 48 A.D.2d 410, 411).

Matter of Roberts, 21 A.D.3d 108 (1st Dept. 2005) and *Matter of Eisen,* 174 A.D.2d 141 (1st Dept. 1992) are perfect examples of the proper application of the

automatic disbarment provisions of Judiciary Law § 90. They are cited for the express purpose of demonstrating their inapplicability to respondent or the DDC's conduct with respect to respondent in this matter.

Neither accepting a gift from a client or former client (which respondent concededly did) is a crime (*see, e.g., Matter of Buchyn,* 300 A.D.2d 739 [3rd Dept. 2002]), nor is taking an excessive fee (which respondent absolutely did not). While a lawyer's acceptance of a gift from a client or former client is inherently suspect, respondent's awareness of that fact was one of the reasons he made his application for increased compensation to Justice Heitler the moment the correct structured annuity policy was received (*Matter of Buchyn,* 300 A.D.2d 739 [3rd Dept. 2002]) **(Exhibit "7")**. Kevin Veneski knew when the motion was made that respondent was not seeking a fee of more than one-third of the net recovery **(Exhibit "7")**. The motion was originally submitted without opposition. It was only when Leinwand got involved, that Kevin Veneski suddenly withdrew his support. Respondent hated the idea of accepting a gift – and Kevin Veneski so testified – but it was the only way to extricate the Veneskis from the lawsuit before Judge Mukasey without it costing them a dime or subjecting Kevin Veneski to additional stress (which respondent knew he couldn't handle).

Kevin Veneski is not a brain-damaged baby case. The only reason Kevin Veneski is not gainfully employed today is his inability to handle stress. That was a result of his second stroke (which was minor compared to his first one in 1988 from which he made an amazing recovery). Simply reciting that Kevin Veneski has serious brain damage is meaningless. How it manifests itself is what counts. Respondent knows every intimate detail thereof (which is part of the reason

respondent admired and befriended the Veneskis and devoted most of the last four years of his life defending them from DeClemente without charge).

Collateral estoppel is not provided for in Judiciary Law § 90. It is not provided for in the Rules and Procedures of the Departmental Disciplinary Committee and is not a rule of law. It is a rule of common sense and public policy based on equitable considerations. If a person has been found guilty of a crime beyond a reasonable doubt, then common sense dictates, *a fortiori,* that he (or she) is guilty of the same conduct "by clear & convincing evidence" as well as "a preponderance of the credible evidence. (all of which demand lesser burdens of proof). (*See, Matter of Kilcullen,* 55 A.D.2d 437 [1st Dept. 1977], citing *Matter of Levy,* 37 N.Y.2d 279 [1975]).

Even where the doctrine of collateral estoppel is truly applicable (as in *Matter of Miller,* 76 A.D.3d 258 (2nd Dept. 2010)) a Statement (or Notice) of Charges is still required. It's only once issue has been joined that a reasoned determination can be made if collateral estoppel in another proceeding is appropriate and warranted. In *Matter of Miller,* it was only after the attorney was served with a statement of five charges (which he answered), followed by a pretrial conference, that a determination was made that collateral estoppel was applicable to four of the five charges but that a full hearing was required with respect to Charge 5. None of those procedures or safeguards were followed at bar.

By extricating the Veneskis from the Federal Court action against them before Judge Mukasey, respondent gave up his rights to defend the action on the merits which, under the laws of New York or Ohio (where Core Funding was from) afforded him a complete defense to the action. It was as selfless an act as one

human being could do for another. Under New York and Ohio law, a finding of usury results in the forfeiture of both principal and interest (*see, Rancman v. Interim Settlement Funding Corp.,* 2001 WL 1339487 (Ohio App. 9 Dist.), *aff'd* 99 Ohio St.3d 121, 789 N.E.2d 217, 2003-Ohio-2721 (2003); and *Schneider v. Phelps,* 41 N.Y.2d 238, 243 (1977)). The nicest thing about it was respondent did it anonymously (so Kevin never knew that he and his wife had been sued by DeClemente in the Southern District of New York).

The Second Department requires the institution of formal disciplinary proceedings even in the face of convictions requiring automatic disbarment (*see, Matter of MacKenzie,* 32 A.D.3d 189 (2nd Dept. 2006)). This is to give the attorney the opportunity to contest whether the conduct of which he was convicted constituted a "serious crime". Is being held in criminal contempt a "criminal offense"? If so, is it a crime? If it is a crime, is it a "serious crime" as defined in Judiciary Law § 90(4)(d)? Are the attorneys in both proceedings the same? Many practicing attorneys have the same name. If disbarment is not automatic, is the application of collateral estoppel appropriate? In addition to being held in contempt of court, MacKenzie was found guilty of violating Judiciary Law § 487, which is a misdemeanor. Clearly a misdemeanor is a crime, but is it necessarily a "serious crime" as defined in Judiciary Law § 90(4)(d)? Does a conviction under Judiciary Law §§ 478, 479, 480, 481, 482, 483, 484, 486 or 487 require "a preponderance of the credible evidence", "clear & convincing evidence", or "proof beyond a reasonable doubt"? (*See,* Judiciary Law, § 485). The reasonableness of an automatic disbarment in the face of a conviction beyond a reasonable doubt for the commission of a felony is hard to argue with. Respondent has successfully prosecuted medical fraud (ghost surgery) in the Second Judicial Department

under the standard of "clear and convincing evidence." Yet he has successfully prosecuted violations under Judiciary Law § 487 (a misdemeanor) by "a preponderance of the credible evidence". The inconsistency and uncertainty engendered thereby with respect to the consequences thereof is frightening to the recipient of the complaint.

As far as respondent has been able to ascertain, the only basis for the use of collateral estoppel in attorney disciplinary matters is 22 NYCRR § 605.4, and all it refers to with respect thereto is "decisional law". At the time of respondent's admission to practice in 1969, no attorney knew he could possibly lose his license and be disbarred under collateral estoppel without being charged with any wrongdoing or being given an opportunity to defend himself. Had respondent actually known that at the time, he would have pursued an aviation career. When an Airline Transport Pilot (ATP or "Captain") is charged with violating a Federal Air Regulation, at least he knows what he's accused of before he's convicted and he's permitted to defend himself before his certificate is suspended or revoked. Professional airline pilots may not be required to maintain "Special Accounts", but their professionalism and integrity unquestionably impacts the public's confidence, safety and well-being.

Leave to appeal to the Court of Appeals should be granted to enable this Court to determine what standard of proof should be required in all disciplinary proceedings. If the subject of the disciplinary complaint is neglect of client matters, or flat out negligence, then the standard of proof need be no higher than "a preponderance of the credible evidence" or, at most, proof "by clear and convincing evidence". That is because the standard of proof in a legal malpractice case is no more than "a preponderance of the credible evidence." The reason why

the "clear and convincing evidence" standard may be warranted under those circumstances in a disciplinary proceeding are the consequences. In the former, the attorney faces a monetary judgment. In the latter, he loses his license and his livelihood. In cases of attorney discipline involving fraud, deceit, or dishonestly, nothing less than "clear and convincing evidence" should be required. Regardless of how else depicted, they are quasi-criminal accusations (*see cases cited in Mildner v. Gulotta,* 405 F.Supp. 182 [E.D.N.Y. 1976]).

Even in automatic disbarment situations, the attorney should still be permitted to prove that the proceeding in which he was convicted was "fixed", either through jury tampering or judicial tampering which rises to the level of criminal misconduct **(Exhibit "4") (Exhibit "17")**. Often these things are not discovered until the appeal process in the underlying action has been completed, or the time to appeal has expired. Automatic disbarment is based upon the assumption that the attorney received due process of law and was convicted beyond a reasonable doubt. If an attorney in a disbarment proceeding can prove either beyond a reasonable doubt or at least by clear and convincing evidence that the outcome of the prior proceeding was affected by criminal misconduct, then disbarment should not be automatic. Regardless of the basis for an attorney's disbarment, he should be served with a Notice of Charges and the basis for his disbarment in all cases. Respondent would argue that the procedures followed in *Matter of MacKenzie,* 32 A.D.3d 189 (2nd Dept. 2006) should be adopted throughout the state. Even reciprocal discipline is not based on principles of comity. It's based on a desire to protect the public at minimum cost to the state. When it's not appropriate, it should not be imposed.

To entertain the doctrine of collateral estoppel, there have to be two sets of pleadings in two different actions or special proceedings. Without the pleadings, and bills of particulars or answers to interrogatories (if available), one cannot possibly know if the facts, claims and issues in the different proceedings are the same. The only thing Justice Heitler referred respondent to the Disciplinary Committee for **(Exhibit "12")** was

> the question of whether Norman Leonard Cousins improperly pressured his client, Kevin Veneski, to loan money to him, without advising his client to seek the advice of independent counsel.

It is undisputed that Kevin Veneski never loaned respondent any money.

Nothing the DDC gathered from their investigation of Justice Heitler's Orders or letter prompted the DDC to seek permission to file formal charges against respondent.

Because collateral estoppel has the potential to deny a litigant due process of law, it should be used - if not sparingly - cautiously.

Anything issued by Justice Heitler in the *Veneski* matter following settlement of the *Veneski* malpractice action on November 19, 2002 is highly suspect **(Exhibit "9") (Exhibit "10") (Exhibit "12") (Exhibit "13")**.

Once Harris D. Leinwand came into the picture, Kevin Veneski withdrew his support for respondent's application for increased compensation. Prior thereto he had fully supported it. In the face of Veneskis' cross-motion and the revelation of Veneski's 2006 "confession" that he had perjured himself at his 2004 deposition and that respondent had instructed him to lie, Justice Heitler advised respondent to obtain legal counsel and that she would not decide either the motion or cross-

motion without a hearing **(Exhibit "9")**. Respondent was *thrilled* at the prospect of a hearing – provided it *wasn't* held before respondent completed his cross-examination of Thomas A. DeClemente in Jersey City.

Respondent immediately retained the services of his longtime friend and colleague, the late Mel Sachs **(Exhibit "9")**. When Mel suddenly died of pancreatic cancer, respondent retained former Bronx ADA Gary Todd Certain of Certain & Zilberg, PLLC to represent him at the hearing.

While hearing preparations intensified, the parties awaited word from Justice Heitler's Chambers as to the time and date of the hearing. In the meantime, respondent's cross-examination of DeClemente continued before the Hon. Thomas P. Olivieri, P.J.Ch. in Superior Court, Hudson County.

Then, without notifying the parties that she had decided <u>not</u> to hold a hearing on the issues raised by the motion and cross-motion, and without giving them an opportunity to submit additional evidence that they would have submitted at the hearing (as fairness dictated) (*cf.* CPLR 3211(c)), Justice Heitler issued her January 30, 2007 Decision & Order (with which the Court is familiar). The next day, Justice Heitler referred respondent to the Disciplinary Committee **(Exhibit "12")**.

Constrained by the provisions of CPLR 2221(a) that a motion to renew or reargue shall be made "to the judge who signed the order," respondent promptly moved by Notice of Motion & Supporting Papers for renewal, reargument and reconsideration of Supreme Court's Order of January 30, 2007. Just as respondent was required to comply with CPLR 2221(a) in moving before Justice Heitler, Justice Heitler was required to comply with 22 NYCRR 100.3(D)(2);

100.3(E)(1); 100.3(F); 1200.36(a); Opinions 05-37; 01-120 (Vol. XX); 89-74 (Vol. IV); 89-54 (Vol. III) and recuse herself from any further participation in the case. Judicial Ethics Opinion 06-107, dated September 7, 2006 **(Exhibit "10")** left her no other choice:

Opinion 06-107
September 7, 2006

Digest: A judge who sanctioned an attorney for an unintentional violation of a disciplinary rule is not required to, but may, report that attorney to the Departmental Disciplinary Committee. Should the judge chose to report the attorney, he/she must exercise recusal, subject to remittal, when that lawyer appears before him/her while the disciplinary matter is pending before the Departmental Disciplinary Committee.

When respondent moved by Notice of Motion, dated March 30, 2007

> for an Order pursuant to CPLR 2221 granting renewal, reargument and reconsideration of Supreme Court's Order of January 30, 2007 (Heitler, J.) filed February 2, 2007 (Exhibit "45"); vacating said Order; and ordering a full and open hearing on the issues raised by NORMAN LEONARD COUSINS' application for increased compensation pursuant to Judiciary Law § 474-a (4) (brought on by Notice of Motion, dated February 1, 2006) as well as plaintiffs' opposition and cross motion in response thereto[,]

Justice Heitler's conduct was governed by Judicial Ethics Opinion 06-107, dated September 7, 2006 which she was apparently fully aware of **(Exhibit "10")**.

Respondent thought the phrase in CPLR 2221(a) "unless he or she is for any reason unable to hear it" referred to retirement, death or disability of a judge. Having never had a complaint filed against him by a Judge or Justice of a Court and having never aspired to be a jurist himself, respondent was unaware that upon referral of an attorney to the DDC, the referring Judge was required to recuse him or herself from any further participation in the case unless *all* parties, and their attorneys, after being informed of the Judge's obligation to recuse him or herself, unanimously agreed to permit the Judge to continue on the case. On December 4, 2008, the Code of Judicial Conduct was amended to prohibit disclosure of the reason for the Judge's recusal or to permit the Judge to further

participate in the case under <u>*any*</u> circumstances (*see,* Joint Opinion 08-183 and 08-202 and 09-112).

Justice Heitler had actual knowledge of her obligation to recuse herself **(Exhibit "10")(Exhibit "12")** and deliberately withheld that information from the parties when they appeared before her for oral argument on July 24, 2007 **(Exhibit "13")**.

When respondent learned of Justice Heitler's misconduct, he made a motion in Supreme Court, New York County to vacate her prior orders and decisions. Because respondent now knew that Justice Heitler was disqualified from sitting on the case, he made an application to (then) Administrative Judge Joan B. Carey to remove the *Veneski* case from Justice Heitler's docket and return it to the Clerk's Office for random reassignment to another judge. Justice Carey granted respondent's application and a new justice was arbitrarily assigned to the case by the computer in the Motion Support Office. It was assigned to IAP Justice Joan B. Carey !

It is not known if Justice Carey sent it back to Motion Support for arbitrary reassignment or simply referred the motion to the Hon. Joan B. Lobis, J.S.C. for decision.

Despite the fact that the motion was unopposed by Veneskis' then attorney, Harris D. Leinwand (and, indeed, the motion was submitted "on default"), Justice Lobis denied respondent's application in a Short Form Order dated September 25, 2009 on the grounds that respondent should have objected to Justice Heitler's further participation in the case <u>*before*</u> she decided the motion for renewal, reargument & reconsideration. That makes no sense. The only way that would

happen is if Justice Heitler had fully disclosed her obligation to recuse herself, all parties agreed to permit her continued participation in the case, and one of the parties *thereafter* sought recusal because they were dissatisfied with her decision. You can't knowingly waive a right you don't know you have. The burden was on Justice Heitler to fully inform the parties that she was obligated to recuse herself and to inform them of the procedures available to them if they wished her to continue her involvement in the case **(Exhibit "10")**. That she kept that knowledge to herself is well documented **(Exhibit "13")**.

Essentially, the DDC seeks to deprive respondent of his license to practice law by bypassing the Rules and Procedures of the Departmental Disciplinary Committee for the disciplining of lawyers by applying collateral estoppel based on a letter from a Judge **(Exhibit "12")** who **(a)** was disqualified from sitting on the case **(Exhibit "10")**; **(b)** who deliberately withheld that information from the parties **(Exhibit "13")**; **(c)** intentionally sandbagged respondent by insisting, repeatedly, that she would not decide the motions without a hearing; and **(d)** punished respondent by refusing to consider the evidence he provided that he intended to introduce at the hearing (despite the fact that there was no order or direction to exchange or mark exhibits before the hearing). This is why the prosecutor, judge and jury should not be one person. In addition, by referring respondent to the DDC **(Exhibit "12")**, the prosecutor, judge and jury also became a witness. That's why we have the witness-advocate rule and why Judges who have referred lawyers to the DDC may no longer hear their cases **(Exhibit "10")**.

Appropriate application of collateral estoppel to an attorney disciplinary matter is presented in *Matter of Morrissey,* 217 A.D.2d 74 (1st Dept. 1995). Respondent's observation is not based on the decision itself, but upon close

examination and study of the underlying proceedings in *Mar Oil, S.A. v. Morrissey,* 782 F. Supp. 899 (S.D.N.Y. 1992), *aff'd in relevant part* 982 F.2d 830 (2d Cir. 1993), which are lengthy and detailed. The case was tried before Senior Judge Newman of the United States Court of International Trade, sitting as a District Court Judge by Designation. What differentiates *Mar Oil* from *Veneski* is that Judge Newman was not disqualified from sitting on the case; he gave everybody a full and fair trial and an opportunity to be heard; he sandbagged *nobody*; he permitted parties to call their witnesses and cross-examine their adversary's witnesses; he received into evidence all relevant and material documents, items and things; and, at the conclusion thereof wrote:

> Having seen the witnesses, heard their testimony, considered the probabilities and evaluated and resolved the issues of credibility, I decide and find that:

Justice Heitler observed no witnesses, heard no testimony, had no idea that the attorney purporting to represent the Veneskis before her (Harris D. Leinwand) worked for Thomas A. DeClemente (who had already sued the Veneskis in New York, New Jersey and Pennsylvania) and who boasted that he was DeClemente's "lapdog".[2]

Justice Heitler had no *idea* respondent was a government witness against DeClemente in New Jersey and that daily copy of all respondent's cross-examination of DeClemente in Jersey City was going to the prosecutor's office in Trenton. That was why it was *imperative* that respondent complete DeClemente's

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[2] Justice Heitler may not have known that, but the DDC did, and withheld that information from the Special Referee (Peter L. Zimroth) during the sanctions hearing and wrongfully objected to respondent's counsel offering into evidence the audio recording of Leinwand's "lapdog admission" together with a properly certified transcript thereof.

five-month cross-examination (five days over a five-month period) before the hearing before Justice Heitler commenced. Respondent was at all times acutely sensitive to the requirement that he say or do *nothing* that would impair or defeat the successful prosecution of DeClemente in New Jersey **(Exhibit "8") (Exhibit "17") (Exhibit "18")**. Everything and anything respondent uttered in Leinwand's presence either to Justice Heitler or in the corridor outside her Courtroom was promptly reported to DeClemente by Leinwand.

Justice Heitler neither knew nor appreciated that the Veneskis were respondent's close personal friends (and remained so after their medical malpractice case was successfully concluded) and if defending himself meant hurting the Veneskis, he would stand mute.

By the time all DeClemente's claims against the Veneskis were dismissed **(Exhibit "15")**, respondent had successfully defeated Thomas A. DeClemente, Harris D. Leinwand and Anthony P. Limitone Jr. (Leinwand's law school classmate and local New Jersey counsel).

DeClemente told Leinwand to have Kevin Veneski withdraw his support for respondent's application for increased compensation so DeClemente could save two counts of his Federal Court complaint in Pennsylvania from dismissal (promissory estoppel and unjust enrichment) **(Exhibit "11")**. Respondent had already secured total dismissal of DeClemente's complaint against Juanita Veneski and dismissal of all DeClemente's *fraud* claims against Kevin Veneski from Hon. A. Richard Caputo, U.S.D.J. in the Middle District of Pennsylvania **(Exhibit "11")**. Had Judge Caputo known that respondent had moved for increased compensation in New York and that Kevin Veneski had supported his

application, he would have dismissed DeClemente's claim against Kevin Veneski in its entirety.

In a sham deposition of which no one had notice, conducted in DeClemente's office on June 21, 2006, Leinwand instructed Kevin Veneski to testify *under oath* that his 2004 testimony was *perjury* and that he had freely and knowingly lied under oath. *What lawyer in his right mind would ever counsel a client to do such a thing without* at least *obtaining immunity from prosecution for perjury by Federal or State authorities beforehand!!!?*

Concerned that he was required to report Kevin Veneski's sworn admission of perjury to the Hudson County Prosecutor's Office by the Code of Judicial Conduct, Judge Olivieri asked Anthony P. Limitone Jr. from the bench if his client had really committed perjury. "I don't think so," Mr. Limitone replied. "Not really."[3] That response at least got Judge Olivieri off the hook.

In preparation for Kevin Veneski's second deposition, DeClemente and Leinwand told Kevin Veneski that DeClemente had made a motion in Hudson County Superior Court the following week to hold Kevin Veneski and his wife in contempt; but if Kevin recanted his 2004 deposition testimony, DeClemente would withdraw the motion. Fiercely protective of his wife and family, and cut off from all legitimate counsel, Kevin did as he was told.[4] Judge Baber later took judicial notice that no such motion was pending at the time of Veneskis' deposition or had

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[3] Respondent was present in the courtroom at the time and heard every word of both sides of the exchange.

[4] Perjury is no more a basis for contempt in New Jersey than it is in New York. Incivility is a basis for contempt in both New York and New Jersey (*see, e.g., Holtzman v. Tobin,* 78 Misc.2d 8 (1st Dept. 1974)). Respondent actually litigated this issue before Judge Olivieri in Hudson County.

ever been made. That too may be included in the Record on Appeal if the Court will permit.

DeClemente promptly took Kevin Veneski's "confession" back to Pennsylvania and moved to vacate Judge Caputo's dismissal of DeClemente's complaint against Kevin & Juanita Veneski on the grounds that it was procured by perjured testimony. *That* motion Walter Grabowski handled. Everything before that respondent handled.[5]

The Second Department recently affirmed Supreme Court's denial of a CPLR 3211(a)(5) motion to dismiss a complaint based on the doctrine of collateral estoppel in *Simpson v. Walter,* 2010 NY Slip Op 08089 (2nd Dept. 11-9-2010):

> The doctrine of collateral estoppel bars relitigation of an issue which has necessarily been decided in a prior action and is determinative of the issues raised in the present action, provided that there was a full and fair opportunity to contest the decision now alleged to be controlling (*see Tydings v Greenfield, Stein & Senior, LLP,* 11 NY3d 195, 199; *Buechel v Bain,* 97 NY2d 295, 303-304, *cert denied sub nom. Buechel v Bain,* 535 US 1096; *Mahler v Campagna,* 60 AD3d 1009, 1011). . . . Preclusive effect may only be given to issues that were "actually litigated, squarely addressed and specifically decided" (*Ross v Medical Liab. Mut. Ins. Co.,* 75 NY2d 825; *see Motors Ins. Corp. v Mautone,* 41 AD3d 800, 801).
>
> Furthermore, "[c]ollateral estoppel is a flexible doctrine grounded in the facts and realties of a particular litigation which should not be rigidly or mechanically applied since it is, at its core, an equitable doctrine reflecting general concepts of fairness" (*Matter of Hunter,* 6 AD3d 117, 131-132 n 2, *affd* 4 NY3d 117; *see Buechel v Bain,* 97 NY2d at 303). Additional factors supporting a determination that the doctrine should not be rigidly applied here are that the denial of the plaintiff's motion to disqualify Alter from representing Diana Johnson in the 2007 election proceeding was not

[5] That proved to be a blessing, because respondent knew Kevin Veneski had never lied about anything the entire time he represented him and respondent might have made things worse by calling Kevin a liar about lying. Walter Grabowski, who never met the Veneskis and didn't know them, took the position that whatever Kevin Veneski may have lied about was irrelevant to the dismissal of DeClemente's complaint. Judge Caputo agreed and denied DeClemente's motion in its entirety.

> essential to the resolution of the ultimate issue in that proceeding, which was whether the plaintiff was a resident of Kings County, and that the plaintiff's failure to appeal the adverse ruling on the disqualification motion was reasonable since she ultimately succeeded in having the challenge to her residency dismissed.

While the seminal case of *Schwartz v. Public Administrator,* 24 N.Y.2d 65 (1969) greatly expanded the scope of collateral estoppel, the more recent case of *Gilberg v. Barbieri,* 53 N.Y.2d 285 (1981) severely limited it:

> The question on this appeal is whether a conviction for the petty offense of harassment can later be used to preclude the defendant from disputing the merits of a civil suit for assault, involving the same incident and seeking a quarter of a million dollars in damages.

The Court of Appeals held it could not.

An application for increased compensation pursuant to Judiciary Law § 474-a(4) is analogous to a wrongful death compromise if the beneficiaries of the proceeds are in agreement. It's similar to an infant's compromise where the infant's guardian supports the application. An application for increased compensation pursuant to Judiciary Law § 474-a(4) is analogous to a fee dispute if opposed by the client. Judiciary Law § 474-a(4) authorizes the Court to grant counsel's request for greater compensation than that provided for in § 474-a(2) *despite* the client's opposition.

At the time of the initial submission of respondent's application for increased compensation in the Submission Part in Room 130 on February 14, 2006, it was submitted without opposition and with full support of the Veneskis. Based on the law at the time, the motion should have been granted without opposition (*see, e.g., Yalango v. Popp,* 84 N.Y.2d 601 (1994); *Contorino v. Florida OB/GYN Assn., P. C.,* 283 AD2d 67 (2nd Dept. 2001); *O'Connell v. Shivaram,* 37

A.D.3d 435 (2nd Dept. 2007)), especially because plaintiff's counsel was a sole practitioner (see, *Doe v. Karpf,* 23 Misc.3d 229 (Sup.Ct., N.Y.Co. 2008)).

To paraphrase Judge Wachtler's observation in *Gilberg,*

> [T]here is no suggestion that counsel was aware that the denial of his application for increased compensation might result in his disbarment from the practice of law under the doctrine of collateral estoppel in a subsequent disciplinary proceeding ! (*Gilberg,* at p. 293).

Five months later, by Notice of Cross-Motion dated July 12, 2006, Harris D. Leinwand (DeClemente's "lapdog") moved (nominally on behalf of the Veneskis):

> for an order denying the motion of Norman L. Cousins ("COUSINS") pursuant to Judiciary Law § 474-a, finding that Cousins owes Kevin Veneski $1,231,061.89 for the fees and disbursements and gifts taken from Kevin and Juanita Veneski (the "Veneskis") and leaving it to the Bankruptcy Court, or some court, if and when the automatic stay is further modified or vacated or terminated, to determine what Cousins owes the Veneskis for indemnity if they are held to owe Legal Asset Fundi11g, LLC ("LAF") and what Cousins owes the Veneskis for attorney's fees for defending against actions of LAF and others, whose actions were caused by Cousins and for attorney's fees pursuing Cousins in this and other Courts and for damages for physical and mental pain and suffering caused by Cousins in the litigation mentioned above, while they, especially Kevin Veneski, were impaired and/or stressed.

At the time of Leinwand's cross-motion (July 12, 2006), the U.S. Attorney's office was investigating DeClemente's forgery of respondent's signature on a Notice of Security Fund Assignment which DeClemente's secretary notarized and DeClemente sent to the Liquidation Bureau on May 16, 2003 in an effort to misappropriate $666,666.66 of *Veneski* settlement proceeds (of which approximately $250,000 belonged to Core Funding Group, LLC, whose money DeClemente was trying to obtain). Mel Sachs suggested to Justice Heitler that

the matter be adjourned for 90 days until the Justice Department had completed its investigation and determined if it was going to seek an indictment against DeClemente (but she wasn't getting the message) **(Exhibit "9")**.

To make sure Harris Leinwand did *exactly* as he was told, DeClemente called Justice Heitler during a conference in her robing room and spoke with her directly on speakerphone **(Exhibit "9")**. DeClemente didn't represent the Veneskis or anyone else involved in the motion and had no business communicating with Justice Heitler **(Exhibit "9")**. Eventually Justice Heitler said "goodbye" and hung up **(Exhibit "9")**, but why she spoke with him in the first place is unknown. On its face, he had nothing to do with the motion or cross-motion **(Exhibit "9")**. Respondent new <u>*exactly*</u> why DeClemente called, but was honor bound to various prosecutors and duty-bound to the Veneskis (who may not have been his clients any more, but were still his friends) to say nothing. The Veneskis were still being pursued by DeClemente in New Jersey and Pennsylvania **(Exhibit "6")** **(Exhibit "11")** **(Exhibit "15")**.

Justice Heitler suggested the parties get into a room and settle the matter, but at respondent's insistence, Mel Sachs refused **(Exhibit "9")**. It was imperative for the successful defense of the Veneskis in Pennsylvania that Justice Heitler make a decision (whatever it was).

There are so many lessons to be learned from *Gilberg* that apply to the case at bar. For example, *what was respondent's incentive to defend himself before Justice Heitler against Leinwand's accusations?* None. *Why?*

First of all, respondent knew that Leinwand worked for DeClemente. Anything respondent said in his presence was repeated to DeClemente in minutes

via cell phone. Respondent knew from many years of experience, that prosecutors keep their investigations close to their vest. Respondent had no idea *what* he might say in his defense that would jeopardize ongoing investigations of DeClemente in New York and New Jersey. *Most importantly*, respondent would say or do *nothing* that would prejudice the Veneskis. Not because they had been his clients, but because they were still his friends. Intensifying respondent's agony was the fact that he had pressured Kevin Veneski to hire Leinwand as bankruptcy counsel in the first place. None of this would have happened had Kevin Veneski not retained Leinwand at respondent's insistence.

Even if respondent had been properly served with a Notice of Charges pursuant to 22 NYCRR 605.12(a) and every procedure required by the Rules of the Supreme Court, Appellate Division, First Department had been followed, this is not a case appropriate for resolution by collateral estoppel. This is a case of who knew what when and *why* someone did what they did when they did it. The difference between overreaching and selflessness is chronology. Clearly credibility is an issue. But to ascertain the truth, a precise *timeline* of events is required.

Collateral estoppel was denied by the Court of Appeals in *Gilberg* even though there was a prior nonjury trial and the parties were permitted to testify, call witnesses, and cross examine. In the proceedings before Justice Heitler, not only was respondent denied the opportunity to testify, call witnesses and cross examine, he was denied even the opportunity to submit documentary evidence because the Court (Heitler, J.) insisted there would be a hearing. Minor though the offense in the City Court action might have been in *Gilberg,* there was no suggestion that the Presiding Judge was disqualified from sitting on the case. The

fact that Justice Heitler was required to disqualify herself from hearing the motion to renew and reargue and to inform the parties thereof **(Exhibit "10")** and deliberately failed to do so **(Exhibit "13")**, provides even more reason for denying collateral estoppel in the instant proceeding.

Lastly, Justice Heitler made no findings of any disciplinary violations by respondent. She merely referred respondent to the Disciplinary Committee for an investigation of whether there were because she felt there *might* have been **(Exhibit "12")**. One can only think the DDC concluded otherwise, because they never charged respondent with *anything*.

One of the reasons respondent has worked closely with many prosecutorial and disciplinary agencies over the course of his career without compensation or expectation of, or desire for, compensation is his desire to protect the public against people who shouldn't be doing what they're doing (especially in the position in which they're doing it). Most people are ill-equipped or unable to influence much of what goes on around them. Respondent has been blessed to be able to do so.

Respondent feels no remorse because he has done absolutely nothing to be remorseful about. He protected his friends (the Veneskis) from a fearsome enemy from whom they could not protect themselves. He has *regrets* about certain actions he took to protect the Veneskis from DeClemente that he would love to share for the benefit of all those interested, including other attorneys; but that is not remorse. If respondent thought for one second that he had done something improper or unethical in protecting the Veneskis from DeClemente, he would not have brought it to the Court's attention by moving for increased compensation

pursuant to Judiciary Law § 474-a(4) **(Exhibit "7")**. He would have simply let sleeping dogs lie.

WHEREFORE, movant respectfully prays that the relief sought herein be granted in all respects.

/s/ NORMAN L. COUSINS
NORMAN LEONARD COUSINS

Sworn to before me this 19th day of March, 2011.

/s/ MERRILLY E. NOETH
Notary Public

TABLE OF CASES

OTHER AUTHORITIES