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December 15, 2010

BY OVERNIGHT MAIL USPS EV109717618US
PERSONAL AND CONFIDENTIAL

Andrew W. Klein, Esq.
Clerk of the Court
New York State Court of Appeals
20 Eagle Street
Albany, NY 12027

Re: Matter of Norman L. Cousins,
a Disbarred Attorney

Dear Mr. Klein:

The following constitutes the response of the Departmental Disciplinary Committee, First Judicial Department (Committee), to your December 9, 2010 letter inviting comment as to appellant's motion to appeal as of right to this Court from an order of the Appellate Division, First Judicial Department (Appellate Division), pursuant to CPLR 5601(b)(1), and b(2). In its order dated October 19, 2010, the Appellate Division disbarred appellant essentially for his dishonest conduct in obtaining an excessive fee more than the amount permitted by Judiciary Law § 474-a, from a brain damaged client whom appellant represented in a medical malpractice action. Matter of Cousins __ A.D.3d __, 909 N.Y.S 2d 421 (1st Dept 2010). For the reasons set forth below, the Committee submits that this Court lacks subject matter jurisdiction in this matter.

In his Preliminary Appeal Statement, appellant sets forth five issues or contentions which he proposes to raise on appeal to this Court. The first three issues are, in reality, variations of the same argument. Appellant contends that he was denied due process in the disciplinary proceedings because the Appellate Division applied the doctrine of collateral estoppel to find him liable for violations of the Code of Professional Responsibility. Appellant's contention is without merit. The application of collateral estoppel in the disciplinary context does not violate due process.

This Court has previously determined that the prerequisites for the invocation of the doctrine of collateral estoppel are as follows: (1) identity of issue which has necessarily been decided in a prior action and is decisive of the present proceeding, and (2) a full and fair opportunity to contest the civil findings now said to be controlling. Kaufman v. Eli Lilly and Co. 65 N.Y. 2D 449, 455 (1985). In framing the collateral estoppel issues, appellant does not argue that the two prongs of the collateral estoppel doctrine were not met in the disciplinary proceedings here. Rather, he questions whether collateral estoppel should be applied in disciplinary proceedings at all. In fact, the first of appellant's five enumerated issues appears to assert an even broader principle when he poses the following question: "is collateral estoppel an acceptable substitute for due process of law?" In other words, appellant appears to be arguing that the application of collateral estoppel is never appropriate. Collateral estoppel is, of course, a time-honored doctrine wholly consistent with due process. As this Court has observed about collateral estoppel: "it is a doctrine intended to reduce litigation and conserve the resources of the court and litigants and it is based upon the general notion that it is not fair to permit a party to relitigate an issue that has already been decided against it." Id.

In making his argument against collateral estoppel, respondent cites to the Appellate Division's decision in an unrelated disciplinary case, Matter of Antoine, 46 A.D.3d 60 (1st Dept 2007), in which the Appellate Division denied a motion by the Committee to revoke a Haitian attorney's license to act as a legal consultant (Appellant's third purportedly appealable issue). Appellant's reliance on Matter of Antoine is misplaced because that case had nothing to do with collateral estoppel. In Matter of Antoine, the Appellate Division denied the Committee's motion to revoke the attorney's legal-consultant license because the attorney did not have any opportunity to challenge the allegations of misconduct brought by the Committee. Id. at 61-62. In the instant matter, appellant had ample opportunity to contest the allegations which ultimately led to his disbarment in the underlying civil proceedings before Justice Heitler of the New York County Supreme Court, including a hearing held before a Referee appointed by Justice Heitler. Matter of Cousins __ A.D.3d __ 909 N.Y.S.2d at 423-424 (1st Dept 2009)

Appellant's fourth issue also fails to provide a basis for an appeal as of right to this Court. Petitioner's fourth argument is that the burden of proof in New York's disciplinary proceedings should be raised from a "fair preponderance" of the evidence to "clear and convincing evidence". Like the issue of collateral estoppel, this issue has also long been settled. Specifically, this Court has upheld the fair-preponderance

standard in attorney disciplinary proceedings, observing that “the interest here at stake [a license to practice law] does not come within that category [of a denial of personal or liberty rights]...,” but rather involves the “privilege to practice law, a not insignificant privilege, but one which, once extended, is more nearly to be classified as a property interest, as to which the higher standard of proof has not been required.” Matter of Cappocia, 59 N.Y.2d 549, 552- 553 (1983).

Appellant’s fifth and final assertion is that the Committee denied him due process by failing to comply with Judiciary Law § 90(8), which gives petitioners and respondents in disciplinary proceedings the right to appeal to this Court “from a final order of any appellate division in such proceeding upon questions of law involved therein, subject to the limitations prescribed by section three of article six of the constitution of this state.” Since appellant is in the process of following the statutory prerequisites to appeal to this Court, and he has not been prevented from doing so by the Committee, appellant’s argument is baseless. Respondent has also moved for reargument before the Appellate Division and for leave to appeal to this Court. That motion is pending.

Accordingly, and for the foregoing reasons, the Committee respectfully requests that this Court find that it does not have subject matter jurisdiction because there is no substantial constitutional question directly involved to support an appeal as of right.

Respectfully submitted,


Vitaly Lipkansky

Encl.

cc: Victor M. Serby, Esq. (By Overnight Mail)
Attorney for Appellant