NEW YORK CITY BAR ASSOCIATION

COMMITTEE ON PROFESSIONAL DISCIPLINE

The New York City Bar Association's Committee on Professional Discipline (the "Committee") filed an *amicus curiae* brief in a confidential matter. A redacted version of the brief follows.

The Court issued a ruling contemporaneously with the Committee's filing of its motion for leave to file the *amicus curiae* brief, and subsequently denied the Committee's motion as moot.

To Be Submitted By: Devika Kewalramani, Esq.
Chair, Committee on Professional Discipline

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION –

In the Matter of , an attorney and counselor-at-law:

Petitioner.

Respondent.

[PROPOSED]

AMICUS CURIAE BRIEF OF NON-PARTY THE COMMITTEE ON PROFESSIONAL DISCIPLINE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

RULES

OTHER AUTHORITIES

I.
INTEREST OF AMICUS CURIAE

The Association of the Bar of the City of New York ("New York City Bar"), founded in 1870, is a voluntary association of lawyers, judges and law students. Today, the New York City Bar has more than 24,000 members. Its purposes include "cultivating the science of jurisprudence, promoting reforms in the law, facilitating and improving the administration of justice, [and] elevating the standard of integrity, honor and courtesy in the legal profession." (Constitution of the Association of the Bar of the City of New York, Art. II.) The New York City Bar has over 150 committees that focus on different legal practices areas and issues. Through amicus briefs, testimony, reports, statements, and letters drafted by committee members, the New York City Bar comments on questions of law and public policy. This amicus brief was prepared by the Committee on Professional Discipline (the "Committee") and was approved by that Committee and by the President of the New York City Bar.

The New York City Bar's Committee on Professional Discipline focuses on issues relevant to the attorney disciplinary process and attorney disciplinary laws. Committee members include lawyers who represent respondent attorneys in disciplinary cases and who have served as disciplinary counsel staff attorneys. The Committee on Professional Discipline examines professional discipline issues and makes recommendations regarding potential changes in the process and the laws

that govern the professional conduct of lawyers in New York. Among other things, the Committee issues reports and papers, submits amicus briefs, proposes new rules of professional conduct or amendments of existing rules and disciplinary procedures, proposes legislation or comments on existing legislative proposals, and sponsors continuing legal education programs on professional discipline and ethics topics.

This brief was not authored in whole or in part by counsel for any party. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person contributed money that was intended to fund preparing or submitted this brief. The retired judge who is a member of the Committee, while a valued member of the Committee, did not participate in the preparation of this brief. This brief does not necessarily reflect the individual views of any or all of the members of the Committee or any organizations, institutions or firms with which the Committee members are associated.

The position advanced in this amicus brief is that the application of collateral estoppel in disciplinary proceedings to reach a finding of disciplinary rule violations based on sanctions orders entered in non-disciplinary civil litigation should not be done mechanically. Rather the application of estoppel should be done cautiously, keeping in mind the fairness consideration of the collateral estoppel doctrine the New York Court of Appeals has enunciated, and should be confined, as appears to

be the present law, to extreme circumstances. This approach is called for by a number of considerations: a lawyer subject to sanctions may not have the procedural opportunities to contest the sanctions available to a litigant in the normal course in a civil action; the sanction may not have been necessary to the underlying judgment and indeed may be entirely collateral to the judgment in the non-disciplinary civil litigation; the imposition of discipline may not be foreseeable from the imposition of a sanction over civil litigation discovery conduct so as to give the attorney the incentive to defend against the imposition of sanctions in a civil case; and the objectives of imposing sanctions in civil litigation and the objectives of imposing discipline in the disciplinary system are different.

II.
BACKGROUND

This amicus brief refers to the following case to illustrate the significant policy considerations associated with the fair and just application of the collateral estoppel doctrine.

[REDACTED]

III.
DISCUSSION

The Committee believes that automatic application of the collateral estoppel doctrine poses a significant danger where a lawyer is given no opportunity to contest the findings of misconduct in a prior non-disciplinary civil proceeding. The

Case presents an important issue for the legal community because it reflects how the collateral estoppel doctrine should not be used to mechanically impose disciplinary sanctions for violation of the Rules. Similarly, the doctrine should not be used to limit the disciplinary proceeding to a determination of sanctions where a federal court ordered sanctions against lawyer who was not a party to the civil litigation, the misconduct involved discovery, and the lawyer did not appeal the sanction. In addition, the Committee believes that collateral estoppel should be confined, as appears to be the present law, to extreme circumstances. To explain why, this amicus brief sets forth:

(I) a statement of the doctrine of collateral estoppel, noting the requirements and the "fairness" consideration according to the Court of Appeals;

(II) a review of the use of collateral estoppel in New York disciplinary proceedings; and

(III) a discussion of practical considerations cautioning against the application of the doctrine of collateral estoppel in the context of a non-disciplinary civil litigation discovery sanctions order being the basis for a determination of professional misconduct in violation of the Rules.

A. THE DOCTRINE OF COLLATERAL ESTOPPEL ACCORDING TO THE NEW YORK COURT OF APPEALS

In the oft-cited case of *Schwartz v. Public Administrator*, 24 NY2d 65, 71 (1969), the Court of Appeals articulated the four features of the doctrine of collateral estoppel:

First, the Court identified two requirements for the application of collateral estoppel: (1) "an identity of issue which has necessarily been decided in the prior action and is decisive of the present action;" and (2) "a full and fair opportunity to contest the decision now said to be controlling." *See Kaufman v. Eli Lilly and Co.*, 65 NY2d 449, 455 (1985) ("[f]irst, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination").

Second, the Court recognized that "the burden rests on the defendant to show that collateral estoppel should not be applied because he did not have a full and fair opportunity (*De Witt, Inc. v. Hall*, 19 NY2d 141, p. 148 (1967)), just as the burden of showing that issue was identical and necessarily decided rests on the moving party." 24 NY2d at 73. *See also Kaufman,* 65 NY2d at 455 ("party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination, whereas the party

attempting to defeat its application has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action").

Third, the Court elaborated on the second requirement, the full and fair opportunity to litigate the issue in the prior action, and stated that "the various factors which should enter into a determination whether a party has had his day in court would include such considerations as the size of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in the applicable law and foreseeability of future litigation." 24 NY2d at 72.

Fourth, the Court added: "No one would contend that the doctrine of collateral estoppel should be applied rigidly." 24 NY2d at 73.

The Court has since *Schwartz v. Public Administrator* repeatedly cautioned against a mechanistic application of collateral estoppel. In *Gilberg v. Barbieri*, 53 NY2d 285, 292 (1981), the Court observed:

> In the Schwartz case and subsequent decisions it was emphasized that historically and necessarily collateral estoppel is a flexible doctrine which can never be rigidly or mechanically applied. (*Schwartz v. Public Administrator of County of Bronx*, *supra*, 24 NY2d at p. 73, 298 NYS2d 955, 246 NE2d 725 (1969); *People v. Berkowitz*, *supra*, 50 NY2d 333, 344, 428 NYS2d 927, 406 NE2d 783 (1980); *People v. Plevy*, 52 NY2d 58, 4436 NYS2d 224, 417 NE2d 518 (1980)).

Similarly, in *Staatsburg v. Staatsburg Fire Dist.*, 72 NY2d 147, 153 (1988), the Court stated:

> [W]e have consistently emphasized that these principles are not to be mechanically applied as a mere checklist. Collateral estoppel is an elastic doctrine and the enumeration of these elements is intended as a framework, rather than a substitute, for analysis. For example, the question whether a party had a full and fair opportunity to contest the prior decision is not answered simply by reference to the procedural benefits available in the first forum or by a conclusion that the requirements of due process were satisfied (*see, Gilberg v. Barbieri*, 53 NY2d 285, 292 (1981)). Instead, the analysis requires consideration of "the realities of litigation", such as recognition that if the first proceeding involved trivial stakes, it may not have been litigated vigorously (*see, id.,* at 292-293; *Schwartz v. Public Adm'r, supra* at 72).
>
> In the end, the fundamental inquiry is whether relitigation should be permitted in a particular case in light of what are often competing policy considerations, including fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results. No rigid rules are possible. . . .

More recently, in *Auqui v. Seven Thirty One Ltd. Partnership*, 22 NY3d 246, 255 (2013), the Court noted:

> Whether collateral estoppel should be applied in a particular case turns on general notions of fairness involving a practical inquiry into the realities of the litigation (*Jeffreys v. Griffin*, 1 N.Y.3d 34 at 41 (2003), *quoting Matter of Halyalkar v. Board of Regents of State of N.Y.*, 72 NY2d 261, 268 (1988)).

B. THE USE OF COLLATERAL ESTOPPEL IN NEW YORK DISCIPLINARY PROCEEDINGS

A 2002 report issued by the New York City Bar's Committee of Professional Responsibility ("City Bar Report") observed, [i]n "New York, unlike in most other

states, an attorney who has been sanctioned by a judge may be precluded, by the doctrine of collateral estoppel, from litigating the underlying merits of his conduct at a subsequent disciplinary proceeding." *The Collateral Estoppel Effect of Sanctions, The Record*, Vol. 57, No. 3, p. 1 (Summer 2002), available at http://www2.nycbar/Publications/record/18.%2osummer02pages.pdf.

The City Bar Report's analysis of case law, however, showed that the use of collateral estoppel in New York disciplinary proceedings occurred in extreme cases (not discovery conduct in prior non-disciplinary civil proceedings), including a prior court finding that the taking of fees from an escrow or guardianship fund was improper, a prior court finding on the merits against the attorney as a party to the litigation for fraud, extortion or some other improper behavior, and a prior court finding that the action brought by the attorney was frivolous. *The Collateral Estoppel Effect of Sanctions*, pp. 2-3. The cases cited in the Petition also fall into these categories. *See Matter of Morrissey*, 217 AD2d 74 (1st Dep't 1995); *Matter of Taylor*, 113 AD3d 56 (1st Dep't 2013); *Matter of Sylvor*, 225 AD2d 87 (1st Dep't 1996); *Matter of Yao*, 231 AD2d 346 (1st Dep't 1997); *Matter of Mac Truong*, 2 AD3d 27 (1st Dep't 2003); *Matter of Abady*, 22 AD3d 71, 72 (1st Dep't 2005), *lv denied*, 2005 NY App. Div. LEXIS 14043 (1st Dep't 2005); *Matter of Veski*, 29 AD2d 250 (1st Dep't 2006); *Matter of Babigian*, 247 AD2d 817, 669 (3d Dep't 1998); *Matter of Capoccia*, 272 AD2d 838 (3d Dep't), *lv denied*, 95 NY2d 769

(2000); and *Matter of Fagan*, 58 AD3d 260 (1st Dep't 2008), *lv denied*, 12 NY3d 813 (2009).

C. COURT IMPOSED SANCTIONS SHOULD NOT LEAD TO AUTOMATIC DISCIPLINE BASED ON COLLATERAL ESTOPPEL

The City Bar Report stated: "court-imposed sanctions should not lead to further automatic discipline." *The Collateral Estoppel Effect of Sanctions*, p. 6. The City Bar Report warned against the use of court imposed sanctions as the basis for professional discipline because of four "special dangers in granting preclusive effect to findings made by courts in the course of imposing sanctions." *The Collateral Estoppel Effect of Sanctions*, p. 6.

First, a lawyer who is sanctioned in a non-disciplinary civil litigation over discovery conduct may not have the procedural opportunities available to a litigant in the normal course in a civil action. As the Second Circuit has noted, there are "troublesome aspects" inherent in imposing sanctions when the trial court "may act as accuser, fact finder and sentencing judge, not subject to the restrictions of a procedural code." *Mackler Productions, Inc. v. Cohen*, 146 F3d 126, 128 (2d Cir. 1998). The New York rule governing the sanctioning of frivolous conduct (Rules of New York Uniform Court System (22 NYCRR § 130-1.1(d)) does not provide a procedure for the imposition of sanctions, thereby leaving it to the discretion of the judge. Thus, an attorney may not truly have a full and fair opportunity to litigate the merits of such sanctions. *The Collateral Estoppel Effect of Sanctions*, p. 6. In

addition, in some cases, a lawyer's client may make a strategic business decision not to appeal a civil litigation sanction due to concerns that such a sanction order by the court, if appealed, may ultimately negatively impact the client's own case. Lawrence, *Collateral Estoppel in Attorney Disciplinary Proceedings: A Hobson's Choice*, *International Association of Defense Counsel Journal*, 81 Def. Couns. J. 58 (January 2014).

Second, the civil litigation sanction may not have been necessary to the underlying judgment and indeed may be entirely collateral to the judgment. Collateral estoppel traditionally attaches only to determinations that were necessary to support the judgment entered in the first action. Wright, Miller & Cooper, *Federal Practice & Procedure* § 4221; *Menna v. Joy*, 86 AD2d 138 (1st Dep't 1982) (findings of fact not essential to determination of earlier proceeding not binding on later proceeding). *The Collateral Estoppel Effect of Sanctions*, pp. 6-7.

Third, the imposition of a disciplinary sanction in a disciplinary proceeding resulting from the imposition of a sanction over civil litigation discovery conduct may not be foreseeable such that it gives the attorney the incentive to defend against the discovery sanction. *The Collateral Estoppel Effect of Sanctions*, p. 7. The sense of fairness in the application of collateral estoppel that the New York Court of Appeals requires (*see* discussion above, pp. 9) militates against the application of

collateral estoppel in the disciplinary context when there is an issue of foreseeability.

Fourth, the objectives of imposing sanctions in civil litigation and the objectives of imposing discipline in the disciplinary system are different. Modest financial sanctions may be imposed by courts in civil litigation in order to deter attorneys from engaging in relatively minor misconduct in the interests of efficient administration of justice. *The Collateral Estoppel Effect of Sanctions*, pp. 7-8.

The Case illustrates the City Bar Report's caution against the "special dangers in granting preclusive effect to findings made by courts in the course of imposing sanctions." *The Collateral Estoppel Effect of Sanctions*, p. 6. *[REDACTED TEXT]* Extreme cases discussed above may be said to give rise to the foreseeability of disciplinary proceedings based on the Rules against dishonest or fraudulent conduct, but not in the more ordinary situation involving a discovery sanction. A judge's perceived need to impose such a discovery sanction should not automatically lead to the blemishing of an attorney's disciplinary record except in extreme cases.

IV.
CONCLUSION

The New York City Bar and its Committee on Professional Discipline believe that the doctrine of collateral estoppel involves important public policy interests and considerations for the legal profession, and should not be applied

mechanistically to impose professional discipline on a lawyer, thereby depriving the lawyer of the opportunity to contest findings of misconduct imposed in a prior non-disciplinary civil proceeding. Rather, the application of collateral estoppel in disciplinary proceedings to find disciplinary violations based on sanctions orders

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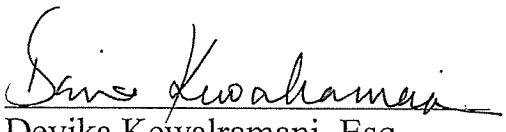
entered in civil litigation should be done cautiously, with the fairness consideration of the New York Court of Appeals in mind, and should be confined, as appears to be the present law, to extreme circumstances.

Dated: New York, New York
July 29, 2014

Respectfully submitted,



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