SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket Nos. DRB 93-046 and 93-047

IN THE MATTER OF

BERNARD S. BERKOWITZ
AND
JAMES P. DUGAN,

ATTORNEYS AT LAW

Decision and Recommendation
of the
Disciplinary Review Board

Argued: May 12, 1993

Decided: September 21, 1993

Cynthia M. Craig appeared on behalf of the District V-A Ethics Committee.

Todd M. Sahner appeared on behalf of respondent Bernard S. Berkowitz.

Respondent James P. Dugan appeared pro se.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of New Jersey.

This matter arose from a formal complaint charging respondents with conflict of interests, in violation of RPC 1.7 and RPC 1.8. The complaint alleged that respondent Berkowitz represented Palmer Asphalt ("Palmer"), a New Jersey corporation that manufactures roofing materials, at the same time that respondent Dugan represented Bay Bridge Associates ("Bay Bridge"), the proponent of a residential development on property contiguous to the land on which Palmer's warehouse was situated, and while respondent Dugan had a business interest in Bay Bridge.

Respondent Berkowitz was admitted to the New Jersey bar in 1957. Respondent Dugan was admitted in 1959. During the period relevant to these proceedings, respondents were partners in the law firm of Hannoch Weisman, in Roseland, New Jersey.

At the time of these events, 1988, respondent Berkowitz had been Palmer's corporate counsel for twenty-five years. He had also represented its principals, Lewis Ripps and Alton Adler, in other legal matters of a personal nature. On December 12, 1988, Palmer held its annual meeting at Hannoch Weisman's office. Present were respondent Berkowitz, Mr. Ripps, Mr. Adler — another shareholder in Palmer Asphalt — and Martin Goldstein — Palmer's accountant, who is also Mr. Ripps' first cousin. Palmer's agenda contained sixteen items. The eleventh item on the agenda was a newspaper article (Exhibit P-14) announcing that Bay Bridge was proposing to build a highrise complex, marina, shopping area and restaurant on a twenty-acre site. The proposed development surrounded the Palmer warehouse facility on three sides. The article also stated that Bay Bridge would be seeking rezoning of the property from heavy industrial to residential and mixed use to accommodate the marina, restaurant and possibly a theatre. The article disclosed that Bay Bridge would be represented by respondent Dugan.

According to Mr. Ripps, at Palmer's annual meeting of December 12, 1988, he showed the article to respondent Berkowitz. He described the conversation that ensued as follows:

> I brought the article to [respondent Berkowitz'] attention and I told him that I am very much concerned about what I read in the paper, because it seems to be apparently that there's an attempt to rezone an area in

which my company is included within the boundaries, because it talks about a proposed 20 acre development which would border North Street on the north, Avenue A on the east and 5th Street on the south. And our plant, all right, our warehouse facility was on 5th Street within those borders. And I was concerned because the article talks about rezoning it for residential use, that I was going to be a nonconforming use, and in addition to which they talk about the fact that the project is going to include 525 residential units, 10 houses, etcetera, etcetera. And I was very alarmed about this, probably because I had the feeling that you bring in 525 residential units in a cooperative ownership, now, I'm going too far, not a single home owner, but 525 people cooperatively working to do whatever it is they could to protect their interests against the interests of my company * * * * I asked Mr. Berkowitz to, if he could, please help us with this matter, because it was critical to our company, certainly the value of our property. We could not sell our property if it were rezoned for residential use, other than for residential use. And it certainly would not bring the value to our company that the property is worth. And we have a petrol chemical business, I cannot pick up and move it someplace else. This thing was business threatening to me, and the worse [sic] experience I have had in the years I've been in the business.

[T2/7/1992 82-83]

Mr. Ripps went on to explain that the 13,000-square foot warehouse was crucial to the operation of Palmer's manufacturing business, located across the street, because there was no other place to store raw materials. Mr. Ripps also explained that, besides being concerned about the rezoning of the property, he was worried that the residents of the development would perceive asbestos — used as a raw material in Palmer's compound and stored in the warehouse — as hazardous because of its "terrible reputation." Mr. Ripps added that, although Palmer was frequently inspected by OSHA and met all its regulations, "we still have to confront the public's fears and the public's apprehensions"

(T2/7/1992 77).

Mr. Ripps acknowledged that he did not specifically inform respondent Berkowitz, at Palmer's annual meeting of December 12, 1988, that he wanted to oppose the proposed rezoning ordinance simply because he was unaware, until February 13, 1989, that an ordinance had been proposed. Mr. Ripps testified that, although he considered the rezoning and the residential development as a serious threat to his business, he believed, at that time, that the proposal for the ordinance was in its preliminary stages and that, in addition, he would be receiving formal notice about any changes from the Board of Adjustments, as the owner of property affected by the ordinance.

Still according to Mr. Ripps, he requested that respondent Berkowitz handle this matter in Palmer's behalf and respondent Berkowitz agreed. It was Mr. Ripps' understanding that respondent Berkowitz would undertake further activities with respect to the proposed zoning change, such as, contacting local authorities and determining from respondent Dugan what the residential development actually entailed. According to Mr. Ripps, it was his expectation that respondent Berkowitz would personally handle the matter in behalf of Palmer, albeit respondent Berkowitz might seek the assistance of other members of Hannoch Weisman to work with him along the way. His expectation was based on respondent Berkowitz' statement, at the December 12, 1988 meeting, that some attorneys at Hannoch Weisman were land use experts and on the fact that, in the past, several attorneys from Hannoch Weisman had handled legal

matters in behalf of Palmer that were outside of respondent Berkowitz' legal expertise. Mr. Ripps concluded by saying that he had not expressed panic, at the December 12, 1988 annual meeting, because he had turned over the matter to the attention of his attorney, respondent Berkowitz, who, although professing no knowledge of the residential development and of respondent Dugan's representation of Bay Bridge, nevertheless assured Mr. Ripps that he would ask respondent Dugan about it. In fact, respondent Berkowitz suggested that Mr. Ripps meet with respondent Dugan to determine if the residential development would affect Palmer's property.

Mr. Ripps testified that, between December 12, 1988 and February 13, 1989, he made thirteen telephone calls to respondent Berkowitz to inquire about the progress of the matter. He was unable to remember whether he had spoken to respondent Berkowitz all thirteen times, but contended that all of the conversations must have been about the rezoning matter, as there were no other outstanding Palmer matters to discuss. According to Mr. Ripps, he had little or no response from respondent Berkowitz, but he "thought nothing of it because [he] had tremendous confidence in Mr. Berkowitz" (T2/7/1992 88). He also received a telephone call from George Katz, one of Bay Bridge's partners, about the possibility of the sale to Bay Bridge of the land on which the Palmer warehouse was situated. According to Mr. Ripps, when he retorted that he was not interested in selling the land because the warehouse was a crucial part of Palmer's operation, Mr. Katz

requested that he "keep an open mind." Mr. Ripps also stated that he had advised respondent Berkowitz of this conversation, and that respondent Berkowitz had replied that it might not be "a bad idea" to sell the property to Bay Bridge; Mr. Ripps, however, assured respondent Berkowitz that he was not interested in selling it.

On February 13, 1989, Mr. Ripps met with respondent Berkowitz and respondent Dugan. The record reflects that respondent Berkowitz billed Palmer for three conferences with respondent Dugan, including that meeting. It was Mr. Ripps' recollection that, at the February 13, 1989 meeting, respondent Dugan confirmed that he represented Bay Bridge and, like George Katz, asked Mr. Ripps to "keep an open mind" about the sale of the property to Bay Bridge. According to Mr. Ripps, when he asked respondent Dugan if there was "any public process in place," respondent Dugan vaguely replied, "yes, later on this month" (T2/7/1992 92). Mr. Ripps then recounted how, when respondent Dugan stepped out of the meeting for a few minutes, respondent Berkowitz remarked ". . . you know, Lewis, he said, I wouldn't be surprised if Jimmy has a little interest in this, because that's -- he does that in other kinds of investments he gets involved in and represents clients that he has" (T2/7/1992 92).

When Mr. Ripps became suspicious of respondent Dugan's vague reference to a meeting "later on this month" (Mr. Ripps considered respondent Dugan a "very precise individual"), he went to the planning board office and discovered that the meeting would be taking place the very next evening. Respondent Berkowitz'

testimony confirmed that respondent Dugan did not say "the meeting is tomorrow," while respondent Dugan could not recall discussing the date of the planning board meeting at that time.

Thereafter, Mr. Ripps telephoned respondent Berkowitz and "expressed tremendous alarm." According to Mr. Ripps, he asked respondent Berkowitz:

> * * * what is it I'm supposed to do, we have this hearing tomorrow night and, you know, can you come down and represent us? I said, I don't know whether you can or you can't represent us and I don't want to be stuck tomorrow evening. And I think we more or less mutually agreed Mr. Berkowitz would not be able to represent us that next evening and/or should not represent us that evening. And I, later that evening, called and imposed upon a longstanding relationship with Mr. Feinberg to represent us.
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> [T2/7/1992 93-94]

Indeed, William M. Feinberg, Esq., testified that Mr. Ripps had contacted him late at home on February 13, 1989, asking whether he could represent Palmer before the planning board the next evening. Mr. Ripps explained that there was an application pending before the planning board to amend the Bayonne zoning ordinance that would detrimentally affect the value of his property and turn it into a non-conforming use. According to Mr. Feinberg, the rezoning would require Palmer to apply for a use variance to the planning board if, for instance, Palmer wanted to expand or, say, the property was destroyed for any reason. According to Mr. Feinberg, that would entail considerable expense because of the need to retain experts in the field of traffic, engineering, real estate, environmental issues and so forth; in addition, not only was this variance difficult to obtain, requiring five out of the

seven votes of the seven members of the planning board, but was frequently met with objections from neighbors in residential areas.

On February 14, 1989, Mr. Ripps attended the planning board meeting accompanied by Mr. Feinberg. When respondent Dugan approached Mr. Ripps and asked whether he would object if he, respondent Dugan, represented Bay Bridge on the application that evening, Mr. Ripps replied, after consulting with Mr. Feinberg, that he would. At that juncture, another attorney addressed the planning board, first introducing himself as the attorney for Bay Bridge, and then introducing respondent Dugan as a witness. That attorney informed the planning board that respondent Dugan was a principal in Bay Bridge. According to Mr. Ripps, "I was absolutely shocked. I had no idea that Mr. Dugan was a principal in Bay Bridge" (T2/7/1992 95). Mr. Ripps testified that the attorney "didn't do much." Instead, respondent Dugan and Bay Bridge's planner spoke at length. At the end of Bay Bridge's presentation, the planning board denied Mr. Feinberg an opportunity to be heard on the basis that two prior hearings had already taken place on the matter. The planning board advised Mr. Feinberg to submit his objection to the City Council.

At the conclusion of the meeting, the planning board passed a motion that an ordinance for a planned unit development ("PUD") ordinance be accepted and forwarded to the City Council for its adoption. This would have included the Palmer warehouse in the new PUD district. Parenthetically, Bay Bridge did not request the planning board to rezone the property as a PUD. All Bay Bridge

was seeking was the rezoning to RM multi-family residential. It was, rather, at the City's engineer's instance that the planning board considered and, in fact, passed the motion to have the area rezoned as a PUD.

Ultimately, the City Council adopted the PUD ordinance, but amended it to eliminate all properties not owned by Bay Bridge. Accordingly, the Palmer property was not included in the PUD district, as adopted by the City Council. Eventually, the ordinance was declared invalid as a result of litigation instituted by Palmer and others. According to Mr. Ripps, Hannoch Weisman continued to represent Palmer in a corporate capacity until April 1989.

* * *

Respondent Berkowitz acknowledged having been given a copy of the newspaper article by Mr. Ripps at Palmer's December 12, 1988 annual meeting at Hannoch Weisman. He admitted that he did not read it through at that time and that Mr. Ripps had characterized its contents to him. In his view, Mr. Ripps did not appear "overall concerned to me, but he was concerned in a sense that he might, if it reached fruition, have an impact on his business that would be harmful" (T2/7/1992 190). He acknowledged that Mr. Ripps had asked whether Hannoch Weisman had any real estate or land use lawyers and that he had replied, "yes." He added, however, that Mr. Ripps had not specifically asked him to challenge the residential development. He also denied that there had been any discussions about a possible conflict of interest arising out of

respondent Dugan's representation of Bay Bridge. He conceded, however, that "it occurred to me that there might be [a conflict of interest]" (T2/7/1992 192).

That same day, December 12, 1988, after Palmer's annual meeting, respondent Berkowitz discussed the matter with respondent Dugan, who informed him that he, in fact, represented Bay Bridge and that the firm had done so for a number of years. According to respondent Berkowitz, he got the impression from respondent Dugan that the Palmer property was "in that area, not part of the zoning, but contiguous or in the general vicinity" (T2/7/1992 192). Respondent Dugan did not inform respondent Berkowitz of his interest in Bay Bridge at that time.

That day or the next, respondent Berkowitz discussed with Dean Gaber, Esq., the Chair of Hannoch, Weisman's executive committee, and the person whom respondent Berkowitz consulted on conflict of interest issues, whether the firm could continue to represent Palmer in other matters that were being handled by the firm, should Palmer object to the zoning ordinance. According to respondent Berkowitz, he and Mr. Gaber "poured over the ethics rules" and concluded that, so long as the firm did not represent Palmer "in opposition to one of our clients," the firm could continue to represent Palmer in other matters. That conclusion, of course, was not entirely correct. Because of Palmer's and Bay Bridge's competing interests, continued representation would be possible only after compliance with the requirements contained in RPC 1.7.

It was respondent Berkowitz' recollection that, at the

February 13, 1989 meeting with respondent Dugan and Mr. Ripps, respondent Dugan had explained the proposal to Mr. Ripps, using maps and other documents. Despite respondent Dugan's knowledge, since October 1988, that the ordinance might encompass property contiguous to Bay Bridge's, he advised Mr. Ripps that, in his opinion, the ordinance would not affect the Palmer property. According to respondent Berkowitz, Mr. Ripps, however, felt that "it might or it would" have an impact on the property (T2/7/1992 199). After some fruitless discussion about the sale of the Palmer property to Bay Bridge, the meeting ended inconclusively. At the very end of the meeting, Mr. Ripps indicated that he would be hiring William Feinberg to represent him in the rezoning matter.

Asked whether Mr. Ripps had stated, at that meeting, whether he would be opposing the Bay Bridge development, respondent Berkowitz replied that he might have. He could not remember exactly whether Mr. Ripps had said that he would be opposing the development or whether Mr. Ripps had expressed serious concerns after the meeting with respondent Dugan. But during later testimony, respondent Berkowitz acknowledged that, after the February 13, 1989 meeting, he assumed that Mr. Ripps was definitely opposing the ordinance and that Hannoch Weisman would not be involved in that representation at all. In fact, respondent Berkowitz acknowledged that he had handwritten William Feinberg's name on the top of his notes of that meeting, presumably because of Mr. Ripps' announcement that he would be hiring William Feinberg to represent him in connection with the rezoning matter.

With regard to his knowledge of respondent Dugan's interest in Bay Bridge, respondent Berkowitz testified that he had first learned about that fact "either at the February 13, 1989 meeting or later" (T2/7/1992 210). As to this topic, respondent Dugan testified that he had no recollection of telling respondent Berkowitz about his interest in Bay Bridge in December 1988. In his own words, "I had no reason to, but I can't recall" (T3/10/1992 56).

With respect to Hannoch Weisman's continued representation of Bay Bridge, respondent Berkowitz explained that it was his understanding that the firm could go on representing Bay Bridge until such time as Palmer decided to oppose the residential development. By letter dated February 17, 1989 to Mr. Ripps, respondent Berkowitz informed him that the firm was withdrawing as attorneys for Bay Bridge.

* * *

At the conclusion of the ethics hearing, the DEC found that <u>RPC</u> 1.8 (business relationship with a client) was inapplicable. The DEC also found that (1) Mr. Ripps had not retained respondent Berkowitz to challenge the zoning ordinance; (2) neither respondent Berkowitz nor respondent Dugan knew of Mr. Ripps' intention to oppose the rezoning until February 13, 1989, the date of the meeting among respondent Berkowitz, respondent Dugan and Mr. Ripps; (3) neither respondent knew, until February 13, 1989, that the representation of Palmer and Bay Bridge would be directly adverse, and (4) the rezoning of areas surrounding the property owned by

another client did not necessarily make the representation "directly adverse" to each other. The DEC concluded that neither respondent Berkowitz nor respondent Dugan had violated RPC 1.7. The DEC recommended that the complaint be dismissed. Following an appeal by Mr. Ripps, the Board determined to bring the matter on for a hearing.

CONCLUSION AND RECOMMENDATION

Upon a *de novo* review of the record, the Board recommends that the DEC's finding be reversed. In the Board's view, the evidence clearly and convincingly establishes that respondents' conduct was unethical.

Respondent Berkowitz argued, and the DEC so found, that Mr. Ripps did not retain respondent Berkowitz to challenge the zoning ordinance. According to respondent Berkowitz, Mr. Ripps never asked him specifically to challenge the development at the December 12, 1988 meeting and never announced his intention to oppose the rezoning. Accordingly, respondent Berkowitz argued, there could not have been a conflict of interest at that time. However, respondent Berkowitz — and the DEC — overlooked the fact that Mr. Ripps unequivocally expressed to respondent Berkowitz, on December 12, 1988, his extreme concern about the detrimental effect of the residential development on his business. Even if Mr. Ripps did not specifically request that respondent Berkowitz oppose the ordinance, it is obvious that he had serious objections to the residential development itself because of its deleterious effect on

the operation of his business and on the value of his property. In fact, respondent Berkowitz himself conceded, at the DEC hearing, that Mr. Ripps appeared very concerned about the harmful impact of the development on his business and on his property. Accordingly, the possibility of a very real, very serious conflict of interest was apparent as early as December 12, 1988.

> 'In observing the admonition of Canon 6 to avoid the representation of conflicting interests, the lawyer must have in mind not only the avoidance of a relation which will obviously and presently involve the duty to contend for one client what his duty to the other presently requires him to oppose, but also the probability or possibility that such a situation will develop.'
>
> [In re Kamp, 40 N.J. 588, 594 (1963), citing Henry S. Drinker, Legal Ethics 104 (1953)]

Moreover, assuming, for argument's sake, that Mr. Ripps had never even remotely requested that respondent Berkowitz represent Palmer in the rezoning matter, a conflict of interest still existed because respondent Berkowitz was still acting as corporate counsel for Palmer at the same time that respondent Dugan was representing Bay Bridge (and that respondent Dugan had an interest in Bay Bridge), when the interests of those two clients were clearly adverse. As provided by RPC 1.10, a lawyer shall not represent a client when any attorney in the same firm, practicing alone, would be prohibited from doing so. Accordingly, whatever respondent Dugan could not do, respondent Berkowitz could not do. Clearly, respondent Dugan could not act as Palmer's corporate counsel while representing Bay Bridge, because of their competing interests. If respondent Dugan could not represent Palmer, neither could

respondent Berkowitz, because of the imputed disqualification contemplated by RPC 1.10. Even if respondent Dugan had withdrawn his representation of Bay Bridge immediately upon discovering that Palmer objected to the rezoning, respondent Berkowitz still could not continue to represent Palmer as its corporate counsel because of respondent Dugan's interest in Bay Bridge. The appropriate focus of inquiry, thus, should not be only on whether respondent Berkowitz was retained to represent Palmer in the rezoning matter, as respondent Berkowitz and the DEC would have it. Respondent Berkowitz could not have continued as corporate counsel for Palmer, albeit not representing it in the ordinance challenge, when one of his partners, respondent Dugan, was (1) seeking results adverse to Palmer's interests in behalf of Bay Bridge, and (2) had a personal interest in the venture.

This is not to say that respondent Berkowitz was prohibited from representing Palmer because of respondent Dugan's simultaneous representation of Bay Bridge. Respondent Berkowitz, however, would have been required to fully explain to Mr. Ripps the circumstances of the representation, as well as its pitfalls, in order to enable Mr. Ripps to make an informed decision about the firm's continued representation of Palmer. Otherwise, how could Mr. Ripps reasonably expect undivided loyalty on the part of his attorney, knowing that one of his attorney's partners was representing a client with interests adverse to Palmer's and, furthermore, when that partner had a financial stake in the venture?

In sum, even after respondent Berkowitz discovered, on

December 12, 1988, that Mr. Ripps had expressed serious concerns about the prejudicial effect on his property of the residential development proposed by Bay Bridge, which was being represented in that undertaking by respondent Dugan, a partner in the same firm, he continued to act as Palmer's corporate counsel without having explained to Mr. Ripps the circumstances of the representation and without having obtained Mr. Ripps' consent thereto, as required by RPC 1.7. It is true that respondent Berkowitz attempted to determine whether the continued representation was proper. Nevertheless, his erroneous conclusion, after consultation with another partner in the firm, that there was no conflict of interest should not exonerate him. His conduct was clearly violative of RPC 1.7.

Respondent Dugan, too, violated RPC 1.7. As a member of the law firm representing Mr. Ripps, respondent Dugan was just as obligated as respondent Berkowitz to make full disclosure of the circumstances of the representation to Mr. Ripps and to obtain his consent thereto. Those circumstances would include, of course, his own business interest in Bay Bridge. The Board found no clear and convincing evidence, however, that respondent Dugan knowingly omitted from respondent Berkowitz and Mr. Ripps his personal stake in the Bay Bridge venture.

The discipline in cases involving conflicts of interest has ranged from a private reprimand to disbarment. See In re Kamp, supra, 40 N.J. 588 (1963) (public reprimand for representation of both seller and purchaser without full disclosure to one client of

the attorney's relationship to the other client and advice to seek independent counsel); In re Humen, 123 N.J. 289 (1991) (two-year suspension for advising client to purchase property from friend, thereby placing friend's interests above those of client, and for serious entanglement of attorney's business concerns with client's); and In re Wolk, 82 N.J. 326 (1980) (disbarment for submitting false counsel fee affidavit to court and for counselling widowed client to invest $10,000 in second mortgage on property owned by company in which the attorney had an interest).

After balancing the impropriety of respondents' conduct with the lack of evil motives on respondents' part and the absence of harm to the client, a five-member majority of the Board recommends that each respondent receive a public reprimand. One member would have imposed a private reprimand on each respondent. One member did not participate.

The Board further recommends that respondent be required to reimburse the Ethics Financial Committee for administrative costs.

Dated: 9/21/93

By: Raymond R. Trombadore
Chair
Disciplinary Review Board