SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 04-340
District Docket No. I-03-002E

IN THE MATTER OF	
FREDERICK W. HARDT	
AN ATTORNEY AT LAW	

Decision

Argued: November 18, 2004

Decided: December 21, 2004

Carl N. Tripician appeared on behalf of the District I Ethics Committee.

Jeffrey I. Baron appeared on behalf of respondent.

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

This matter was originally before us as an ethics appeal from the District I Ethics Committee's ("DEC") post-hearing dismissal of the complaint. We determined to schedule the matter for oral argument on the basis that respondent may have engaged in a conflict of interest situation.

Respondent was admitted to the New Jersey bar in 1966. On January 28, 1977, he received a public reprimand and was removed

from his position as the Borough of Pemberton municipal judge. In that matter, respondent falsely certified from the bench that the defendant pleaded not guilty to the charges against him, where, in fact, the defendant was absent from court, his appearance was entered on the record by the court clerk, and the arresting officer, too, was absent. Thereafter, respondent dismissed the charges. In a reported opinion, the Supreme Court held that respondent had violated the Code of Judicial Conduct, including Canon 2, titled "A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities". In re Hardt, 72 N.J. 160 (1977).

The complaint in this matter alleged that, while employed as special counsel to a municipality, respondent created an appearance of impropriety by representing a private client before several township bodies, a violation of RPC 1.7(c)(2). However, as detailed below, we find that respondent engaged in an actual conflict of interest under RPC 1.7(b) and Advisory Committee on Professional Ethics opinions.

Stephen Lankenau, the grievant, was the owner/operator of a group of funeral homes, including a Pemberton Township business established in 1976.

In 1998, a potential competitor, John Moore, sought to establish a funeral home on the same street, in the same

commercial zone as Lankenau. Toward that end, Moore filed an application seeking a variance from the township zoning board.

The property Moore sought to convert was a notorious problem property in the township, which had housed a disruptive bar. Lankenau was concerned that the zoning board would view Moore's application favorably and that little concern would be given to the impact that another funeral home would have on his operation. Therefore, in early 1998, Lankenau approached his long-time attorney, Carl Schulze, to represent him in opposing Moore's application. Schulze declined the representation, but recommended respondent, a local attorney with deep ties to Pemberton Township.[1] At about this same time, in February 1998, respondent was in negotiations with the township to become its special counsel in a condemnation litigation titled Township of Pemberton v. Lesnak.

On May 14, 1998, Lankenau met respondent for the first time to discuss the possible representation. By letter-agreement dated May 18, 1998, Lankenau retained respondent to represent him in the Moore matter. Initially, the representation entailed an opposition to Moore's request for a variance.[2] On May 26,

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[1] Schulze was kept informed about the case for years to come, and watched events unfold from the sidelines.

[2] The Lankenau funeral home was a "grandfathered" non-conforming use.

1998, respondent wrote to Lankenau, stating his belief that, if the zoning board denied Moore's application, the township would likely change the zoning ordinance to allow the use.

On May 21, 1998, the township formally retained respondent as special counsel in the Lesnak litigation. Respondent and the township executed an agreement to provide legal services, which included

> all necessary court appearances, research, investigation, correspondence, preparation and drafting of pleadings and other legal documents, trial preparation and related work to properly represent you in this matter.
>
> [HPRue.][3]

At no point did respondent disclose to Lankenau that he was also representing the township.

On June 15, 1998, the township zoning board held a hearing on Moore's application. Another attorney from respondent's office attended the hearing, in part to request an adjournment. The attorney's request was denied, however, and the Moore matter was heard.

On July 20, 1998, the zoning board granted a variance to Moore.

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[3] HPRue refers to the hearing panel report's unmarked exhibit.

Thereafter, Lankenau authorized respondent to appeal the zoning board determination and to challenge any change in the ordinance that would allow Moore to operate a funeral home at that site. Lankenau recalled that respondent told him that he would file an appeal of the zoning board decision, but would not sue Pemberton Township on the zoning change. Respondent gave him no reason for that determination. According to Lankenau,

> [i]t was our understanding having to do with this particular situation that if he deemed it necessary in which to sue the township, then it would be done. And he kept saying he didn't think that was the best way to go, and that he would not represent us in that particular, you know, suit.
>
> [1T42.][4]

Lankenau testified that respondent never advised him that his position as special counsel had any bearing on his determination to limit Lankenau's representation.

In the summer of 1998, the lead attorney for the township in the Lesnak litigation, an associate from the law firm of Barron & Gillespie, passed away unexpectedly. Therefore, on August 18, 1998, John C. Gillespie, the township solicitor, asked respondent to become the township's counsel of record in the Lesnak litigation. Respondent agreed.

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[4] 1T refers to the transcript of the February 3, 2004 DEC hearing.

On September 4, 1998, respondent filed a complaint on Lankenau's behalf, appealing the zoning board's decision to grant Moore's use variance. Respondent named both Moore and the zoning board as defendants, but not the township.

On October 8, 1998, the zoning board filed an answer to the complaint. On October 20, 1998, Moore filed an answer and counterclaim.

Over the next several months, respondent wrote numerous letters and memoranda to the file, and participated actively in Lankenau's representation.

On December 17, 1998, the township amended the ordinance to allow funeral homes in Lankenau and Moore's commercial zone. Therefore, on January 19, 1999, Moore successfully moved to dismiss Lankenau's complaint.

At about the same time, the planning board approved Moore's site plan application. On April 24, 1999, respondent filed another complaint, on Lankenau's behalf, this time against the planning board and Moore, challenging the site plan approval. Once again, respondent did not name the township as a defendant.

Throughout November and December 1999, respondent was active in both the Lankenau and Lesnak matters. In fact, respondent conceded that, between November 1999 and the start of

the Lesnak trial in January 2000, he spent a "few hundred hours" preparing the case for trial.

Respondent also testified that, in December 1999, the parties in the Lankenau matter reached a tentative settlement. Respondent claimed that he notified his adversary and the court of the potential settlement, but that Lankenau backed out, choosing instead to expand his litigation by suing additional parties.

Therefore, respondent claimed, he wrote to Lankenau on December 7, 1999, suggesting that he consult with another attorney for purposes of suing the township. The letter states, in part, "Assuming that you wish to press ahead with the issue on the merits, I would think, given my opinion on the subject, that you may wish to bring in other counsel to handle the appeal."

Lankenau testified that, on January 17, 2000, his regular attorney, Schultz, called to tell him that a newspaper article that day discussed a condemnation matter for the township, and cited respondent as the attorney for the township. Lankenau met with respondent the following day and terminated the representation. According to Lankenau, had he known about respondent's involvement with the township, he would not have retained him. Furthermore, Lankenau was convinced that

respondent had not pursued all available legal avenues, including naming the township as a defendant in the actions, because of his legal representation of the township.

Shortly thereafter, on February 2, 2000, on joint application by respondent and Moore's attorney, Lankenau was, "due to the peculiar circumstances presented in this matter . . . given the right to substitute counsel no later than February 7th, 2000." Lankenau then retained new counsel to complete the matter.

For his part, respondent did not deny that he had engaged in the dual representation, having been retained by both Lankenau and the township. However, respondent argued that the dual representation was appropriate. Respondent's position was that his involvement in the Lesnak matter was minimal during the time leading up to the trial, in late 1999.

Respondent also offered the testimony of Gillespie, the township attorney. Gillespie recalled discussing the conflict of interest issue with respondent at the inception of the Lankenau representation, in 1998. He agreed with respondent at the time that the dual representation was appropriate. Gillespie's testimony was intended to show that respondent had considered the possibility of a conflict, and had determined that none existed.

Gillespie further testified that he and respondent concluded that, as long as respondent did not sue the township on Lankenau's behalf, no conflict would arise. He analogized respondent's situation to the municipal Joint Insurance Fund ("JIF") litigation, wherein attorneys were permitted to represent "for example, the municipality or any of its agents, servants or employees in a claim, like a negligence claim, that you are not conflicted in appearing in front of the zoning or planning board." Gillespie admitted, however, that the JIF attorneys were not paid by the municipality directly. Rather, they are paid from a joint fund, administered by a central agency. Respondent, on the other hand, was paid directly by the township.

Gillespie also testified that respondent had been retained as special counsel "for a very limited, very narrowly defined purpose, for a single issue having nothing to do with [Lankenau's] objections to Moore's funeral home." Yet, later in his testimony, Gillespie admitted that no language in the fee agreement with the township limited respondent's role as its attorney. Moreover, Gillespie admitted that respondent's professional involvement with the township intensified in August 1998, when he became counsel of record in the matter.

Finally, respondent was asked about his failure to send Lankenau a copy of a May 6, 1999 letter that he sent to Gillespie, in which he reassured the township that he would not challenge the zoning ordinance or otherwise involve the township in litigation. Respondent conceded that he never sent that letter to Lankenau or raised the issue of a conflict of interest with his client. Likewise, he never advised Lankenau to consult with independent counsel in the event that Lankenau wished to sue the township. According to respondent, if Lankenau had asked him to sue the township, he would have disclosed his professional affiliation with the township and would have recommended that Lankenau retain separate counsel.

The DEC found no appearance of impropriety, reasoning that the presenter failed to prove that respondent was a member of the "municipal family," discussed below. The DEC recommended the dismissal of the complaint, from which Lankenau appealed to us. As noted earlier, we determined to bring this matter on for oral argument, as allowed by R. 1:20-15(e)(3).

Upon a de novo review of the record, we are unable to agree with the DEC's dismissal of the complaint.

At the outset, it should be mentioned that, effective January 1, 2004, the Court overhauled RPC 1.7, abolishing the

long-troubled 'appearance of impropriety' aspect of the rule contained in subsection (c)(2). Respondent's conduct, however, took place while that subsection was in effect. The rules in force at the time that the conduct occurred will be controlling. In re Lunetta, 118 N.J. 443, 447 (1989).

Former RPC 1.7(c)(2) provided:

> (c) This rule shall not alter the effect of case law or ethics opinions to the effect that:
> (2) in certain cases or situations creating an appearance of impropriety rather than an actual conflict, multiple representation is not permissible, that is, in those situations in which an ordinary knowledgeable citizen acquainted with the facts would conclude that the multiple representation poses substantial risk of disservice to either the public interest or the interest of one of the clients.

Respondent represented Lankenau, a private client, before both the zoning board and the planning board in Pemberton Township, when, at the same time, he represented the township in the Lesnak condemnation litigation. We find that this simultaneous representation created not only an appearance of impropriety, but also a conflict of interest situation.

Respondent was deeply involved in both Lankenau's and the township's representation during the years 1998 through early 2000. He spent several hundred hours on Lesnak, and, judging from the voluminous record generated during Lankenau's

representation, spent a substantial amount of time on his behalf as well. In his role as special counsel in the Lesnak matter, and then as the township's attorney of record, respondent "stepped into the shoes" of the township attorney, Gillespie. He thus, became bound by the same ethics proscriptions applicable to Gillespie.

The Advisory Committee on Professional Ethics ("ACPE") has imposed restrictions on special counsel, such as respondent, when engaged in short-term municipal representations:

> We think that . . . "a person generally familiar with the affairs of the municipality could reasonably believe that an attorney in such a position would be subject to and hindered by a professional conflict of interest," and such a person would not perceive any material distinction between representing the public corporation generally as compared to representing that entity as special counsel in labor matters. This being so, it would be improper for the lawyer or his firm to represent private interests before (or in litigated matters against) the public entity during service as special counsel.
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> [A.C.P.E. Op. 466, 106 N.J.L.J. 518 (December 18, 1980).]

The ACPE also stated that the municipal attorney is so identified in the public eye with the legal affairs of the municipality in general that it would be improper for him to appear before a zoning board in matters presented on behalf of a private litigant. In an earlier opinion, the ACPE reasoned that

the public would likely think that the private client was being treated favorably before the board because of the municipal attorney's relationship to the municipality. A.C.P.E. Op. 4 (June 27, 1963).

In another opinion, the ACPE further ruled that a municipal attorney could not represent a private client in connection with a variance, even if it was in a different municipality, where the client was also involved in a project that might require municipal approvals in the attorney's municipality. A.C.P.E. Op. 90 (April 21, 1966).

Further constraints are contained in ACPE opinions using the term "municipal family." A.C.P.E. Op. 452, 105 N.J.L.J. 353 (April 24, 1980).

> In construing the pre-2004 RPCs, the courts and the committees had repeatedly held that an attorney who is a member of the 'municipal family' may not represent private clients before the boards, courts, or agencies of the municipality that employs the attorney.
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> The Supreme Court reasoned that the public may believe that the lawyer is trading on official influence and that any success achieved in the matter is a result of the lawyer's position in the municipality rather than on the merits of the case (citations omitted).
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> [Kevin H. Michels, New Jersey Attorney Ethics, §20:2 at 432 (2004).]

The DEC found that the presenter had not proven that respondent was a member of the "municipal family." It is unquestionable, however, that, as township attorney, Gillespie was a member of the municipal family. When respondent became the township's special counsel and, later, the attorney of record in Lesnak, he replaced Gillespie as the township's legal counsel and, therefore, became a member of the municipal family as well. If Gillespie was precluded from representing Lankenau before the Pemberton Township zoning board, so too was respondent. By doing so, respondent violated the above-cited ACPE opinions and, as seen below, RPC 1.7(b). We would have been constrained to find a violation of that RPC even if respondent had disclosed the dual representation to Lankenau and obtained his consent thereto. Under RPC 1.7(b)(2), a public entity – the township – cannot consent to such a representation.

Respondent violated RPC 1.7(b) because his representation of the township's interests materially limited his representation of Lankenau's interests, as demonstrated by respondent's refusal to sue the township on behalf of Lankenau. Indeed, at the outset of the representation, respondent advised Lankenau that he would not challenge the zoning ordinance or sue the township. The possible conflict of interest weighed heavily on him early in the case. He discussed the issue at length with

Gillespie at the start of the representation, and determined to proceed with Lankenau's case. Thereafter, on several occasions during the case, he discussed the matter further with Gillespie, even writing to him on May 6, 1999, to assure him that he would not involve the township in any litigation.

Yet, respondent never told Lankenau about his role as township attorney. Respondent's admonition that he would not challenge the township gave Lankenau no context for the limitation because Lankenau was unaware of respondent's loyalties to the township. In fact, Lankenau reasonably thought that respondent had limited the representation at the outset as a litigation strategy, that is, that better strategies existed than to challenge the township. Otherwise stated, it was reasonable for Lankenau to think that his lawyer would change course and challenge the township, if the case called for it in the future. In fact, Lankenau stated unequivocally that, had he known why respondent had limited his representation, he would not have retained him in the first place.

Parenthetically, respondent's own actions showed that his dual allegiances were at odds. On the one hand, he kept Gillespie informed about the Lankenau representation, and reassured him that he would not involve the township in litigation over the Moore application. On the other hand, he did

not advise Lankenau of those concerns, or send him a copy of correspondence in which he raised the issue. He simply chose to continue with the dual representation. In all areas of the representation but this one, respondent had an open line of communications with Lankenau.

For all of the above reasons, we determine that respondent engaged in a conflict of interest situation, thereby violating the aforementioned ACPE opinions and RPC 1.7(b). So, too, under the standards in place at the time of respondent's actions, the dual representation of Lankenau and Pemberton Township created an appearance of impropriety, a violation of RPC 1.7(c)(2), which is subsumed in our finding of an actual conflict of interest.

We are mindful that the complaint did not charge respondent with conflict of interest. His overall conduct, however, viewed either under an actual conflict light or under the appearance of impropriety doctrine, was at issue and fully explored before the DEC. Moreover, respondent was aware that his conduct raised the specter of an actual conflict. Not only did his verified answer make several references to the absence of an actual conflict, but the parties discussed conflict of interest issues in various parts of the record. We find, thus, that the record developed below gave respondent sufficient notice of a potential finding

of a violation of that rule. Furthermore, respondent did not object to the admission of such evidence in the record. We, therefore, deem the complaint amended to conform to the proofs. R. 4:9-2; In re Logan, 70 N.J. 222, 232 (1976).

It is well-settled that, absent egregious circumstances or economic injury to clients, a reprimand constitutes sufficient discipline for engaging in a conflict of interest situation. See In re Berkowitz, 136 N.J. 134, 148 (1994) (conflict of interest found between clients of partners in the same law firm, due to proximity of first client's commercial property to second client's proposed residential development); In re Porro, 134 N.J. 524 (1993) (conflict of interest for attorney represented a developer operating in a municipality where the attorney was both the municipal attorney and the attorney for the sewer authority, represented those entities at the same time while an associate in the attorney's firm served as counsel to the planning board that approved the developer's subdivision, and represented the municipality in a lawsuit in which the sewer authority was a co-defendant); In re Doig, 134 N.J. 118 (1993) (conflict of interest where an attorney undertook the dual representation of two individuals in a business/real estate transaction without obtaining their consent after full disclosure; attorney also engaged in a misrepresentation and had

a prior private reprimand); and In re Woeckener, 199 N.J. 273 (1990) (conflict of interest where an attorney represented his wife in connection with city development at the same time that he was the city attorney).

Here, there is no evidence of economic harm to Lankenau or the township. The only aggravating factor is respondent's thirty-year old reprimand, which, in our view, is too remote in time to justify increased discipline. We, therefore, determine that a reprimand is the appropriate form of discipline for respondent's conduct. Chair Mary J. Maudsley did not participate.

We also determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative expenses.

Disciplinary Review Board
William J. O'Shaughnessy
Vice-Chair

By: Julianne K. DeCore
Julianne K. DeCore
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of Frederick W. Hardt
Docket No. DRB 04-340

Argued: November 18, 2004

Decided: December 21, 2004

Disposition: Reprimand

Members	Suspension	Reprimand	Admonition	Disqualified	Did not participate
Maudsley					X
O'Shaughnessy		X			
Boylan		X			
Holmes		X			
Lolla		X			
Pashman		X			
Schwartz		X			
Stanton		X			
Wissinger		X			
Total:		8			1

Julianne K. DeCore
Julianne K. DeCore
Chief Counsel