SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 00-374

IN THE MATTER OF

WILLIAM P. WELAJ

AN ATTORNEY AT LAW

Decision

Argued: March 15, 2001

Decided: July 29, 2001

John J. Janasie appeared on behalf of the Office of Attorney Ethics.

Michael B. Himmel appeared on behalf of respondent.

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

This matter was before us based on a recommendation for discipline filed by the District XIII Ethics Committee ("DEC").

Respondent was admitted to the New Jersey bar in 1973 and maintains an office for the practice of law in Somerville, New Jersey. He has no disciplinary history.

The complaint alleges violations of RPC 1.7(b) (conflict of interest); RPC 1.8 (conflict of interest/prohibited business transaction); RPC 8.4(a) (knowingly assisting

another to violate the Rules of Professional Conduct); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation) and RPC 8.4(d) (conduct prejudicial to the administration of justice). At the DEC hearing, the Office of Attorney Ethics ("OAE") withdrew the RPC 1.8 charge.

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The OAE began its investigation of this matter following respondent's May 1996 testimony at the federal criminal trial of Nicholas Bissell, a former Somerset County prosecutor. Bissell was convicted of fraud, obstruction of justice, perjury and income tax evasion. Respondent was not charged with any criminal conduct. He testified as a witness for the prosecution at Bissell's trial.

In 1979, respondent joined Bissell's law firm as a junior partner. Shortly thereafter, he became a partner in a business venture known as R.B.& W. Associates ("R.B.&W."),[1] which owned the office building in which Bissell and respondent's law office was located.

Prior to joining the firm, respondent had practiced criminal law for six years, first as an appellate attorney for the Division of Criminal Justice, Attorney General's office, then as an assistant prosecutor for Middlesex County and, finally, as an assistant prosecutor for

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[1] "R.B.&W." stood for Ross, Bissell and Welch, the original partners. By 1979, Ross was no longer a partner. In 1981, Welch left the law firm and R.B.&W. was recast as a partnership without Welch.

Somerset County. However, when respondent became a member of Bissell's firm, he was precluded from handling criminal defense cases in Somerset County because Bissell was a municipal court judge for one of the municipalities in the county.

When Bissell was appointed prosecutor of Somerset County in October 1982, the law partnership was dissolved. Respondent purchased Bissell's interest in the partnership assets.

As to R.B.& W., respondent and Bissell entered into a trust agreement, dated November 1, 1982, whereby Bissell relinquished "all of his right, title, claim and interest" in R.B.&W. to respondent, in trust for Bissell's children. The agreement was to remain in effect until October 28, 1987 or until (a) the Attorney General determined the agreement was not necessary, (b) the death of respondent or Bissell or (c) Bissell was no longer the prosecutor of Somerset County.

Respondent testified that the reason for the trust agreement, which divested Bissell of any interest in R.B.&W., was that respondent wanted to practice criminal defense law in Somerset County while Bissell was the prosecutor for the county; the agreement would avoid the "inherent conflict" that would result if he and Bissell were adversaries in criminal cases and, at the same time, partners in a business. According to respondent, the trust agreement meant that he would be "running the building" and that Bissell would have no control over it or receive any profits from it.

Although respondent contended that the trust agreement was meant to avoid conflicts, he and Bissell ignored the agreement in their dealings. As detailed below, respondent, on

behalf of R.B.&W., took out bank loans and gave the proceeds to Bissell to use in another business venture in which respondent had an interest. R.B.&W.'s income from the office building was used to repay the loans.

Sometime after Bissell became prosecutor, respondent began handling criminal defense cases in Somerset County.[2] He estimated that he handled approximately 120 to 130 criminal cases in the county until 1992, when he ceased such work because one of his new partners became county counsel.

When representing defendants in criminal cases, respondent would sometimes discuss the cases, including plea agreements, with Bissell. According to respondent, Bissell was a "hands-on prosecutor" and the assistant prosecutors had limited discretion in plea bargains. Respondent stated that, with rare exceptions, Bissell had to approve all plea agreements.

Respondent testified that, in August 1983, Bissell asked him if he would like to purchase an interest in a gas station business. According to respondent, Bissell, Bissell's wife, Barbara, and/or Bissell's father owned several gas stations in the county. Although Barbara was the named owner of the gas station, respondent viewed Bissell as the actual owner. According to respondent, Bissell assured him that any conflict would be avoided by a trust agreement similar to the R.B.&W. trust agreement. Respondent testified that, in September 1983, he signed a trust agreement dealing with the gas station, but did not even

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[2] At Bissell's trial, respondent testified that he began handling criminal cases in Somerset county in 1982. At the ethics hearing, he stated that he did not remember when he stated doing such work, but was certain that it was after 1982 and, most likely, after 1983.

"skim" it prior to signing it because he trusted Bissell. He further testified that he did not receive a copy of the agreement until 1995, when the United States Attorney's office requested that he obtain a copy from Bissell.

The gas station trust agreement signed by respondent and Barbara stated that respondent had purchased one-half of Barbara's interest in "a corporation and business known as Bissell's" and that, in order to avoid a conflict "arising out of their business relationship and [Barbara's] husband's employment" as county prosecutor, respondent "agrees to transfer his interest in the business known as Bissell's to [Barbara] in trust" for the benefit of respondent's children. Although the agreement indicated that it was signed on November 1, 1982, the same day as the R.B.&W. trust agreement, respondent testified that the agreement was not signed until September 1983 and that Bissell had not even approached him about the investment until August 1983.[3]

On September 9, 1983, respondent paid $20,000 to Bissell, not Barbara, for his one-half interest in the gas station. On October 18, 1983, respondent paid an additional $45,000 by way of a personal loan from Somerset Trust Company. On the New Loan Data form, the purpose of the loan was stated as "[a]cquire interest in gasoline station owned by N. Bissell Jr." The proceeds of respondent's loan were applied toward an existing $55,000 loan owed to Somerset Trust by Nicholas and Barbara Bissell d/b/a Bedminster Citgo.

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[3] Respondent also testified that there were some minor alterations in the unsigned copy of the R.B.&W. trust agreement that he received at the time he signed the original and in the copy of the signed agreement that he later received from Bissell.

According to respondent, Bissell assured him that he would have to pay only the initial $20,000 for the gas station and that the business would make the monthly payments on the $45,000 loan. Respondent testified that all of his discussions about the business were with Bissell and that he considered Bissell, not Barbara, to be his partner in the business. Respondent stated that he was not involved in the operation of the gas station, never examined its books and never received any monies from it. In fact, he claimed he lost money in the business.

For a short time after respondent's purchase, the business made the monthly payments on his $45,000 loan. Respondent testified that, thereafter, Bissell told him that the business was losing money and requested that respondent borrow funds, on behalf of R.B.&W., to use for the gas station. Respondent agreed. On behalf of R.B.&W., respondent procured three loans: a $22,000 loan in 1984, a $37,892.45 loan in1986 and a $48,000 loan in1987.

With respect to the $22,000 1984 loan, respondent could not recall whether the proceeds were to be used for the gas station or whether he had simply given the funds to Bissell. Part of the proceeds ($17,892.45) of the 1986 loan was used to pay off the 1984 loan and part of the proceeds ($31,366.15) of the 1987 loan was used to pay off the 1986 loan. Although the bank documents indicate that the remaining proceeds from the 1986 and 1987 loans were to be used for "working capital" for R.B.&W., respondent testified that he gave the funds to Bissell to use for the gas station. Therefore, respondent gave Bissell a

total of $58,633.85 of R.B.&W.'s funds. According to respondent, he later learned that Bissell had misappropriated funds from the gas station business.

But for the loan payments, R.B.&W. would have realized a profit from the building rents.

Respondent testified that, in 1988, Barbara signed a document in which she agreed to indemnify and hold him harmless for any debts or liabilities of the business, including his loan from Somerset Trust.[4] According to respondent, he handwrote the agreement, which had Bissell's input.

Although the initial gas station trust agreement indicated that the gas station was owned by a corporation known as "Bissell's," the 1988 indemnification agreement indicated that it was owned by a partnership, Bissell & Welaj, trading as Bedminster Mobil. The record does not explain this discrepancy. The agreement also stated that it "hereby terminates the partnership known as Bissell & Welaj, trading as Bedminster Mobil." Respondent testified that, notwithstanding the statement that the partnership was terminated, it was his understanding that, if the gas station business became profitable or was sold for a profit, he would share in the profit. According to respondent, the Somerset Trust loan was repaid in 1989, when another person invested funds in the business and his interest was reduced from fifty percent to twenty-five percent. Respondent continued to receive K-1 partnership tax forms for the gas station business in 1988, 1989, 1990 and 1991.

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[4] The indemnification agreement was not part of the record. However, respondent read from the agreement when he testified at Bissell's trial.

Respondent testified that his business dealings with Bissell did not affect his representation of his clients and that it "never crossed [his] mind" to disclose them to his clients. According to respondent, he never compromised his clients' interests and neither he nor his clients received any special treatment from Bissell or from the assistant prosecutors.

Respondent further testified that he relied on Bissell's assurances that the trust agreements resolved any possible conflicts. According to respondent, it never occurred to him to consult with anyone or to independently research the conflict issues. Respondent stated that, when he joined Bissell's law firm in 1979, Bissell was already an experienced, well-regarded attorney and that he had always considered Bissell to be his mentor. He claimed that he never questioned anything that Bissell told him about their business relationships because

> as long as [Bissell] was protecting himself, I was protected, and I was confident knowing that [Bissell] had a far greater interest, a far, to me, he had a lot more to lose as the Somerset County Prosecutor, and I felt confident relying upon, it never crossed my mind that I needed to check out what he was doing. If he said something, I listened. I believed it, and I never did believe that he would ever suggest something that he shouldn't be doing that was in violation of the trust agreement.

Respondent also testified that, when he gave Bissell the proceeds from the R.B.&W. loans, he did not consider that he was violating the trust agreement. According to respondent,

> when [Bissell] suggested that we take out money on the building in the form of a loan, the word, loan, I never equated in my mind with sharing profit

because you have to pay the loan back. So to me the loan didn't violate the terms of agreement. We were not sharing income. We were not sharing profits. We were taking out money that had to be paid back.

Respondent testificd that he withdrew from his law partnership in May 1997 because he was concerned that the negative publicity that he received when he testified at Bissell's trial would adversely affect his clients and his partners. Since May 1997, respondent has been primarily doing "pool appellate work" for the public defender's office. He also does "some County Counsel work" for his former law firm on an hourly basis. Rcspondent estimated that his annual income has decreased by seventy percent since 1997.

* * *

The DEC found "clear and convincing evidence of a violation of the rules of attorney conduct." Although the DEC did not specify which rules were violated, a fair reading of its report indicates that it found, at least, a conflict of interest. The DEC pointed to the New Jersey Supreme Court Advisory Committee on Professional Ethics ("ACPE") Opinion 317, 98 N.J.L.J. 822 (1975), which prohibited a county prosecutor's former associate from practicing criminal law in the same county so long as the associate's firm sublet office space from the prosecutor. The opinion states that "[i]t is clear that as long as the prosecutor maintains any legal or economic control over the offices rented by the [former associate] or the law firm with which he is newly associated, both are barred from practicing criminal law

in the county where the prosecutor serves."[5] The DEC analogized the business relationship prohibited by ACPE Opinion 317 to respondent's business relationship with Bissell.

As to respondent's testimony that he relied on Bissell to resolve any conflicts, the DEC stated that, while respondent's reliance was "understandable," it did not "divest the Respondent of his own obligation to be both familiar with and abide by the terms of the Opinion letter and related ethics rules as a private attorney."

The DEC also found that respondent's loans on behalf of R.B.&W. for use in the gas station business were "contrary" to the R.B.&W. trust agreement. However, it is not clear from the report whether the DEC found that such conduct violated any Rules of Professional Conduct.

Although the DEC "concluded that [respondent] did not have personal knowledge of any alteration of [the R.B.&W. trust agreement or the gas station trust agreement]," it was not clear whether the DEC found that respondent was guilty of any violations of RPC 8.4(a), RPC 8.4(c) or RPC 8.4(d), as charged in the complaint.

The DEC recommended that respondent be reprimanded.

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[5] The opinion also states that, so long as the relationship between the prosecutor and his former associate with respect to the office space is resolved, "there appears to be no reason to forbid a former associate of a newly appointed prosecutor from engaging in the practice of criminal law in the county where the prosecutor serves, at least in those cases where information gained through the former association does not bear on the case being handled."

Upon a de novo review of the record, we are satisfied that the DEC's conclusion that respondent was guilty of unethical conduct is fully supported by clear and convincing evidence.

Respondent admitted that, when he signed the 1982 R.B.&W. trust agreement, he knew that he could not represent clients in criminal cases in Somerset County so long as he maintained any business relationship with Bissell. Yet, one year later, he became involved in a new business venture with Bissell. Although Barbara Bissell was the named owner of the gas station, respondent knew that Bissell controlled the business. Indeed, all of respondent's discussions about the business were with Bissell, not Barbara.

Thereafter, respondent compounded that misconduct by ignoring the R.B.&W. trust agreement, which had been reached to avoid the original conflict concerning the ownership of the law office building.[6] Respondent knew that Bissell could not be involved in or receive any income from R.B.&W.'s operations. Yet, he gave Bissell more than $58,000 of R.B.&W.'s funds. Respondent's explanation that he did not equate giving the loan proceeds to Bissell to sharing income or profits with him is not credible, since R.B.&W. repaid the loans, not Bissell.

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[6] The complaint did not allege that it was a conflict of interest for respondent to be the trustee for Bissell's children, while representing criminal defendants in the county where Bissell was the prosecutor.

It is undisputed that, during the time that respondent was involved in these ventures with Bissell, he represented approximately 120 criminal defendants in Somerset County and that he never revealed to his clients his business relationship with Bissell.

Respondent's excuse that he relied on Bissell to resolve the conflicts is unavailing. As stated by the DEC, respondent cannot divest himself of his obligation to comply with ethics rules. "Lawyers are expected to be fully versed in the ethics rules that regulate their conduct. Ignorance or gross misunderstanding of these rules does not excuse misconduct." In re Berkowitz, 136 N.J. 134, 147 (1994).

Respondent also attempted to mitigate his misconduct by minimizing the extent of his legal expertise at the time Bissell became prosecutor. However, in 1982, respondent had already been an attorney for nine years. He had sufficient expertise to successfully take over Bissell's practice when Bissell became prosecutor. Furthermore, when respondent ceased representing criminal defendants in Somerset County in 1992, because one of his new partners had become county counsel, respondent had been an attorney for twenty years. Therefore, there is no merit to respondent's claim that his inexperience as an attorney should excuse or mitigate his actions.

In sum, respondent's representation of defendants in criminal cases in Somerset County at the same time that he was involved in business ventures with Bissell violated RPC 1.7(b) and (c)[7]. The complaint alleged that respondent violated RPC 1.7 (no subsection

[7] The Rules of Professional Conduct became effective on September 10, 1984, when they replaced the Disciplinary Rules. Although most of respondent's actions occurred after

stated). The OAE and respondent agreed that RPC 1.7(b) was applicable to respondent's conduct. However, RPC 1.7(c) is also applicable. RPC 1.7(c) states, in part, as follows,:

> This rule shall not alter the effect of case law or ethics opinions to the effect that:
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> (1) in certain cases or categories of cases involving conflicts or apparent conflicts, consent to continued representation is immaterial.

In this case, an existing ethics opinion, ACPE Opinion 317, prohibited the type of conduct engaged in by respondent. Therefore, respondent also violated RPC 1.7(c).

There is also clear and convincing evidence that respondent assisted Bissell's violations of the conflict of interest rules, in violation of RPC 8.4(a).

The question is whether respondent's actions also contravened RPC 8.4(d), which prohibits conduct prejudicial to the administration of justice. There is no evidence that respondent's relationship with Bissell affected respondent's representation of his clients or that there was a subversion of justice. In fact, the evidence was to the contrary. The testimony was that respondent represented his clients zealously and that his clients never received any special consideration from the prosecutor's office.

However, actual prejudice to the justice system is not necessary for a finding that respondent violated RPC 8.4(d). In In re Garber, 95 N.J. 597 (1984), the attorney was suspended for one year for his violations of the Disciplinary Rules analogous to RPC 1.7(b)

September 10, 1984, some actions preceded it. Because, however, the relevant RPCs have parallels in the Disciplinary Rules, we will refer to the RPCs only.

and RPC 8.4(d), as well as to RPC 1.7(a). Garber represented an eyewitness to a "gangland style" murder, who recanted his identification of the defendant, an individual Garber had represented in the past and whom he continued to represent in matters unrelated to the murder indictment. In rejecting respondent's argument that he did not violate any Disciplinary Rules because he zealously represented his eyewitness client and that his actions did not affect the outcome of the murder case, the Court stated that it was "evident" that Garber "had both the opportunity and motivation to undermine the proper administration of justice...We conclude, therefore, that in addition to clear violations of [the conflict of interest rules]," respondent also "[engaged] in conduct that is prejudicial to the administration of justice." Id. at 611. The Court in Garber was also concerned with "the attendant public perception that, as a consequence of [Garber's] compromised position, professional probity has been diluted and the administration of justice perverted." Ibid.

Here, respondent's partner in the unethical conduct was a county prosecutor. Respondent not only violated his own ethics responsibilities, but he assisted the prosecutor in violating ethics rules. As stated by the OAE, "[o]ne was serving as prosecutor, one was serving as a criminal defense attorney, neither one of them was playing by the rules." We thus, find that respondent's actions were prejudicial to the administration of justice, in violation of RPC 8.4(d).

Although the complaint alleged that respondent breached his fiduciary obligations to Bissell's children under the R.B.&W. trust agreement, neither the complaint nor the OAE's brief charged that such breach violated any RPC. Rather, the OAE's position

appeared to be that the breaches of fiduciary obligations were part of the overall conflict of interest and that they should be taken into account in fashioning the appropriate discipline. Therefore, we do not find a separate violation based on any breach of fiduciary duty that respondent owed to Bissell's children.[8]

Finally, with respect to the allegation that respondent violated RPC 8.4(c) because he altered or assisted Bissell in altering the trust agreements, we agree with the DEC that there was no evidence that respondent altered, assisted in altering or had knowledge of the alterations to the trust agreements.

In summary, respondent violated RPC 1.7(b) and (c) and RPC 8.4(a) and (d).

In general, a reprimand is the appropriate discipline in cases involving a conflict of interest, "absent egregious circumstances or economic injury to the clients involved." In re Berkowitz, 136 N.J. 134, 148 (1994). Although there is no evidence that respondent's clients suffered any injury by reason of the conflict, respondent's misconduct involved more that a simple conflict between an attorney and a client. Respondent represented approximately 120 criminal defendants while he was simultaneously engaged in business dealings with the county prosecutor. His actions were certain to lead to a "public perception" that his and Bissell's "professional probity [had] been diluted and the administration of justice perverted."

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[8] Furthermore, the R.B.&W. trust agreement gave respondent the "sole right to mortgage, lease or dispose of said partnership including the real property...and shall also have the right to invest and reinvest the proceeds thereof, subject only to his duties and obligations under the laws of the State of New Jersey as a fiduciary of Bissell's children."

Conduct that subverts the administration of justice generally warrants a period of suspension and, in particularly egregious circumstances, disbarment. See In re Edson, 108 N.J. 464 (1987) (disbarment where the attorney counseled clients to manufacture evidence in defense of their drunk-driving cases, participated as defense counsel while his clients committed perjury and gave false information to the municipal prosecutor); In re Asbell, 135 N.J. 446 (1994) (two-year suspension where the attorney, a county prosecutor, staged an assassination attempt on his own life and filed a false police report to secure his reappointment as a prosecutor); In re Garber, supra, 95 N.J. 597 (1984) (one-year suspension); In re Cohn, 46 N.J. 202 (1966) (one-year suspension where the attorney accepted a retainer to represent an individual who was also the chief witness for the State in a pending administrative proceeding against another client whom the attorney was already representing); In re Farr, 115 N.J. 231 (1989) (six-month suspension where the attorney, an assistant prosecutor, removed drugs from the evidence room for use by himself and two informants, falsely introduced one of the informants as an employee of the prosecutor's office and allowed her to accompany him on a narcotics investigation).

However, where the attorney's conduct has been less egregious, the Court has imposed a reprimand. See In re Alcantara, 144 N.J.257 (1995) (reprimand where the attorney contacted another attorney's client without permission and requested that the person refrain from giving testimony favorable to the State; however, the Court cautioned that, in the future, it would impose a suspension for similar violations); In re Whitmore, 117 N.J. 472 (1990) (reprimand where the attorney, a municipal prosecutor, failed to explain to the

court that he had a "belief or suspicion" that the police officer who had conducted the breathalyzer test had left the courtroom prior to the hearing so that the case would be dismissed).

In mitigation, we considered that respondent's unethical conduct ceased in 1992, although, as pointed out by the OAE, it spanned several years. Respondent also presented, through testimony and an affidavit, persuasive evidence of his good character and his reputation as an attorney.

Furthermore, respondent has suffered significant negative consequences as a result of his dealings with Bissell. Because of the adverse publicity he received following his testimony at Bissell's trial, he stepped down as the managing partner of his law firm and ceased representing private clients. He also sustained a significant decrease in annual income. He now handles criminal appeals for the Public Defender's Office and some "county counsel work" for his former law firm on an hourly basis.

In light of the foregoing, we unanimously determined that a three-month suspension is the appropriate quantum of discipline for respondent's ethic's infractions.

We further determined to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs.

Dated: 7/29/01

By: ROCKY L. PETERSON
Chair
Disciplinary Review Board