SUPREME COURT OF NEW JERSEY
Disciplinary Review Board
Docket No. DRB 89-039

IN THE MATTER OF :

FREDERICK WOECKENER :

AN ATTORNEY-AT-LAW :

Decision and Recommendation
of the
Disciplinary Review Board

Argued: July 19, 1989

Decided: December 6, 1989

Michael Kingman appeared on behalf of the District IIB Ethics Committee.

Respondent appeared pro se.

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

This matter is before the Board based upon a presentment filed by the District IIB Ethics Committee.

Respondent was admitted as a member of the New Jersey Bar in 1972 and is engaged in the practice of law in Jersey City, New Jersey. In December 1987, a formal complaint (Exhibit P-1) was filed with the District IIB Ethics Committee and served upon respondent. The formal complaint charged respondent with the following allegations of unethical conduct: (1) violation of R.P.C.

4.2, when respondent met with an opposing party, without that party's counsel being present; (2) violation of R.P.C 1.7 (b) and (c), when respondent served as city attorney while representing his wife's interests in a property development in the same city; and (3) violation of R.P.C. 8.4 (e), when respondent promised to improperly influence city government in his position as city attorney.

In 1984, respondent's wife signed a contract to purchase property in Hoboken. At the same time, she entered into a joint venture agreement with two persons who were to obtain site approvals and variances to build two twenty-two-story apartment buildings on the same piece of property. In January 1985, these variances were granted by the Board of Adjustment in Hoboken. At the Board of Adjustment hearing, a Mr. D. asked for an adjournment so he could gather evidence to oppose the variance requests. The adjournment was denied. The granting of these variances gave rise to the subsequent litigation, which, in turn, prompted this ethics complaint.

In February 1985, Mr. D.'s attorney filed a complaint in lieu of prerogative writ to have the variances overturned. In September 1985, a stipulation of dismissal was filed in this lawsuit based upon a settlement between the parties. However, in the same month, Mr. D. claimed he had not reached a settlement or approved the dismissal. Lengthy litigation ensued to reinstate the complaint. This litigation included four separate trial hearings and three appellate reviews between April 1986 and May 1988. Following the

last review and a subsequent rehearing on the merits of granting the variances, the variances were ultimately denied. The judge who heard the appeals in this variance litigation contacted the ethics committee concerning the improper activity of the attorneys in this case.[1]

This activity by the attorneys started in July 1985. In July 1985, Mr. D.'s attorney met with respondent to discuss various matters, including the development property in Hoboken owned by respondent's wife. Soon after that meeting, respondent met with Mr. D. on two separate occasions, without Mr. D.'s attorney being present.

The substance of those conversations held in July are disputed by Mr. D., his attorney, and respondent. Both respondent and Mr. D. testified that they briefly discussed respondent's wife's property and the variance lawsuit. Mr. D. testified that respondent told him that all developers in the area should work together so that the land development would not be tied up by litigation (T79,T80)[2]. Respondent essentially testified to the same facts (T165, T166, T174, T175). However, Mr. D. had also earlier testified, at one of the underlying civil litigation hearings that respondent, as the city attorney, had offered to assist Mr. D. in acquiring certain city waterfront property. At

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[1] After a full hearing on November 30, 1988, the District IIB Ethics Committee determined Mr. D.'s attorney had not engaged in unethical conduct.

[2] T denotes the transcript of the November 30, 1988 committee hearing.

the ethics hearing, Mr. D. testified that perhaps he was confused in his recall of the sequence of events because later, when respondent was no longer city attorney, they both worked together to have the city council put up for bid these same waterfront lots (T104, T112, T113, T167, T168).

Mr. D.'s attorney testified about whether respondent had permission to meet with Mr. D. without Mr. D.'s attorney being present. The attorney's testimony was inconsistent; however, the import of his testimony was that he never gave a blanket consent to respondent to discuss the development with Mr. D. (T126, T144, T158). Furthermore, respondent admitted that he did not have the attorney's permission to meet with Mr. D.:

> [Q.] While you were City Attorney and while you were representing your wife you met with an individual who was an adverse
>
> [A.] Yes, well, -- yes.
>
> [Q.] party in that development law suit who was represented by Counsel. Correct?
>
> [A.] That is correct. At that individual's request.
>
> [Q.] O.K. At that individual's request. And at the time you met with that individual you knew he was represented by Counsel and you did not have Counsel's permission to meet with that person. Correct?
>
> [A.] I was not specifically told by [counsel] --
>
> [Q.] That's not the question, I'd appreciate it if you would respond to the question. You did not have Counsel's permission to meet with his client. Is that correct?
>
> [A.] No.
>
> [Q.] And, in fact, --

[Q.] No it's not correct?

[A.] No I'm saying it's correct, what you just stated....

* * *

[Q.] I understand all of that. I understand all of that. I'm talking about what, in fact, -- not what your intent is but what, in fact, happened and what, in fact, happened was there were conversations, as a result of the conversations you and Mr. [D.] agreed that there would be a settlement, Mr. [D.] agreed with you, he would dismiss the case, all this was done without your ever having spoken to Mr. [D.]'s attorney and without you ever communicating to Mr. [D.]'s attorney that you were engaged in the settlement negotiations or that they had been consummated. Is that right?

[A.] That is correct but, again I object to the characterization of them as settlement negotiations because --

[Q.] Well your testimony is that that's what happened, you agreed with him to settle the case and he told you the case was settled. Right?

[A.] That's essentially what happened and I think there's a difference, and I would like to state for the record, between entering into knowingly and aggressively entering into settlement discussions with an individual as opposed to meeting with that person at their request and then during the course of that meeting an agreement as to this particular law suit takes place. I think there is a distinction as opposed to motive and reason for the original meeting. [T182, T184.]

The committee found respondent violated R.P.C. 4.2, as alleged in the first count of the complaint, by meeting with grievant without his counsel being present or without counsel giving his consent to the meeting. The committee also found respondent violated R.P.C. 1.7 (b) and (c), as alleged in the second count, because in July 1985, when he was city attorney for the City of

Hoboken, he met with Mr. D. to settle a pending law suit that involved both respondent's wife's interest and the City of Hoboken. The Committee did not find Mr. D.'s equivocal testimony sufficient evidence to sustain count three, which alleged respondent improperly implied he could use his position as city attorney to assist Mr. D.

CONCLUSION AND RECOMMENDATION

Upon a de novo review of the full record, the Board is satisfied that the conclusions of the committee in finding respondent guilty of unethical conduct are fully supported by clear and convincing evidence.

The Board finds respondent violated R.P.C. 4.2 when he met with Mr. D. without the presence of Mr. D's counsel. Moreover, the Board concludes that respondent violated R.P.C. 1.7 (b) and (c) when he represented his wife's development undertaking at the same time he was city attorney. The Board also agrees with the committee that there was insufficient evidence to find respondent violated R.P.C. 8.4(e) by implying the ability to influence improperly a government agency.

Respondent admitted in his own testimony that he met with opposing party without opposing counsel's permission. Respondent's argument that the other party initiated the contact is irrelevant. Attorneys are required to follow the Rules of Professional Conduct regardless of whether or not lay parties understand those

requirements. Respondent's argument that Mr. D.'s counsel did not clearly prohibit the contact is also unpersuasive. It is not a defense for respondent to argue that opposing counsel did not clearly advise him of his duty under the Rules of Professional Conduct. Respondent responsible for his own ethical conduct and he should not have assumed a consent that was not clearly articulated.

Furthermore, respondent was the city attorney for the City of Hoboken at the same time that he represented his wife, who was a principal in a new development enterprise in Hoboken. Respondent admits that he continued to represent his wife during the time that he was the city attorney, but he contends it was not done in a hidden manner and his client was his wife. He further argued that no act of representation occurred during his six months as city attorney.

The Supreme Court has been clear that an attorney cannot represent a land developer in the town in which the attorney is city counsel as it is contrary to public interest. In re A. and B., 44 N.J. 331 (1965).

> The subject of land development is one in which the likelihood of transactions with a municipality and the room for public misunderstanding are so great that a member of the Bar should not represent a developer operating in a municipality in which the member of the Bar is a municipal attorney or the holder of any other municipal office of apparent influence. We all know from practical experience that the very nature of the work of the developer involves a probability of some municipal action such as zoning applications, land subdivisions, building permits, compliance with the building code, etc.

> It is accordingly our view that such dual representation is forbidden even though the attorney does not advise either the municipality or the private client with respect to matters concerning them. The fact of such dual representation itself is contrary to the public interest.
> [Id. 44 N.J. at 334-35 (emphasis added).]

> While in a sense this rule may be deemed somewhat harsh particularly in the situation where, as here, the representation of both municipality and developer was at no time in connection with a transaction involving both clients, we are strongly of the view that the public interest demands strict adherence to the letter of In re A. and B., supra. A municipal attorney's public obligations are such that he must take particular pains to avoid the shadow of suspicion which inevitably is cast when he begins to entangle himself in a representative capacity in the legal affairs of a developer operating within the municipality.
> [In re Dolan, 76 N.J. 1, 7 (1978), quoting, In re A. and B., 44 N.J. 331, 334-35 (1965).]

An attorney for the planning board in the municipality in which he lived asked the Advisory Committee on Professional Ethics whether he could represent his wife who wanted to oppose a variance before the board of adjustment. The Advisory Committee stated, in pertinent part:

> "[o]ur law reports are replete with cases where planning boards, boards of adjustment and governing bodies have not always been in accord on requests for variances. In this case if the board of adjustment granted a variance, the matter might be referred back to the planning board for action, in which case the inquirer would obviously have a conflict of interest."
> [Opinion 112, 90 N.J.L.J. 365 (1967).]

The Advisory Committee concluded that the inquirer should not represent his wife before the board of adjustment at the same time he was attorney for the planning board. Similarly, in this case,

respondent should not have continued to represent his wife's development interests while employed as city attorney.

Finally, the Rules of Professional Conduct concerning conflict of interest provide that an appearance of impropriety, rather than actual conflict, must also be avoided in cases such as this. R.P.C. 1.7 (c)(2). The attorney must not create a suspicion that he is using the influence of his public office for a private client. Where the public interest is involved, every situation that affords the opportunity for impropriety should be avoided in order to eliminate public suspicion that an attorney in public office will use his position on behalf of a client. Opinion 88, 89 N.J.L.J. 49 (1966).

In mitigation, the Board considered that respondent was continuing a long-term representation of his wife, and such representation, although unwise, was not undertaken with an improper motive. The Board also recognized respondent has been a member of the Bar for seventeen years with no prior ethical violations.

The Board, therefore, unanimously recommends that the respondent receive a private reprimand. Two members did not participate.

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

Date: 12/6/1989

Raymond R. Trombadore
Chair
Disciplinary Review Board