

Kevin E. Young, Esq.
236 Main Street
Toms River, New Jersey, 08753
(732) 286-6400
Investigator

DISTRICT IIIA ETHICS COMMITTEE,	:	
	:	DOCKET NO: IIIA-06-063E
Complainant,	:	
	:	
vs.	:	DISCIPLINARY ACTION
	:	
ELIAS ABILHEIRA, ESQ.	:	
	:	COMPLAINT
Respondent,	:	

DISTRICT IIIA ETHICS COMMITTEE by way of Complaint against respondent
says:

General Allegations

1. Elias Abilheira was admitted to the Bar of the State of New Jersey in 1994.
2. Respondent maintains a law office at 34 East Main Street, Freehold, Monmouth County, New Jersey.
3. The respondent was the Mayor of the Township of Millstone during the relevant time period, to wit, May 25, 2005.

Count I

1. On or about May 25, 2005, Respondent represented builder/developer /purchaser who had a contract to purchase property at 40 Brookside Road, in the Township of Millstone.
2. During this period of time, Respondent was the Mayor of the Township of Millstone.

3. The property located at 40 Brookside Road required certain variances be granted by the Millstone Township Board of Adjustment in order to be sold by the property owners, Mr. and Mrs. Steven Labarbera, to respondent's client.

4. The Board of Adjustment met on May 25, 2005 and heard the application of Mr. and Mrs. Steven Labarbera. Respondent was responsible, in part, for the passage of some of the variances under consideration by the Board that evening. Respondent represented the potential purchaser of the property.

5. The Respondent attended the Board of Adjustment hearing and was sworn in and offered brief history of one of the ordinances in discussion.

6. The Labarbera variances application passed by a majority vote.

7. Respondent, in his dual capacity as Mayor and as attorney for the contract purchaser violated RPC 1.8(K) Conflict of Interest.

WHEREFORE, respondent should be disciplined.

DISTRICT IIIA ETHICS COMMITTEE

DATED: June 26, 2006

By: /s/ Kevin E. Young
Investigator

Abilheira & Ferrara, P.C.
34 East Main Street
Freehold, New Jersey 07728
(732)866-1883
Attorneys for Respondent

DISTRICT IIIA ETHICS COMMITTEE,	:	
	:	DOCKET NO: IIIA-06-063E
Complainant,	:	
	:	
vs.	:	DISCIPLINARY ACTION
	:	
ELIAS ABILHEIRA, ESQ.	:	
	:	ANSWER
Respondent,	:	

Elias Abilheira, Esq., by way of Answer to the Complaint filed herein, says:

GENERAL ALLEGATIONS

1. Admitted.
2. Admitted.
3. Admitted, term as Mayor expired on December 31, 2005.

FIRST COUNT

1. Denied. On or about said date respondent represented a purchaser who had contracted to buy a property that was represented as being an approved building lot upon which the prior home had burned down. Said purchaser was a small single home builder. Said purchaser had never subdivided land, and has never to date appeared before any Planning Board or Board of Adjustment of the Township of Millstone. Said purchaser is not a developer.
2. Admitted. Respondents term as mayor expired on December 31, 2005.
3. Denied. Sellers presented said property to respondent's client with the representation said property was an approved building lot. When it was discovered that

said property was not an approved lot and required variances, purchaser declined to purchase same. The purchaser offered to consider purchasing the property if sellers obtained building approvals.

4. Denied. Respondent was not responsible in any manner whatsoever for the passage of any variances by the Board of Adjustment. Upon information and belief some if not all of the variances were denied. In fact those members appointed by the Respondent to the Board of Adjustment voted against the variances. Admitted that respondent represented a potential purchaser of the property as stated on the record by respondent.

5. Denied in part, admitted in part. Respondent was in the municipal building on the night in question executing paperwork and checks. During the meeting a commotion occurred when Ms. Labarbera was crying in the hallway. When respondent looked in the open Courtroom to see what was occurring, a discussion on the record was taking place as to why the Labarberas required variances to obtain building permits as the lot was previously an approved building lot and had apparently previously had a home on it that had burned down. The Respondent had drafted an ordinance change that stopped people who owned old undersized approved lots from building on the lots unless they obtained approval from the Board of Adjustment. There was confusion as to why the applicant had to come before the Board of Adjustment for variances for an approved building lot. Apparently as the ordinance was less than a year old the issue had not previously been before the Board. The Respondent offered to explain what had changed in the ordinances that prevented the Labarberas from pulling building permits for a lot that had previously had a home on it, but first asked the Board attorney if that would constitute a conflict as the respondent represented a potential purchaser. The Board attorney stated it was not a

conflict. Respondent then explained that prior to the new ordinance the applicant could build on the lot without variances. The respondent explained that a new ordinance was passed less than a year ago that changed the law for old undersized approved building lots and now the Labarberas could not pull permits unless they obtained variances. The respondent did not comment, opine or give testimony as to whether the variances should or should not be granted, or whether they were appropriate under the new ordinance.

6. Denied. To respondent's knowledge all of the variances were not granted.

7. Denied. When the Mayor voted on the ordinance that stopped the Labarberas from building on their lot, he was not representing the contract purchaser, and the purchaser, to respondent's knowledge, was not the owner of, or contract purchaser of any properties effected by the ordinance at any time during its consideration or passage, which period was months before. Furthermore, the respondent never represented any party before the Board of Adjustment, nor gave any testimony supporting or opposing the Labarbera application. The respondent's client has never been before the Planning Board or the Board of Adjustment of the Township of Millstone, either prior to the incident which is the subject matter of this grievance or since said date. The Respondent in no way was ever acted in any manner which could have been construed as a violation of RPC 1.8(k), and the original dismissal of this grievance should stand.

AFFIRMATIVE DEFENSES

1. The Complaint fails to state a claim upon which relief can be granted.

2. The ordinance in question was drafted and passed long before the Respondent represented the potential purchaser with respect to the property which was later effected by the Ordinance. At no time during the drafting and passage of the ordinance was the

respondent representing any client with any interest or potential interest in any property effected by the Ordinance.

3. Respondent has never represented any client before any Board, Court or other deliberative body of the Township of Millstone either before or after he was mayor and as such could not have any conflict.

4. Respondent never acted in any manner which presented a substantial risk that would impact his representation to his client.

5. The Respondent was denied due process by not being contacted during the second investigation following the initial dismissal of the grievance, at the very least the conduct alleged in the complaint, even if proved constitutes such a minor and technical violation, respondent should have been offered diversion in accordance with Court Rule 1:20-3(i)(2).

6. The allegations set forth in the Complaint cannot be established by clear and convincing evidence.

MITIGATING FACTORS

1. Respondent has been admitted to the Bar for over 10 years and never has he had any prior grievances filed against him. In fact Respondent has served in many pro bono positions and volunteer positions, including as trustee to the Monmouth County Legal Aid Society, has provided pro bono representation to individuals purchasing homes through Habitat for Humanity and provides continued pro bono representation to the First Presbyterian Church of Freehold.

2. The activity alleged herein was not clearly unethical as both the attorney for the Board of Adjustment and the original investigator found no evidence of unethical

actions, resulting in the grievance being dismissed.

3. None of the aggravating factors typically discussed in the context of an ethics violation and set forth in various precedent are applicable herein.

4. Respondent has fully cooperated with the investigation of this matter resulting in the original dismissal.

5. No person was damaged by the alleged misconduct.

WHEREFORE, respondent respectfully submits that his conduct did not constitute any ethical violation and specifically did not violate RPC 1.8, and therefore, the Complaint must be dismissed.

DEMAND FOR HEARING ON CHARGES AND MITIGATION

Respondent hereby demands a hearing on charges and mitigation with regard to this matter, and a copy of all records.

Abilheira & Ferrara, P.C.
Attorneys for respondent

Dated: August 28, 2006

/s/ By: Elias Abilheira, Esq.

VERIFICATION

I, Elias Abilheira, am the respondent in the within disciplinary action and hereby certify as follows:

1. I have read every paragraph of the foregoing answer and verify that the statements therein are true and based on my personal knowledge.

2. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ Elias Abilheira

Investigative Report

Re: Frank Geck v Elias Abilheira, Esq.

Docket No.IIIA-06-013F

Procedural History

By letter dated March 21, 2006, the Disciplinary Review Board reversed and remanded the above matter for a new investigation by a new investigator. The original grievance form was prepared by Frank Geck on or about June 3, 2005. An investigation ensued, and ultimately a report was prepared by the assigned Investigator, Kathleen Peterson , Esq. Her three page investigative report is dated October 5, 2005. (Exhibit A)

The report concluded that no Rule(s) of Professional conduct was violated. A dismissal of the matter was recommended. By letter dated November 18, 2005, from Steven Secare, Esq., Secretary of the District IIIA Ethics Committee, the Grievant, Frank Geck was notified that the matter was dismissed. (Exhibit B). In a Notice of the Appeal dated 1/2/06, the Grievant appealed the dismissal.

I received the investigative assignment on or about March 30, 2006. I spoke telephonically with the Grievant at length on April 11, 2006. This matter was also discussed at the monthly District IIIA Ethics Committee meeting held on April 26 2006. I conducted a follow-up telephonic interview with Frank Geck on April 28, 2006.

Statement of Facts

The grievant clearly indicates to me that he does not dispute the Statement of Facts that are contained in the Investigative Report of Kathleen Peterson. Those facts, therefore, are adopted and incorporated in this report by reference.

Additionally, Mr. Geck indicates that the Respondent, Elias Abilheira, Esq., only attended the Board of Adjustment meeting for the Labarbera variance application. It

should be noted that there were other matters on the Board of Adjustment agenda. He left shortly after the Labarbera presentation. As noted in Exhibit A, Respondent represented the prospective purchaser, a developer, NJY Builders, who was in the process of purchasing the Labarbera property. The property would close if the appropriate variances were granted.

The Board of adjustment granted the variances.

Analysis

Disciplinary Rules Involved

I perceive RPC 1.8(k) Conflict of Interest to be implicated in this situation. A lawyer employed by a public entity, either as a lawyer, or in some other role, shall not undertake the representation of another client, if the representation presents a substantial risk that the lawyer's responsibilities to the public entity would limit the lawyers responsibilities to provide independent advice or diligent and competent representation to either the public entity or the client.

Discussion of Application of Disciplinary Rule

The respondent in this matter was the mayor of the Township of Millstone. As such, he clearly falls within the language of RPC 1.8(k) wherein it includes individuals employed by a public entity "as a lawyer" or "in some other role". The rule additionally requires that the representation of the client is forbidden if it presents a "substantial risk that the lawyer's responsibilities to the public entity would limit the lawyer's ability to provide independent advice or diligent and competent representation to either the public entity or the client". As a mayor, the respondent not only can influence the passage of zoning rules, he is also in a position to appoint those who interpret or decide issues relating to existing

rules and regulations. Because the respondent represented a developer who could benefit or be harmed by ordinance changes or the passage of new ordinances, he could not undertake the representation of either, and at the same time provide independent advice or competent representation to either the public entity or the client. RPC 1.8(k) was effective January 1, 2004.

Conclusion

Based upon the facts in this case, and the information provided by the grievant, I conclude that respondent violated RPC 1.8(k)

Respectfully submitted

Dated: June 26, 2006

/s/ Kevin E. Young, Esq.
Investigator

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	:	DOCKET NO: IIIA-06-063E
Complainant,	:	
	:	
vs.	:	DISCIPLINARY ACTION
	:	
ELIAS ABILHEIRA, ESQ.	:	
	:	HEARING REPORT
Respondent,	:	RECOMMENDING DISMISSAL

PANEL:

MICHAEL K.W. NOLAN, ESQUIRE, CHAIR
DEBRA HIMBER, ESQUIRE
ROBERT O'BRIEN, PUBLIC MEMBER

TO:

THE HONORABLE CHAIR AND THE MEMBERS OF THE DISCIPLINARY
REVIEW BOARD.

The District IIIA Ethics Committee Hearing Panel respectfully shows:

I. PROCEDURAL HISTORY

1. Respondent, Elias Abilheira (hereinafter "Respondent") was admitted as a member of the bar of New Jersey in 1994 and was engaged in the practice of law at 34 East Main Street, in the town of Freehold, County of Monmouth, State of New Jersey.
2. On or about July 3, 2005, Grievent, Frank Geck, filed an Attorney Ethics Grievance against Respondent. (Exhibit 1).
3. Kathleen Peterson, Esquire completed an investigation and ultimately prepared a three page investigative report dated October 5, 2005. (Exhibit 2) The report concluded that no Rule(s) of Professional conduct was violated. A dismissal of the matter was recommended.

4. On November 18, 2005, Steven Secare, Esquire, Secretary of the District IIIA Ethics Committee, drafted correspondence to the Grievant, Frank Geck, notifying him that the matter had been dismissed.

5. On January 4, 2006, the Grievant filed a Notice of Appeal, appealing the dismissal. (Exhibit 3).

6. On March 21, 2006 the Disciplinary Review Board reversed and remanded the above matter for a new investigation by a new investigator. (Exhibit 4).

7. On or about March 30, 2006, Kevin Young, Esquire was provided the investigative assignment and issued a Report. (Exhibit 5).

8. On or about June 26, 2006, a formal Complaint (Exhibit 6) was filed with the District Ethics Committee and was served upon the Respondent.

9. Respondent's Answer was filed on or about August 28, 2006. (Exhibit 7)

10. A formal Hearing was conducted in this matter on May 3, 2007.

II. SYNOPSIS OF ALLEGATIONS

The formal Complaint charged the Respondent with the following allegations of unethical conduct:

A. On or about May 25, 2005, Respondent represented a builder/developer/purchaser who entered a contract to purchase property located at 40 Brookside Road, Millstone, New Jersey.

B. The Respondent at the time was serving as Mayor of the Township of Millstone.

C. The property which was the subject of said contract required that several variances be granted by the Millstone Township Board of Adjustment in order to be sold by

the property owners Mr. and Mrs. Steven Labarbera, to Respondent's client as a buildable lot.

D. The Board of Adjustment met on May 25, 2005 at which time the application for the variances was heard. Respondent was instrumental, in part, for the passage of some of the variances under consideration by the Board that evening. Respondent represented the potential purchaser of the property.

E. The Respondent attended the Board of Adjustment hearing and was sworn in and offered brief history of one of the ordinances in discussion.

F. The Labarbera variances applications were passed by a majority vote.

G. Respondent, in his dual capacity as Mayor and as attorney for the contract purchaser violated RPC 1.8(k) Conflict of Interest.

III. FINDINGS OF FACT

As a result of reviewing the testimony and exhibits, the Hearing Panel makes the following factual findings and conclusions:

Only two witnesses testified at the Hearing, the Respondent and the Grievant.

The following summary of background facts and testimony were not disputed and the Panel accepted same as being clear and convincing evidence.

1. The Labarbera family owned a parcel in the Millstone and in 2004 contacted the Respondent, in his capacity as a Millstone Committeeman regarding the requirement for a variance to build a home on the lot. The Labarberas were advised that there was no requirement for a variance and all they needed to do was to pull building permits.

2. In early 2005, the Respondent became the Mayor of Millstone and drafted a new ordinance regarding development of parcels in Millstone, which, for purposes of this

matter, resulted in requiring the Labarberas to obtain a variance to build their house. It appears as though the Labarberas did not pull building permits nor build on their lot in 2004. Because of their delay they became subject to the new ordinance.

3. On or about May 13, 2005, the Labarberas entered into a real estate contract with NJY Builders. (Hearing Exhibit C-1). The Respondent represented NJY Builders and completed contract review on his client's behalf. Respondent testified that during due diligence, it became apparent that as per the contract the Sellers were unable to provide the Buyers with the necessary permits. Respondent testified that the real estate contract was voided by both parties. To offer further proof, Respondent introduced into evidence his correspondence file which showed the Labarberas and NJY were re-instating the real estate contract. (Hearing Exhibit C-4). This evidence was offered to prove that the original contract was voided as Respondent was unable to produce any letter of cancellation or other documents regarding the real estate contract.

4. Respondent testified that he was the mayor of Millstone and physically in the municipal building on May 25, 2005. Respondent indicated he was at the building to complete administrative tasks and to be on hand because of a variance application concerning a church and not for the Labarberas variance application, the underlying nexus involved in this grievance.

5. Grievant admitted he was at the meeting specifically because of the variance application filed by the Labarbera family regarding the property and his concern as to what would happen to this parcel.

6. Both Respondent and Grievant agree as to what occurred during the May 25, 2005 Board meeting. Mrs. Labarbera, pregnant and visibly upset, recognized the Mayor in

the hallway and told the Board that he could explain why they needed a variance as he drafted the new ordinance. Respondent admitted that initially he did not remember the Laberberas but felt sorry for Mrs. Labarbera when he realized who she was. When he heard his name being discussed in the meeting room he entered.

7. The Grievant testified that when the mayor came into the room, he believed that "the fix was in" and that the Mayor, although he could not prove it, was bribed into using his influence to get the Labarberas' application approved.

8. Despite this opinion, upon cross examination and further questioning, the Grievant testified as to the accuracy of the Board of Adjustment minutes. (Hearing Exhibit C-2). Grievant admitted that the Mayor (Respondent) requested confirmation as to there being no conflict and offered the Board a brief explanation of the ordinance and why the Labarberas were appearing for a variance.

9. Both witnesses agree that Respondent did not tell or urge, in any way, the Board members to either approve or reject the Labarberas' application and that the duration of the Respondent's explanation of the ordinance was brief, probably less than five (5) minutes and upon his completion of explanation the Respondent left the room and did not witness the vote.

10. The Grievant admitted that he did not have any proof that the Respondent received any money or "kick backs". Grievant also testified and confirmed much of the testimony of Respondent.

IV. CONCLUSION

Although the Complaint alleges a potential violation of RPC 1.8(k), the Panel considered this matter in light of both RPC 1.7 and 1.8(k) as applied to an attorney who also

holds the office of mayor of a municipality. With these facts, the panel deliberated on the events and relationship of the parties to determine whether Respondent violated any RPC.

The only possible factual question was whether Respondent was representing NJY Builders at the time of the Labarberas' variance application and, if so, did this representation create an actual conflict and a substantial risk as to his role to either the public entity or his client. RPC 1.8(k). Respondent was able to and did indeed offer clear and convincing proof that he was not engaged as the attorney for the purchaser of the Labarera property at the time he appeared as an elected official to answer factual question for the Board of Adjustment as the contract at that point had been terminated. There is no question that Respondent was not representing or in any way involved with the Labarberas.

The Panel finds Respondent's testimony and exhibits that the underlying original real estate contract between Labarberas and NJY Builders was voided, to be clear and convincing evidence that Respondent was not representing any party on May 25, 2005, and hence the Panel need not inquire further as to the substantial risk analysis.

Respondent, to his credit, disclosed his prior involvement with the contract purchaser; he recognized a potential conflict issue, internally examined same and disclosed his prior involvement; he inquired of the Board Attorney as to the conflict question and finally asked permission from the Board Attorney and the Board itself before making any comments. The Respondent restricted his comments to the historical background of the ordinance in question. He did not offer his opinion; he did not urge or even suggest to the board they make any decision; his appearance was brief; he did not have any interest in the outcome.

These facts and circumstance show, once again, why the appearance of impropriety rule was addressed and no longer part of the RPC.

"For the foregoing reasons, we hold that the "appearance of impropriety" standard no longer retains any continued validity in respect of attorney discipline."

Opinion 697, 188 N.J. 549, 567-568; and FNS; 911 A.2d. 51 (2006).

As there was insufficient, in fact, no evidence offered to show that Respondent was "representing" another client which created an actual conflict - Respondent did not run a "substantial risk" that his appearance before the Board of Adjustment on May 25, 2005 would limit his ability to provide either the public entity or his client independent advice or diligent, competent representation.

V. DETERMINATION

The Panel has carefully considered and reviewed the testimony in evidence, examined the relationship between all of the parties and has concluded that the Respondent's conduct does not constitute unethical conduct. There was insufficient evidence to show by clear and convincing proof that Respondent had an actual conflict of interest with any party. There was no evidence proffered to show that Respondent's conduct was, in any way, an attempt to manipulate the Board's decision or in any way to interfere with the Board's independent operation. For these reasons, the Hearing Panel agrees unanimously that Respondent, Elias Abilheira did not commit an ethical violation and the matter should be dismissed.

VI. PANEL DECISION

Michael K.W. Nolan, Esq. - Dismissal

Debra Himber, Esq. - Dismissal

Robert O'Brien - Dismissal

The Hearing Panel's decision is unanimous.

Respectfully Submitted,

DISTRICT IIIA ETHICS COMMITTEE

By /s/ Michael K.W. Nolan, Esq. Panel Chair

DATE: May 17, 2007