



By CLAIRE PAPANASTASIOU

Why are James L. Rudolph and Kenneth A. Sweder smiling?

Not that long ago the two Boston attorneys could not — and would not — see eye-to-eye. But today, they are in agreement — or at least as much as they can be after 2 1/2 years of bitter — and sometimes very public — negotiations involving the New England restaurant dynasty of Legal Sea Foods, Inc.

Those nasty days, however, are over. The family feud that made for great fodder in the Boston dailies is legal history, thanks to an out-of-court settlement with undisclosed specifics. Sweder and Rudolph are not talking about the details of the case. However, when a lawyer has a case like this one, it's hard not to want to talk about what went on behind the scenes.

"At times it was hard," reflects Rudolph, who represented Marc D. Berkowitz, who filed suit in July 1995 against his father, mother and brother over alleged business contract breaches involving the multi-million dollar restaurant enterprise.

"There were a lot of heated exchanges and letters going back and forth expressing our differences," says Rudolph, a partner at Gargill Sassoon & Rudolph. "But when we worked out a settlement, we worked cooperatively."

Sweder — the attorney for Legal Sea Foods — agrees, sharing Rudolph's sentiment that he's delighted the highly publicized ordeal is behind him.

"I am very pleased that the Berkowitz family was able to solve it," says Sweder. "Carrying the case through trial would have diminished any chance they would have had to establish a relationship with Marc Berkowitz."

### Family Affair

Sordid family details aside, the Legal Sea Foods case was destined to receive heightened media attention because it is a such a New England institution. Add millions of dollars into the mix as well as a full-blown sibling rivalry and allegations of questionable parental acts, and the ingredients are there for a volatile situation.

"This case was an extraordinary one with respect to its intensity in the personal nature of the allegations," says Sweder, chairman of the litigation department at Boston's Stroock & Stroock & Lavan.

But attorneys who represent family businesses, like Sweder and Rudolph, expect such tension. Both agree that the only element in this case that differs from others was the notoriety of the Berkowitz family. Other than that, it was, in many ways, just a typical family business affair gone sour.

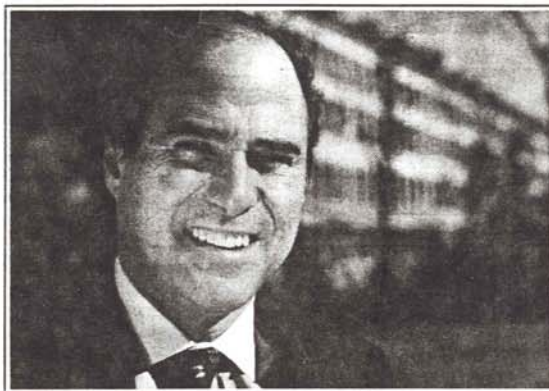
At the core, the case was about a business deal gone bad. Marc Berkowitz, who claimed that he was fired after his father named his brother Roger to head the chain, sued for breach of contract, infliction of emotional distress and breach of fiduciary duties.

"Unfortunately it happens this way all the time," says Rudolph of more obscure family-business cases.

The Legal case will remembered for its family drama — and not, however, for any earth-shattering precedent, although both lawyers note interesting legal points in the ordeal.

The family's celebrity status and apparent unhealthy and well-publicized dynamic didn't help in keeping the case from the media

# Two Boston Attorneys Make 'Legal' History In Settling Family Feud



JAMES L. RUDOLPH

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glare. Articles in the Boston daily press as well as Boston magazine published virtually every secret the family had to offer. It was not pretty for the family — nor for the lawyers involved.

"It was difficult to tread the line between reacting to claims that were being made and not wanting the family's problems to be set forth over the wire," says Sweder, adding that the litigator side of him secretly wished for a trial. "There is a side of the trial lawyer who would like to disprove some of the claims that were being made against my client, but I certainly encouraged and did everything possible to settle this case."

As for Rudolph, he's pleased that his client received vindication.

"Marc is happy that the settlement gives him that kind of validation," says Rudolph, who handled the case with partner James S. Singer and associate Gus Del Puerto.

Nonetheless, it was a tough case as far as emotions, and both lawyers managed to maintain their objectivity to the best of their ability. But even today — months after the settlement in January on the eve of the trial — both counsel seem gun shy, hedging their words when asked about the "other side."

But all is well that ends well, say Sweder and Rudolph, who credit each other and a certain Superior Court judge, Margot Botsford, for settling the feud.

### Judicial Intervention

The case was specially assigned for trial last year to Botsford, who at the request of Sweder scheduled a hearing for reconsideration of motions for summary judgment which were denied by Middlesex Superior Court Judge Sandra Hamlin. After deciding to hear Sweder's motions, Botsford also picked a trial date of Jan. 6. On Jan. 7, The Boston Globe reported a settlement in the Berkowitz case.

The motion hearing in December proved invaluable in that it gave both sides a taste of what a trial would be like. But more important, it also gave the parties plenty to think about.

"[Judge Botsford] led me to believe and [Sweder] to believe that we didn't know how she would rule on the motions," recalls Rudolph. "She made both clients realize that there was nothing guaranteed at trial."

Botsford then suggested the parties go see a mediator — again. The first go-round had been early on in the game with former Superior Court Judge Samuel Adams.

Photos by Carol Lundeen



KENNETH A. SWEDER

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investigating one of its own.

A special litigation committee was formed in the Legal case, and a confidential report was issued, notes Sweder, adding that Botsford never did rule on the admissibility of the report, which he deemed a valuable tool.

"This was a case that clearly had a need for a special litigation committee," adds Sweder, stressing that "it is a procedure that should be used to a greater extent" in Massachusetts.

### A Time To Heal

After a two-week mediation with Sugarman, the parties agreed to an out-of-court — and very private — settlement.

Under the terms disclosed in a press release, the civil suit in Middlesex County Superior Court was dismissed with prejudice and Marc Berkowitz, who once owned 26 percent stock in Legal, will not hold a position nor have any financial or other ownership interest in Legal Sea Foods, Inc.

And while there is speculation from Rudolph that Legal just wanted to cut its fiscal losses, Sweder says that the reasons for the settlement have nothing to do with money.

"Legal Sea Foods and the family wanted to settle this case because they wanted to do so based on the familial relationship and to keep from being severed forever," says Sweder, adding that Legal is fiscally sound. "And I think they deserve a lot of credit." **MLW**

"I think Sam did a great job, but neither of the parties were ready," notes Rudolph.

This time the parties would meet with former Suffolk Law School dean Paul R. Sugarman, and they were primed, say Rudolph and Sweder, noting that a concrete trial date helped fuel negotiations.

"It was a question of timing," says Sweder of the mediation's success, crediting Botsford for the execution of the case. "Setting the trial date and hearing the motions [to dismiss] engendered that dose of reality we were looking for all along."

### Legally Speaking

Lost in all the gossip hubbub were some interesting legal issues — in addition to the judicial strategy, say the lawyers. Chief among the legal novelties of the case was the use of the special litigation committees, which both Sweder and Rudolph agree are not frequently used in Massachusetts corporate actions.

Used in derivative claims, special litigation committees are appointed by the board of directors of the defendant company to investigate and report upon claims alleged against the corporation.

"Courts have found that directors are disqualified from determining what is in the best interest of a corporation if they are the ones being charged with some kind of dereliction of duty," explains Sweder, noting that the board appoints an independent director to investigate the claim. "But if you have someone on the board who is not being charged, then the board still maintains its power in determining what is in the corporation's best interests, and the courts respect the decision of the [independent director]."

Not surprisingly, Rudolph disagrees. "It's the fox guarding the chicken coop," says Rudolph, citing a conflict of interest by corporate directors charged with the duty of