Supreme Court of New Jersey
Disciplinary Review Board
Docket No. DRB 19-266
District Docket No. XIV-2010-0485E

In the Matter of

John J. Robertelli

An Attorney at Law

Dissent

Decided: April 30, 2020

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

Back in 2007-2008 when the events in this case occurred, Facebook, begun as a tool for college students to communicate with each other, was in its infancy. Indeed, until the end of 2006 one needed an "edu" address to access Facebook at all. Moreover, at the time the events here occurred, no ethics authority in any state had addressed the issue raised here, that is, whether it violates the RPCs to "friend" someone when that person's Facebook information is limited or non-public. Thus, Facebook and its methodologies were not nearly

as familiar to most of the public a decade ago as today. Because extensive testimony showed that respondent lacked knowledge about Facebook and the kind of contacts, if any, needed to access Facebook data, and because the record also reflects significant lapses or changes in the memory of witnesses over time leading to conflicting evidence, we find that there is not clear and convincing evidence of any ethics violation by respondent and would dismiss this complaint.

We do agree with the majority that if the same behavior engaged in by respondent occurred today, it would violate RPC 4.2 (communicating with a represented party) and RPC 5.3 (failure to supervise a nonlawyer). We also agree with the majority that it would be advisable for the Court to promulgate guidance and standards for the bar regarding the use of social media to communicate with represented parties. But we do not find clear and convincing evidence that back in 2008, over a decade ago, respondent (or indeed most attorneys) was familiar with Facebook, knew about its various privacy settings and had knowledge sufficient to show that he intentionally violated any RPC.

We start by noting the Court's own words when it reviewed an issue in this case unrelated to the instant one, that is, whether the Director of the Office of Attorney Ethics (OAE) had the authority to docket a grievance once a District Ethics Committee declines to do so. In deciding that the Director had such authority, thereby moving this ethics grievance to a hearing before a special

master (SM), the Court suggested that the ethics issue presented was "an important, novel issue as to which there is little guidance." The Court stated, "[t]his matter presents a novel ethical issue: whether an attorney can direct someone to "friend" an adverse, represented party on Facebook and gather information about the person that is not otherwise available to the public. No reported case law in our State addresses the question." Robertelli v. New Jersey Office of Atty. Ethics, 224 N.J. 470, 487 (2016) (emphasis added). The lack of guidance on this issue is also reflected in the fact that our consideration of this issue has resulted in four opinions (a majority and three dissents) reaching separate conclusions regarding how the applicable Rules of Professional Conduct should be applied on these facts.

We also think it noteworthy that Judge Rachelle Harz, the trial judge hearing the underlying case in which the Facebook information was used, refused to bar that evidence on the grounds that it was obtained by violating the RPCs and did not file any ethics complaint against respondent, although plaintiff's lawyer filed a motion in 2009 asking her to refer respondent to ethics authorities.

And it is worth mentioning that under our case law, an attorney's actions are evaluated based on the ethics rules that are in effect when the questionable

conduct occurs. See In re Yaccarino, 101 N.J. 342, 384 n.14 (1985) and In re Lunetta, 118 N.J. 443, 447 n.1 (1989).

Because the evidence is thoroughly discussed in the majority opinion, we do not repeat most of that discussion in this dissent. We emphasize only a few facts that are undisputed: (1) as the SM found, respondent's paralegal, Valentina Cordoba, who accessed the Facebook page to obtain information about the plaintiff, Dennis Hernandez, did not explain to respondent the various privacy settings on Facebook or explain to him how the settings on that account changed at some point from public to quasi-private, nor did she clearly explain to him what a "friend" request was. Rather, she "dumbed down" the explanation, telling him that Hernandez's information was now "in another area of the internet" and she could get it by "clicking a button." (2) As the SM also found, respondent himself was technologically unsophisticated. He testified that in 2008, he didn't even use email very much; rather he usually communicated with his staff in person or by telephone, and relied heavily on his staff for use of technology. He never had a Facebook page, even today. (3) Both Cordoba and respondent testified that respondent never directed Cordoba to contact Hernandez or send any kind of message to him.

In this case, the OAE seeks to discipline an attorney with a thirty-year spotless disciplinary history and an outstanding reputation for integrity and good

character based on "a novel ethical issue" that "[n]o reported case law in our State [has] addresse[d]." Robertelli, 224 N.J. at 487. Indeed, the majority's opinion (at p. 32) acknowledges that this issue regarding "the intersection of professional ethics and the modern world of social media" is "novel," and that all the ethics opinions from around the country on this issue concerning social media were written after the events in this case occurred, i.e., after 2008. Accordingly, in light of the novelty of this issue at that time as pronounced by the Court in its Robertelli opinion and in the majority opinion itself, any determination that respondent's conduct violated the RPCs should, in the interest of fairness, be applied prospectively only.

The imposition of discipline under these circumstances is, in our view, particularly harsh given the length of time that has passed since the conduct in question. When there is a decade's long delay as here, a loss of records and evidence necessary for a respondent's defense is likely to occur, the memory of witnesses will be subject to naturally occurring vicissitudes making them less reliable, and a respondent's career and reputation will be subject to over-long painful disruption, as described by this respondent.

Given the conflicting testimony, the changed recollections of witnesses of key facts over the many years of this pending investigation, Hernandez's deletion of his Facebook page at the heart of this case, and the flimsy, almost

non-existent evidence that respondent had meaningful knowledge of the workings of an embryonic Facebook in 2008, we do not find clear and convincing evidence that respondent violated any RPC.

Surely, this is not a respondent from whom the public needs protection. The findings of the special master, who had the opportunity to observe the testimony and evaluate the credibility of the witnesses who were testifying about events that had occurred many years before, support a dismissal of the charges and we are not inclined, on this record, to second guess those conclusions to reach a different result.

Like the special master, we would dismiss this complaint and leave it to the Court to make it clear that, going forward, conduct of this type will subject an attorney to discipline.

Disciplinary Review Board
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