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.

This disciplinary matter directly implicates the extent to which a defense counsel may utilize inexpensive methods of investigation to secure non-confidential information relevant to establishing the potentially fraudulent nature of a claim. As a corollary, this Board must also decide whether the ethics rules leave an attorney and his client at the mercy of an adverse party's non-production of discoverable evidence through either a failure to produce, or

deliberate decision to conceal, that information.[1] For the reasons discussed below, I dissent from the majority decision and vote to affirm the dismissal of the ethics claims against respondent.

In considering this issue, it is extremely important to identify what this matter does NOT involve. This matter does NOT involve:

- access to a communication between the personal injury plaintiff and his counsel;
- access to communication treated by the personal injury plaintiff as personal or confidential; to the contrary, it involved a communication shared on Facebook with over 600 "friends," most of whom the plaintiff admitted he did not even know, notwithstanding the claim that his page was supposedly "private;"
- access to a relevant communication made BY the plaintiff (as opposed to information actually posted by a third party, if plaintiff's testimony is to be believed); or
- a communication by the respondent's paralegal that mentioned or inquired about 1) the incident underlying the plaintiff's claims, 2) any damages or injury sustained, or 3) the general health of the plaintiff.
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It is also important that respondent's paralegal played no role in inducing the posting of the information suggesting plaintiff's injury claim may have been

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[1] Respondent's Exhibit 6 in the ethics hearing before the Special Master included a certification submitted to the trial court in the underlying personal injury action identifying innumerable claimed instances where the plaintiff and his counsel had failed to produce, or deliberately concealed, factual information requested in discovery. Included among this list is a claim that plaintiff had deliberately lied in his deposition about the existence of a video showing him wrestling with his brother.

I draw no conclusions about the conduct of plaintiff or his counsel here. Nevertheless, respondent's mindset about plaintiff's discovery production helps illuminate the ethics issues raised in this matter.

fraudulent. She merely viewed the posted information along with another 600 (or more) persons.

This matter DOES involve purely factual information that could have, and possibly should have, been received by respondent in discovery as part of the truth-seeking function of the adversarial process.[2]

Here, defense counsel sought to use inexpensive investigative techniques to test the bona fides of the plaintiff's claims. In doing so, respondent's paralegal did not attempt to 1) secure access to attorney-client communications, 2) interface with the plaintiff in a manner that undermined the attorney-client relationship, or 3) encourage the plaintiff to make an admission or disclosure.

Simply put, respondent did not cause plaintiff to say or do anything he would not have otherwise said or done, and hence did not undermine the attorney-client relationship between plaintiff and his counsel.

No principle of justice supports the notion that an attorney should have LESS access to relevant facts and information otherwise freely and routinely available for the asking to the rest of the world (or at least a substantial portion

[2] During the underlying hearing, plaintiff claimed that the video captured an interaction with his brother prior to the incident causing his injuries. It is worth noting that the video was posted a full year AFTER the filing of the complaint, and eighteen months after the alleged injuries. Given the strong financial incentives involved, there would have been more than adequate grounds for respondent and his client to desire both an opportunity to secure evidence such as the video, and to test the veracity of the denial of relevance by plaintiff and his counsel.

of it). I therefore vote to affirm dismissal of the ethics charges against the respondent by the Special Ethics Master.[3]

I. RPC 4.2

The relevant portion of RPC 4.2 provides:

> In representing a client, a lawyer shall not communicate **about the subject of the representation** with a person the lawyer knows, or by the exercise of reasonable diligence should know, to be represented by another lawyer in the matter, . . . [emphasis added]

There is little dispute about the actual content of the communication between respondent's paralegal and the plaintiff. Those communications were, at best, minimal and none involved either the pending litigation, the underlying incident, or plaintiff's alleged damages.

According to respondent's paralegal, she sent the plaintiff a message stating that "he looked like her favorite hockey player." He allegedly responded that "he hoped that was a good thing." She testified that she then received an invitation to become his friend. The plaintiff, by contrast, testified that the friend request originated with her. No further direct communication between them took place. She thereafter joined the 600 other persons with whom the plaintiff was

[3] Further, many of the facts upon which the majority based its conclusion involve a hearing record that often conflicted or had major gaps. The majority's exercise of de novo fact-finding, contrary to the findings of the Special Master, in a hearing that post-dated the events in question by a decade, seems an anathema to the "clear and convincing" standard of proof. I, therefore, also concur in the dissent of Members Singer and Boyer as to this point.

more than happy to discuss details of his life in public, many of whom were complete strangers to plaintiff.

Of course, the issue of whether plaintiff did or did not look like a hockey player, much less the paralegal's favorite hockey player, was not an issue in the underlying personal injury action. A fortiori, this issue of resemblance also had nothing to do with plaintiff's retention of, and relationship with, his counsel.

This communication therefore did not implicate the most basic requirement of RPC 4.2, a communication concerning the "subject" of the representation.

The majority decision side-steps this most basic element of an RPC 4.2 violation. It presumes satisfaction of this element merely because respondent's agent later received access to a potentially useful video posted by a third party (when it was also made available to 600 other people with no confidential relationship to plaintiff or his counsel).

Absent prior, established authority to the contrary, the ethical propriety of respondent's conduct under RPC 4.2 must therefore be evaluated by the plain language of the rule; that is, whether the actual communication at issue was directed to the "subject" of the representation.[4] Here, the communication did not

[4] For example, if the paralegal later exchanged messages directly with the plaintiff designed to exact an admission relating to his physical condition, then that subsequent communication would clearly implicate RPC 4.2. But that simply did not happen here.

relate to the subject of the lawsuit, and therefore did not satisfy the first element of a violation under RPC 4.2.

By imposing discipline through an interpretation of RPC 4.2 that is not fairly discernable from either the language itself, or from prior decisions or ethics opinions, the majority arguably violates the respondent's due process rights. See Kevin H. Michels, New Jersey Attorney Ethics, §43:3-2 at 1094 (2009 ed.) (citing numerous cases applying interpretation prospectively due to vagueness).

Moreover, the history of RPC 4.2 does not support an expansive application that would make ANY contact by an attorney's agent under ALL circumstances a violation of the rule.

New Jersey initially adopted RPC 4.2 in the same form as that promulgated by the American Bar Association.[5] Comment 1 to the ABA's version of RPC 4.2 identified its purpose as threefold:

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[5] RPC 4.2, as adopted by the American Bar Association, provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

In 2004, the Supreme Court of New Jersey adopted amendments to RPC 4.2 to resolve questions about its scope, particularly as it applied to former employees of a corporation, as addressed in ACPE 668 and in In re Opinion 668 of the Advisory Committee on Professional Ethics, 134 N.J. 294 (1993). The Court's review stemmed from the explosion of environmental

> This Rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible [1] overreaching by other lawyers who are participating in the matter, [2] interference by those lawyers with the client-lawyer relationship and [3] the uncounselled disclosure of information relating to the representation. [numbering added.][6]

This articulation of the Rule's purpose does not support the notion that RPC 4.2 was meant to preclude investigative efforts outside the formal discovery process, or to shield erstwhile public information to come into the hands of adverse counsel.

Rather, the purpose was to avoid disrupting the attorney-client relationship by forbidding an adverse counsel to insert a wedge between the two. Neil S. Sullivan v. Medco, 257 N.J. Super. 155, 157 (App. Div. 1992). Indeed, the origins of the rule suggest that it derived from a sense of professional courtesy to a fellow tradesman, rather than a rule of ethics.[7]

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insurance coverage litigation. Corporate polluters attempted to create roadblocks to the informal investigation of their historical corporate practices by contending that all current and former employees were represented by corporate counsel and could only be questioned through expensive and time-consuming depositions. In doing so, the Court limited the use of RPC 4.2 as a means to shield discovery of damaging evidence by limiting its application to a corporation's "litigation control group."

[6] RPC 4.2 was recommended for adoption in New Jersey without comment by the Debevoise Committee and promulgated by the New Jersey Supreme Court in 1983. New Jersey adopted verbatim the language of ABA Model Rule 4.2, but declined to adopt the Comments.

[7] A leading commentator whose treatise on legal ethics is cited in the preface to the ABA Model Code, stated that one of the general obligations of an attorney is not to steal another attorney's clients. H. Drinker, Legal Ethics at 190 (1953). A more recent article has posited that counsel

The view that the rule shields a represented client from improper approaches is a relatively modern development. Wright by Wright v. Group Health Hospital, 103 Wash. 2d 192, 691 P.2d 564 (1984); Note, DR 7-104 , 61 Minn. L. Rev. at 1010. The rule now ensures that a client has the benefit of counsel before speaking about, or negotiating over, the pending lawsuit or transaction. It does not grant adverse counsel a right to shield facts or information otherwise available to the general public for the asking.

The rule's reach has therefore always been tempered by countervailing interests; namely, an attorney's responsibility to his or her own client to conduct a thorough investigation of the facts of a case. See Geoffrey C. Hazard, Jr. & Dana Remus Irwin, Towards a Revised 4.2 No-Contact Rule, 60 Hastings L. J. 797, 800 (2009). An overly formal application of the rule, beyond the core function of protecting attorney-client communications and relationships, which supports foreclosing access to otherwise discoverable communications and information would thereby "inhibit[] the search for truth." Id. at 802-03.

For this reason, the majority's analysis of Apple Corps., Ltd v. Int'l Collectors Society, 15 F. Supp. 2d 456 (D.N.J. 1998) misses the mark. In that

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should be invited to any interactions with his client to safeguard against pressure being brought to bear on the client to seek a compromise of his attorney's fees or to seek new counsel. Note, DR 7-104 of the Code of Professional Responsibility Applied to the Government "Party," 61 Minn. L. Rev. 1007, 1010 (1977).

case, investigators posing as shoppers contacted defendant to establish non-compliance with a consent decree carefully delimiting the manner in which certain Beatles memorabilia could be marketed.

Unlike here, there was no question that the communication in issue directly and deliberately involved the very subject of the consent decree for which the defendant had ongoing representation. Nevertheless, in declining to find a violation of RPC 4.2, the court observed that the defendant's sales agents contacted by the investigators were lower-level corporate employees, outside of the "litigation control group" to whom the rule applied. Id. at 473.

But this fact did not serve as the only rationale for the court's decision. The court also observed that the contacts at issue did not undermine the attorney-client relationship by subjecting the corporate entity to unfair manipulation that could have been avoided with the advice of counsel. The court reasoned, "[i]t is not the purpose of [R.P.C. 4.2] to protect a corporate party from the revelation of prejudicial facts." Id. at 474. Indeed, the court suggested a potentially different outcome if the investigators had inquired, even of these low-level employees, about instructions received in connection with the consent order's limitation on the marketing of memorabilia. Id. at 474.

Under this rationale, it makes no sense to find a violation of RPC 4.2 here, where the actual communication under review did not even remotely touch and

concern the subject of the litigation. Nothing about the limited interaction and communication by respondent's paralegal, or the subsequent discovery of the potentially damaging video, placed in the public domain by a non-party, implicated an attorney-client communication. Extending RPC 4.2 to the circumstances here would only have served to permit an adverse party or his counsel to conceal that which they should have produced in discovery in the first place.

The Apple Corps. decision acknowledged plaintiff's need to engage in undercover work under the direction of counsel in order to test the defendant's compliance with the consent decree. RPC 4.2 did not prohibit the communication because the investigators' contact only omitted disclosure of their purpose in initiating contact.

Given this rationale, the fact that the interaction involved low-level corporate employees cannot be the determinative fact. No sound principle could support the notion that the defendant would have gotten a free pass at violating the consent decree unchecked, if the marketing calls were directed to the CEO or a sole proprietorship operating outside the corporate form. Posing as a member of the general public, while engaging in no substantive conversations about the lawsuit between the parties, does not trigger a violation of RPC 4.2. Id. at 474.

Thus, this matter before the Board is materially indistinguishable from Apple Corps.

II. RPC 8.4(c)

At page twenty-five of its decision, the majority acknowledged the authority in Apple Corps. permitting the use of undercover investigators to seek evidence of wrongdoing by concealing their identity and purposes, quoting at length:

> undercover agents in criminal cases and discrimination testers in civil cases, acting under the direction of lawyers, customarily dissemble as to their identities or purposes to gather evidence of wrongdoing. This conduct has not been condemned on ethical grounds by courts, ethics committees or grievance committees. This limited use of deception, to learn about ongoing acts of wrongdoing, is also accepted outside the area of criminal or civil-rights law enforcement. The prevailing understanding in the legal profession is that a public or private lawyer's use of an undercover investigator to detect ongoing violations of the law is not ethically proscribed, especially where it would be difficult to discover the violations by other means.
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> Id. at 475 (internal citations omitted).

The majority decision avoided the import of this analysis here by transitioning back to that court's RPC 4.2 discussion of the litigation control group. The majority, thus, infers that the court's rejection of an RPC 8.4(c) violation rested on similar grounds. This inference is not supported by actual analysis of RPC 8.4(c) in Apple Corps.

In its RPC 8.4(c) analysis, the Apple Corps. court never touched upon whether a misleading statement was directed to a low-level employee or a member of the litigation control group. Id. at 475-76. The court's discussion addressed solely whether an investigator assigned to gather evidence may conceal his or her identity for the purpose of gathering needed and otherwise unavailable evidence.

In rejecting the applicability of the rule, the Apple Corps. court reasoned that RPC 8.4(c) was not implicated because it did not involve a lawyer "acting in a lawyerly capacity." Id. at 475, citing David B. Isbell & Lucantonia N. Salvi, Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under the Model Rules of Professional Conduct, 8 Geo. J. Legal Ethics 791, 816 (1995).

The Apple Corps. court therefore noted that counsel's use of persons acting under cover was often "indispensable" and proper for obtaining evidence of misconduct. It cited with approval examples of an attorney's agent pretending to be a prospective tenant to uncover housing discrimination, or as a prospective employee to uncover employment discrimination. Id. at 475. Nothing in the Apple Corps. decision remotely suggests that a concealed identity would have been barred by RPC 8.4(c) if the evidence were obtained from a corporate

executive rather than a low-level employee, if the landlord violator had owned the apartment complex in an individual capacity, or if a discriminating employer operated as a sole proprietorship.

Neither does the rationale support the notion that this exception to RPC 8.4(c) applies only when the conduct at issue relates to the investigation of criminal conduct, or the type of conduct violating the public policy of the state such as the discrimination laws.[8]

To the contrary, the very decision in Apple Corps. involved the use of an investigator acting under concealment to promote a commercial financial interest via enforcement of a contract between the parties in the form of a consent order. In that regard, such pretexting has often been utilized and accepted to secure information promoting the private financial interests of persons and entities.[9]

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[8] Undoubtedly, one may argue that the investigation of potential criminal activity serves a beneficial public purpose warranting a different standard for prosecutors and similar government lawyers. A plausible contrary view, however, would be that the potential denial of a person's liberty calls for a higher, rather than a lower, standard of honesty and integrity by government counsel. Regardless of which policy contention ought to prevail, there is simply no basis for creating a retroactive distinction for this type of legal practice – entirely unsupported by the actual and universal language of RPC 8.4(c) and RPC 4.2, without the PRIOR deliberate consideration by the Supreme Court of New Jersey and promulgation of such a standard for prospective application.

[9] For other decisions in which the practice of "pretexting" served as the source of necessary evidence, See, e.g., Gidatex, S.r.L. v. Campaniello Imports, Ltd., 82 F. Supp. 2d 136, 139 (S.D.N.Y. 2000); A.V. By Versace, Inc. v. Gianni Versace, S.p.A, 87 F. Supp. 2d 281 (S.D.N.Y. 2000); Design Tex Group, Inc. v. U.S. Vinyl Mfg. Corp., No. 04 Civ. 5002, 2005 WL 357125.

There is no obvious reason why the financial interests of the municipality and its insurer in the matter currently before us are less worthy of a similar, thorough investigative effort. The concealing of her identity by respondent's paralegal, in an effort to discover evidence believed to demonstrate that the plaintiff's claim may be fraudulent, is therefore indistinguishable from Apple Corps. and similar decisions.

Nothing in the language of RPC 8.4 (or RPC 4.2, for that matter) supports the notion that the ethics rules vary depending upon the type of practice the attorney is engaged in. If the Court meant to have starkly different rules for different types of practitioners and practice areas, it would have articulated those distinctions in its formulation of the rules.

The lack of materiality[10] of the paralegal's statement – on the banal issue of whether the plaintiff resembled a particular hockey player – in order to conceal her identity and purpose, precludes the respondent's investigative efforts from entering into the realm of an RPC 8.4(c) violation. This charge should be dismissed as well.

(S.D.N.Y. Feb. 14, 2005); Chloe v. Designersimports.com USA, Inc., No. 07-CV-1791, 2009 WL 1227927 (S.D.N.Y. Apr. 30, 2009).

[10] Accord, Apple Corps., 15 F. Supp. 2d at 475-76.

III. RPC 5.3

The finding of a violation under RPC 4.2 and RPC 8.4(c) served as a predicate for finding a violation under RPC 5.3. Accordingly, the absence of a violation under either of those rules militates in favor of dismissing the findings of a violation under RPC 5.3 as well.

CONCLUSION

The goal of the adversary system is the seeking of truth through the diligent and thorough work of advocates charged with advancing the interests of their clients. That work is, of course, circumscribed by certain rules of conduct necessary to protect the public and to instill confidence in the adjudicative system for resolving disputes.

The establishment of a formal discovery process largely serves this function of truth-seeking by imposing disclosure obligations upon parties to a dispute. However, formal discovery has never served as the sole method for seeking information bringing the truth to light. In the context of RPC 4.2 and RPC 8.4(c), courts have recognized that the formality of the discovery process can be unnecessarily slow and expensive – and often futile when not conducted in good faith. These limitations are partly overcome through more informal methods of gathering facts and information. Such investigative work by an

attorney can also serve as a potential check against manipulation over, and non-compliance with, by a party or counsel in order to promote their personal financial interests.

I do not doubt that gaining access through the use of social media can, under other facts, trigger a violation of RPC 4.2.[11] Here, however, the majority would impose discipline upon respondent for obtaining information that the plaintiff or, more particularly, a friend of the plaintiff, effectively posted for the world to see. Such information is unrelated to the attorney-client relationship.

Under these circumstances, the majority decision would allow RPC 4.2 and RPC 8.4(c) to function as a defensive weapon inhibiting the truth-seeking process by making respondent the ONLY person shielded from access to readily available non-confidential information. The purpose and language of these rules, as currently formulated, do not compel this result.

Disciplinary Review Board
Peter Petrou, Esquire

By: _____
For: Ellen A. Brodsky
Chief Counsel

[11] For example, if an attorney disguised his identity by pretending to be the adverse party's own attorney, that would seemingly create interference with the attorney-client relationship that RPC 4.2 was meant to protect.