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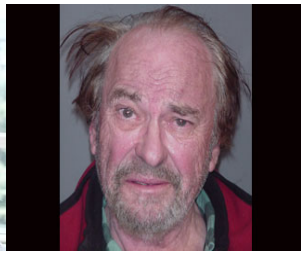

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Lesson Plan

Introduction

R.P.C. 4.2 Communication with Person Represented by Counsel

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, including members of an organization's litigation control group as defined by R.P.C. 1.13, unless the lawyer has the consent of the other lawyer, or is authorized by law or court order to do so, or unless the sole purpose of the communication is to ascertain whether the person is in fact represented. Reasonable diligence shall include, but not be limited to, a specific inquiry of the person as to whether that person is represented by counsel. Nothing in this rule shall, however, preclude a lawyer from counseling or representing a member or former member of an organization's litigation control group who seeks independent legal advice.

Comment: Our Rules of Professional Conduct generally prohibit a lawyer from communicating with another lawyer's client about the subject of the representation without the other lawyer's consent. R.P.C. 4.2. That ethical prohibition applies to any form of communication with a represented party by the adversary lawyer or that lawyer's surrogate, whether in person, by telephone or email, or through social media. Although it is fair game for the adversary lawyer to gather information from the public realm, such as information that a party exposes to the public online, it is not ethical for the lawyer -- through a communication -- to coax, cajole, or charm an adverse represented party into revealing what that person has chosen to keep private.

As to the quantum of discipline, historically, attorneys found guilty of communicating with represented parties have received discipline ranging from an admonition to a censure, depending on the presence of other violations, and the consideration of aggravating and mitigating factors.

Part I

In re Robertelli, 248 N.J. 293(2021)

a) Procedural history

The Robertelli saga spawned a significant disciplinary decision from the Supreme Court in 2016. An initial complaint related to Respondent had been reviewed and dismissed as being without merit by the local District Ethics Committee secretary, a decision that is not subject to appeal. However, the Office of Attorney Ethics took an unhealthy interest in Respondent's case and launched its own investigation. The Respondent sought to stop that investigation on the basis that the local secretary had already dismissed it. However, in Robertelli vs. Office of Attorney Ethics, 224 N.J. 470(2016) the Supreme court ruled that the OAE as plenary authority to investigate and prosecute potential violations of the Rules of Professional Conduct regardless of the actions of the local DEC secretary.

In the ensuing years, the subsequent OAE investigation resulted in a complaint that was tried before a special master, a review by the DRB and a *de novo* determination by the Supreme Court in 2021.

b) Background: A brief history of *Facebook*

Facebook was launched in 2004 to a limited scope of users -- college and university students and later high school students. Not until the latter part of 2006 was *Facebook* membership opened to the general public. In July 2007, *Facebook* had 30 million users worldwide; in August 2008, 100 million users; and as of June 2021, 2.9 billion users.

In 2008, only fifteen percent of lawyers who responded to the American Bar Association's Legal Technology Survey reported personally maintaining a presence on social media. In contrast, by 2020, seventy-seven percent of lawyers reported using social media for professional purposes.

The issue in this attorney disciplinary case is the application of that seemingly clear ethical rule to a time, more than a decade ago, when the workings of a newly established social media platform -- Facebook.com -- were not widely known.

In 2008, *Facebook* -- then in its infancy -- had recently expanded its online constituency from university and high school students to the general public. A *Facebook* user could post information on a profile page open to the general public or, by adjusting the privacy settings, post information in a private domain accessible only to the universe of the user's "friends."

c) Facts of the *Robertelli* case

Respondent represented a public entity and public employee in a personal-injury action brought by Dennis Hernandez. During the course of internet research, Respondent's paralegal forwarded a flattering message to Hernandez, and Hernandez unwittingly granted her "friend" status, giving her access to his personal private information. This fact and the associated information were ultimately revealed during the discovery process, triggering an ethics complaint against Respondent alleging a violation of R.P.C. 4.2 and other rules.

Following three days of hearings, a Special Master, in particular, found that Respondent in 2008 did not have an understanding of *Facebook's* privacy settings or *Facebook*-speak, such as "friending." The Special Master held that the OAE did not prove by clear and convincing evidence that Respondent violated the RPCs and dismissed the charges. This decision was appealed to the Disciplinary Review Board and subsequently to the Supreme Court.

d) Decision by the Supreme Court

1) The proofs did not support a finding by clear and convincing evidence - The Court essentially adopted the factual and credibility findings of the Special Master and ruled that the RPC violations charged against Respondent had not been proved by clear and convincing evidence.

2) A Message to the DRB - In its decision, the DRB had rejected the credibility findings made by the Special Master and had substituted its own judgment. In response, the Supreme Court restated a well-established rule of law (e.g. see State v. LoCurto, 157 N.J. 463(1999)) which vests a degree of deference in the credibility decisions made by a trial-level court. According to the Supreme Court:

> Although we are the final triers of fact in a disciplinary matter, a special master's credibility findings are generally entitled to some level of deference. That is so because, as an appellate court, we are left to survey the landscape of a cold record. We recognize that a special master has "the opportunity to make first-hand credibility judgments about the witnesses who appear[ed] on the stand," and "to assess their believability" based on human factors indiscernible in a transcript: the level of certainty or uncertainty expressed in a vocal response, the degree of eye contact, whether an answer to a question is strained or easily forthcoming, and so many other indicia available only by actual observation of the witness.

3) A message to the New Jersey Bar - Attorneys should know that they may not communicate with a represented party about the subject of the representation -- through social media or in any other manner -- either directly or indirectly without the consent of the party's lawyer. Today, social media is ubiquitous, a common form of communication among members of the public. Attorneys must acquaint themselves with the nature of social media to guide themselves and their non-lawyer staff and agents in the permissible uses of online research. At this point, attorneys cannot take refuge in the defense of ignorance.

[T]here should be no lack of clarity today about the professional strictures guiding attorneys in the use of *Facebook* and other similar social media platforms.

When represented *Facebook* users fix their privacy settings to restrict information to "friends," lawyers cannot attempt to communicate with them to gain access to that information, without the consent of the user's counsel. To be sure, a lawyer litigating a case who -- by whatever means, including through a surrogate -- sends a "friend" request to a represented client does so for one purpose only: to secure information about the subject of the representation, certainly not to strike up a new friendship. Enticing or cajoling the represented client through a message that is intended to elicit a "friend" request that opens the door to the represented client's private *Facebook* page is no different. Both are prohibited forms of conduct under R.P.C. 4.2. When the communication is ethically proscribed, it makes no difference in what medium the message is communicated. The same rule applies to communications in-person or by letter, email, or telephone, or through social media, such as *Facebook.*

[This] is the universal view adopted by jurisdictions that have addressed the issue. What attorneys know or reasonably should know about *Facebook* and other social media today is not a standard that we can impute to Robertelli in 2008 when *Facebook* was in its infancy.
[L]awyers should now know where the ethical lines are drawn. Lawyers must educate themselves about commonly used forms of social media to avoid the scenario that arose in this case. The defense of ignorance will not be a safe haven.

We remind the bar that attorneys are responsible for the conduct of the non-lawyers in their employ or under their direct supervision. R.P.C. 5.3 requires that every attorney "make reasonable efforts to ensure that the" conduct of those non-lawyers "is compatible with [the attorney's own] professional obligations" under the RPCs. R.P.C. 5.3(a), (b). For example, an attorney will be held accountable for the conduct of a non-lawyer if the attorney "orders or ratifies the conduct" that would constitute an ethical violation if committed by the attorney or "knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take reasonable remedial action." R.P.C. 5.3(c)(1), (2). In short, attorneys must make reasonable efforts to ensure that their surrogates -- including investigators or paralegals -- do not communicate with a represented client, without the consent of the client's attorney, to gain access to a private *Facebook* page or private information on a similar social media platform.

See also Apple Corps., Ltd vs. Int'l Collectors Society, 15 F.Supp.2d 456(D.N.J. 1998) (Use of internet to investigate a represented adversary about whether the terms of a consent decree had been violated.)

Part II

Website Content
In re Hyderally, 208 N.J. 453(2011)

a) Background

This ethics proceeding requires the Court to determine whether respondent violated R.P.C. 8.4(c), which prohibits "conduct involving dishonesty, fraud, deceit or misrepresentation," by virtue of his display of the seal of the New Jersey Board on Attorney Certification on his law firm website, notwithstanding the fact that respondent is not a Certified Attorney

b) Facts of the case

In 2005, Respondent asked his cousin, who is a California website designer to create a website for his law practice. The cousin added the New Jersey Attorney Certification seal to respondent's website. The seal, including the language "New Jersey Supreme Court Certified Attorney," appeared on sixteen pages of respondent's website, including the pages containing biographical information about respondent, his associates and his staff, none of whom has been certified in accordance with Rule 1:39. On each page, the seal was placed under a heading entitled "Memberships/Affiliations."

The "New Jersey Supreme Court Certified Attorney" seal remained on respondent's website for more than two years. Respondent testified that during this period, he knew he had a website, but "never went into it with that level of detail to look at the web site, ... to look at that specific seal or see what that seal meant or anything of that nature."

In 2007, the Supreme Court Committee on Attorney Advertising (CAA) received a grievance about respondent's display of the seal. The Committee referred the issue to the Office of Attorney Ethics (OAE) on February 8, 2008. On February 9, 2010, the OAE filed a Complaint charging respondent with violating R.P.C. 8.4(c), which provides that it is professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."

At his hearing, Respondent testified that the seal's presence on his website had been unintentional and inadvertent, that he had no intention of holding himself or his associates out as certified pursuant to Rule 1:39, and that he did not include any reference to attorney certification on his business cards or letterhead. Respondent testified that he did not receive any referral fees from attorneys, as Rule 1:39–6(d) authorizes with respect to certified attorneys. In 2009, he retained a professional website design company to redesign his website, and accordingly terminated his cousin's website design services.

c) Holding

Applying those principles to the case before us, we conclude that there is no clear and convincing evidence demonstrating that respondent either intentionally included the New Jersey Supreme Court Certified Attorney seal, or approved its continued presence, on the website created for him by Mr. Hyderally. Accordingly, there is no basis for a finding, under the applicable standard of proof, that respondent's conduct constituted "dishonesty, fraud, deceit or misrepresentation." R.P.C. 8.4(c). We agree with the DRB's unanimous determination that the complaint against respondent should be dismissed.

d) A Message to the New Jersey Bar

Notwithstanding our decision on the record of this case, we remind the Bar that attorneys are responsible for monitoring the content of all communications with the public—including their websites—to ensure that those communications conform at all times with the Rules of Professional Conduct. No attorney who has not complied with the requirements of Rule 1:39 should display the New Jersey Supreme Court Certified Attorney seal on a website, in other advertising, on letterhead or in any other form of communication, or otherwise state or imply that he or she has been certified pursuant to Rule 1:39. Prospectively, attorneys who are not authorized by Rule 1:39 to utilize the New Jersey Supreme Court Certified Attorney seal, but who display that seal on their websites or in other communication, will be subject to appropriate discipline. Whether a website is created by an outside consultant or developed and maintained by an attorney or his or her staff, all language and design that appears on it should be reviewed.

Members of the Bar may be subject to discipline if their websites or other communications improperly display the seal of the New Jersey Board on Attorney Certification. Attorneys are responsible for monitoring all advertising and other communications with the public to ensure conformity with the Rules of Professional Conduct.