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

Corrected Decision

Argued: November 21, 2019

Decided: April 30, 2020

Steven J. Zweig appeared on behalf of the Office of Attorney Ethics.

Michael S. Stein appeared on behalf of the respondent.

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

This matter was before us as an ethics appeal from a post-hearing dismissal by a special master. We determined to grant the appeal and to schedule the matter for oral argument. The formal ethics complaint charged respondent with having violated RPC 4.2 (communicating with a person represented by counsel); RPC 5.1(b) and (c) (failure to supervise a subordinate lawyer); RPC

5.3(a), (b), and (c) (failure to supervise a nonlawyer assistant); RPC 8.4(a) (violating the RPCs through the acts of another); RPC 8.4(c) (conduct involving dishonesty, fraud, deceit or misrepresentation); and RPC 8.4(d) (conduct prejudicial to the administration of justice).

For the reasons set forth below, we determine to impose an admonition.

Respondent was admitted to the New Jersey bar in 1990 and has no disciplinary history. During the relevant timeframe, he was the managing partner of Rivkin Radler, LLP in Hackensack, New Jersey.

On May 18, 2010, Dennis Hernandez filed a grievance with the District IIB Ethics Committee (DEC), alleging that respondent had contacted him through his Facebook page, despite his known represented status, in violation of the RPCs. Robertelli v. N.J. Office of Attorney Ethics, 224 N.J. 470, 474 (2016). On June 22, 2010, the DEC Secretary informed Hernandez of her determination to decline to docket the grievance, maintaining that the allegations, if proven, would not constitute unethical conduct. Ibid. The Secretary's determination was made pursuant to R. 1:20-3(e)(3), with the agreement of a public member. Ibid.

By letter dated July 30, 2010, Hernandez's attorney, Michael Epstein, requested that the Director of the Office of Attorney Ethics (OAE) review the matter and docket it for a full investigation. Ibid. On November 16, 2011, following an investigation, the OAE filed a formal ethics complaint against

respondent and his associate, Gabriel Adamo.[1] Id. at 475. Subsequently, respondent filed an answer disputing all the allegations of the complaint. Ibid.

Six months later, respondent requested that the OAE withdraw its complaint, contending that R. 1:20-3(e)(6) and New Jersey precedent barred the OAE from proceeding, in light of the DEC Secretary's declination to docket the grievance. The Director denied that request. Ibid.

On September 13, 2012, respondent filed a complaint in the Superior Court of New Jersey, seeking an order declaring that the Director lacked the authority to review the DEC's declination to docket the grievance and enjoining the OAE from pursuing it. Ibid. The Superior Court determined that it lacked the authority to review or enjoin the acts of the OAE. Id. at 476. The Appellate Division affirmed, and the Court granted respondent's petition for certification. Ibid.

The Court held that the OAE has the authority to review a grievance after a declination to docket by a DEC. Id. at 473, 490. The Court also noted that "[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

[1] The allegations against Adamo were dismissed upon the OAE's motion at the close of its case during the ethics hearing before a special master.

reported case law in our State addresses the question." Id. at 487. The Court added that "the Director has the discretion and authority to investigate and prosecute 'any case in which the [Disciplinary Review] Board or the Supreme Court determines the matter should be assigned to the Director.' As a result, even at this stage, the Court could ask the Director to examine the novel and potentially serious ethical issue raised in this case." Id. at 487-88.

After the Court's decision, a special master presided over a three-day hearing. The following facts are derived from the record below.

On October 5, 2007, Hernandez filed a complaint against several public entities in connection with injuries he sustained in the parking lot of the building in which the Borough of Oakland (the Borough) Police Department was located. In November 2007, respondent's law firm was hired to represent the Borough, the police department, and a police sergeant, individually. Hernandez alleged that, while doing push-ups in the station's parking lot, he was struck by the sergeant's police vehicle and, because of his injuries, had lost athletic and academic scholarships. During the investigation into the matter, respondent worked with his associate, Adamo, and a paralegal, Valentina Cordoba.

During the early stages of respondent's investigation into the matter, he received a phone call from a Borough police officer, who informed him that criminal charges had been filed against Hernandez. The charges and resulting

indictment led respondent to believe that there were inconsistencies in Hernandez's tort claim notice. Consequently, respondent asked Cordoba to conduct a general internet search of Hernandez. Cordoba testified that respondent had cautioned her about the level and nature of communication that she was permitted to have with Hernandez. Respondent denied having asked Cordoba to contact Hernandez. Firm billing records show that Cordoba first performed internet research on Hernandez, using Facebook and Myspace, on February 28, 2008.

According to Cordoba's research, during a period in which Hernandez claimed to be permanently disabled and was enrolled in the Pre-Trial Intervention program, he had posted information on Facebook that demonstrated his participation in activities inconsistent with a permanent disability. He also posted x-ray images from the accident and engaged in discussions with others who criticized him for having performed push-ups in the street. Respondent directed Cordoba to continue to monitor Hernandez's social media and to inform respondent if Hernandez discussed the lawsuit.

Respondent testified that, in 2007 and 2008, he had no knowledge of social media beyond an awareness that people were communicating on the internet. He claimed that he had no understanding of the type of information users posted on Facebook; that, in 2007, he had never heard the term "friend

request;" and that he had no knowledge about public or private settings in connection with social media.

Conversely, Cordoba testified that, in 2008 and 2009, she had explained to respondent the concept of friending someone on Facebook. Hernandez's Facebook profile was public when Cordoba first accessed it. At some point in April 2008, she discovered that Hernandez had changed his Facebook profile to private. She testified that she informed respondent of that change, and that he instructed her not to send Hernandez a friend request until he checked with the adjuster. Soon thereafter, respondent told Cordoba to proceed.

According to Cordoba, she explained to respondent that she planned to prompt Hernandez to send her a friend request by sending Hernandez a private message. Respondent then authorized her to send a general message. Cordoba proceeded to send Hernandez a message, telling him that she thought he looked like her favorite hockey player. Hernandez replied that he "hoped that was a good thing." Cordoba stated that Hernandez then sent her a friend request, which she accepted. Cordoba did not respond to his written message. Several months later, on November 4, 2008, Cordoba discovered a video on Hernandez's Facebook page depicting him wrestling with his brother.

In turn, Hernandez testified that his Facebook account always had been private and that, at some point during the litigation, he received a friend request

from Cordoba and had accepted it. He was certain that Cordoba had initiated the request, because she also sent requests to several of his friends. After accepting her request, Hernandez sent her a message asking who she was. In response, Cordoba told him that he looked like her favorite hockey player. There were no other communications between them. Hernandez admitted that, prior to accepting Cordoba's friend request, he had not reviewed her profile or otherwise investigated who she was. He further admitted that he regularly received and accepted friend requests from strangers.[2] Hernandez testified that, when he eventually learned that Cordoba worked for the defendants' attorneys in his lawsuit, he felt that his privacy had been invaded.

Respondent had a different recollection of his communications with Cordoba. He recalled that, at some point prior to finding the video, Cordoba informed him that Hernandez's privacy settings had changed. At the time, however, she did not explain it that way. Rather, she said the information was on a different part of the internet and that one had to "click a button" to get there. Respondent denied that the words "private" or "public" were used when Cordoba discussed Facebook with him, rather, she described the activity as the equivalent of putting a "post-it" or posting something on a "bulletin board."

[2] During this period, Hernandez had over 600 Facebook friends. He denied posting any videos on his profile and maintained that one of his friends had posted the video at the center of this matter.

During his first day of testimony below, respondent recounted that he had told Cordoba to hold off on "clicking the button," until he reported the information to the insurance adjuster. He denies, however, that he was seeking authority from the adjuster to proceed. Subsequently, he directed Cordoba to "click the button and continue to monitor the site."

Nonetheless, during his third day of testimony, respondent recounted a different version of events. He claimed that, when Cordoba approached him about Hernandez having information on a different part of the internet, respondent was writing a brief that was due that day and told Cordoba to hold off and continue to monitor the internet. The next day, after he finished the brief, he instructed Cordoba to "click the button." Respondent, thus, suggested that he was distracted by the deadline of his brief, and, then instructed Cordoba to take no action until the next day, when he could give more attention to the Hernandez matter. Respondent denied having mentioned the insurance adjuster during this conversation, contrary to his prior testimony. Respondent consistently denied that he had instructed Cordoba to contact Hernandez, to misrepresent her identity, or to ask Hernandez any questions.

On March 25, 2009, respondent provided to Epstein, counsel for Hernandez the information obtained from Facebook, including the video. Respondent testified that he always had intended to disclose the information,

believing that it had been obtained properly. In a separate letter sent the same day, respondent notified Epstein of his intention to call Cordoba as a witness, because she is a "friend" on Hernandez's Facebook page. The next day, March 26, 2009, respondent received a letter from Epstein, informing him that the discovery period had ended and, therefore, the Facebook video was inadmissible. Epstein also accused respondent of having obtained the video through improper means and asserted a violation of RPC 4.2. Respondent testified that he became aware via Epstein's letter that Cordoba had accessed Hernandez's "private" Facebook page.

In an e-mail sent to Adamo two days later, March 28, 2009, respondent referenced Epstein's letter, and asked, "I thought you looked into this?" Adamo updated respondent on the status of discovery in the matter and informed him that the caselaw on RPC 4.2 did not address the use of Facebook, much less the propriety of inviting someone to become a "friend." After being pressed to clarify his e-mail to Adamo, respondent admitted that, prior to receiving Epstein's letter on March 26, 2009, he had never directed Adamo to specifically research any RPC 4.2 issues.

Contrary to Cordoba's testimony, respondent testified that it was only after receiving Epstein's letter that he had sought more information about Facebook and had learned, for the first time, that Hernandez had switched his

Facebook account from public to private. He maintained that most of the information that his firm had gathered from Facebook had been obtained while Hernandez's Facebook profile was unrestricted and open to the public. Respondent denied knowledge that Cordoba had initially messaged Hernandez or that Hernandez had sent Cordoba a friend request, claiming he learned those facts after having received Epstein's letter.

In a November 17, 2010 letter to the OAE, however, respondent had acknowledged that Cordoba initially told him that everything on Hernandez's page was public and that, subsequently, she informed him that Hernandez had changed his settings to "semi-private." When confronted with this letter at the hearing, respondent acknowledged that, prior to the November 4, 2008 discovery of the video, he had engaged in a conversation with Cordoba about Hernandez's changing his profile setting to "semi-private." On November 21, 2019, during oral argument before us, counsel for respondent vociferously disputed that respondent made such a concession during his testimony. Nonetheless, upon direct questioning by the special master, respondent clearly stated that, to the best of his recollection, the conversation with Cordoba regarding Hernandez's switch to "semi-private" took place prior to the retrieval of the wrestling video.

At the hearing below, the presenter followed up the special master's questioning in an effort to clarify respondent's answer and his November 17, 2010 letter to the OAE. In that letter, respondent implied that the video was discovered when Hernandez's Facebook profile was open to the public. Respondent did not change his testimony that the video was discovered after the profile was no longer public. Rather, he asserted that the use of the words "private" and "public" were not part of his discussions with Cordoba, and that he used them in his letter to the OAE, based on what he had learned later. In the very next question, however, respondent again acknowledged that Cordoba sought his authorization before she endeavored to access Hernandez's private profile. Then, respondent backtracked and said, "[Cordoba] didn't use those words" in reference to "public" and "semi-private." Respondent repeated this cycle of providing inconsistent statements throughout the record, in both letters to the OAE and during his testimony at the ethics hearing.

Finally, respondent testified that this matter seriously disrupted his life and has been hanging over his head for years. He asserted that, with every hearing, the case was back in the news, usually on the front page of many publications. He testified that, whenever a new article was published, he received calls from attorneys all over the country asking for information or advice. He claimed that his reputation has been damaged, and that this matter

has impacted his ability to engage in fundraising for several charities with which he works. He additionally claimed that, before this ethics grievance arose, he had been in preliminary discussions to become an equity partner at his firm, but that those discussions have never resumed. He stated a belief that the absence of discussion may be connected to the fact that this case is still lingering.

At the outset of his findings of fact and conclusions of law, the special master observed that no documentary records had been preserved or presented in respect of the events of 2008 and 2009 underlying these charges. Further, the special master noted that the testimony of witnesses at the hearing, more than a decade after the events in question, was not wholly consistent with statements they had made contemporaneously with the events. The special master posited that memory issues, combined with the novelty of Facebook during the relevant timeframe and the absence of records, subjected any factual findings to doubt and challenge.

In particular, the special master had serious doubts about the accuracy of much of Cordoba's testimony, not because he found her to be untruthful, but rather, because she was suffering from laryngitis and a severe cold on the day of her testimony. Moreover, her recollection had to be refreshed by memoranda of her statements given to the OAE years earlier. The special master surmised that Cordoba's testimony regarding Facebook was more reflective of what she

had learned in the intervening ten years, rather than what she knew in 2008. Therefore, from his perspective, her present-day interpretation of the conversations she had with respondent years before could not be relied on to meet the OAE's clear and convincing evidence burden of proof.

Nonetheless, the special master determined that, at the time these events arose, respondent was "uninformed, not knowledgeable, and indeed largely ignorant concerning information available on and obtained from the internet." He found that respondent had proceeded under the misimpression that everything Hernandez had posted on Facebook was available for public viewing, and that the material found by Cordoba was akin to material that could be posted on a bulletin board. The special master, thus, determined that respondent did not understand, at the time, that his instruction to Cordoba amounted to directing her to communicate with an adverse, represented party.

The special master considered the differing accounts of the conversations in respect of respondent's instruction to Cordoba after he learned that Hernandez had changed his Facebook settings. The special master determined that the conversations conveyed respondent's lack of knowledge or understanding about what Cordoba needed to do to access Hernandez's information, resulting in Cordoba's giving respondent "as little as she thought he would understand in terms he could comprehend." In other words, she "dumbed it down."

Ultimately, the special master concluded that Cordoba had not fully explained to respondent the process of what it meant to "friend" someone, and that respondent had not directed Cordoba to "friend" Hernandez or to communicate with him, "as communication would have been reasonably understood by respondent" at that time. The special master found that respondent had not been told that Hernandez's privacy settings had been modified. Rather, his understanding, at that time, was that Hernandez's information could still be accessed, by clicking a button or looking at a different area of the internet.

After a lengthy discourse on applicable opinions and rules from other jurisdictions regarding the issues in this matter, the special master addressed each of the specific allegations of the complaint. As to RPC 4.2, the special master determined that respondent reasonably believed that he had not been communicating with a party, but rather had been "'fishing' in publicly available information . . . ." Although respondent's belief was incorrect, the special master concluded that, given his lack of knowledge regarding the internet and social media, coupled with the dearth of guiding legal and ethics standards at the time, respondent's conduct did not rise to the level of an ethics infraction. The special master surmised that today, however, "generally understood proper ethical

conduct, would forbid what happened in this case." Thus, the special master found that it would be unfair to retroactively impose a new rule on respondent.

Next, the special master found that a violation of RPC 8.4(c) requires the intent to commit wrongdoing, and that such an intent was not proven in this case. Pointing to opinions from other jurisdictions that would find the conduct here to be deceitful, the special master observed that those decisions were issued after the conduct occurred in this matter. He opined that the standard today should be that friending someone, without full disclosure as to purpose and identity, is unethical. Therefore, if the conduct were to occur today, he would find a violation of RPC 8.4(c).

Further, the special master dismissed the alleged violation of RPC 8.4(d), finding that "arguing a novel legal issue" is not unethical, and that the OAE's argument that respondent violated this Rule lacks "specificity and context." In any event, the special master found the charge to be without merit, because it was based on cross-motions filed in the underlying matter, disputing the admissibility of the Facebook issue. The special master also dismissed the allegation that respondent violated RPC 5.1(b) and (c), because the charges against respondent's associate, Adamo, had been dismissed. Similarly, the special master dismissed the charges that respondent violated RPC 5.3(a), (b)

and (c) and RPC 8.4(a), reasoning that they were dependent on finding violations of RPC 4.2 and RPC 8.4(c).

In conclusion, the special master determined that the complaint against respondent should be dismissed in its entirety. The answer to the Court's question in its referring decision, however, was met with the special master's recommendation that the Court adopt a standard that attorneys may not, directly or indirectly, friend a represented individual, without the knowledge and consent of that person's counsel.

Following a de novo review of the record, we are unable to agree with the determination of the special master and find clear and convincing evidence that respondent's conduct was unethical.

In our view, despite the timeframe of the conduct underlying this case, relevant caselaw and RPCs provided sufficient guidance for respondent to have properly navigated the issues that he faced in respect of investigating Hernandez via the internet. Stated differently, the standards that respondent was required to adhere to remain the same, regardless of the medium at issue. The special master opined that "[r]espondent proceeded under the misimpression that everything Hernandez posted was available for public viewing." Respondent's testimony, his professional obligations to supervise a nonlawyer employee, and the general professional ethics obligations of every attorney, contradict that assertion.

Although this matter confronts the application of Rules developed in an "analog" world to conduct committed in what is now a "digital" world, the non-existence of technology at the time the Rules were drafted does not transform the conduct under scrutiny into novel behavior. Rather, respondent's misconduct, neither unique nor new, simply took place in a more modern forum. The forum does not change the nature of the misconduct or the necessity for respondent to be aware of his professional obligations.

RPC 4.2 contains three elements: (1) there must be a communication with a party to the litigation; (2) the party must be represented by counsel; and (3) the communication must relate to the litigation. All three elements exist here. Respondent exhibited his heightened awareness of that very fact when he commenced his investigation of Hernandez, cautioning Cordoba about the level and nature of the communication permitted with Hernandez. It does not matter, in this context, who initiated the friend request, what "friend request" was understood to mean at the time, or who sent whom the private message first. The Rule is meant to protect the represented party and, therefore, the duty to refrain from such prohibited communications falls on the opposing attorney and his subordinates – in this case, respondent and his paralegal.

Respondent argued that his conduct was not unethical because he did not know, understand, or believe that any of Cordoba's actions constituted

communication with a represented party. Specifically, he denied having instructed Cordoba to send a message to Hernandez, and emphasized that Cordoba simply told Hernandez that he looked like her favorite hockey player, a statement that does not pertain to the litigation. This argument ignores the undisputed primary purpose for Cordoba having looked at Hernandez's profile in the first place. In this regard, the OAE is correct that the purpose of the interaction was to obtain information about the litigation. The remaining issues are obscured by the undue focus on the medium used to communicate.

In our view, the fact that the medium of communication was Facebook is not dispositive. A paralegal, under the supervision and direction of an attorney, communicated with a party, known to be represented by counsel, with the intent to surreptitiously obtain information about the litigation. This is the type of conduct that RPC 4.2 unequivocally prohibits.

Additionally, respondent claimed almost total ignorance regarding technology, especially Facebook, at the time of the underlying events. The record contained conflicting testimony in respect of what Cordoba explained to him at the time. Based on the testimony from both respondent and Cordoba, however, several facts are undisputed.

First, it is undisputed that a conversation occurred between Cordoba and respondent after Hernandez modified the privacy settings of his Facebook

account, and it was no longer public. Second, it is undisputed that Cordoba sought some type of permission or authorization from respondent to proceed with her surveillance of Hernandez on Facebook. Third, it is undisputed that respondent initially replied to Cordoba to "hold off" and then subsequently gave her permission to proceed. Fourth, it is undisputed that Cordoba sent Hernandez a message to facilitate access to his information. Therefore, the facts of this matter, regardless of the medium used for communication, support a finding that Cordoba, at the direction of respondent, communicated with a party represented by counsel, about the litigation, in violation of RPC 4.2.

Although Cordoba committed the misconduct, the violation of RPC 4.2 is imputed to respondent under the circumstances of this case. RPC 5.3(a) requires every attorney or firm to adopt and maintain reasonable efforts to ensure that the conduct of nonlawyers employed by the attorney or firm is compatible with the professional obligations of a lawyer. Further, RPC 5.3(b) requires a lawyer with supervisory authority over a nonlawyer to make reasonable efforts to ensure that person's conduct is compatible with the professional obligations of the lawyer. Respondent failed in his obligation on both counts. Under the guise of purported ignorance, he completely delegated the surveillance of Hernandez to his paralegal, without any concern for the issues that could arise from conducting such an investigation on the internet.

Most significantly, however, Cordoba's conduct is imputed to respondent through RPC 5.3(c). That Rule imposes responsibility on the supervising attorney if the conduct committed by the nonlawyer would violate the RPCs had it been engaged in by a lawyer, if:

> 1) the lawyer orders or ratifies the conduct involved;
>
> 2) the lawyer has direct supervisory authority over the person and knows of the conduct at a time when its consequences can be avoided or mitigated but fails to take remedial action; or
>
> 3) the lawyer has failed to make reasonable investigation of circumstances that would disclose past instances of conduct by the nonlawyer incompatible with the professional obligations of a lawyer, which evidence a propensity for such conduct.

Respondent directed Cordoba to conduct the surveillance on Hernandez. Cordoba testified that she informed respondent that Hernandez's page became private and that, initially, he instructed her to hold off on sending a friend request. Later, however, he directed her to proceed. Cordoba testified that she told respondent she would send a message attempting to induce Hernandez to send her a friend request. Respondent acknowledged that Cordoba informed him that the page was changed to private but that she did not explain it to him that way. He recalled being told that she had to "click a button." He recalled telling her to hold off at first but then told her to proceed.

The change in Hernandez's Facebook privacy settings prompted Cordoba to bring that development to respondent's attention. Both agree that this discussion took place. Cordoba previously reviewed Facebook and Myspace for several hours over multiple sessions without asking respondent whether she could "click a button" or go to a "different part of the internet." Then, a significant change occurred that led Cordoba to conclude that she should obtain respondent's permission before proceeding. The ensuing conversation, regardless of which version is more accurate, should have been sufficient to give respondent pause and to cause him to instruct Cordoba not to proceed. In fact, it did give him pause.

We do not accept either of respondent's explanations that he instructed Cordoba to "hold off," not because he thought her conduct was wrong or he required permission from the insurance adjuster, but because he wanted to keep the adjuster apprised of what they had discovered, or because he was writing a brief. According to all three versions of the conversation, Cordoba's version or either of respondent's versions, respondent told Cordoba to hold off at first, but then directed her to proceed. That is the moment respondent failed to take reasonable action to avoid or mitigate the consequences of Cordoba's conduct.

Further, it is in that moment that, again, despite the special master's findings, Cordoba's version of the conversation is likely more credible than

respondent's.[3] The change in privacy status compelled Cordoba to seek instruction from respondent. It is a stretch to believe that, as respondent recalls, Cordoba never used the words "public" or "private" to explain the change. Cordoba initiated the conversation because of that modification to Hernandez's privacy setting. Even if she had to "dumb it down," as the special master put it, the privacy component is not so esoteric that an attorney cannot fathom what it means in the context of a nascent technology.

Moreover, in that same moment, where Cordoba was concerned enough to approach respondent, and he was concerned enough to instruct her to hold off, respondent should have taken reasonable action to learn more. Ignorance cannot be used as a shield. This is especially true, given that respondent also testified that he had become aware, prior to the discovery of the video, that Hernandez had switched his Facebook settings to "semi-private." In his November 17, 2010 letter to the OAE, much closer to the time of the events in this matter, respondent acknowledged that Cordoba had initially told him everything posted was viewable by the general public. Later, she informed

[3] The special master found Cordoba less credible because she was sick during her testimony. It is not clear how her illness had any bearing on her credibility. The special master also believed that her testimony was undermined by the number of times she could not recall something and had her memory refreshed by statements she made to the OAE several years prior to the hearing, closer in time to the events at issue. To us, this lends credibility to her statements, rather than undermining them. This is the rare instance where we do not accept a credibility determination made by a trier of fact.

respondent that Hernandez changed his settings to "semi-private." As respondent stated during his testimony, the discovery of the video occurred after he learned that Hernandez's information was "semi-private," and would require Cordoba to "click a button" to access it. His oft-stated caveat in this regard that they never used the words "public" or "private" in their discussions does not change our view of these circumstances.

Accordingly, we determine that respondent's conduct amounted to an instruction to conduct this improper surveillance. Even if we had determined otherwise, respondent still violated RPC 5.3(c) when he "ratified" the misconduct by attempting to use the fruits of Cordoba's surveillance in the underlying litigation. Further, despite the contradictory testimony about what respondent knew or when he knew it, by respondent's own version of events, he failed to properly oversee Cordoba's investigation or take any measures to ensure that she would conduct that investigation in accordance with respondent's ethics obligations. In his summation brief to the special master, respondent claimed he was "wholly uninvolved and unknowing with respect to all of it." That in and of itself is a violation of the RPCs. Respondent failed to supervise Cordoba in violation of RPC 5.3(a), (b), and (c) and, therefore, Cordoba's violation of RPC 4.2 is imputed to respondent because of that failure.

Flowing from the RPC 4.2 violation is a violation of RPC 8.4(c). In communicating with Hernandez, Cordoba omitted any information about who she was, where she worked, or what she was searching for by gaining access to his Facebook page. Her violation of RPC 8.4(c), in the form of a misrepresentation by silence or omission, is imputed to respondent as well. Concerning to us is respondent's attempt, in his summation brief, to blame Hernandez for his casual acceptance of Cordoba as a "friend" without investigating who she was. A party represented by counsel has no such duty of investigation. The entire construct of the RPCs regarding communication with a represented party is to protect the party from an adversarial attorney.

Additionally, we find respondent's reliance on Apple Corps., Ltd v. Int'l Collectors Society, 15 F. Supp. 2d 456 (D.N.J. 1998) to be misplaced. In that case, the attorney for the plaintiffs and that attorney's agents contacted salespeople, posing as members of the public, to engage in business transactions in order to ascertain whether the salespeople were violating a consent order between the parties to the litigation. The court held that

> RPC 4.2 cannot apply where lawyers and/or their investigators, seeking to learn about current corporate misconduct, act as members of the general public to engage in ordinary business transactions with low level employees of a represented corporation. To apply the rule to the investigation which took place here would serve merely to immunize corporations from liability

> for unlawful activity, while not effectuating the purposes behind the rule.
>
> [Id. at 474-475.]

The court in Apple also endorsed the position that investigators and testers who merely conceal their identities and purposes to the extent necessary to gather evidence do not violate RPC 8.4(c). The court explained that:

> 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.
>
> [Id. at 475 (internal citations omitted).]

Apple is inapplicable to the instant matter. That case involved a corporation and the communication at issue was with employees who were not part of the litigation control group. There was, thus, no violation of RPC 4.2. Here, the communication was directly with the sole, individual plaintiff in a personal injury matter, who was known to be represented by counsel. Further, the investigation was not seeking to detect wrongdoing in the context of criminal

or civil-rights law enforcement, and it was not seeking evidence of ongoing violations of the law, as in the Apple case or otherwise generally understood by the Apple court.

Furthermore, there is no other way to consider Cordoba's intentional omission of her identity and her position with respondent's law firm as anything other than subterfuge. She was seeking access to information to defeat Hernandez's claims against the Borough. Therefore, not only was the omission a misrepresentation by silence, it was for the sole purpose of gaining access to information to which she would have been denied if she had identified herself and the information sought was directly and materially related to the litigation. Deception is in complete contradiction to an attorney's ethics obligations and here, the deception is part and parcel of the RPC 4.2 violation.

Respondent also was charged with violating RPC 5.1(b) and (c) in his supervision of Adamo; RPC 8.4(a) for allegedly assisting or inducing Cordoba to violate the Rules; and RPC 8.4(d) for allegedly disrupting the litigation when he presented the Facebook evidence during discovery. The record is clear that Adamo did not violate any of the RPCs. In fact, at the end its case, the OAE moved to dismiss all the charges against Adamo. The special master granted that motion. Therefore, we determine to dismiss the charged violations of RPC 5.1(b) and (c). Additionally, it is redundant to apply RPC 8.4(a) to this matter, because

it is subsumed by the RPCs discussed above. Therefore, we determine to dismiss that charge as well. Finally, in respect of the RPC 8.4(d) charge, the record contains no evidence of a waste of judicial resources. We determine to dismiss that charge, too.

In sum, we find that respondent violated RPC 4.2, RPC 5.3(a), (b), and (c), and RPC 8.4(c). We determine to dismiss the charges that he violated RPC 5.1(b) and (c), RPC 8.4(a), and RPC 8.4(d). We next address the appropriate quantum of discipline for respondent's misconduct.

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. See, e.g., In the Matter of Mitchell L. Mullen, DRB 14-287 (January 16, 2015) (admonition for attorney who, in the course of an e-mail chain, communicated directly with the grievant on at least three occasions, when he knew or should have known that the grievant was represented by counsel; the communications involved the subject of the representation; the attorney also sent a notice of deposition directly to the grievant and never attempted to notify opposing counsel of the deposition date, in violation of RPC 4.2; in mitigation, the attorney's conduct was minor and caused no harm to the grievant, and he had been a member of the bar for thirty-nine years, with no disciplinary record);

In re Tyler, 204 N.J. 629 (2011) (reprimand for attorney who, in one of six bankruptcy matters, communicated directly with the client about a disgorgement order in the matter, although she knew or should have known that subsequent counsel had been engaged, a violation of RPC 4.2; gross neglect and pattern of neglect, lack of diligence, and failure to communicate with the clients also found; in mitigation, the attorney had no prior discipline and was struggling with medical issues at the time of the misconduct); and In re Veitch, 216 N.J. 162 (2013) (censure for attorney who, in a criminal matter, communicated with his client's co-defendant, who had pleaded guilty, about the merits of the criminal case, even though counsel for the co-defendant had previously denied the attorney's request to talk to his client, a violation of RPC 4.2; in mitigation, the attorney had an unblemished disciplinary history of thirty-eight years and neither any party nor the judicial system suffered any actual harm).

This matter is most akin to Mullen, where the attorney communicated by e-mail with a party represented by counsel. Mullen's adversary was copied on most of the e-mails. Here, however, there is an added element of deceit, because respondent's directed communications were conveyed in a private message, to gain access to a private Facebook page, as part of an investigative effort which, by its very nature, was completely hidden from Hernandez's counsel, Epstein. The element of deceptiveness slightly escalates the severity of respondent's

conduct as compared to Mullen's. As in Mullen, there was no harm to the adverse party because, here, the Facebook video and other discovery obtained from the site were barred, as having been produced out of time. Therefore, standing alone, respondent's RPC 4.2 violation would likely result in either an admonition or a reprimand. Respondent, however, has additional violations.

Attorneys who fail to supervise their nonlawyer staff typically receive discipline ranging from an admonition to a reprimand, depending on the presence of other ethics infractions, prior discipline, or aggravating and mitigating factors. See, e.g., In re Bardis, 210 N.J. 253 (2012) (admonition for attorney who failed to reconcile and review his attorney records, thereby enabling an individual who helped him with office matters to steal $142,000 from his trust account, causing a shortage of $94,000; mitigating factors were the attorney's deposit of personal funds to replenish the account, numerous other corrective actions, his acceptance of responsibility for his conduct, his deep remorse and humiliation for not having personally handled his own financial affairs, and his lack of a disciplinary record); In re Mariconda, 195 N.J. 11 (2008) (admonition for attorney who delegated his recordkeeping responsibilities to his brother, a paralegal, who then forged the attorney's signature on trust account checks and stole $272,000 in client funds); In re Deitch, 209 N.J. 423 (2012) (reprimand for attorney's failure to supervise his

paralegal-wife, who stole client or third-party funds via thirty-eight checks payable to her, by either forging the attorney's signature or using a signature stamp; no prior discipline); and In re Murray, 185 N.J. 340 (2005) (reprimand for attorney who failed to supervise nonlawyer employees, which led to an unexplained misuse of client trust funds and to negligent misappropriation; the attorney also failed to maintain books and records that would have revealed the scheme; she also failed to perform quarterly reconciliations of her trust account and, for a time, failed to maintain an active trust account; prior admonition for similar deficiencies).

Misrepresentations ordinarily require a reprimand. See, e.g., In re Walcott, 217 N.J. 367 (2014) (attorney misrepresented to a third party, in writing, that he was holding $2,000 in escrow from his client as collateral for a settlement agreement; violations of RPC 4.1(a)(1) and RPC 8.4(c)); In re Chatterjee, 217 N.J. 55 (2014) (for a five-year period, the attorney misrepresented to her employer that she had passed the Pennsylvania bar examination, a condition of her employment; she also requested, received, but ultimately returned, reimbursement for payment of the annual fee required of Pennsylvania attorneys; compelling mitigation considered); and In re Liptak, 217 N.J. 18 (2014) (attorney misrepresented to a mortgage broker the source of

the funds she was holding in her trust account; attorney also committed recordkeeping violations; compelling mitigation).

On balance, respondent's surreptitious communication with a person he knew to be represented by counsel should be met with either an admonition or a reprimand. When coupled with the RPC 5.3(a), (b), and (c) and RPC 8.4(c) violations, a censure could be warranted.

In mitigation, respondent has an otherwise unblemished career in twenty-nine years at the bar. Further, this matter has languished for more than ten years and has gained an enormous amount of notoriety. Although some of that delay was due to respondent's procedural litigation, some mitigation is deserved. This delay likely caused an undue amount of distress to an otherwise cooperative attorney. Further still, the overall facts lack a sense of nefariousness, especially in light of the fact that respondent served the discovery on Epstein and never hid the circumstances of how the video was obtained. Therefore, we find the mitigation sufficiently compelling to reduce the otherwise appropriate quantum of discipline to an admonition.

Vice-Chair Gallipoli and Member Zmirich voted for a censure, and filed a separate dissent. Members Boyer and Singer voted to dismiss the matter, and filed a separate dissent. Member Petrou also voted to dismiss the matter, and filed a separate dissent.

We further determine to require respondent to reimburse the Disciplinary Oversight Committee for administrative costs and actual expenses incurred in the prosecution of this matter, as provided in R. 1:20-17.

POLICY RECOMMENDATIONS

Remaining to be addressed are the issues regarding the intersection of professional ethics and the modern world of social media. In fact, in Robertelli v. N.J. Office of Attorney Ethics, 224 N.J. 470, the Court made clear that it was interested in the novel and serious ethics concerns presented in this matter and the lack of guidance on the topic in New Jersey. Other jurisdictions have addressed several issues to some extent, as cited in both the OAE's brief and the special master's report. Following a review of precedent in other jurisdictions, we take this opportunity to offer a policy statement for consideration by the Court.

In March 2009, the Philadelphia Bar Association Professional Guidance Committee issued Opinion 2009-02 (the Philadelphia Opinion), discussing Facebook and Myspace accounts maintained by a witness, not a party, deposed in connection with litigation. The question presented considered the propriety of a friend request from an attorney to a third party in order to gain access to the information on her profile pages without identifying himself as counsel. Such

information might include material that could be used to impeach the witness. The Committee opined that:

> the proposed course of conduct contemplated by the inquirer would violate RPC 8.4(c) because the planned communication by the third party with the witness is deceptive. It omits a highly material fact, namely that the third party who asks to be allowed access to the witness's pages is doing so only because he or she is intent on obtaining information and sharing it with a lawyer for use in a lawsuit to impeach the testimony of the witness. The omission would purposefully conceal that fact from the witness for the purpose of inducing the witness to allow access, when she may not do so if she knew the third person was associated with the inquirer and the true purpose of the access was to obtain information for the purpose of impeaching her testimony . . . .

The Philadelphia Opinion also noted the dispute among other jurisdictions concerning whether there are times when deception by attorneys and their agents might be permissible. The opinion, however, favors the language from Supreme Court opinions in Oregon and Colorado, which find such deception to constitute engaging in dishonesty, fraud, deceit, misrepresentation, or false statements.

New York addressed these issues in 2010, in an opinion issued by The New York State Bar Association Committee on Professional Ethics Opinion #843 (Sept. 10, 2010) (Opinion #843), followed later that same month by the New York City Bar Committee on Professional Ethics Formal Opinion 2010-2 (Opinion 2010-2). Opinion #843 addresses the propriety of accessing the

Facebook or Myspace pages of a party if the lawyer does not send a friend request and simply relies on the information publicly available within the party's profile. The opinion concluded that accessing publicly available information from an adverse party's social networking website was ethical and permissible.

Opinion 2010-2 carried the question a step further, inquiring whether a lawyer, directly or through an agent, may contact unrepresented parties through a social networking website and request permission to access their private profile to obtain information to be used in litigation. After noting the existence of New York courts' approval of a policy of "informal discovery," the opinion determined that attorneys or their agents may use their real names and profiles to send "friend requests" to obtain information from unrepresented parties' network websites. Opinion 2010-2, however, prohibits, any use of deception in this process, while noting that the

> potential ethical pitfalls associated with social networking sites arise in part from the informality of communications on the web. In that connection, in seeking access to an individual's personal information, it may be easier to deceive an individual in the virtual world than in the real world. For example, if a stranger made an unsolicited face-to-face request to a potential witness for permission to enter the witness's home, view the witness's photographs and video files, learn the witness's relationship status, religious view and date of birth, and review the witness's personal diary, the witness almost certainly would slam the door shut and perhaps even call the police. In contrast, in the "virtual" world, the same stranger is more likely to be

> able to gain admission to an individual's personal webpage and have unfettered access to most, if not all, of the forgoing information.

On March 16, 2011, the Connecticut Bar Association Committee on Professional Ethics issued Informal Opinion 2011-4 (Opinion 2011-4), considering the hypothetical case where a lawyer directly seeks to friend an adverse party represented in litigation. Opinion 2011-4 reasoned that, in order to friend a social network user, the lawyer would need to communicate with the social network user, essentially seeking permission from the user to gain access to the user's non-public information and communications. If the lawyer were to send a friend request to an adverse party, the friend request would be a "communication" with the adverse party for the purpose of developing information for use in the litigation. If the request were accepted, these direct communications between a represented party and the lawyer representing the opposing party would violate Rule 4.2.

Opinion 2011-4 also noted that using a third person to do that which the attorney could not do also would violate the cited rule, as well as Rule 4.1, requiring truthfulness to others, and Rule 8.4, prohibiting dishonesty, deceit, and misrepresentation.[4]

[4] This opinion was published several years after the commission of the misconduct in the instant matter.

Also in 2011, the San Diego County Bar Association published Legal Ethics Opinion 2011-2 (the San Diego Opinion) noting that, because the nature of a friend request is a request for access to information being shared on the website page, it is a form of communication. If the communication to the represented party is motivated by the search for information about the subject of the representation, the communication is, therefore, about the subject matter of that representation. The San Diego Opinion also notes that friending someone is not the same as viewing publicly available information on that person's social network page.

Additionally, an attorney violates his ethics duty not to deceive, by making a friend request of a represented party without disclosing why the request is being made. This part of the analysis applies irrespective of whether the person sought to be friended is represented or whether the person is a party to the matter. In this regard, the San Diego Opinion conflicts with New York's Ethics Opinion that permits attorneys to send a friend request to an unrepresented party without disclosing the reason for the request. Instead, it is consistent with the Philadelphia Ethics Opinion, holding that omitting the highly material fact of the true purpose of the friend request constitutes improper purposeful concealment.

In sum, the San Diego Opinion imposed limits on how attorneys may obtain information that is not publicly available, particularly from opposing parties who are represented by counsel. That opinion holds that an attorney is barred from making an ex parte friend request of a represented party. Such communication to a represented party intended to discover information pertaining to the litigation is impermissible, no matter which words are used in the communication and no matter how that communication is transmitted to the represented party. Further, an attorney's duty not to deceive prohibits him or her from making a friend request, even of unrepresented witnesses, without disclosing the purpose of the request.

On June 20, 2013, the New Hampshire Bar Association Board of Governors adopted Ethics Committee Advisory Opinion #2012-13/05 (the New Hampshire Opinion), which essentially tracks the opinions of the Philadelphia and San Diego Ethics Opinions, while rejecting the New York Opinion allowing attorneys to communicate with unrepresented persons without disclosing the purpose of a friend request, agreeing with those jurisdictions that found that such a failure to fully disclose identity and purpose constitutes a form of deception.

The New Hampshire Opinion also addresses whether an attorney's client may send a friend request to an adverse party, and then if access is granted, share the learned information with his or her own attorney. The opinion recognized

that subordinates, employees, and investigators working for an attorney may not do that which the attorney may not do. The opinion held, however, that actions by clients who do not conceal their identities and communicate truthfully with another person in an adversarial position do so not at the direction of their attorneys. Therefore, the opinion deemed it permissible for a client to gain access to non-public material through a friend request and share the with the client's attorney.

On May 8, 2014, the Massachusetts Bar Association House of Delegates issued Ethics Opinion 2014-5, adopting the reasoning and conclusions of the Philadelphia, New Hampshire, and San Diego Ethics Opinions. In September 2015, Colorado adopted Opinion 1276 ("Use of Social Media for Investigative Purposes"), which expressly rejected the New York Ethics Opinions, and sided with New Hampshire and San Diego concerning the need to disclose the full identity of the attorney and purpose for a friend request to unrepresented witnesses.

The foregoing recitation of several states' approach to these issues shows a general consensus, with the exception of New York. We recommend that New Jersey join Massachusetts, Colorado, Philadelphia, New Hampshire, and San Diego in adopting the standards promulgated in those specific ethics opinions

regarding the use of social media to communicate with represented and unrepresented parties to a litigation.

We, thus, recommend that the Court issue the following policy: An attempt by an attorney, their subordinates, or any agents, or proxies including but not limited to the client, to gain access to an represented party's otherwise private social media constitutes improper communication, in violation of RPC 4.2. Furthermore, any attempt to gain access to an individual's social media, whether that individual is represented by counsel or not, without explicitly disclosing who is making the request, and the specific purpose of the request, constitutes conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of RPC 8.4(c). Accessing and viewing publicly available information on someone's social media page is appropriate.

Disciplinary Review Board
Bruce W. Clark, Chair

By: _____
For: Ellen A. Brodsky
Chief Counsel

SUPREME COURT OF NEW JERSEY
DISCIPLINARY REVIEW BOARD
VOTING RECORD

In the Matter of John J. Robertelli
Docket No. DRB 19-266

Argued: November 21, 2019

Decided: April 30, 2020

Disposition: Admonition

Members	Admonition	Censure	Dismiss	Recused	Did Not Participate
Clark	X				
Gallipoli		X			
Boyer			X		
Hoberman	X				
Joseph	X				
Petrou			X		
Rivera	X				
Singer			X		
Zmirich		X			
Total:	4	2	3	0	0

For: Ellen A. Brodsky
Chief Counsel