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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-1930-20

CITY OF ENGLEWOOD,

Plaintiff-Respondent,

v.

FRED PULICE,

Defendant,

and

ALBERT WUNSCH, III, ESQ.,

Defendant-Appellant.

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Argued October 3, 2022 – Decided November 1, 2022

Before Judges Whipple, Smith, and Marczyk.

On appeal from the Superior Court of New Jersey, Law Division, Bergen County, Docket No. L-5202-20.

Albert H. Wunsch, III, argued the cause for appellant (Albert H. Wunsch, III, attorney; Albert H. Wunsch, III, of counsel and on the briefs; Jeffrey Zajac, on the briefs).

Ryan S. Carey argued the cause for respondent (Apruzzese, McDermott, Mastro & Murphy, PC, attorneys; Ryan S. Carey, of counsel and on the brief; Kyle J. Trent, on the brief).

PER CURIAM

Plaintiff City of Englewood (Englewood or "the city") initiated disciplinary proceedings against Englewood Police Lieutenant Fred Pulice and subsequently filed a complaint in the Law Division, seeking to disqualify Pulice's attorney Albert Wunsch. After initially denying relief, the Law Division judge disqualified Wunsch upon reconsideration on November 13, 2020. Wunsch appeals from the disqualification. We affirm.

A review of the entire record informs our decision, but we focus on the facts relevant to Wunsch's disqualification from Pulice's disciplinary proceeding.

Pulice began working for the Englewood Police Department (EPD) in 1997. According to Pulice, Englewood Police Chief Lawrence Suffern disliked him because of his union activity, his support for Suffern's rivals and his criticism of Suffern.

In July 2018, Lieutenant Herman Savage reported to Suffern that Pulice had slept while on duty twice. Suffern referred Savage's allegations to the EPD's Internal Affairs Unit for investigation. The Internal Affairs Unit was

headed by Lieutenant Matthew de la Rosa, who recused himself from the investigation. As a result, the investigation was carried out by Joseph Doyle, EPD's Internal Affairs Investigator.

Doyle determined the content, direction, process, and scope of the investigation. He had discretion to determine which witnesses to interview, what questions to ask, and what evidence to pursue. Among the witnesses he interviewed were Officers Daniel Larkin and Julio Alvarado. Larkin provided a video recording which depicted Pulice sleeping on duty. Alvarado also disclosed information adverse to Pulice. Englewood asserts that both of these officers were also represented by Wunsch, even though they provided information adverse to Pulice.

On March 21, 2019, Doyle interviewed Pulice at Wunsch's office. Pulice denied having ever slept on duty. He asserted that he had pretended to sleep, but not actually slept. In total, Englewood asserts it uncovered evidence of four separate incidents where Pulice was allegedly asleep on duty.

Doyle submitted his report to Suffern, clearing Pulice of all charges, but Suffern refused to accept Doyle's findings. Instead, he considered the investigation tainted because of de la Rosa's participation in several interviews, despite his previous recusal. Suffern believed that Doyle and de la

Rosa had sabotaged the investigation to protect Pulice. He disregarded their findings and commenced disciplinary proceedings against Pulice. Englewood then charged Doyle with eight administrative violations. Wunsch asserts these charges arose as a response to Doyle's investigation of Pulice.

Pulice and Doyle executed conflict waivers to allow Wunsch to represent both. Wunsch then entered an appearance on behalf of Pulice.

Englewood provided Wunsch with discovery prior to the first disciplinary hearing, but Wunsch did not respond to the city's repeated discovery requests. On the morning of the hearing, Wunsch gave Englewood's attorney a list of twenty-six witnesses, all of them without a proffer, and revealed he had also been retained to represent Doyle.

Wunsch provided Englewood his discovery a few days later via an untimely email. Attached to the message were over five hundred pages of documentation labeled as "Pulice Exhibits 1-72," which Wunsch intended to use during the proceedings. Among the pages were confidential documents unrelated to the disciplinary charges against Pulice, including documents about several confidential internal affairs matters.

In a letter to the hearing officer dated July 31, 2020, Englewood asked the officer to disregard Wunsch's exhibits because they were produced after

the deadline. The city also accused Wunsch of violating ethics rules by 1) representing both fact witnesses and the target of the investigation; 2) improperly representing Doyle, who was part of Englewood's litigation control group and could not be contacted by Wunsch; and 3) failing to notify Englewood that Wunsch was in possession of confidential or privileged materials. Englewood demanded that Wunsch withdraw from the matter, identify the sources of the confidential documents, and return the documents by August 5, 2020. Wunsch refused to return the documents or withdraw from the matter.

Englewood filed a complaint and order to show cause against Pulice and Wunsch in the Law Division. The city sought to bar Wunsch from using the confidential documents, compel him to return them along with an explanation of how he had obtained them, and disqualify him from representing any party or witness in Pulice's disciplinary matter. Wunsch filed an answer accompanied by certifications and conflict waivers from Pulice, Alvarado, Doyle, and Larkin.

During the order to show cause hearing, Englewood argued Wunsch failed to demonstrate any of the confidential documents were relevant to Pulice's disciplinary matter. Englewood also asserted that because Wunsch

purported to represent Doyle, the city was barred from asking Doyle whether he released the confidential documents, and that Wunsch attempted to occasion delay on the matter improperly. The city also argued the Superior Court had proper jurisdiction because the hearing officer, as a former police chief, could not properly disqualify Wunsch or enjoin him from using the confidential documents.

On October 8, 2020, the trial judge ordered Pulice and Wunsch to cease using the confidential documents, but otherwise denied relief in all respects. In an attached rider, the court explained access to the confidential documents was governed by the procedure set forth by the Attorney General, and Wunsch and Pulice had failed to follow that procedure. Therefore, they were not entitled to use the documents. The court found the disqualification issue was adequately addressed by the waivers Wunsch supplied.

The record was insufficient to determine whether Wunsch had engaged in conduct prejudicial to the administration of justice, so the court denied Englewood's request that he be disqualified on that basis without prejudice. The court did not address the issue of whether it had proper jurisdiction.

Englewood moved for reconsideration pressing the argument that disqualification was warranted because Wunsch purported to represent Doyle,

a member of Englewood's litigation control group. The court agreed, and Wunsch was disqualified across the board. This appeal followed.

Whether counsel should be disqualified is an issue of law subject to de novo appellate review. Atl. City v. Trupos, 201 N.J. 447, 463 (2010). We will not consider issues "not properly presented to the trial court when an opportunity for such a presentation is available unless the questions so raised on appeal go to the jurisdiction of the trial court or concern matters of great public interest." Grillo v. State, 469 N.J. Super. 267, 279 (App. Div. 2021) (internal quotations omitted). Where the trial court has arrived at the correct result despite resting its decision on an unsound basis, the decision should be affirmed. Atl. Ambulance Corp. v. Cullum, 451 N.J. Super. 247, 254 (App. Div. 2017).

Wunsch argues Englewood improperly based its cause of action on the Rules of Professional Conduct (RPC), and the violation of such rules cannot form the basis for civil liability. He also argues the Superior Court acted ultra vires because disciplinary proceedings are governed by N.J.S.A. 40A:14-148 and N.J.S.A. 40A:14-150, which vest the court with the power to enforce subpoenas and review convictions, but do not mention the power to disqualify attorneys. We disagree.

Although the RPC, standing alone, cannot establish a cause of action for damages, Meisels v. Fox Rothschild LLP, 240 N.J. 286, 299 (2020) (citing Baxt v. Liloia, 155 N.J. 190, 201 (1998)), no one has sought damages in this case, and we reject Wunsch's attempt to recast his disqualification as civil liability. The relevant question is not how the judgment affects Wunsch's potential revenue, but whether the RPC can give rise to an action for disqualification.

On that question, Camden Iron & Metal, Inc. v. Klehr, Harrison, Harvey, Branzberg & Ellers, LLP, is illustrative. 384 N.J. Super. 172, 178 (App. Div. 2006). The plaintiff in that case sought to enjoin its former lawyer from representing a new client in Pennsylvania, claiming the representation constituted an impermissible conflict and that the lawyer was disseminating confidential information. Id. at 177. The trial court denied the former lawyer's motion to dismiss, but we reversed for two reasons: (1) the legal activity at issue took place in Pennsylvania and was under the exclusive jurisdiction of the Pennsylvania Supreme Court, and (2) the RPC "do not provide an independent basis for a cause of action." Ibid.

Although the second reason might suggest Wunsch's disqualification was improper, as his alleged violation of the RPC could not form an independent

basis for a cause of action, we decline to follow that reasoning here. The "independent basis" referenced in Camden Iron is distinguishable. In Camden Iron, the plaintiff pursued an injunction just because the defendant was violating the RPC, even though the violation was untethered to any matter in New Jersey. Here, the disqualification sought by Englewood affects an ongoing New Jersey litigation. Our courts have a clear interest in protecting the integrity of proceedings within our borders.

There was no other venue to pursue relief, and the question of law is a complex one. The hearing officer, as a non-lawyer, could not act on a disqualification issue. On the other hand, the Law Division had the power to intervene, as it was the designated court of appeals for disciplinary convictions. Besides, we know of no provision that states the Superior Court's authority is limited to what is specifically set forth in N.J.S.A. 40A:14-148 and N.J.S.A. 40A:14-150.

We also reject Wunsch's argument that Doyle was no longer part of Englewood's litigation control group because Suffern had "cast him out"[1] after Doyle's contrary recommendation by serving him with a notice of administrative charges on May 31, 2019.

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[1] During oral argument, Wunsch repeatedly likened Doyle as having been cast out of the litigation control group as Satan was cast out of heaven.

Wunsch's representation of Doyle is governed by RPC 4.2 and RPC 1.13. RPC 4.2 states:

> 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 RPC 1.13 . . . . 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.

RPC 1.13(a) states:

> [T]he organization's lawyer shall be deemed to represent not only the organizational entity but also the members of its litigation control group. Members of the litigation control group shall be deemed to include current agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter whether or not in litigation, provided, however, that "significant involvement" requires involvement greater, and other than, the supplying of factual information or data respecting the matter. Former agents and employees who were members of the litigation control group shall presumptively be deemed to be represented in the matter by the organization's lawyer but may at any time disavow said representation.

In general terms, RPC 4.2 and RPC 1.13 prohibit Wunsch from contacting members of Englewood's litigation control group.

Under RPC 1.13, an individual is part of the litigation control group if he is a current employee "responsible for, or significantly involved in, the determination of the organization's legal position." Doyle was not responsible for the determination of Englewood's position. However, he may have been "significantly involved." No case has defined what level of involvement constitutes "significant." Although the rule itself and other courts have said mere knowledge of "factual information or data" does not establish "significant involvement," no further elaboration has been provided. See Andrews v. Goodyear Tire & Rubber Co., 191 F.R.D. 59, 79 (D.N.J. 2000); Michaels v. Woodland, 988 F. Supp. 468, 471 (D.N.J. 1997).

We look to guidance in the report of the New Jersey Supreme Court Special Committee on RPC 4.2. Report of the New Jersey Supreme Court Special Committee on RPC 4.2 (1995), reprinted in KEVIN H. MICHELS, NEW JERSEY ATTORNEY ETHICS, Appendix J, www.gannlaw.com (2022). This report instructs us that membership in the litigation control group is a fact-sensitive issue, and the key inquiry is the employee's role in determining the organization's legal position. Id. at § VII. The "litigation control group" is something distinct from the "control group," which is defined as "those employees of the organization entrusted with the management of the case or

matter in question." Id. at §§ V-VII. Although the distinction between the two groups is nuanced, we conclude the "litigation control group" is broader than the "control group," as it requires mere involvement rather than management of the case.

The plain meaning of the term "significant involvement" places Doyle in the litigation control group. It is undisputed he ran the investigation against Pulice and determined who to interview. Although Suffern ultimately rejected his recommendation, he did so upon listening to the interviews that Doyle conducted. Doyle was significantly involved in the determination of Englewood's position even though he was not the final decision maker.

However, Doyle's involvement in Englewood's decision making ended. RPC 1.13 is ambiguous as to whether an employee continues to be part of the litigation control group once he or she is no longer involved with decision making. This ambiguity did not exist in the Committee's earlier draft of the rule which reads as follows:

> [T]he organization's lawyer shall also be deemed to represent the litigation control group which shall be deemed to include current and former agents and employees responsible for, or significantly involved in, the determination of the organization's legal position in the matter . . . .

> [Report of the New Jersey Supreme Court Special Committee on RPC 4.2, § VII (emphasis added).]

Under this formulation, an employee's membership in the litigation control group extends beyond the employee's role in decision making, as even former employees can be part of the group. The Committee eventually decided to exclude former employees from the litigation control group. The reason for the exclusion was explained:

> The Committee is, however, concerned that categorizing former members of the control group congruently with current members of the control group may raise unintended and inappropriate difficulties. First, the Committee is convinced that a member of a control group, whether current or former, obviously has the right to seek his or her own representation in the matter and must be free to do so, and attorneys must be free to represent them. The potential for a conflict of interest between the entity and an individual member of the control group is too significant not to take into account. This has been specifically provided for by the proposed last sentence of [RPC] 4.2.
>
> Moreover, while the Committee recognizes that ordinarily former members of the control group are friendly to the continuing interests of the organization as the organization defines it, that is not always the case. Some former members may see themselves as whistle-blowers or as otherwise in a position of conflict with the organization. There may very well be fiduciary privileges and obligations as between and among former and current members of the control group and the organization militating, among

> themselves against disclosing confidences. The Committee has concluded, however, that those obligations must remain matters as among the control group members and the organization and should not necessarily, unless substantive law otherwise requires, prevent the attorney for an adversarial party from counseling or interviewing a former employee or impinge on the right of the former employee who wishes not only to seek independent advice, but also to make himself available in whichever way he may choose to interests hostile to the corporation.
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> For these reasons, the Committee now proposes that the former members of the litigation control group be deemed presumptively represented by the organization but that they have the right to disavow that representation. Accordingly, an attorney making the communications pursuant to [RPC] 4.3 to determine representation may inquire as to whether the former employee disavows organizational representation or not.
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> [Id. app. 2 (emphasis added).]

The above passage does not answer the question of whether a current employee can be a former member of the litigation control group. Thus, we look elsewhere.

We conclude these questions are best resolved in light of the purpose of RPC 4.2 and New Jersey's jurisprudence on disqualification. The purpose of RPC 4.2. is to "preserv[e] the integrity of the attorney-client relationship and the posture of the parties within the adversarial system. Principally, the rule

seeks to protect the lay person who may be prone to manipulation by opposing counsel." Andrews, 191 F.R.D. 59 at 76 (internal quotations omitted) (citing Michaels, 988 F.Supp. at 470).

Our jurisprudence generally disfavors disqualification. Disqualification is a "harsh remedy" that must be used sparingly. Van Horn v. Van Horn, 415 N.J. Super. 398, 415–16 (App. Div. 2010). In determining disqualification in other contexts, our courts have utilized a "fact-sensitive" approach. For instance, courts conduct a fact-sensitive analysis to decide if two matters are substantially related under RPC 1.9. Dental Health Ass'ns. S. Jersey, P.A. v. RRI Gibbsboro, LLC, 471 N.J. Super. 184, 194 (App. Div. 2022). The analysis turns on "the identification of any particular confidence[s] having been revealed," and the parties seeking disqualification must "make more than bald and unsubstantiated assertions that the lawyer disclosed business, financial and legal information." Ibid. (internal quotations omitted). These requirements apply even if the non-movant has asserted that the two matters are "strikingly similar." Id. at 191.

Based on our review, we conclude, disqualifying Wunsch from representing Doyle does not advance the purpose of protecting "the lay person who may be prone to manipulation by opposing counsel." Doyle is not being

manipulated. He came to Wunsch for help after Englewood levelled eight disciplinary charges against him. Whatever confidences Doyle possesses regarding Englewood Wunsch would already be privy to from discovery. Englewood has not identified any specific information that may be compromised by Wunsch's representation of Doyle.

However, the conflict between Pulice and Doyle is another matter. Although Suffern rejected Doyle's recommendation, he did so based on the information that Doyle gathered. Thus, Englewood continues to rely on Doyle's investigation to make its case. In order to protect Pulice, Wunsch would have to attack certain aspects of Doyle's work. Such an attack would be inconsistent with Wunsch's duty to defend Doyle against the eight charges that arose from the investigation. Additionally, Englewood intends to call Doyle as a witness – which it has the right to do – and Wunsch would have to cross-examine Doyle. Wunsch cannot fulfill his obligations towards both clients in such a scenario. The simultaneous representation of Pulice and Doyle constitutes a conflict under RPC 1.7(a) and RPC 1.9(a). This conflict is not waivable.

In State v. Faulcon, an attorney was disqualified from representing the defendant because he had represented a State's witness when the witness gave

a statement to the police. 462 N.J. Super. 250, 253–54 (App. Div. 2020). Although both the defendant and the witness wanted to see defendant exonerated and had waived any conflict, we disallowed the representation. It was in the witness's best interest to testify truthfully, and defense counsel could not cross-examine him without disclosing confidences. Id. at 259. The same concern exists here. It would be inappropriate for Wunsch to cross-examine Doyle about the investigation he conducted, when he has been retained to defend Doyle against charges arising from the investigation. Thus, Doyle and Pulice have materially adverse interests in the same matter, and disqualification is justified even without proof that confidences have been disclosed. See Twenty-First Century Rail Corp. v. N.J. Transit Corp., 210 N.J. 264, 275–76 (2012) (where clients hold materially adverse interests in the same matter, test that includes consideration of whether confidences were communicated is not applicable).

Given that the record supports disqualification, we need not discuss the remaining arguments presented.

Affirmed.

I hereby certify that the foregoing is a true copy of the original on file in my office.

CLERK OF THE APPELLATE DIVISION