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SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NOS. A-1578-21
A-1580-21

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

ANDRES M. CARDENAS-
ORTEGA,

Defendant-Respondent.

STATE OF NEW JERSEY,

Plaintiff-Appellant,

v.

WILSON ORTEGA,

Defendant-Respondent.

Submitted September 21, 2022 – Decided March 6, 2023

Before Judges Vernoia and Firko.

On appeal from interlocutory orders of the Superior Court of New Jersey, Law Division, Warren County, Indictment Nos. 21-10-0326 and 14-02-0059.

James L. Pfeiffer, Warren County Prosecutor, attorney for appellant (Gloria M. Rispoli, Assistant Prosecutor, of counsel and on the briefs).

Robert A. Russell, attorney for respondents.

PER CURIAM

We granted the State's motion for leave to appeal in these two cases we scheduled back-to-back and consolidated for the purpose of issuing a single opinion.

In A-1578-21, defendant Andres M. Cardenas-Ortega is charged in an indictment with three counts of first-degree aggravated sexual assault, two counts of aggravated sexual contact, and one count of third-degree invasion of privacy. The indictment alleges Cardenas-Ortega committed the offenses between 2018 and 2019.

In A-1580-21, defendant Wilson Ortega is charged in an indictment with first-degree aggravated sexual assault, second-degree sexual assault, second-degree attempted sexual assault, and two counts of second-degree endangering the welfare of a child. The indictment alleges Ortega committed the crimes at various times between 2001 and 2004, and 2008 and 2009.

The alleged victim of the crimes charged in the separate indictments is J.C.¹ That is, in A-1580-21, it is alleged J.C. is the juvenile victim of the crimes charged against Ortega. In A-1578-21, it is alleged J.C. is the victim of the crimes charged against Cardenas-Ortega.

Defendants retained the same counsel, Robert A. Russell. The State moved to disqualify Russell as counsel in both cases because on January 28, 2018, prior to his retention as counsel for defendants, Russell met with J.C. to discuss her possible representation by Russell on criminal charges then pending against her. Although J.C. did not retain Russell, and did not speak with him following the meeting, she shared confidential information with him the State contends is adverse to her interests in defendants' respective trials.

We granted the State leave to appeal from the court's orders denying the State's disqualification motions. Based on our review of the motion record in each case, we affirm the orders in both cases.

I.

The Charges Against Ortega

¹ We use initials to refer to the alleged victim because her identity is excluded from public access under Rule 1:38-3(c)(12).

Ortega fled the United States following the commencement of the Warren County Prosecutor's Office's investigation of claims he sexually assaulted J.C. when she was a juvenile. J.C. identified Ortega as her "stepfather growing up."

In February 2014, a grand jury charged Ortega in an indictment with two counts of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(1); three counts of second-degree sexual assault by contact, N.J.S.A. 2C:14-2(b); one count of second-degree attempted sexual assault by contact, N.J.S.A. 2C:5-1 and 2C:14-2(b); and two counts of second-degree endangering the welfare of a child, N.J.S.A. 2C:24-4(a)(1). As noted, J.C. is the alleged victim of each of the crimes charged.

A judge issued a bench warrant for Ortega's arrest after he failed to appear for arraignment. Ortega remained a fugitive until his arrest in June 2019. Russell entered his appearance as Ortega's substitute counsel on January 23, 2020. At "some point" in "early 2020," J.C. learned Russell represented Ortega, and she told a Warren County Prosecutor's Office Victim Advocate she had previously consulted with Russell as her potential counsel.

The Charges Against Cardenas-Ortega

In early 2021, J.C. reported to the police that between September 2018 and July 2019, she resided with Cardenas-Ortega, who she identified as her

boyfriend. She also reported she discovered video recordings "show[ing] her being 'raped' by" him. She provided the recordings to the police, who determined they showed Cardenas-Ortega penetrating J.C.'s vagina and anus with his penis and fingers on various dates while J.C. was unconscious. J.C. reported she did not consent to the acts of penetration depicted on the recordings; she was unaware of the acts until she discovered the recordings; and she did not consent to the recordings.

The police arrested Cardenas-Ortega on various charges based on his alleged sexual assaults of J.C. On June 25, 2021, Russell entered a notice of appearance on Cardenas-Ortega's behalf. Following a July 2, 2021 detention hearing, J.C. again informed the Warren County Prosecutor's Office she "had a consultation with" Russell and "that he knew certain information" about her.

In October 2021, a grand jury charged Cardenas-Ortega in an indictment with three counts of first-degree aggravated sexual assault, N.J.S.A. 2C:14-2(a)(7); two counts of third-degree aggravated sexual contact, N.J.S.A. 2C:14-3(a); and one count of third-degree invasion of privacy, N.J.S.A. 2C:14-9(b)(1).

The State's Motions to Disqualify Russell

In June 2021, the State filed motions to disqualify Russell in the Ortega and Cardenas-Ortega matters. The State supported its motions with

certifications from an assistant prosecutor stating J.C. reported she was "a prior prospective client of . . . Russell's"; J.C. met with Russell in January 2018 to discuss his possible representation of her in a criminal matter; and during the meeting, J.C. shared confidential information concerning "juvenile adjudications, the [then-]pending criminal charges [against her], her immigration status, [her] substance abuse history, and that she was the victim of child sexual abuse, amongst other confidential personal information [that] needed to be shared for her criminal representation." The State claimed Russell had a conflict of interest in his representation of defendants in their separate matters because the alleged victim in the cases, J.C., was a former prospective client of Russell's under Rule of Professional Conduct (RPC) 1.18 who shared confidential information with Russell that could be used to J.C.'s disadvantage during defendants' trials.

The court conducted a joint evidentiary hearing on the motions. J.C. testified in support of the State's motions, explaining Ortega was her "stepfather growing up," Cardenas-Ortega had been her "boyfriend," and she was the alleged victim in the separate criminal cases pending against them.

J.C. also testified about her meeting with Russell. She explained that on January 28, 2018, she was arrested for criminal trespass, harassment, and

violation of a restraining order. The alleged victim of those offenses was an individual she then dated. Within hours of her arrest, she sought to hire Russell as her counsel. She called him, and they arranged to meet a few hours later at a local restaurant.

J.C. went to the restaurant with a friend and separately met with Russell for "[thirty] to [forty] minutes." She showed Russell the restraining order that had been entered against her; informed Russell she had contacted the individual in whose favor the restraining order was entered; discussed her concerns about the criminal trespass charge, which she viewed as "the more serious charge"; and explained she was "scared because [she] had some applications pending" with immigration services. Russell advised defendant not to contact the individual in whose favor the restraining order had been entered.

According to J.C., she also discussed her "financial situation" with Russell because he was concerned she would be unable to afford him. Russell agreed to accept a \$1,000 retainer from J.C., and the two arranged to meet the following day at his office where she would deliver payment.

J.C. also expressed concern regarding her juvenile record. Russell advised J.C. her juvenile record would not "come into play." J.C. also told Russell her juvenile matter involved "charges with alcohol," and she explained that

"concerned [her], because [her] current arrest," for which she consulted Russell, "was also with alcohol involved." Russell asked J.C. if she "had a problem with alcohol" to which she replied she "didn't believe [she] had a problem, [but] that [she] just made stupid decisions while under the influence." J.C. also told Russell one of her pending immigration applications was "due" to her being a victim of "an assault . . . when she was a child, but [she] never mentioned the name" of the individual who she alleged committed the offense and identified him only as "the boyfriend of [her] mother."

J.C.'s friend testified she accompanied J.C. to the restaurant and observed J.C. meet with Russell. J.C.'s friend did not participate in the meeting or hear the conversation between J.C. and Russell.

Russell also testified. He explained he had no recollection of the meeting with J.C. He also testified J.C. never retained him to represent her.

According to J.C., her consultation with Russell ended with an agreement she would meet with him the following day to deliver the retainer payment. J.C. recalled Russell told her "to call him when [she] was going to hand him the thousand dollars." J.C. testified that, based on the meeting, she understood "Russell was going to be [her] counsel for the charges."

Later on the day of the consultation, J.C. was arrested again for violating the restraining order. She contacted an ex-boyfriend, who spoke with Russell about the new arrest. The ex-boyfriend reported to J.C. that Russell advised her to "wait it out" and Russell would speak to her the following day to discuss "what's going to be next."

Based on arrangements made by her family, J.C. met with and retained a different lawyer the following day. She did not contact Russell again or attend the planned meeting at his office, and she ignored two text messages from Russell inquiring about "what was going on and if [J.C.] was going to retain him or not."

After hearing argument and considering post-hearing briefs, the court issued an order and detailed written opinion denying the State's motions. The court rejected the State's claim Russell should be disqualified under RPC 1.9, which applies to conflicts of interest between attorneys and former clients. The court found J.C. made a "verbal agreement" to retain Russell but that the scheduled second meeting at which she was to pay the retainer did not take place. The court further found Russell "ultimately was not retained as counsel." The court reasoned it is "unrealistic to equate one consultation which lasted less than an hour to a case where an attorney represented the State's witnesses or a

codefendant in prior matters." The court concluded RPC 1.9 is inapplicable because J.C. had never been Russell's client, and therefore J.C. was not a "former client" under the rule.

The court determined J.C. was Russell's "former prospective client" and, as such, RPC 1.18 governed the alleged conflict presented by Russell's January 28, 2018 meeting with J.C. The court did not find a conflict under RPC 1.18, reasoning the information J.C. provided during the consultation did not concern a matter that is "the same or substantially related to the" pending criminal cases against Ortega and Cardenas-Ortega, and the information was not "significantly harmful to" J.C., as the "former [prospective] client" in the pending criminal cases. In part, the court further found "none" of the information provided by J.C. to Russell "which could potentially pose a threat of prejudice . . . would likely be admissible" in the criminal cases "under the Rules of Evidence."

For example, the court explained J.C.'s prior criminal record, juvenile record, and the entry of a temporary restraining order against her are likely inadmissible under N.J.R.E. 608. The court also rejected the State's claim the information J.C. provided concerning her immigration status could be used against her at trial, noting admission of that information was "not likely," the State did not offer a basis establishing its admissibility, and the Court and the

State could not rely on speculation as to what might occur at trial to establish a disqualification of counsel. The court further rejected the State's claim that J.C.'s disclosure — she made "stupid decisions" while under the influence of alcohol — could be used against her at trial, reasoning that information "could just as easily be revealed to . . . Russell by his client, . . . Cardenas-Ortega, who was in a relationship with [J.C.] at the time of the alleged offense, or in the normal course of [Russell's] investigation."

The court concluded the State failed to demonstrate the information provided by J.C. during the January 28, 2018 meeting barred Russell's representation of Cardenas-Ortega or Ortega under RPC 1.18. The court entered orders denying the State's motions in defendants' cases. We granted the State's motions for leave to appeal from the court's orders.

II.

"[A] determination of whether counsel should be disqualified is, as an issue of law, subject to de novo plenary appellate review." City of Atlantic City v. Trupos, 201 N.J. 447, 463 (2010). Where the trial court conducts an evidentiary hearing, we defer to its findings of fact that are supported by substantial credible evidence, State v. Pierre, 223 N.J. 560, 576 (2015), but "for mixed questions of law and fact" we "give deference . . . to the supported factual

findings of the trial court" and "review de novo" the court's "application of any legal rules to such factual findings[.]" State v. Harris, 181 N.J. 391, 416 (2004) (emphasis in original). We apply these standards here.

"[A] non-indigent defendant's Sixth Amendment right to counsel encompasses the right to be represented by the counsel of his [or her] choosing, as the Sixth Amendment commands . . . that the accused be defended by the counsel he [or she] believes to be best." State v. Faulcon, 462 N.J. Super. 250, 254 (App. Div. 2020) (alterations in original) (internal quotations omitted) (quoting State v. Hudson, 443 N.J. Super. 276, 283 (App. Div. 2015)). "However, the right to counsel of one's choice is not absolute." State v. Kates, 426 N.J. Super. 32, 45 (App. Div. 2012).

Pertinent here, "[a] defendant's right to choose counsel is . . . circumscribed by the court's power to guard against conflicts of interest, and to vindicate the court's 'independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession'" Ibid. (quoting Wheat v. United States, 486 U.S. 153, 160 (1988)); see also Hudson, 443 N.J. Super. at 284 ("[A] defendant's Sixth Amendment right to effective assistance of counsel mandates counsel provide both adequate and conflict-free representation."). "In criminal matters, in which the trust between attorney and

client has enhanced importance, special vigilance is required because an attorney's divided loyalty can undermine a defendant's Sixth Amendment right to the effective assistance of counsel." State ex rel. S.G., 175 N.J. 132, 139 (2003).

As the United States Supreme Court explained in Wheat, "courts have an independent interest in ensuring criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." 486 U.S. at 160. "Accordingly, . . . it is incumbent on the courts to ensure that defendants receive conflict-free representation." S.G., 175 N.J. at 140.

In any event, the State bears the burden of demonstrating "a disqualifying conflict exists." Faulcon, 462 N.J. Super. at 254 (quoting Hudson, 443 N.J. Super. at 282). Here, the State argues the court erred by finding it failed to satisfy its burden because J.C. was Russell's former client, the court should have determined the conflict issue under RPC 1.9, and Russell has a disqualifying conflict of interest under the rule in his representation of defendants in their respective cases. The State also contends that, even assuming the court correctly determined J.C. is Russell's former prospective client, Russell has a disqualifying conflict of interest under RPC 1.18. Last, the State claims the

court erred by not properly informing defendants of the potential adverse consequences, based on the claimed conflicts, of Russell's continued representation of defendants. We consider the State's arguments in turn.

The State contends the court erred by finding RPC 1.9 does not govern the claimed conflicts of interest because, contrary to the court's determination, J.C. is Russell's former client. The court's found J.C. is not Russell's former client because J.C. never paid Russell, Russell never entered an appearance in any proceeding on J.C.'s behalf, and the relationship between J.C. and Russell did not extend beyond their initial consultation.

In pertinent part, the rule provides, "[a] lawyer who has represented a client in a matter shall not thereafter represent another client in the same or a substantially related matter in which that client's interests are materially adverse to the interests of the former client unless the former client gives informed consent confirmed in writing." RPC 1.9(a). The rule further "prohibits a lawyer from using or revealing information relating to a former client's representation to the former client's disadvantage." Dental Health Assocs. S. Jersey, PA v. RRI Gibbsboro, LLC, 471 N.J. Super. 184, 193 (App. Div. 2022).

"The existence of [an] attorney-client relationship places upon [the attorney] the responsibilities set forth in" RPC 1.9. Herbert v. Haytaian, 292

N.J. Super. 426, 437 (App. Div. 1996). "[A]n attorney-client relationship is created" where "the prospective client requests the lawyer undertake the representation, the lawyer agrees to do so[,] and preliminary conversations are held between the attorney and client regarding the case[.]" Id. at 436.

Measured against this standard, the motion court did not err by finding J.C. and Russell did not have an attorney-client relationship during their January 28, 2018 meeting. That is because there is no evidence Russell agreed to undertake J.C.'s representation during their meeting. As J.C. explained, Russell informed her he required a \$1,000 retainer to undertake her representation, and she agreed to deliver the requisite retainer the next day. Following the meeting, J.C. decided to obtain other counsel and did so without any trepidation that she had an agreement with Russell for him to serve as her counsel. J.C. did not meet with Russell again as originally planned; she did not deliver the retainer Russell told her he required; and she ignored Russell's subsequent messages inquiring as to whether she intended to retain him as her counsel.

J.C. did not testify that, based on her meeting with Russell, she understood they had an agreement he was then serving as her counsel. To the contrary, she explained that when she left the meeting, she understood only that Russell was "going to be" her attorney, presumably when she paid the retainer he advised

was required as a condition of his retention. Russell apparently had the identical understanding; according to J.C., on the day following the consultation, Russell sent her text messages asking whether she intended to retain him as her attorney or not. In other words, neither J.C. nor Russell understood they had an attorney-client relationship during their January 28, 2018 meeting, and there is no evidence Russell agreed to represent J.C. such that they ever had an attorney-client relationship under the Haytaian standard. See *ibid.* The evidence established only that Russell agreed he would represent J.C. in the future if she paid the retainer he required, but that never happened.

Similarly, J.C.'s conduct following her meeting with Russell is inconsistent with the any reasonable inference she had an attorney-client relationship with Russell. When police arrested J.C. following her consultation with Russell, she did not call Russell but instead called her then-boyfriend. She also never communicated with Russell again; she did not attend their planned meeting at which she was to pay the required retainer; she did not respond to Russell's inquiries concerning her interest in retaining him; and she retained other counsel for representation in the matters for which she consulted with Russell. Cf. *In re Silverman*, 113 N.J. 193, 217 (1988) (quoting *In re Palmieri*,

76 N.J. 51, 58-59 (1978)) (explaining the existence of an attorney-client relationship may "'be inferred from the conduct of the parties'").

In Haytaian, we explained an attorney-client relationship "'may be established through preliminary consultations, even though the attorney is never formally retained and the client pays no fee[,]'" 292 N.J. Super. at 436 (quoting Bays v. Theran, 639 N.E.2d 720, 723-24 (Mass. 1994)), and "[t]he creation of an attorney-client relationship does not rest on whether the client ultimately decides not to retain the lawyer or whether the lawyer submits a bill." Ibid. But see O Builders & Assocs., Inc. v. Yuna Corp. of NJ, 206 N.J. 109, 120 (2011) (finding RPC 1.9 was not "implicated" because the attorney had not been "retained" by the putative client seeking the attorney's disqualification). We also explained, however, an essential element of an attorney-client relationship is an "express[] or implied[] [agreement] to give," or the actual provision of, "the desired advice and assistance." Haytaian, 292 N.J. Super. at 436 (citations and internal quotations omitted).

For the reasons we have explained, the State failed to prove those essential elements of an attorney-client relationship here. Again, there is no evidence Russell agreed to act as J.C.'s counsel at their brief meeting; he instead informed J.C. he required a retainer to serve as her counsel, and J.C. later abandoned her

plan to fulfill the condition of Russell's agreement to serve as her counsel by failing to appear and deliver the retainer he required in favor of retaining another lawyer to act as her counsel. There is also no evidence Russell provided J.C. with any "desired advice and assistance" pertaining to the then-pending criminal charges against her.² See ibid.; cf. id. at 436 (finding an attorney-client relationship where the attorney agreed to undertake an investigation of a sexual harassment matter although ultimately not retained and when, over the course of a month, the attorney received confidential information and the client's views on various issues related to the investigation, and it was "reasonable to conclude" the attorney "expressed his own views and advice" on the subjects related to the investigation). We therefore agree with the motion court that RPC 1.9 is inapplicable to the State's disqualification motions because the State did not demonstrate J.C. and Russell had an attorney-client relationship during the January 28, 2018 meeting at which J.C. shared confidential information.

However, our determination RPC 1.9 does not govern Russell's obligations concerning the confidential information J.C. provided during their

² We are not persuaded that, given all the circumstances presented, the singular generic bit of advice Russell provided to J.C. concerning what might occur in the future — that she should not violate the TRO against her — established J.C. had formed an attorney-client relationship with Russell during the meeting.

meeting does not leave J.C.'s communications unprotected or allow Russell to represent other clients, including Cardenas-Ortega and Ortega, without limitation. Under RPC 1.18, "[a] person who communicates with a lawyer the possibility of forming a client-lawyer relationship with respect to a matter is a prospective client," and if no relationship is formed, such person is a "former prospective client." RPC 1.18(d). Based on the record presented, and for the reasons we have explained, we are persuaded the court correctly determined J.C. is Russell's former prospective client under RPC 1.18(d)'s plain language.

RPC 1.18 "protects parties," such as J.C. here, "who have disclosed information to counsel during a preliminary discussion, without requiring a court to strain to find that the preliminary discussion created a representation." O Builders & Assocs., Inc., 206 N.J. at 122. In pertinent part, the rule provides:

(a) A lawyer who has had discussions in consultation with a prospective client shall not use or reveal information acquired in the consultation, even when no client-lawyer relationship ensues, except as RPC 1.9 would permit in respect of information of a former client.

(b) A lawyer subject to paragraph (a) shall not represent a client with interests materially adverse to those of a former prospective client in the same or substantially related matter if the lawyer received information from the former prospective client that could be significantly harmful to that person in the matter

[RPC 1.18(a), (b).]

"To justify disqualification" under RPC 1.18(b), "two factors must coalesce: (1) the information disclosed in the consultation must be the same or substantially related to the present lawsuit[;] and (2) the disclosed information must be significantly harmful to the former [prospective] client in the present lawsuit." Greebel v. Lensak, 467 N.J. Super. 251, 257-58 (App. Div. 2021) (citing O Builders & Assocs., Inc., 206 N.J. at 113-14).

A matter is considered "'substantially related' if 'the lawyer for whom the disqualification is sought received confidential information from the former client that can be used against that client in the subsequent representation of parties adverse to the former client' or the 'facts relevant to the prior representation are both relevant and material to the subsequent representation.'" Id. at 258 (quoting O Builders & Assocs., Inc., 206 N.J. at 125). Our Supreme Court has explained that information is "significantly harmful" if "prejudicial in fact to the former prospective client within the confines of the specific matter in which disqualification is sought[.]" O Builders & Assocs., Inc., 206 N.J. at 126. A disqualification motion is "subject to careful scrutiny" and the moving party must "demonstrate what of [the] claimed confidential information would be

beyond the reach of . . . pre-trial discovery" in the case in which the disqualification is sought. Id. at 130.

Measured against these principles, and mindful the State bore the burden of establishing the alleged disqualifying conflicts, Faulcon, 462 N.J. Super. at 254, we are persuaded the court correctly determined the evidence presented does not permit a finding Russell should be disqualified. That is, accepting J.C.'s scant testimony about her brief consultation with Russell about a wholly unrelated matter — the then-pending criminal charges against her — the record is devoid of evidence establishing any information she disclosed is "substantially related to the" matters pending against either defendant or is "significantly harmful" to J.C. in the pending matters against defendants. Greebel, 467 N.J. Super. at 257-58. The State therefore did not sustain its burden of establishing Russell had a disqualifying conflict under RPC 1.18, and, for that reason, we affirm the court's orders denying the State's motions in the separate cases. Faulcon, 462 N.J. Super. at 254.

We observe the record includes evidence about three confidential communications J.C. made to Russell that suggest at least a theoretical possibility of a disqualifying conflict under RPC 1.18. But the limited evidence the State presented at the evidentiary hearing was insufficient to establish the

three communications resulted in a conflict under RPC 1.18 requiring Russell's disqualification. We consider the three communications in turn.

First, during the consultation, J.C. informed Russell she made "stupid decisions while under the influence" of alcohol. That admission includes information defendants would not otherwise obtain during pre-trial discovery. See O Builders & Assocs., Inc., 206 N.J. at 130. In our view, J.C.'s admission to Russell might properly be used in a manner adverse to J.C. in Cardenas-Ortega's matter if either Cardenas-Ortega claims at trial that the acts of vaginal and anal penetration depicted on the recordings while J.C. were unconscious were performed with J.C.'s consent provided while she was intoxicated, or if J.C. testifies that her state of unconsciousness in the recorded incidents resulted from intoxication and defendant claims innocence based on J.C.'s consent to his acts.³ Thus, if defendant intends to argue at trial that J.C. consented to the alleged charged acts while intoxicated, or if J.C. will testify at trial her state of unconsciousness in the recordings was the result of alcohol intoxication, her admission she makes stupid decisions while intoxicated is "both relevant and material to" Russell's representation of Cardenas-Ortega in his pending criminal

³ We note Russell advised the court during a proceeding that Cardenas-Ortega intends to claim J.C. consented to the acts depicted in the recordings.

case, O Builders & Assocs., Inc., 206 N.J. at 125, and may be "significantly harmful" to J.C.'s credibility — including as to any denial she provided consent — in Cardenas-Ortega's criminal trial, id. at 126.⁴

We recognize that absent evidence J.C.'s state of unconsciousness depicted in the recordings was caused by intoxication, or a claim by Cardenas-Ortega that J.C. consented to the acts of penetration while intoxicated, or evidence J.C. consented to the acts depicted while intoxicated, J.C.'s admission to Russell that she makes "stupid decisions" while intoxicated would appear not to have any probative value, would be inadmissible at Cardenas-Ortega's trial, and would not support a finding Russell has a disqualifying conflict under RPC

⁴ We reject the motion court's reasoning J.C.'s statement she makes "stupid decisions" while intoxicated could not support a finding of a conflict of interest for Russell under RPC 1.18. The court based its conclusion on a finding the information "could just as easily be revealed to" Russell by Cardenas-Ortega or during the normal course of Russell's investigation. That finding ignores J.C.'s statement constitutes a potentially significant admission by the alleged victim of the crimes charged in the indictment that might undermine her credibility and claim she did not consent to the vaginal and anal penetration depicted in the recordings. Opinions of others that J.C. made stupid decisions while intoxicated, including the opinions of Cardenas-Ortega, if he opted to testify, or some other witness developed during an investigation — even if admissible at trial — would not carry the same probative weight as the same admission by the alleged victim of the charged offenses. Additionally, the court's conclusion that either Cardenas-Ortega or some other source developed during Russell's investigation could provide similar information is founded on nothing more than speculation.

1.18. Again, the evidence the State presented in support of its disqualification motion did not address those potential issues and did not otherwise allow a determination that Russell has a disqualifying conflict. Rather, the evidence presented by the State supports the motion court's conclusion Russell does not have a disqualifying conflict.

The record presented at the evidentiary hearing included a second statement made by J.C. to Russell that suggests another potential disqualifying conflict, but the State not did present sufficient evidence establishing it to be so. See Faulcon, 462 N.J. Super. at 254 (quoting Hudson, 443 N.J. Super. at 282) ("The burden rests with the State to demonstrate a disqualifying conflict exists."). More particularly, J.C. testified she confided in Russell that one of her immigration applications was based on her being the victim of an assault when she was a child by an individual whose name she did not mention but who she described as her mother's boyfriend. The record shows J.C. has separately referred to Ortega as both her stepfather and her mother's boyfriend, and Ortega is charged in the indictment with assaulting J.C. when she was a child. Thus, the record suggests Ortega may be the individual whom J.C. identified to Russell as her childhood assailant but the State failed to present any evidence establishing whether or not that is the case. Ibid.

Thus, the motion record does not reveal whether the individual to whom J.C. referred in her statement to Russell is Ortega, but the record suggests a possibility that may be the case. If J.C.'s disclosure to Russell during the consultation was about Ortega, her statement provides factual information that is "both relevant and material to" Russell's representation of Ortega in his pending criminal case, O Builders & Assocs., Inc., 206 N.J. at 125; it is a statement made in confidence by J.C. that Russell's current client, Ortega, assaulted her as charged in the indictment.

The statement was not considered as such by the motion court because the State did not present evidence addressing the issue. We therefore find no error in the motion court's determination that, based on the evidence presented, the State failed to establish that J.C.'s statements to Russell about being sexually assaulted as a child did not create a disqualifying conflict for Russell in his representation of Ortega.

The third statement J.C. made to Russell that suggests a potential disqualifying conflict for Russell under RPC 1.18 is J.C.'s disclosure that one of her immigration applications is "due" to the assault by her mother's boyfriend. Again, the record does not permit a determination that J.C.'s statement to Russell was actually about Ortega, and, for that reason, the motion court correctly

determined the State did not offer an evidentiary basis establishing a disqualifying conflict for Russell.

If, however, J.C.'s statement was made about an alleged sexual assault by Ortega that she has relied on to support an immigration application, the disclosure may be "prejudicial in fact" to J.C during Ortega's trial. It could be relied on to show J.C. has an untoward motive — her reliance on Ortega's alleged assault as support for her immigration application — to falsely testify she was assaulted by Ortega when she was a juvenile. See State v. Feaster, 156 N.J. 1, 28 (1998) (approving inquiry into witness's interest in "tailor[ing]" testimony to obtain defendant's conviction to collect reward money payable "only after defendant's conviction"); cf. Muhanna v. Gonzales, 399 F.3d 582, 587 (3d Cir. 2005) (finding immigration judge's questioning of asylum applicant regarding relevant "ulterior motive" for marrying American citizen did not violate due process, as the motive "call[ed] into question" defendant's application).

We acknowledge each of the three disclosures J.C. made to Russell that we have discussed suggests only the possibility of a disqualifying conflict under RPC 1.18. And, as we have explained, we therefore determine the State's failure to present evidence establishing a conflict based on any of those statements

requires that we affirm the court's orders denying the State's disqualification motions. Faulcon, 462 N.J. Super. at 254.

We remind the trial court of its ongoing duty to "guard against conflicts" and ensure Russell's representation of defendants in their separate matters is "'conducted within the ethical standards of the profession'" Kates, 426 N.J. Super. at 45 (quoting Wheat, 486 U.S. at 160). Thus, if presented with any evidence demonstrating Russell has a disqualifying conflict, the court shall address the issue, make findings, and issue an appropriate order to ensure defendants have representation free of any disqualifying conflicts.⁵

Moreover, we remind counsel of his continuing ethical duty to carefully consider and determine whether any reasonably anticipated trial evidence or defense will result in a disqualifying conflict under RPC 1.18. See State v. Jimenez, 175 N.J. 475, 490 (2003) (observing counsel "would be duty-bound to withdraw from her representation of defendant" if counsel "discovered any information . . . that would remotely suggest" the presence of a conflict).

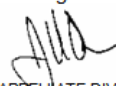
⁵ Our discussion of the three disclosures made by J.C. that suggest the potential for disqualifying conflicts shall not be interpreted as a finding Russell has a disqualifying conflict. Any such determination may only properly be made based on competent evidence, and, as noted, the evidence presented at the hearing, without more, did not establish those disclosures support a finding Russell has a disqualifying conflict under RPC 1.18.

Counsel is also ethically bound to advise the court if any reasonably anticipated evidence or defense will result in a disqualifying conflict, and immediately withdraw his representation prior to trial on that basis. Ibid.

In sum, we find based on the evidence presented to the motion court, that the State failed to sustain its burden of establishing any of the disclosures made by J.C. to Russell support a disqualification under RPC 1.18(b).⁶ Faulcon, 462 N.J. Super. at 254. We agree with the State, however, that the court should engage in a colloquy with each defendant as necessary under the circumstances extant in their respective cases to inform defendants of the issues raised in the State's motions, the State's claims of actual and potential conflicts of interest presented by Russell's prior consultation with J.C., and this court's ruling to ensure they each make a knowing and voluntary decision to proceed with the counsel of their choice as permitted by the RPCs.

Affirmed in A-1578-21 and A-1580-21.

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


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⁶ Although not addressed by the parties, we are conscious that the manner in which the conflict issues were aired in the trial court resulted in the public exposure of the victim's alleged confidences. Although the victim may have knowingly waived her right to maintain the confidentiality of the statements she claims to have made to Russell, both the State and the court should be sensitive to the issue in any further proceedings.