NOT FOR PUBLICATION WITHOUT THE
APPROVAL OF THE APPELLATE DIVISION

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. A-3341-21

EVOLUTION AB (PUBL.), EVOLUTION US LLC, and EZUGI NJ LLC,

Plaintiffs-Respondents,

v.

RALPH J. MARRA, JR., ESQUIRE, and CALCAGNI & KANEFSKY, LLP,

Defendants-Appellants.

APPROVED FOR PUBLICATION

January 23, 2023

APPELLATE DIVISION

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Argued December 20, 2022 – Decided January 23, 2023

Before Judges Sumners,[1] Susswein and Fisher.

On appeal from an interlocutory order of the Superior Court of New Jersey, Law Division, Atlantic County, Docket No. L-0616-22.

Kevin H. Marino argued the cause for appellants (Marino, Tortorella & Boyle, PC, attorneys; Kevin H. Marino, John A. Boyle and Erez J. Davy, on the briefs).

Russell L. Lichtenstein argued the cause for respondents (Cooper Levenson, PA, attorneys; Russell L. Lichtenstein and Jennifer B. Barr, on the brief).

[1] Judge Sumners did not participate at oral argument but joins the opinion with counsel's consent.

PER CURIAM

Defendants – an attorney and law firm – have a client that produced a report, which asserts that plaintiffs unlawfully conducted gambling-related business in forbidden countries. At the client's behest, the defendant attorneys sent the report to the New Jersey Division of Gaming Enforcement (DGE). When the media learned of the report, plaintiffs sued the defendant attorneys for defamation and other torts, and successfully obtained an order compelling the defendant attorneys to provide their client's identity. We granted leave to appeal that order and, having concluded the judge should have first made an informed decision about the weight of plaintiffs' claims, we vacate the order and remand for further proceedings.

I

This defamation action was commenced in the Chancery Division in December 2021. Plaintiffs Evolution AB (publ.), Evolution US LLC, and Ezugi NJ LLC[2] claim that the defendant attorneys – Ralph J. Marra, Jr., Esq., and Calcagni & Kanefsky – forwarded a document labeled "Evolution's Online

[2] The first named plaintiff alleges in its complaint that it is a Swedish public limited company, and that the other two entities are Delaware and New Jersey limited liability companies, respectively, and are both subsidiaries of the Swedish company.

Casino Presence in Illegal Markets, Investigative Report, November 2021" (the Report) to the DGE on November 12, 2021. Plaintiffs allege the Report is "untrue and misleading" and defamatory.[3]

Other than the attorneys, plaintiffs named fictitious defendants, labeled: John Does 1-10 and Jane Roes 1-10. They claim the Report "was prepared" by the former group "at the behest" of the latter group, which are "competitor(s) of" plaintiffs. Plaintiffs allege those identified as "John Does 1-10" are clients of the defendant attorneys and that it is unknown to them whether those identified as "Jane Roes 1-10" are also clients of the defendant attorneys.

Along with filing their complaint, plaintiffs obtained an order that required the defendant attorneys to show cause why they should not disclose the identities of their client or clients and those that commissioned the Report. The defendant attorneys responded with a Rule 4:6-2(e) motion to dismiss. The chancery judge denied both the motion to dismiss and the application to compel disclosure and transferred the matter to the Law Division.

Plaintiffs immediately served the defendant attorneys with interrogatories and document requests. The defendant attorneys moved for a protective order that was supported by the certification of Thomas Calcagni, Esq., who explained

[3] Plaintiffs also assert claims of tortious interference, fraud, and trade libel.

that the law firm was retained by "an unnamed investigative firm that had prepared a lengthy report . . . based on a comprehensive, nearly year-long investigation" of plaintiffs' operations. Calcagni further certified that the law firm "performed due diligence and independent analysis" and "went to great lengths to verify" that the Report "had sufficient evidentiary and legal support." Once satisfied that the evidence "was credible and comprehensive and that it provided strong support" for the Report's findings and conclusions, the defendant attorneys reached out to the DGE, which agreed to receive it. Calcagni also certified that, on November 30, 2021, an investigator for the Pennsylvania Gaming Control Board requested the Report, and that defendant Marra provided it a few days later. Around the same time, the defendant attorneys provided a New Jersey deputy attorney general with "additional evidence compiled by the investigative firm that would contradict certain public statements made by Evolution in response to news reports" about the Report; this evidence, according to Calcagni's certification, "included videos of 'investigative gambling' by the investigative firm on Evolution games using IP addresses from black market countries (such as Iran, Hong Kong and Singapore), screenshot images reflecting deposits and withdrawals in connection with those gambling sessions, and transcripts of interviews of certain former Evolution executives,"

that, according to Calcagni, "further confirmed the Report's conclusions regarding Evolution's unlawful conduct."

Calcagni certified that neither Calcagni & Kanefsky nor Marra "provided copies of the Report" or their cover letter to the DGE "to anyone other than the DGE" and its Pennsylvania counterpart.

On May 17, 2022, the judge denied the motion for a protective order for reasons expressed in a thorough written decision.

II

The defendant attorneys moved for leave to appeal, arguing the trial judge erred in entering the May 17, 2022 order by "misinterpret[ing] RPC 1.6 and . . . controlling precedent," by requiring them to "disclose information protected by the informer's privilege," and by finding that plaintiffs' "supposed need for [defendant attorneys'] work product was sufficient to override the protections afforded by RPC 1.6, the attorney-client privilege, and the work-product doctrine." Plaintiffs forcefully responded that neither the attorney-client privilege nor RPC 1.6 protects the identities of the defendant attorneys' "client or the entity that commissioned the [R]eport," and that the informant's privilege and the work-product doctrine are inapplicable.

Because the precise nature of the information sought is not readily apparent, we decline the invitation to decide whether or how the informant's privilege or the work-product doctrine may apply to the discovery requests in question.[4] Instead, we focus on the battle here that pits an attorney's obligation to avoid revealing a client's identity against a litigant's right to the discovery of information necessary for its pursuit of a civil cause of action. In achieving an appropriate balance between these important societal interests – and the ultimate judicial interest in the pursuit of the truth of the parties' assertions – we conclude that the revelation of the client's identity, if at all discoverable, must await a better understanding of the weight of plaintiffs' causes of action, which seem to greatly, if not exclusively, turn on the Report's veracity.

III

RPC 1.6(a) generally prohibits a lawyer from disclosing "information relating to representation of a client" without the client's consent. In considering RPC 1.6(a)'s reach, we start by acknowledging there is no doubt that "information relating to representation of a client" encompasses the client's identity. See In re Advisory Opinion No. 544, 103 N.J. 399, 411 (1986) (holding

[4] We do not foreclose consideration of these other principles, if appropriate, at some later date.

that "client-identifying data [is] clearly covered by the Rules of Professional Conduct as 'information relating to representation'").[5]

Proceeding further, we note that RPC 1.6(a)'s general declaration of nondisclosure contains exceptions. For example, RPC 1.6(a) does not bar: "(1) disclosures that are impliedly authorized in order to carry out the representation, (2) disclosures of information that is generally known, and (3) as stated in paragraphs (b), (c), and (d)." Because subsections (1) and (2) do not permit disclosure here, we turn to subsection (3) and its subparts and conclude that RPC 1.6(d) may arguably be relevant insofar as it states that a lawyer "may reveal such information to the extent the lawyer reasonably believes necessary . . . (4) to comply with other law." The circumstances described in this paragraph and what may constitute "other law" are far from clear.

In arguing that RPC 1.6 doesn't impede the divulging of the information they seek, plaintiffs claim that RPC 1.6(d)(4)'s "other law" reference should be interpreted as applicable here because the discovery order in question is "other law." This reasoning is far too facile. If we were to accept the proposition that

[5] The attorney-client privilege embodied in N.J.R.E. 504 and N.J.S.A. 2A:84A-20(1), may also protect against revelation of a client's identity. See Advisory Opinion No. 544, 103 N.J. at 411; In re Kozlov, 79 N.J. 232, 240 (1979); Dry Branch Kaolin v. Doe, 263 N.J. Super. 325, 329-30 (App. Div. 1993).

the entry of any discovery order eclipses a lawyer's ethical obligations under RPC 1.6, it would not be long before RPC 1.6 would have no meaning at all. That a judge was convinced to enter a discovery order is not the test; there must be a sufficient supporting legal or policy-driven reason underlying the "other law" provision before a disclosure of the client's information may be compelled.

The defendant attorneys' absolutist position is equally facile. The Court clearly held in Advisory Opinion No. 544 that RPC 1.6 does not completely bar disclosure, recognizing instead that "even though . . . information might otherwise be subject to a privilege against disclosure" under this rule, "there may be a legal justification that would allow such disclosure." 103 N.J. at 410. The Court recognized that while RPC 1.6(a) has broad application, there may be situations where compelled disclosure would be appropriate, such as when a client was attempting through nondisclosure to "thwart justice." Id. at 411. We conclude from this that, in the same sense, nondisclosure should not be permitted to thwart an injured party's legitimate right to redress.

In short, we are satisfied that somewhere between the parties' polar-opposite positions lies a middle ground where the client's desire for anonymity does not entirely eviscerate another's valid cause of action or, stated the other way, where a civil claim may not be of sufficient weight to overcome the strong

policy interests underlying RPC 1.6's general rule of nondisclosure. Although Advisory Opinion No. 544 dealt with quite a different circumstance than presented here, the Court's decision makes clear that there may be instances when some degree of disclosure may be warranted.

IV

So, while we recognize disclosure of a client's identity may be compelled in appropriate circumstances, we have little upon which to determine whether this is one of those appropriate circumstances. What – to date – is missing from the analysis that must be undertaken is an understanding of the weight of plaintiffs' claims. On the one hand, we have the position of the defendant attorneys, who claim that after careful consideration and independent examination, they found the Report to be credible. On the other, we have plaintiffs' claim that the Report is untrue and defamatory. If the defendant attorneys' position has merit, and their anonymous client may be fairly viewed as a whistleblower seeking protection from the actions of a vindictive adversary, then perhaps the client should be entitled to retain its anonymity. But if the client has prepared and disseminated false statements designed to harm plaintiffs, then we see no reason why RPC 1.6(d)(4) wouldn't provide an avenue for disclosure of the client's identity.

What is required is a balancing of these interests that can only be accomplished through a greater understanding of the Report's veracity. As the Court said in In re Richardson, 31 N.J. 391, 401 (1960), when considering the assertion of the attorney-client privilege against a request for information relevant to a criminal investigation:

> Throughout their judicial endeavors courts seek truth and justice and their search is aided significantly by the fundamental principle of full disclosure. When that principle conflicts with the attorney-client privilege it must, of course, give way but only to the extent necessary to vindicate the privilege and its underlying purposes. The matter is truly one of balance. . . .

In many cases – and this is one – this balancing cannot occur solely by resorting to the parties' general and self-serving assertions. Only a better understanding of the weight and substance of the parties' allegations will lead to a satisfactory determination about whether the identity of the client or clients should be disclosed.

This does not mean that plaintiffs' claim must be decided before it may be determined whether disclosure is appropriate. But it does mean that the judge should examine the merits – as may frequently occur when determining whether to impose an interlocutory injunction prior to trial, see, In re Estate of Thomas, 431 N.J. Super. 22, 38-39 (App. Div. 2013) – by considering evidence related

to the relevant issue, and by making factual findings that would support a sound conclusion about disclosure.

In remanding for that purpose, we leave to the trial judge's discretion the best way to proceed. What is required need not be elaborate. The judge may or may not decide that an evidentiary hearing would be helpful. It may be that some abbreviated discovery – perhaps allowing plaintiffs to depose the defendant attorneys and explore what it is they did and what they considered in finding the Report credible – may go a long way in providing the judge with greater clarity about the Report's veracity, which seems to be the key to the success or failure of plaintiffs' suit. Or, it may be – considering the DGE and its Pennsylvania counterpart have had the Report for over a year – that their investigations have yielded, or may soon yield,[6] sufficient enlightenment about the Report's veracity. Perhaps, some other approach – standing alone or in combination with those we have suggested – may provide an expeditious path toward fulfilling our mandate. The judge should also consider whether or to what extent information should be received and reviewed in camera as the means for best protecting the client's anonymity until a ruling on disclosure may be made.

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[6] The trial judge, for example, may determine that it is appropriate to await results from either or both these agencies before tackling the difficult task imposed by our decision.

In short, while we mandate that a better understanding of the Report's veracity, or lack of veracity, must be obtained before granting or denying disclosure, we leave to the judge's sound discretion the method utilized to achieve this goal.

The order under review is vacated and the matter remanded for further proceedings in conformity with this opinion. We do not retain jurisdiction.

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

CLERK OF THE APPELLATE DIVISION