

NEW JERSEY STATE BAR ASSOCIATION
New Jersey Law Center
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BRIAN DELANEY,

Plaintiff-Respondent,

v.

TRENT S. DICKEY and SILLS
CUMMIS & GROSS, P.C.,

Defendants-Petitioners.

SUPREME COURT OF NEW JERSEY
DOCKET NO. 083440

Appellate Division
Docket No. A-1726-17T4

CIVIL ACTION

Sat Below:

Hon. Carmen H. Alvarez, P.J.A.D

Hon. Susan L. Reisner, J.A.D.

Hon. William E. Nugent, J.A.D.

BRIEF OF *AMICUS CURIAE* NEW JERSEY STATE BAR ASSOCIATION

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PRELIMINARY STATEMENT

In deciding the matter at bar, the Appellate Division engaged in improper rulemaking, a function that is exclusively reserved for this Court following committee consideration and public commentary. Accordingly, the New Jersey State Bar Association (NJSBA), as *amicus curiae*, respectfully urges the Supreme Court to reverse that portion of the Appellate Division decision that invokes new mandates for attorneys under the Rules of Professional Conduct (RPCs) and restore the *status quo*, such that the reasoning of the court below can be tested through the Judiciary's formal rulemaking process.

The Appellate Division's published decision creates new ethical obligations for attorney-client communications and attorney retainer agreements by significantly expanding the established parameters of the Rules of Professional Conduct (RPCs).

The Appellate Division's interpretation of RPC 1.4(c) requires New Jersey lawyers to participate in an in-depth review of legal services agreements with prospective clients, rather than requiring attorneys to provide a reasonable explanation sufficient for the potential client to make a reasonable and informed decision about the representation. The Appellate Division also overstepped its authority by reading new limitations in to RPC 1.8(h)(1), which, it acknowledged, was unnecessary to resolve the matter on

appeal. Thus, the court below imposed significant ethical burdens on all attorneys without the benefit of the state's rulemaking process, a procedure that requires consideration, commentary, and reasoned debate by concerned parties, including the NJSBA.

Pursuant to R. 2:12-4, the instant case presents issues of general public importance for both the bench and bar as it involves a new holding that poses significant concern as to the formation and enforceability of the attorney-client relationship. Consistent with the concerns the NJSBA raised regarding the lower court's holding in Balducci v. Cige, 456 N.J. Super. 219 (App. Div. 2018), this Court should enter a holding providing a clear delineation of its plenary role in reviewing and adjudicating the issues at bar.¹ The NJSBA respectfully requests that this Court reverse that portion of the judgment of the Appellate Division pertaining to new requirements or prohibitions in connection with RPC 1.4(c) and 1.8(h)(1).

¹ The Court recently heard oral argument in the Balducci matter on October 24, 2019. See Balducci v. Cige, 236 N.J. 616 (2019) (granting certification).

PROCEDURAL HISTORY AND STATEMENT OF FACTS

The NJSBA relies on the procedural history provide by the parties.

LEGAL ARGUMENT

POINT I

THE APPELLATE DIVISION INTRUDED ON THE SUPREME COURT'S PLENARY AUTHORITY TO IMPOSE ETHICAL REQUIREMENTS ON NEW JERSEY ATTORNEYS BY CREATING NEW ETHICAL MANDATES AND IMPOSING SWEEPING NEW RESPONSIBILITIES ON ATTORNEY-CLIENT COMMUNICATIONS.

A. The Court Below Improperly Engaged in Rulemaking and Created Attorney Ethical Requirements that Exceed the Current Scope of the Rules of Professional Conduct.

The court below unilaterally amended the Rules of Professional Conduct when it published an opinion governing the fundamental mechanics of how an attorney may enter into a retainer agreement with their prospective client. Further, it inappropriately directed the terms of the attorney's discussion with their client as they commence the attorney-client relationship. The NJSBA submits that the Supreme Court should reverse the portion of the Appellate Division decision that oversteps the panel's authority by intruding on the Court's plenary authority to create ethical standards and govern attorney conduct.

At the outset, the lower court and the parties correctly recited that RPC 1.4(c) establishes a threshold for attorney-client interaction in this context, stating: "a lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding representation." The court further correctly noted the precedential impact of Atalese

v. U.S. Legal Services Group, L.P., 219 N.J. 430 (1997), in this context, which requires that "clients must be informed they are giving up [their] right[s] to bring [their] claims in court or have a jury resolve the dispute." Atalese, 219 N.J. at 447.

While the decision below invokes several additional cases of general holding that RPC 1.4(c) mandates that an arbitration provision be "clear" and a lawyer or law firm provide a "full and complete disclosure of all charges," there is no specific set of questions or defined parameters for what must be said or done in this situation, provided the attorney's conduct and interaction meet the reasonableness standard. Delaney v. Dickey, No. A-1726-17 (App. Div. Aug. 23., 2019) (slip op. at 15). It is, therefore, improper that the Appellate Division retroactively imposed specific requirements about how to meet the Rule's mandate, including dictates about whether a client is provided a printed or electronic copy of the arbitration rules.

RPC 1.4(c) is necessarily satisfied in those situations where an attorney or law firm provides a prospective client with the opportunity to review a legal services agreement and ask questions, even if the client declines to ask such questions. Even if the Court finds that a law firm *could* do more during that initial interaction, all that is necessary to comply with the Rule is that the lawyer's or the law firm's conduct be reasonable.

Likewise, the Appellate Division's finding that a lawyer or law firm violates RPC 1.8(h)(1), which prohibits an attorney or law firm from making an agreement that limits the attorney's liability for malpractice, where they freely negotiate a mutual waiver of damages, should also be subject to the vetting of the rulemaking process and ultimately determined by the Supreme Court. Absent this Court's intervention, the comments by the Appellate Division, even in *dicta*, will be interpreted as imposing a new prohibition against such waivers that was promulgated without the scrutiny of discussion, debate, and public commentary.

The NJSBA submits that it is imperative that this Court preserve its scope of authority with respect to the drafting of the Rules of Professional Conduct and their interpretation. Specifically, new Rules of Professional Conduct and expansive interpretations of existing Rules should be considered and adopted only under the established process of referral by this Court to its appropriate, designated committees involving stakeholder review and comment. Such proscriptions should not be handed down by trial or appellate court fiat. Indeed, significant due process concerns arise where a lawyer or law firm are subjected to a new bright-line ruling foisting a new, substantive interpretation on them and imposing that interpretation retroactively.

Application of the lower court's newly-created RPC interpretations should also be reversed as it is not proper to

apply such new standards retroactively to the conduct here. As this Court has long and consistently held, an attorney should be evaluated under the rules and standards in effect at the time the conduct had occurred. See Comparato v. Schait, 180 N.J. 90, 96 (2004) citing In re Yaccarino, 101 N.J. 342, 384 n.14 (1985) (holding that "[n]ewly adopted ethics rules do not apply to charges predating them."). Accordingly, any new rules or interpretations should be given prospective effect only.

The Court should reverse the decision below where it imposes new, untested, and burdensome requirements on New Jersey attorneys and law firms.

B. The Court Below Usurped the New Jersey Supreme Court's Constitutional Authority to Regulate Attorney Conduct and Promulgate Rules.

Despite a clear and articulated understanding of state constitutional principles and settled case law concerning this Court's plenary authority, vis-à-vis regulating attorney conduct, the appellate panel below chose to create new ethical interpretations in connection with legal service agreements and prospectively imposed those heretofore unknown mandates on lawyers and law firms.

The appellate panel below aptly acknowledged this Court's plenary authority to "make rules" and otherwise regulate "the

practice of law and the discipline of persons admitted" under Article VI, Section 2, paragraph 3 of the New Jersey Constitution. Delaney, No. A-1726-17 (slip op. at 9-10). Further, the panel properly invoked this Court's independent supervisory authority, as recited and discussed in Cohen v. Radio-Elecs. Officers Union, Dist. 3, NMEBA, 146 N.J. 140 (1996) and In re LiVolsi, 85 N.J. 576 (1981).

In Cohen, this Court found that the attorney's conduct and agreement at issue met ethical standards, and cited the Restatement of the Law Governing Lawyers, § 29A, in holding that "[a] court shall construe an agreement between a lawyer and a client as a reasonable person in the circumstances of the client would have construed it. Those principles apply as readily to retainer agreements as to other agreements between lawyers and clients." Cohen, 146 N.J. at 157 (emphasis added). Indeed, that "reasonableness" is precisely the standard that should be applied here and elsewhere in evaluating attorney retainer agreements and their related circumstances under RPC 1.4(c).

Moreover, the NJSBA previously appeared as *amicus curiae* in the other case relied upon by the panel below, In re LiVolsi. There, the NJSBA raised arguments addressing this Court's plenary disciplinary authority, a power the Court unanimously upheld and has interpreted broadly. In responding to the NJSBA's constitutional objections to the creation of R. 1:20A without a

methodology for appeal, the Court exerted its absolute authority and established an appeals process in the context of attorney discipline proceedings. That holding made clear that actions related to establishing attorney ethics requirements and disciplinary functions rest with the high court.

The Court's unfettered authority in this sphere is further buttressed by its holding in State v. Destasio, 49 N.J. 247, 253 (1967), which provided for its "plenary responsibility for the administration of all courts in the State." The Court, in exercising this authority, creates rules that "serve as a road map for the conduct of attorneys to guide them in their relationships with their clients" and others. Tax Auth., Inc. v Jackson Hewitt, Inc., 187 N.J. 4 (2006), quoting In re Greenberg, 155 N.J. 138, 152 (1998), cert. denied, 526 U.S. 1132 (1999).

In the case at bar, just as the NJSBA asserted in Balducci v. Cige, 456 N.J. Super. 219 (App. Div. 2018), certif. granted 236 N.J. 616 (2019), where it recently appeared as *amicus curiae*, the Appellate Division has not followed the proper rulemaking process. See Brief of *Amicus Curiae* New Jersey State Bar Association, [https://tcms.njsba.com/personifyebusiness/Portals/0/NJSBA-PDF/Amicus%20cases/Balducci Brief.pdf](https://tcms.njsba.com/personifyebusiness/Portals/0/NJSBA-PDF/Amicus%20cases/Balducci%20Brief.pdf). The decision below has not had the benefit of committee review and recommendation, nor has it withstood the critique of the public or regulated community, something the NJSBA submits is critical for such an expansive

interpretation of the Rules of Professional Conduct and which results in such a significant impact to New Jersey lawyers and clients alike. The NJSBA respectfully requests that the Court hold true to its past practice and allow an examination brought by the wider deliberative process.

Accordingly, the Court should reverse the decision below where it imposes new, untested and burdensome requirements on New Jersey attorneys and law firms.

CONCLUSION

The NJSBA respectfully requests the Court reverse the Appellate Division, and enter an Order consistent with our arguments as stated herein.

Respectfully,

New Jersey State Bar Association

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President
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