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# KD Alert: New Jersey Appeals Court Tackles Limits of Confidentiality

**A recent New Jersey court decision provides much-needed guidance to attorneys when attempting to strike a balance between safeguarding client confidences and complying with New Jersey's broad discovery rules. On January 23, 2023, the Appellate Division of the Superior Court of New Jersey decided** *Evolution AB v. Marra, 2023 WL 350576 (App. Div. Jan. 23, 2023) (approved for publication), and, in doing so, it tackled the limits of an attorney's duty of confidentiality under New Jersey Rule of Professional Conduct ("RPC") 1.6. Specifically, the Appellate Division grappled with the issue of when an attorney's duty of confidentiality to a client must yield to an adversary's claimed right to discover information necessary to prosecute a claim.*

*In Marra, the plaintiff brought a defamation claim against an attorney and law firm, alleging that the attorneys wrongfully produced a report to the New Jersey Division of Gaming and Enforcement (DGE) on behalf of an anonymous client, supposedly asserting that plaintiffs engaged in unlawful gambling-related business activities in forbidden countries. When the media learned of the report, plaintiffs sued the lawyer and his firm and obtained an order compelling defendants to disclose their client's identity. Defendants obtained leave to file an interlocutory appeal of the trial court's discovery order. Applying RPC 1.6, which governs a lawyer's obligation to maintain the confidences of a client, the Appellate Division vacated the discovery order and remanded for further proceedings regarding the weight of the plaintiffs' claims before ordering disclosure of the client's identity. In doing so, the Appellate Division adopted a test, by which it sought to balance the important societal issues that arise from, "the battle [] 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."*

*The defendants in Marra were retained by an investigative firm that prepared a lengthy report regarding the business operations of plaintiffs, a Swedish company and two of its subsidiaries. The report was submitted by the defendants to the DGE and the Pennsylvania Gaming Control Board. After the media learned of the report, the plaintiffs initiated a defamation action in the Chancery Division of the Atlantic County Superior Court, claiming that the report was not true, misleading and defamatory. The matter was transferred to the Law Division, where plaintiffs served defendants with written discovery requests that, among other things, sought disclosure of the identity of defendants' client. In response, defendants moved for a protective order. The trial court denied defendants' application and compelled disclosure. Thereafter, defendants sought interlocutory review, which was granted.*

*On appeal, the Appellate Division readily acknowledged that RPC 1.6(a) prohibits a lawyer from disclosing information relating to the representation of a client without consent, including the client's identity. It also recognized that "nondisclosure should not be permitted to thwart an injured party's legitimate right to redress." The Appellate Division analyzed the exception to the rule under RPC 1.6(d)(4), by which disclosure would be made "to comply with other law." Unsurprisingly, the parties took diametrically opposite positions: plaintiffs argued that the discovery order entered by the trial judge constituted "other law," and that privilege doctrines – such as the informer's privilege, the attorney-client privilege and the work product doctrine – were inapplicable. Defendants, on the other hand, argued that RPC 1.6, in combination with those privileges, completely barred the disclosure of their client's identity.*

*Ultimately, the Appellate Division rejected both parties' contentions and determined that there was a "middle ground" where a civil claim needs to be of sufficient weight to overcome the strong policy interest in ensuring that a client's confidential information remains protected by its counsel, which is encompassed in RPC 1.6's general rule of nondisclosure. This middle ground was to be determined by exploring the veracity of the investigative report. If the report was credible, "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." Clearly, the Appellate Division sought to strike a balance between what it deemed to be two competing policy interests.*

*A conclusion on the report's veracity would aid in the trial court's determination of whether the identity of the client should or should not be revealed. While the Appellate Division suggested numerous ways to undertake this fact finding inquiry, including an evidentiary hearing, abbreviated discovery, an in camera review of documents or consideration of the findings of the New Jersey or Pennsylvania state investigations, it was clear that the selected method would be left to the trial court's discretion.*

*The Appellate Division's ruling underscores the broad protection afforded to client confidences under RPC 1.6. In other words, the duty of confidentiality is more broad than the attorney-client privilege, which generally only applies to communications between attorney and client in connection with the rendering of legal advice. As the rule provides, "A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except . . ." The rule is broad, until it must yield to greater policy considerations.*

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