2013 IL App (1st) 122612-U

No. 1-12-2612

SIXTH DIVISION
March 29, 2013

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

In re MARRIAGE OF	)	Appeal from the
	)	Circuit Court of
ANTHONY KUZIEL,	)	Cook County
	)	
Petitioner-Appellee,	)	No. 11 D 03772
	)	
v.	)	
	)	
MESUDE KUZIEL,	)	Honorable
	)	William S. Boyd,
Respondent-Appellant.	)	Judge Presiding.

PRESIDING JUSTICE LAMPKIN delivered the judgment of the court.
Justice Hall concurred in the judgment.
Justice Gordon specially concurred.

O R D E R

¶ 1 *Held*: The circuit court did not abuse its discretion by disqualifying respondent's counsel based on the court's finding that respondent's counsel violated the rule of professional conduct that prohibits communication with a person counsel knows to be represented by another lawyer.

¶ 2 In this discretionary interlocutory appeal from a dissolution-of-marriage proceeding, respondent Mesude Kuziel appeals the circuit court's order granting petitioner Anthony Kuziel's

motion to disqualify Mesude's counsel. Mesude argues that disqualification was not warranted because (1) her attorney did not violate the rule of professional conduct that prohibits counsel from communicating about the subject of the representation with a person counsel knows is represented by another lawyer; and (2) Anthony has not demonstrated that any prejudice resulted from the complained-of conduct. For the reasons that follow, we affirm the judgment of the circuit court.

¶ 3 I. BACKGROUND

¶ 4 On April 12, 2011, Anthony, through his counsel, filed a petition for dissolution of marriage against Mesude. During the pending proceedings, Mesude had retained four different attorneys as her counsel. On May 4, 2012, her fourth retained attorney, Figliulo & Silverman, P.C., filed an appearance on her behalf. At that time, James Figliulo, who is a principal of that firm, was engaged to be married to Mesude's sister.

¶ 5 Mesude, who had previous conversations with Figliulo regarding her dissolution of marriage action and settlement position, asked Figliulo, on or about April 22, 2012, to speak to Anthony on her behalf regarding the settlement. On April 22, 2012, Figliulo, who knew that Anthony was represented by counsel, spoke to Anthony on the telephone about the dissolution of marriage litigation. That same day, Figliulo sent Anthony a text message that contained Figliulo's telephone number. Anthony's counsel was not privy to the April 22, 2012 telephone conversation between Figliulo and Anthony. According to Figliulo's affidavit, Mesude expressly retained him one week after the April 22, 2012 telephone call.

¶ 6 In June 2012, Anthony filed a motion to disqualify Figliulo and his firm from representing Mesude. Anthony argued that Figliulo and his firm should be disqualified pursuant to Rules 1.10, 1.12, and 2.4 of the Illinois Rules of Professional Conduct of 2010 because Figliulo, who knew that Anthony was represented by counsel, had contacted Anthony directly on April 22, 2012, offered to serve as the parties' mediator to resolve their divorce litigation, and discussed specific settlement position details with Anthony. Anthony asserted that he would not have divulged confidential settlement position information to Figliulo if Anthony had known that Figliulo would represent Mesude in the divorce proceedings. Further, Anthony stated that his counsel learned about the settlement conversation at the May 21, 2012 status date for this case, when Anthony's counsel met Figliulo in the hallway outside the courtroom and Figliulo stated that he "almost had this case settled," knew what Anthony wanted in a settlement, and had talked to Anthony "all about maintenance, child support and the house." Anthony argued that his interests had been compromised as a result of the April 22, 2012 conversation and Figliulo's representation of Mesude put Anthony at a significant disadvantage because he had revealed his ultimate acceptable settlement options to Figliulo.

¶ 7 In response, Mesude argued that Figliulo did not tell Anthony that Figliulo would serve as a mediator or that he was acting as Mesude's lawyer, and Anthony did not reveal any information to Figliulo that Anthony had not already communicated to Mesude. In his affidavit, Figliulo stated, *inter alia*, that he had met and talked to Anthony on a few occasions over the last couple of years at family gatherings. Furthermore, Mesude had talked to Figliulo prior to April 22, 2012, about her divorce case, desire to settle, and objections to Anthony's demands. On April 22,

2012, Figliulo's fiancée was on the telephone with her sister Mesude, who said that Anthony was at her house urging her to settle. Mesude asked her sister if Figliulo would talk to Anthony, and Figliulo agreed and then talked to Anthony while he was at Mesude's house.

¶ 8 According to Figliulo's affidavit, he told Anthony that he was biased on Mesude's behalf and thought it was in the parties' best interests to settle. Anthony told Figliulo that he was not willing to pay Mesude alimony and thought she should get a job. Anthony complained that Mesude would not respond to his settlement proposals or clearly state what she was willing to do. Then Figliulo told Anthony that Mesude was willing to waive maintenance if Anthony paid sufficient child support; Mesude wanted the equity in the house and Anthony to pay her $50,000 for the loan to his business that had been obtained by a lien on their house; Anthony should pay the marital debt; Mesude and Anthony would keep their own personal property and retirement funds; and Mesude would waive her interest in Anthony's business. Anthony responded that Mesude's proposal might be "okay," and Figliulo told him to talk to his lawyer. Anthony asked Figliulo to send his telephone number to Anthony in a text message. Anthony said that he would think about the proposal, talk to his lawyer and get back to Figliulo as soon as possible. Figliulo was optimistic that a settlement could be worked out pretty quickly and thought that Anthony was "receptive." Figliulo sent the text message containing his telephone number to Anthony, and Anthony responded by text that he would call Figliulo soon. Then Figliulo sent Anthony a text thanking him for letting Figliulo know.

¶ 9 In her affidavit, Mesude stated that, during the April 22, 2012 telephone conversation between Figliulo and Anthony, she was standing next to Anthony and he did not tell Figliulo

anything that he had not already told her. Mesude also stated that, at the time of that telephone conversation, she was represented by another attorney and Figliulo was simply trying to talk to Anthony on her behalf as a close friend of the family and not as her lawyer or a mediator.

¶ 10 In his reply, Anthony argued that the affidavits of Figliulo and Mesude established that an implied attorney-client relationship existed between them at the time of the April 22, 2012 telephone conversation. Anthony also argued that when Mesude formally retained Figliulo after that telephone conversation, she ratified his previous acts on her behalf and thereby further defined their existing attorney-client relationship. In addition, Anthony argued that Figliulo had violated Rule 4.2 of the Illinois Rules of Professional Conduct of 2010 (Rule 4.2) by representing Mesude in the divorce and communicating with Anthony about the divorce despite Figliulo's knowledge that Anthony was represented by counsel.

¶ 11 After hearing argument on the motion to disqualify, the trial court found that Figliulo violated Rule 4.2 and disqualified him and his firm from representing Mesude. The trial court noted that Figliulo did not act with any malice or intent to violate Rule 4.2; nevertheless, when he filed his appearance in this matter in May 2012, his actions during the April 2012 telephone conversation with Anthony were ratified. Thereafter, this court allowed Mesude's petition seeking an interlocutory appeal of the circuit court's order disqualifying Figliulo and his firm as her counsel.

¶ 12 II. ANALYSIS

¶ 13 On appeal, Mesude argues that the circuit court had no basis to disqualify her counsel because Figliulo's April 22, 2012 conversation with Anthony did not violate Rule 4.2 where

Figliulo and Mesude did not have an attorney-client relationship on that date, Anthony did not make any confidential disclosures to Figliulo, and Anthony's statements were made in the presence of Mesude, who was already aware of Anthony's settlement position. Mesude concludes that the court's order disqualifying her counsel had no basis and, thus, was an abuse of discretion. Mesude also argues that the disqualification of Figliulo and his firm was not warranted because Anthony did not demonstrate any prejudice.

¶ 14 The trial court's factual determinations are reviewed under the deferential abuse of discretion standard, whereas the trial court's application of the law is subject to *de novo* review. See *SK Handtool Corp. v. Dresser Industries, Inc.*, 246 Ill. App. 3d 979, 989 (1993) (courts of review determine issues involving solely questions of law independent of the trial court's judgment); *Skokie Gold Standard Liquors, Inc. v. Joseph E. Seagram & Sons, Inc.*, 116 Ill. App. 3d 1043, 1054 (1983) (this court conducts an independent review of questions of law presented by the disqualification order).

¶ 15 Attorney disqualification is a drastic measure because it destroys the attorney-client relationship by prohibiting parties from retaining the counsel of their choice. *Schwartz v. Cortelloni*, 177 Ill. 2d 166, 178 (1997). Thus, courts must be cautious to guard against the tactical use of motions to disqualify as tools for harassment. *Id*. This concern, however, must be tempered with the need to enforce the rules of legal ethics, which are aimed at protecting the attorney-client relationship, maintaining public confidence in the legal profession and ensuring the integrity of judicial proceedings. *SK Handtool Corp.*, 246 Ill. App. 3d at 989; *Skokie Gold Standard Liquors, Inc.*, 116 Ill. App. 3d at 1057. A trial court's decision to grant a motion to

disqualify an attorney will not be disturbed absent an abuse of discretion. *Schwartz*, 177 Ill. 2d at 176. An abuse of discretion occurs where no reasonable person would agree with the position adopted by the trial court. *Id*.

¶ 16 The special concurrence is confused about the standards of review used by the majority in this matter. The majority applied a *de novo* standard to the trial court's interpretation of the relevant rule and the trial court's determination, based on an analysis of the relevant case law concerning the formation of an attorney-client relationship, that Figliulo and Mesude had formed an attorney-client relationship before Figliulo spoke to Anthony on the telephone. Then, the majority applied the abuse of discretion standard to the trial court's ultimate determination that it was necessary to disqualify Figliulo from serving as Mesude's counsel in this case.

¶ 17 The Illinois Rules of Professional Conduct of 2010 are "rules of reason" and "should be interpreted with reference to the purposes of legal representation and of the law itself." Ill. S. Ct. R. of Prof. Conduct, Scope, ¶ 14 (eff. Jan. 1, 2010).

> "[V]iolation of a Rule does not necessarily warrant [the remedy of] disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. *** Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons." *Id*., ¶ 20.

¶ 18 Rule 4.2 provides that "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another

lawyer in the matter, unless the lawyer had the consent of the other lawyer or is authorized to do so by law or a court order." Ill. S. Ct. R. of Prof. Conduct 4.2 (eff. Jan. 1, 2010). Rule 4.2 "contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship and the uncounselled disclosure of information relating to the representation." *Id.*, Comment, ¶ 1. This "Rule applies even though the represented person initiates or consents to the communication." *Id.*, ¶ 3.

¶ 19 We address first the issue of whether an attorney-client relationship existed between Figliulo and Mesude before Figliulo spoke to Anthony on the telephone about the divorce. A formal or written agreement is not a prerequisite to the formation of an attorney-client relationship. *Herbes v. Graham*, 180 Ill. App. 3d 692, 699 (1989). Rather, the relationship can be created during the initial contact between the layperson and the lawyer. *Id.* Its formation hinges upon the putative client's manifested intention to seek professional legal advice and his reasonable belief that he is consulting a lawyer in that capacity. *Id.*, citing *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F. 2d 1311, 1319-21 (7th Cir. 1978). Contrary to other jurisdictions, Illinois courts do not require the putative client to show that he actually submitted confidential information to the lawyer. Compare *King v. King*, 52 Ill. App. 3d 749, 753 (1977) (the attorney-client privilege "applies even though the attorney acquired no knowledge which could operate to the client's disadvantage") and *Herbes*, 180 Ill. App. 3d at 698 (the *King* court believed the privilege "applied to protect a lay person who has likely communicated confidences

to an attorney"), with *State ex rel. Youngblood v. Sanders*, 575 S.E.2d 864, 871 (W. Va. 2002) (although a preliminary consultation can serve as grounds for attorney disqualification, the court must find that confidential information was discussed).

¶ 20 Moreover, the analysis focuses on the client's viewpoint rather than that of the attorney. *Herbes*, 180 Ill. App. 3d at 699. The payment of fees and the fact that a further relationship did not develop as a result of the preliminary consultation are not relevant considerations. *King*, 52 Ill. App. 3d at 753; *Herbes*, 180 Ill. App. 3d at 699. The rationale for this policy is the concern that " '[a]t the inception of the contacts between the layman and the lawyer it is essential that the layman feel free of danger in stating the facts of the case to the lawyer whom he consults.' " *King*, 52 Ill. App. 3d at 752, quoting L. Patterson and E. Cheatham, *The Profession of Law*, at 246 (1971).

¶ 21 We agree with the circuit court's determination that Mesude's consultation with Figliulo gave rise to an attorney-client relationship between them before Figliulo spoke with Anthony on the telephone on April 22, 2012. The affidavits of Figliulo and Mesude established that Mesude spoke to Figliulo before April 22, 2012 about her divorce case, desire to settle, and objections to Anthony's demands. Moreover, the substance of the conversation between Figliulo and Anthony established that Figliulo was fully informed about Mesude's ultimate settlement positions concerning maintenance, child support, marital debt, and ownership of the house and Anthony's business. In addition, Mesude expressly authorized Figliulo to discuss settlement terms with Anthony on Mesude's behalf, and Figliulo expressly agreed to perform that service. Figliulo's status as Mesude's future brother-in-law did not prevent the formation of their attorney-client

relationship and in no way insulated Figliulo from his responsibilities under the Rules of Professional Conduct. Mesude's express retainer of Figliulo after the April 22, 2012 telephone conversation, and his filing of an appearance on her behalf in May 2012 simply formalized the attorney-client relationship that had already arisen between them.

¶ 22 We also agree with the circuit court's determination that Figliulo's telephone conversation and text messaging with Anthony violated Rule 4.2. Because an attorney-client relationship was sufficiently formed between Figliulo and Mesude concerning her divorce from Anthony, Figliulo was prohibited by Rule 4.2 from communicating with Anthony about the divorce case and settlement without the consent of Anthony's lawyer. See *Heiden v. Ottinger*, 245 Ill. App. 3d 612, 616-17 (1993) (the father's attorney apparently violated Rule 4.2 where the attorney drew up a settlement agreement relating to the paternity suit for the mother and father and then went to court and had the settlement approved and the suit dismissed, all while the mother was still represented by counsel).

¶ 23 We also find that the disqualification of Figliulo was well within the circuit court's discretion. Courts have interests in protecting the attorney-client relationship, maintaining public confidence in the legal profession and ensuring the integrity of judicial proceedings and have the authority to disqualify an attorney from representing a particular client to protect those interests. *SK Handtool Corp.*, 246 Ill. App. 3d at 989. Moreover, the "Rules of Professional Conduct recognize that the practice of law is a public trust and lawyers are the trustees of the judicial system." *In re The Marriage of Newton*, 2011 IL App (1st) 090683, ¶ 52. Figliulo violated Rule 4.2, which is designed to contribute to the proper functioning of the legal system by protecting a

layperson from overreaching by other lawyers, interference by those lawyers with the client-lawyer relationship, and the uncounselled disclosure of information relating to the representation. The circuit court found that Figliulo did not act with malice or any intent to violate Rule 4.2, and we agree that Figliulo seemed to overlook his role in the settlement conversation as Mesude's lawyer and mistakenly considered himself to be acting simply as her future brother-in-law. However, as a result of Figliulo's overreaching and interference, Anthony, without the benefit of his retained counsel, revealed his ultimate settlement position on disputed divorce issues to Figliulo during their conversation. Figliulo's contact with Anthony was not *de minimis* and there was a showing that the communication resulted in prejudice. Although Figliulo's disqualification as Mesude's lawyer will not undo the prejudice, his disqualification is warranted to maintain public confidence in the legal profession and ensure the integrity of the judicial proceedings.

¶ 24 III. CONCLUSION

¶ 25 For the foregoing reasons, the judgment of the circuit court is affirmed.

¶ 26 Affirmed.

¶ 27 JUSTICE GORDON, SPECIALLY CONCURRING:

¶ 28 The majority affirmed the trial court's order which disqualified the wife's attorney. I concur with this result. However, I write separately because I would affirm the attorney's disqualification on different grounds.

¶ 29 Also, I agree with the Second District's statement concerning our standard of review in attorney disqualification cases (*In re Marriage of Stephenson*, 2011 IL App (2d) 101214, ¶¶ 20-22), and I find confusing the majority's statement of our review (*supra* ¶¶ 14, 16). Thus, I write separately to clarify.

¶ 30 I. Jurisdiction; Standard of Review

¶ 31 In a case such as this, where we are not reviewing an appeal from a final judgment, I think it is the better practice to begin by establishing the source of our jurisdiction.

¶ 32 We have jurisdiction to review this order pursuant to Illinois Supreme Court Rule 306(a)(7) (eff. Feb. 16, 2011), which allows a party to petition for leave to appeal "from an order of the circuit court granting a motion to disqualify the attorney for any party." In the case at bar, the disqualification order issued on August 20, 2012; the wife petitioned this court on September 11, 2012, within 30 days from the order; and we granted leave to appeal on October 3, 2012. Thus, we have jurisdiction.

¶ 33 As for standard of review, I agree with the Second District's holding that an abuse of discretion standard applies to the trial court's ultimate decision of whether or not to disqualify an attorney, rather than a *de novo* standard (*supra* ¶ 14). In *Stephenson*, the Second District held: "A trial court's decision to grant a motion to disqualify an attorney will not be disturbed absent an

abuse of discretion." *In re Marriage of Stephenson*, 2011 IL App (2d) 101214, ¶ 20 (citing *Schwartz v. Cortelloni*, 177 Ill. 2d 166, 176 (1997)). " 'An abuse of discretion occurs where no reasonable person would agree with the position adopted by the trial court.' " *Stephenson*, 2011 IL App (2d) 101214, ¶ 20 (quoting *Schwartz*, 177 Ill. 2d at 176).

¶ 34 The majority states that "the trial court's application of the law [to the facts] is entitled to *de novo* review" *(supra* ¶ 14), as is the trial court's finding "that Figliulo and Mesude had formed an attorney-client relationship before Figliulo spoke to Anthony on the telephone *(supra* ¶ 16)." I must respectfully disagree. In *Stephenson*, the appellate court rejected the argument that we "apply a *de novo* standard of review to the trial court's ultimate decision." *Stephenson*, 2011 IL App 101214, ¶ 22. The majority offers no reason why we should apply a *de novo* standard to these particular issues, when this standard is usually reserved for strictly legal questions, such as the interpretation of a statute or rule. *Stephenson*, 2011 IL App (2d) 101214, ¶ 26 (to questions of law, we apply a *de novo* standard of review (citing *Macknin*, 404 Ill. App. 3d at 530-31)).

¶ 35 We must, however, apply a *de novo* review to the interpretation of any rules at issue. *Stephenson*, 2011 IL App (2d) 101214, ¶ 22 (citing *Macknin*, 404 Ill. App. 3d at 530-31). "We interpret the Illinois Rules of Professional Conduct in the same manner as statutes [and] [t]he construction of the Illinois Rules of Professional Conduct is a question of law, to which we apply *de novo* review." *Stephenson*, 2011 IL App (2d) 101214, ¶ 26 (citing *Macknin*, 404 Ill. App. 3d at 530-31).

¶ 36 II. The Rules at Issue

¶ 37 In the case at bar, the issue before the trial court was whether the wife's attorney should

have been disqualified. pursuant to Rules 1.10, 1.12, 2.4 or 4.2 of the Illinois Rules of Professional Conduct of 2010. The trial court granted the motion based solely on Rule 4.2, and Rule 4.2 is the only rule that the majority discusses. However, Rules 1.10, 1.12 and 2.4 were also argued and briefed by the parties below, and I believe that the disqualification is warranted pursuant to those rules rather than pursuant to Rule 4.2.

¶ 38 In the case at bar, the husband's original disqualification motion stated specifically that he was seeking disqualification "pursuant to Rules 1.10, 1.12 and 2.4 of the Illinois Rules of Professional Conduct" of 2010. The husband's motion argued that the wife's attorney had previously "served as a mediator/or third-party neutral in this case." The motion then quoted Rule 2.4(a) which defines the term "third-party neutral" as follows:

> "A lawyer serves as a third-party neutral when the lawyer assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them." Ill. R. Prof. Conduct R. 2.4(a) (Jan. 1, 2010).

The motion also quoted Rule 1.12(a) which prohibits an attorney, who has "participated personally and substantially" as a mediator or third-party neutral, from representing anyone in the same matter unless he obtains the informed consent of all parties. Ill. R. Prof. Conduct R. 1.12(a) (Jan. 1, 2010). The motion then quoted Comment 3 to Rule 1.12 which states, in relevant part:

> "Although lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6,

> they typically owe the parties an obligation of confidentiality under law or codes of ethics governing third-party neutrals." Ill. R. Prof. Conduct R. 1.12 cmt. 3 (adopted Jan. 1, 2010).

The motion cited Rule 1.10 for the purpose of asserting that, if James Figliulo was disqualified, then so was any attorney is his firm. Ill. R. Prof. Conduct R. 1.10 (Jan. 1, 2010).

¶ 39 In his reply, the husband added a claim that the attorney also violated Rule 4.2, which prohibits a lawyer, as part of his representation of a client, from communicating with someone whom he knows to be represented by a client, without the other lawyer's consent. Ill. R. Prof. Conduct R. 4.2 (Jan. 1, 2010).

¶ 40 The trial court granted the husband's motion solely based on Rule 4.2. The written order, dated August 20, 2012, stated that the disqualification motion was granted "[f]or the reasons and findings set forth by the Court after conclusion of arguments." On that same day, the trial court had stated orally that it found that Rule "4.2 has been violated," and that it was granting the motion on that basis.

¶ 41 Although the trial court disqualified the attorney solely based on Rule 4.2, the rules and comments concerning mediators and third-party neutrals were also briefed and argued to the trial court. In addition, we may affirm on any basis found in the record. *Currie v. Wisconsin Central, Ltd.*, 2011 IL App (1st) 103095, ¶ 31; *Studt v. Sherman Health System*, 2011 IL 108182, ¶ 48 (Karmeier, J., specially concurring) ("an appellate court may affirm a trial court's judgment on any grounds which the record supports (see *Water Tower Realty Co. v. Fordham 25 E. Superior, L.L.C.*, 404 Ill. App. 3d 658, 665 (2010)), even where those grounds were not argued by the

parties (see *Redd v. Woodford County Swine Breeders, Inc.*, 54 Ill. App. 3d 562, 565 (1977))").

¶ 42 III. The Affidavits

¶ 43 In reviewing the motion, we are limited to the affidavits presented, since no evidentiary hearing was held.

¶ 44 From the transcript of the argument on the motion before the trial court, it is not clear whether the wife waived the right to an evidentiary hearing. During the argument on the motion, the wife's attorney (whose disqualification was at issue) requested an evidentiary hearing, "unless" the trial court's ruling would be the same, even if it assumed that all the assertions in his affidavit and the wife's affidavit were true. The trial court assured counsel that was "correct" and that the ruling "would be the same." In addition, since the wife's attorney during the argument on the motion was the same attorney whose disqualification was at issue, namely, James Filiulo, he had the opportunity to, and did, reiterate the facts already asserted in his affidavit. Thus, it is unclear from the transcript if he chose to waive an evidentiary hearing, once he obtained the trial court's ruling that it was accepting the truth of his affidavit and the wife's affidavit, for the purposes of the motion.

¶ 45 Since no evidentiary hearing was held, we will assume – as the trial court did – the truth of the factual statements in the attorney's and the wife's affidavits considered for the purpose of this appeal. We do this, even though the copy of the wife's affidavit presented to us was not sworn before a notary public; we do this, because the trial court indicated that it accepted, as true, the factual statements by the wife contained in that document.

¶ 46 Also, since what was stated in these affidavits is crucially important, we will quote directly from them, instead of paraphrasing. The heart of the attorney's seven-paragraph affidavit is paragraph 4 which states in full:

> "On or about April 22, 2012, Mesude's sister, Ruhan, was on the phone talking to Mesude. Ruhan told me that Anthony was over at Mesdue's house urging Mesude to settle. Mesude had previously talked to me and her sister about the case and her desire to settle and her objection to Anthony's demands. During that phone call, Mesude asked her sister if I would talk to Anthony. I told her I would. Anthony and I then talked while he was at Mesude's house. I did not tell Anthony that I would be willing to act as a third-party 'neutral' or mediator. I told Anthony that obviously I was biased on Mesude's behalf, but that I thought it would be in both of their best interests to settle because otherwise the divorce lawyers would take what limited money they had. Anthony told me that Mesude should get a job and that he was not willing to pay her alimony. Anthony complained that Mesude would not respond to his settlement proposals and would not clearly tell him what she was willing to do. I told Anthony that Mesude had told me she was willing to waive maintenance provided he paid sufficient child support, that she would receive the equity in the house and he

> would pay her $50,000 for the loan to his business that had been obtained with a lien on their house, that Anthony would pay the marital debt, that each of them would keep their own personal property and retirement funds, and that Mesude would waive her interest in his business. Anthony responded that he thought that may be okay and he would think about it. I told Anthony to talk to his lawyer and if Mesude's proposal was acceptable, that I was optimistic a settlement could be worked out pretty quickly. Anthony asked me to send him a text message with my phone number and that he would think about it, talk to his lawyer and get back to me as soon as possible."

¶ 47 In her affidavit, the wife stated:

> "On or about April 22, 2012, while I was talking to my sister on the phone, my husband Anthony Kuziel ('Anthony') was in our house and talking to me about the divorce case and settlement issues. I asked my sister if I could talk to her fiance, Jim Figliulo ('Jim'). I told Jim what I was willing to do to settle. I asked Anthony, who was talking to me at the same time I was talking to Jim, if he would talk to Jim. Anthony said he would and Anthony talked to Jim on the phone while I was right there. I was standing next to Anthony while the conversation was going on. There was some

> discussion about the issues that Anthony and I had been discussing, but I can definitely testify that Anthony did not tell Jim anything that he had not already told me. After the phone call Anthony told me that he was going to talk with his lawyer about some of my suggested settlement ideas and get back to Jim."

¶ 48 IV. Rule 4.2

¶ 49 As stated above, the trial court granted the disqualification motion solely on the basis of Rule 4.2, and the majority affirms solely on that basis, as well. I do not agree and thus I must write separately.

¶ 50 Rule 4.2 states, in full: "[i]n representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order." Ill. R. Prof. Conduct R. 4.2 (Jan. 1, 2010). In the case at bar, there is no dispute that Joseph Figliulo was "a lawyer," that he "communicated about the subject" of a lawsuit with a person he knew "to be represented by another lawyer in the matter," and that he did so without "the consent of the other lawyer."

¶ 51 However, the key words for the purposes of this case are "representing a client" and "the representation." A comment to the rule stresses that this rule does not "preclude communication with a represented person who is seeking advice from a lawer who is not otherwise representing a client in the matter." Ill. R. Prof. Conduct R. 4.2 cmt.4 (adopted Jan. 1, 2010). Thus, for this rule to apply, Figliulo must have been "representing a client" and acting as part of that

"representation" when he spoke to the husband. Without an evidentiary hearing, and based solely on the wife's and Figliulo's affidavits, there is no evidence to support such a finding. The wife stated unambiguously in her affidavit that, "[a]t the time of this conversation, I was represented by Jim Cheslow."

¶ 52 For reasons explained below, I agree with the result reached by the majority, but I quarrel with the procedural underpinnings upon which its conclusion is based. Therefore, I must write separately and file a special concurrence.

¶ 53 The majority holds that a lawyer can be disqualified from representing a party if that lawyer communicated with the other party while the other party was represented by counsel. The majority further finds that the lawyer was representing the wife in the case at bar when he communicated with the husband. Yet, as discussed below, the record shows that he knew both parties and acted as a mediator or third-party neutral while engaged to the wife's sister, but that at the time, the wife was represented by another lawyer. In order for the majority to find a violation of Rule 4.2, the trial court and the majority find that the lawyer's conduct created an attorney-client relationship. There is no authority for the trial court and majority's position that an attorney-client relationship existed, without an evidentiary hearing and based solely on the limited affidavits filed.

¶ 54 V. Rule 2.4

¶ 55 What does exist in the case at bar is the appearance of impropriety when an attorney who formerly served as a mediator or third-party neutral later becomes the attorney for one of the parties to the litigation. *In re W.R.*, 2012 IL App (3d) ¶ 35 ("there is the appearance of

impropriety when an attorney who formerly served as a mediator later attacks one of the parties in the same matter" (citing *People v. Lang*, 346 Ill. App. 3d 677, 805 (2004) (it is important for the judicial system to avoid the appearance of impropriety)).

¶ 56 Rule 2.4(a) defines "a third-party neutral" as a lawyer who "assists two or more persons who are not clients of the lawyer to reach a resolution of a dispute or other matter that has arisen between them." Ill. R. Prof. Conduct R. 2.4(a) (Jan. 1, 2010). In the case at bar, the attorney's affidavit established that he was a lawyer who acted to "assist[] two or more persons who are not clients of the lawyer," namely, the wife and husband, "to reach a resolution of a dispute," namely, a resolution of their divorce proceeding. Ill. R. Prof. Conduct R. 2.4(a) (Jan. 1, 2010).

¶ 57 Specifically, the attorney's affidavit establishes that, after discussing the matter with the wife, he conveyed the following, detailed settlement proposal from the wife to the husband: [1] that "she was willing to waive maintenance provided he paid sufficient child support, [2] that she would receive the equity in the house and he would pay her $50,000 for the loan to his business that had been obtained with a lien on their house, [3] that [he] would pay the marital debt, [4] that each of them would keep their own personal property and retirements funds, and [5] that [the wife] would waive her interest in his business." According to the attorney, the husband seemed favorably disposed to his proposal. As a result of his conversation with both parties, the attorney stated that he "was optimistic a settlement could be worked out pretty quickly." Thus, the attorney's affidavit established that he was a lawyer who acted to "assist[] two or more persons," namely, the wife and husband, "to reach a resolution of a dispute," namely, a settlement of the contentious points in their divorce. Ill. R. Prof. Conduct R. 2.4(a) (Jan. 1, 2010).

¶ 58 Even though the attorney's actions fit Rule 2.4's definition of a third-party neutral --- word for word -- the attorney argues that he was not a third-party neutral because (1) he was not completely neutral; and (2) he did not specifically inform the husband that he was acting as "a third-party neutral." However, neither complete neutrality nor the use of the term is required by the rule's definition.

¶ 59 In the case at bar, the attorney fully disclosed his conflict to the husband. In his affidavit, he states that he informed the husband that, since he was the wife's future brother-in-law, he was "obviously" biased on her behalf. However, he then advised both parties "that it would be in both of their best interests to settle because otherwise the divorce lawyers would take what limited money they had." Despite his bias, he did hold out his plan as being in both their interests, a theme that he reiterated when he appeared before the trial court. At the hearing, the attorney stressed that he believed that the husband and wife were "two basically good people" with "two wonderful little kids," and that he "considered [himself] a family member at that time," and he simply did not want to see the two of them waste their money on attorneys. Based on the attorney's representations in his affidavit and to the trial court, a reasonable person would have viewed his actions as the actions of someone who was trying to assist two people to settle their dispute, which is all that the definition requires.

¶ 60 Thus, I would affirm the trial court's disqualification order on the basis of Rule 2.4, rather than Rule 4.2 as the majority does. Ill. R. Prof. Conduct R. 2.4, 4.2 (Jan. 1, 2010).

¶ 61 As a final matter, the wife argues that disqualification should not apply because the husband cannot show prejudice, specifically, that he disclosed confidential matters to the attorney

during their telephone conversation. However, proof of disclosure of specific confidential information is not required when the disqualification occurs under Rule 1.12, which governs the disqualification of mediators or third-party neutrals. *In re W.R.*, 2012 IL App (3d) 110179, ¶ 34 (disqualification of mediator warranted even though "we do not know the exact information [the mediator] had available to her during mediation"). In fact, the comments to Rule 1.12 make clear that the drafters assumed that "lawyers who serve as third-party neutrals do not have information concerning the parties that is protected under Rule 1.6," which concerns the confidentiality of information divulged by clients to their attorneys. Ill. R. Prof. Conduct R. 1.12 cmt. 3 (adopted Jan. 1, 2010). As a result, whether or not the husband divulged specific confidential information during the telephone conversation does not affect our analysis.

¶ 62 VI. Conclusion

¶ 63 In sum, I concur in affirming the trial court's disqualification of the wife's attorney. However, I do so on a different ground than that cited by either the trial court or the majority. I believe that the trial court did not abuse its discretion by disqualifying the wife's attorney because, when an attorney who formerly served as a mediator or third-party neutral later becomes the attorney for one of the parties to the litigation, it creates an appearance of impropriety that attorneys should strive to avoid. I also write separately to clarify our standard of review and to establish the source of our jurisdiction.