

COMMONWEALTH OF MASSACHUSETTS

NORFOLK, ss.

SUPERIOR COURT
CRIMINAL ACTION
No. 2382CR00313

COMMONWEALTH

vs.

AIDAN KEARNEY

MEMORANDUM OF DECISION AND ORDER
ON COMMONWEALTH'S MOTION FOR
REMEDIAL ORDERS AND SANCTIONS

Before me is the Commonwealth's Motion for Remedial Orders and Sanctions (Motion). Based on the alleged misconduct of counsel for the defendant, Aidan Kearney (Kearney), the Commonwealth asks the Court to (i) order the Norfolk County sheriff's office to revoke Kearney's communication privileges with the exception of his children and counsel; (ii) appoint an independent master to monitor all communications between Kearny and his counsel; and (iii) order Kearney's counsel to pay \$10,000 in monetary sanctions.

The Motion was not accompanied by an affidavit. See Mass. R. Crim. P. 13(a)(2). I heard argument on January 26, 2024 and took limited testimony from William Castillo (Castillo), assistant deputy superintendent at the Norfolk County jail (Jail). In opposition to the Motion, Kearney's counsel submitted an affidavit from counsel.

After hearing and review, and for the reasons stated below, the Commonwealth's Motion is **DENIED**.

BACKGROUND

A grand jury indicted Kearney for eight counts of witness intimidation in violation of G. L. c. 268, § 13B¹; five counts of picketing a witness in violation of G. L. c. 268, § 13A²; and three counts of conspiracy in violation of G. L. c. 274, § 7. He was arraigned on December 22, 2023 and released on personal recognizance with bail warnings. On December 26, 2023, Kearney was arraigned on new charges of witness intimidation and assault and battery on a family member in Dedham District Court, and the District Court revoked Kearney's bail in this case. Since then, Kearney has been in the custody of the Norfolk County sheriff's office and held at the Jail.

The Jail allows inmates access to a tablet with which they can make thirty-minute telephone calls, send messages and e-mail messages, and receive videos and photographs. Inmates have access to those tablets throughout the day until 10:00 p.m.

¹ Pursuant to that statute, "[w]hoever willfully, either directly or indirectly: (i) threatens, attempts or causes physical, emotional or economic injury or property damage to; (ii) conveys a gift, offer or promise of anything of value to; or (iii) misleads, intimidates or harasses another person who is a: (A) witness or potential witness . . . with the intent to or with reckless disregard for the fact that it may; (1) impede, obstruct, delay, prevent or otherwise interfere with: a criminal investigation at any stage, a grand jury proceeding, a dangerousness hearing, a motion hearing, a trial or other criminal proceeding of any type . . . shall be punished by imprisonment in the state prison for not more than 10 years or by imprisonment in the house of correction for not more than 2 1/2 years or by a fine of not less than \$1,000 or more than \$5,000 or by both such fine and imprisonment."

² The statute provides that, "[w]hoever, with the intent of interfering with, obstructing, or impeding the administration of justice, or with the intent of influencing any judge, juror, witness, or court officer, in the discharge of his duty, pickets or parades in or near a building housing a court of the commonwealth, or in or near a building or residence occupied or used by such judge, juror, witness, or court officer, shall be punished by a fine of not more than five thousand dollars or by imprisonment for not more than one year, or both."

All inmate communications are monitored by the Jail except communications with counsel.

On December 28, 2023, Kearney's counsel left a voicemail message for a captain with the sheriff's office and provided his telephone numbers as well as the telephone numbers for two women. Counsel identified one of the women, JA, as an attorney and the other, CH, as a paralegal. He did so to ensure the phone numbers of the "defense team were properly exempted from monitoring." JA is not an attorney. The Commonwealth alleges that JA is Kearney's follower and "minion" and an administrator of one or more of Kearney's Facebook pages and/or Internet blogs. When asked for the evidence that would establish that fact, the Commonwealth argued it was on the "Internet" and common knowledge. That is not sufficient. According to Kearney's counsel, the women whose names he provided for inclusion on the exempt list were personnel offered to him by a New York lawyer whom Kearney had retained to assist with certain First Amendment aspects of the case.³

The next day, the captain confirmed to Kearney's counsel that the two women's telephone numbers were entered as privileged, legal, unrecorded call numbers in the Jail's phone system. The captain also confirmed to Kearney's counsel that two additional people, Elizabeth and Mark, had been added to the privileged call list. Kearney's counsel avers that "Mark" is his investigator, that he identified Mark as his investigator to the Jail, and that Elizabeth is Elizabeth Dembrowski, a New York lawyer who represents Kearney in connection with certain First Amendment issues.

In its Motion, the Commonwealth alleges that between December 29, 2023 and January 12, 2024, Kearney had over sixty unmonitored calls with JA, the woman who had been identified wrongly as a lawyer. At the hearing on the Motion, the

³ Kearney purports to be a journalist covering a separate murder case pending in Norfolk County Superior Court.

Commonwealth corrected that statement, and indicated that Kearney had eighty unmonitored calls with CH, the woman identified as a paralegal, and six – not sixty – unmonitored calls with JA.

The Commonwealth argues that it is “evident” that Kearney’s counsel, Kearney, and JA “conspired to circumvent the rules and regulations of the . . . Jail pertaining to outside communications and privileged attorney-client communications.” They did so, the Commonwealth argues, to afford Kearney “the means to communicate with his followers and to continue to harass and intimidate” the victims and encourage others to do so.

On or around January 11, 2024, the Jail learned that JA was not an attorney and removed her and CH from the privilege list. At the close of the hearing, I ordered Kearney’s counsel to inform the Jail that he is Kearney’s only counsel of record. He did so.

DISCUSSION

I. Applicable Law

Attorneys in the Commonwealth are required and expected to conduct themselves with the highest degree of professionalism, courtesy, and integrity. Allegations of misconduct are serious and are taken seriously by the Court. “Many of a lawyer’s professional responsibilities are prescribed in the Rules of Professional Conduct, as well as substantive and procedural law. However, a lawyer is also guided by personal conscience and the approbation of professional peers. A lawyer should strive to attain the highest level of skill, to improve the law and the legal profession and to exemplify the legal profession’s ideals of public service.” Mass. R. Prof. C., Preamble.

Kearney has a right to counsel under the Sixth Amendment to the United States Constitution and art. 12 of the Massachusetts Declaration of Rights. The right to counsel is “deemed necessary to insure fundamental human rights of life and liberty” (quotation and citation omitted). Commonwealth v. Cavanaugh, 371 Mass. 46, 53

(1976). Communications between a defendant and his lawyer for the purpose of obtaining legal advice are protected from disclosure and cannot be invaded by the Commonwealth. See Attorney General v. Facebook, Inc., 487 Mass. 109, 121-122 (2021) (“The attorney-client privilege protects all confidential communications between a client and its attorney undertaken for the purpose of obtaining legal advice” [quotation and citation omitted]). The purpose of the privilege is “to enable clients to make full disclosure to legal counsel of all relevant facts . . . so that counsel may render fully informed legal advice, with the goal of promot[ing] broader public interests in the observance of law and administration of justice” (quotation and citation omitted). Id. at 121-122. The Supreme Judicial Court has “emphasized the value of protecting confidential attorney-client communications, as the ‘social good derived from the proper performance of the functions of lawyers acting for their clients . . . outweigh[s] the harm that may come from the suppression of the evidence.’” Id. at 122, quoting Hanover Ins. Co. v. Rapo & Jepsen Ins. Servs., Inc., 449 Mass. 609, 615-616 (2007).

There is a “crime-fraud” exception to the attorney-client privilege. “Under the crime-fraud exception, the attorney-client privilege does not extend to client communications ‘if the communication seeks assistance in or furtherance of future criminal conduct.’” Matter of Grand Jury Investigation, 437 Mass. 340, 342 (2002), quoting Purcell v. District Attorney for the Suffolk Dist., 424 Mass. 109, 114 (1997).

“[G]overnment intrusion into the attorney-client privilege may rise to the level of a violation of a defendant’s Sixth Amendment rights, for the attorney-client privilege ‘is key to the constitutional guarantees of the right to effective assistance of counsel and a fair trial.’” Preventive Med. Assocs., Inc. v. Commonwealth, 465 Mass. 810, 826 (2013), quoting United States v. Neill, 952 F. Supp. 834, 839 (D.D.C. 1997), and citing Commonwealth v. Fontaine, 402 Mass. 491, 496 (1988) (“monitoring of privileged communications between a defendant and his attorney touches the core of the right to counsel”).

“Nonetheless, courts generally have held that a violation of the attorney-client privilege implicates the right to counsel ‘only under certain circumstances—specifically, when the government interferes with the relationship between a criminal defendant and his attorney,’ and that interference ‘substantially prejudice[s] the criminal defendant.’” Preventive Med. Assocs., Inc., 465 Mass. at 826, quoting Partington v. Gedan, 961 F.2d 852, 863 (9th Cir.), cert. denied Partington v. Lum, 506 U.S. 999 (1992).

A Court has the inherent power to sanction an attorney for (i) “failing to comply with an order of the court,” (ii) “making knowingly false misrepresentations to the court, intentionally misleading the court, or knowingly concealing information that an attorney has a duty to provide to the court,” (iii) “engaging in conduct in the court room that interferes with a judge’s ability to manage the court room fairly, efficiently, and respectfully,” and (iv) “other types of misconduct, but only where the exercise of that inherent power is necessary to punish, deter, or remedy misconduct that threatens a judge’s ability to ensure the fair administration of justice.” Wong v. Luu, 472 Mass. 208, 218-219 (2015). Where an attorney’s alleged wrongful conduct is neither violative of a court order nor directed at the court via a misrepresentation or inappropriate in-court conduct, the court’s inherent power to sanction is limited to those “rare and egregious cases” in which sanctions are necessary to “ensure the fair administration of justice.” Id. at 216-217.

II. The Commonwealth’s Requests

A. Revocation of Communication Privileges

The Commonwealth first asks me to order the sheriff’s office to revoke Kearney’s communication privileges except for communications with his children and counsel. The Commonwealth has not persuaded me that such an order is appropriate. First, there is no court order prohibiting Kearney from continuing to post, blog, tweet, or otherwise publicly disseminate any information, including about the murder case he claims to be reporting on as a journalist. Persons in the custody of the Jail are permitted

all-day access to the telephone and are not limited in their communications, although those communications are monitored. The Jail has its own rules regarding communications which the Commonwealth asks me to override in connection with Mr. Kearney.⁴

Second, the Jail monitors Kearney's non-privileged communications. It does so for security reasons. The Commonwealth can access Kearney's Jail calls and can listen to them. Thus, to the extent Kearney commits a crime while communicating from jail, or encourages someone else to do so – namely, by encouraging someone to intimidate, threaten or harass a witness, or to picket or parade near a witness's residence to interfere with, impede, or obstruct the administration of justice – Kearney can be charged in connection with that conduct.

Third, the basis of the instant Motion is the allegation that Kearney's counsel misrepresented JA as an attorney in order to *evade* the normal monitoring process. The Commonwealth has not established, or even argued, that the normal monitoring system at the Jail is insufficient to monitor Kearney's conduct. Indeed, when asked at the hearing whether there was any evidence that Kearney committed additional crimes of witness intimidation or harassment from the Jail, the Commonwealth indicated there was and that the Commonwealth was pursuing additional indictments and/or charges. So, to the extent the District Court's revocation of Kearney's bail was intended to ensure that his communications would be monitored during his confinement, as the Commonwealth argued at the hearing, Kearney's non-privileged communications, including with any administrators of his websites, will be monitored and can be the basis for or evidence of additional criminal charges, as appropriate.

⁴ I reasonably infer that the privilege afforded to inmates to use tablets throughout the day to communicate with persons outside the Jail can be revoked or limited by the Jail for violation of Jail rules regarding such communication or for other disciplinary reasons.

B. Monitoring Counsel's Communications

The Commonwealth next asks me to appoint a master or attorney to monitor all communications between Kearney and his counsel. The Commonwealth proffers no law in support of its request, which it acknowledges is extraordinary and unprecedented. The Commonwealth essentially asks me to infer that Kearney's counsel will engage in criminal wrongdoing with his client under the guise of attorney-client communications because counsel misrepresented JA as an attorney.

As an initial matter, the Commonwealth conceded that JA and Kearney communicated only six times in the period during which their communications were not monitored, not the sixty times stated in the Motion. Thus, Kearney's counsel's misrepresentation – negligent or intentional – did not result in a significant opportunity to evade monitoring. On the other hand, Kearney communicated unmonitored eighty times with CH and the Commonwealth concedes that Kearney's counsel made no misrepresentations regarding CH's status. The voicemail message from Kearney's counsel quoted in the Motion indicates that Kearney's counsel explicitly said that CH was a "paralegal." Her phone calls should have been monitored according to the Jail's rules. The captain's inclusion of the paralegal's telephone number on the privileged phone list, therefore, appears to have been, at the minimum, the Jail's error and not the result of anything Kearney's counsel did.

More fundamentally, the Commonwealth has not presented evidence from which I could reasonably infer that Kearney's counsel is likely to engage in wrongdoing with his client such that the privilege shielding their communication should be invaded in advance.⁵ At bottom, the Commonwealth suspects and/or believes that Kearney *may*

⁵ The crime-fraud exception applies after evidence of the crime or fraud is provided to the Court and a party seeks to obtain the privileged communications at issue after the fact. See, e.g., Purcell, supra (addressing whether crime-fraud exception applied to previous attorney-client communication).

use his unmonitored calls with his counsel to continue his harassment and/or intimidation of witnesses. To take such an extraordinary step, to invade the attorney-client privilege in such a manner, I would need far more evidence than a mere allegation, unsupported by evidence, that counsel knowingly misrepresented the status of an individual as a lawyer to enable her communications with Kearney to be unmonitored. I have before me counsel's affidavit denying that he deliberately misrepresented her status. I have no contrary admissible evidence from the Commonwealth.⁶

Nor do I have any other information from which I can reasonably infer that Kearney's counsel will communicate with Kearney for purposes other than his representation of Kearney. The Commonwealth suspects that Kearney's counsel will permit third parties to participate in privileged calls with Kearney or, presumably, will transmit information from Kearney to Kearney's followers. I have no information before me to establish that is likely such that I would order their phone calls to be monitored.

Further, should Kearney attempt to use the privileged communications for such a purpose, Kearney's counsel would be obligated to comply with the Rules of Professional Conduct and potentially disclose that information to prevent a crime from occurring. The following rules of conduct proscribe and limit Kearney's counsel's participation in such conduct. Pursuant to Mass. R. Prof. C. 1.6(b), "A lawyer may reveal confidential information relating to the representation of a client to the extent the lawyer reasonably believes necessary, and to the extent required by Rules 3.3, 4.1(b), 8.1 or 8.3 must reveal, such information: . . . (2) to prevent the commission of a criminal or

⁶ The Commonwealth handed the Court print outs of text messages that appear to be between Kearney's counsel and JA in which JA states that she told Kearney's counsel she was not an attorney. It is unclear from those messages when she is alleged to have done so.

fraudulent act that the lawyer reasonably believes is likely to result in substantial injury to property, financial, or other significant interests of another[.]” Rule 3.3 of the Rules of Professional Conduct provides that “[a] lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.” And, Rule 4.1 of the Rules of Professional Conduct provides, “In the course of representing a client a lawyer shall not knowingly. . . (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”

Finally, fundamentally, I have grave concerns that such monitoring, even with the monitor reporting only to the Court, would generate such a chill on any communications that it would impinge on Kearney’s constitutional right to counsel. In my view, absent any indication of wrongdoing by Kearney’s counsel, other than the alleged misidentification of JA as an attorney, monitoring privileged communications may substantially interfere with the attorney-client relationship and substantially prejudice Kearney. Such a potential violation of a bedrock constitutional right might impair the integrity of the entire criminal proceeding.

C. Sanctioning Kearney’s Counsel

“[T]he inherent powers of a judge to sanction an attorney are not so broad as to right all wrongs.” Wong, 472 Mass. at 224. A judge’s inherent sanctioning powers are “limited to what is necessary to vindicat[e] judicial authority” (quotation and citation omitted). Id. Here, Kearney’s counsel is accused of intentionally making a false statement to the Jail which, if true, would be a violation of the Rules of Professional Conduct. See Mass. R. Prof. C. 4.1 (“In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid

assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”). This Court lacks the power to sanction Kearney’s counsel for making a false statement to the Jail unless I find the statement was intended to interfere with the administration of justice, and, even then, only in egregious cases. See Wong, 472 Mass. at 216-217 “[T]he adjudication of an alleged violation of an ethical rule rests solely with the [Board of Bar Overseers] and [the Supreme Judicial Court], and . . . a judge does not have jurisdiction to rule on issues of compliance.” Id., 472 Mass. at 222, citing S.J.C. Rule 4:01, § 1, as amended, 430 Mass. 1319 (2000) (“exclusive disciplinary jurisdiction” over lawyers practicing in the Commonwealth lies with Supreme Judicial Court and Board of Bar Overseers).

Therefore, even assuming I were to find that Kearney’s counsel deliberately lied to the Jail, in the circumstances presented here, the appropriate response is a report to the Board of Bar Overseers for appropriate discipline. However, Kearney’s counsel filed an affidavit in this case, and stated to me, in open Court, that he did not intentionally misrepresent JA’s status but that he believed she was an attorney. That averment is supported by the fact that counsel did not misrepresent CH or Mark to be attorneys, but indicated they were a paralegal and investigator, respectively. If Kearney’s counsel’s affidavit and statement to the Court were shown to be false, I would have the power, and I would exercise that power, to sanction Kearney’s counsel. Until such evidence is provided, I accept counsel’s affidavit and statement as an officer of the Court.

Further, should Kearney’s counsel aid or assist Kearney in any criminal conduct, he is undoubtedly aware he would face potential criminal liability and, even absent criminal sanction, such conduct itself would violate the Rules of Professional Conduct. See Mass. R. Prof. C. 1.2(d) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may

counsel or assist a client to make a good faith effort to determine the validity, scope, meaning, or application of the law.”).

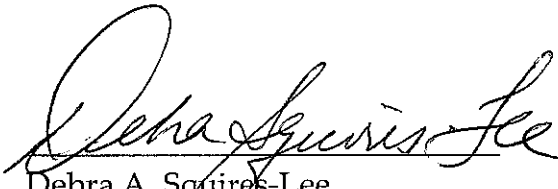
D. Conclusion

Especially when criminal matters garner significant public attention, attorneys must vigilantly maintain the highest degree of ethics, professionalism, and propriety in their conduct in and out of Court. While the Commonwealth’s allegations are troubling, the Commonwealth has not established that the orders it seeks are appropriate. I am confident the Jail will monitor appropriately all of Kearney’s communications, other than with counsel, to ensure Kearney is not engaging in wrongdoing from Jail. The Jail now has the correct information that only one lawyer is counsel of record to Kearney and only that lawyer’s communications should be privileged and unmonitored. I am not persuaded that it is appropriate to have anyone monitor those privileged calls. And, I am not persuaded I have the power to sanction Kearney’s counsel for the alleged misstatement to the Jail.

All parties and counsel and the public should take note that conduct which is found to interfere with the administration of justice will be addressed. Our system of justice requires a due regard for the just and efficient trial of matters before the Court.

ORDER

For the foregoing reasons, the Commonwealth’s Motion for Remedial Orders and Sanctions is **DENIED**.


Debra A. Squires-Lee
Justice of the Superior Court

January ²⁹ 2024