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Summary of Las Vegas Sands Corp. v. Eighth Jud. Dist. Ct., 130 Nev. Adv. Op. 13

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STATUTORY INTERPRETATION: NRS 50.125

Summary

The question at issue is “whether a witness's review of purportedly privileged documents prior to testifying constitutes a waiver of any privilege under NRS 50.125, such that the adverse party may demand production, be allowed to inspect the documents, cross-examine the witness on the contents, and admit the evidence for purposes of impeachment.”

Disposition

When invoked at a hearing, NRS 50.125 requires disclosure of any document used to refresh the witness's recollection before or while testifying – regardless of privilege.

Factual and Procedural History

Steven Jacobs, the real party in interest, filed a breach of employment contract action against petitioners Las Vegas Sands Corp., Sands China Ltd., and non-party Sheldon Adelson, the CEO of Las Vegas Sands (collectively, Sands), arising out of Jacobs's termination as president and CEO of Sands' Macau operations.

Sands motioned to dismiss the action for lack of personal jurisdiction, but was denied. Sands then filed and was granted a writ of mandamus that directed the district court to revisit the issue of personal jurisdiction, hold an evidentiary hearing, and issue its findings. As a result of Sands' alleged misconduct in the ensuing jurisdictional discovery process, the district court sua sponte ordered a separate evidentiary hearing to consider sanctions.

During the sanctions hearing, Jacobs cross-examined a former Las Vegas Sands attorney, Justin Jones. Noting that Jones's testimony had been fairly precise, Jacobs asked if Jones had reviewed his records before arriving at court. Jones responded that he had reviewed billing records and emails that had refreshed his recollection of relevant dates and the timing of events. Jacobs argued at the hearing that these records were openly discoverable under NRS 50.125.² Sands objected, claiming work product doctrine and the attorney-client privilege.

The district court suggested that Jacobs file a motion requesting that the documents be produced and indicated that it would hold argument and rule on the discovery issue at a later date. Yet, without deciding the discovery issue, the district court filed its order imposing sanctions on Sands. Two month's later, Jacobs filed his motion to compel production of the documents Jones used to refresh his recollection claiming Jones had thereby waived his privileges. Sands opposed the motion, arguing that NRS 50.125(1) does not require automatic disclosure of privileged documents but instead requires a balancing test to determine whether

¹ By Craig Friedel.

² NEV. REV. STAT. 50.135(1) (2013) states, “If a witness uses a writing to refresh his or her memory, either before or while testifying, an adverse party is entitled: (a) To have it produced at the hearing; (b) To inspect it; (c) To cross-examine the witness thereon; and (d) To introduce in evidence those portions which relate to the testimony of the witness for the purpose of affecting the witness's credibility.”

disclosure is in the interests of justice. Sands also argued, alternatively, that the rights provided for in NRS 50.125(1) must be exercised at the hearing at which the witness testifies regarding the documents. After hearing the arguments in chambers, the district court entered an order compelling Sands to produce the documents but stayed it pending these writ proceedings.

Discussion

Although discovery matters typically are addressed to the district court's sound discretion and unreviewable by writ petition, the Court chose to exercise its discretion to consider this writ petition because the order at issue compelled disclosure of purportedly privileged information.³

Standard of Review

The parties disputed the district court's interpretation of NRS 50.125. Such interpretation is a question of law subject to the Court's de novo review, even when arising in a writ proceeding.⁴

When invoked at a hearing, NRS 50.125 requires disclosure of any document used to refresh the witness's recollection before or while testifying, regardless of privilege

The court was required to first determine an issue of first impression: "whether the Nevada Legislature intended all writings, including privileged documents, to be produced for impeachment purposes when a witness uses the document to refresh his or her recollection prior to testifying" under NRS 50.125.

Sands argued privileges apply at all stages of all proceedings except where they are "relaxed by a statute or procedural rule applicable to the specific situation"⁵ and that NRS 50.125 does not specifically do so. Alternatively, Sands argued that NRS 50.125 only provides that an adverse party is entitled to a document *at the hearing*. Jacobs asserted that NRS 50.125 makes no exception for privileged documents and, thus, applies to them. Additionally, Jacobs argues that NRS 50.125 lacks the discretionary prong that its federal counterpart⁶ contains, which suggests disclosure is mandatory.

Looking at the language of NRS 50.125, the Court concluded that the language "a writing" is ambiguous in that it could refer to both privileged and unprivileged writings or only to unprivileged writings because a "privilege," under NRS 47.020, applies "at all stages of all proceedings" except where it is "relaxed." Thus, the Court looked at the statute's legislative history.

³ Aspen Fin. Servs., Inc. v. Eighth Judicial Dist. Court, 128 Nev. ___, ___, 289 P.3d 201, 204 (2012) ("[W]rit relief may be available when it is necessary to prevent discovery that would cause privileged information to irretrievably lose its confidential nature and thereby render a later appeal ineffective.").

⁴ Int'l Game Tech., Inc. v. Second Judicial Dist. Court, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008).

⁵ NEV. REV. STAT. 47.020(1)(a) (2013).

⁶ FED. R. EVID. 612.

NRS 50.125 differs significantly from FRE 612

FRE 612(a) was amended to make production of writings used by a witness to refresh recollection *before* testifying subject to the discretion of the court "in the interests of justice, as is the case under existing federal law."⁷ However, NRS 50.125 was codified without this discretionary prong. The Court found this discrepancy significant and held that without such language, Nevada district courts lack discretion to halt the disclosure of privileged documents under NRS 50.125.

This is supported by that fact that since the passage of FRE 612 forty years ago, the Nevada Legislature has had the option to bring NRS 50.125 in line with the federal rule by adding a discretionary prong, but has not. Additionally, allowing privilege to prevail during a witness's testimony would place an unfair disadvantage on the adverse party by encouraging witnesses to use privileged writings to refresh recollection in an attempt to shield themselves from any meaningful cross-examination on his or her testimony utilizing the privileged material.⁸

Therefore, the Court held that, "when invoked at a hearing . . . NRS 50.125 requires disclosure of any document used to refresh the witness's recollection before or while testifying, regardless of privilege." The Court emphasized, however, that the required disclosure of purportedly privileged documents requires an appropriate and timely request under NRS 50.125.

The district court abused its discretion when it ordered the production of purportedly privileged documents because the request was untimely and Jones's credibility was no longer at issue

Sands argued that NRS 50.125 was designed to ensure that an adverse party has a full and fair opportunity to test the witness's credibility. Sands pointed out that this purpose was moot when Jacobs motioned for the production of the documents because the hearing was already over and sanctions were ordered. Jacobs argued that the fact that the district court made its decision post-hearing does not impair Sands' production requirements under NRS 50.125(1). After noting FRE 612 was a rule of evidence and not one of discovery, the Court determined that permitting such an untimely motion would encourage the types of "fishing expeditions" that both the Nevada Legislature and Congress sought to avoid.

Here, the district court turned NRS 50.125 into a discovery tool that has no relation to testing any witness's credibility as evidenced by its assertion that "once a document is used by a witness to refresh his recollection, then that document is subject to discovery." That reading of NRS 50.125 ignores the "at the hearing" language. Thus, the district court abused its discretion by requiring the production of the documents after it entered its order. Jacobs should have notified the court it had to rule at the hearing or submitted his motion immediately following the hearing.

⁷ H.R. Rep. No. 93-650, at 13 (1974), *reprinted in* 1974 U.S.C.C.A.N. 7075, 7086.

⁸ *See Wardleigh*, 111 Nev. at 354-55, 891 P.2d at 1186 (indicating that the "attorney-client privilege is waived when a litigant places information protected by it in issue through some affirmative act for his own benefit" (internal quotations omitted)).

Conclusion

The Court held that a witness's review of purportedly privileged documents prior to testifying constitutes a waiver of any privilege under NRS 50.125. However, in this case, the adverse party failed to assert this waiver at or near the hearing in question and instead waited until well after the district court had entered its order. Thus, the demand was untimely under NRS 50.125(1). Accordingly, the Court granted petitioners' request for a writ of prohibition to halt the production of the purportedly privileged documents.