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APPELLATE PROCEDURE – LAW FIRM DISQUALIFICATION

Summary

The Court considered a motion to disqualify a law firm from participating in the appeal of a failed settlement program.

Disposition/Outcome

The Court concluded that screening may be used to cure imputed disqualification. Additionally, the Court adopted a nonexhaustive list of factors used to determine whether the implemented screening measures are adequate.

Factual and Procedural History

Ryan's Express appealed from a district court's dismissal of its claims against Amador Stage Lines. The appeal was sent to the Court's settlement program where Nicholas Fey, a shareholder at the law firm of Woodburn and Wedge, was the appointed settlement judge. Fey held a settlement conference and received confidential information, but the parties did not reach an agreement.

Following the settlement conference, Amador's counsel joined Woodburn and Wedge as a shareholder and the firm substituted as counsel for the current appeal. Because of Fey's prior involvement as settlement judge, Ryan's Express moved to disqualify Woodburn and Wedge from the case. Amador conceded Fey's disqualification, but argued that the firm took adequate measures to cure the conflict of interest.

Discussion

Justice Douglas wrote for the unanimous Court, seated en banc. Ryan's Express argued that Fey's disqualification must be imputed to all of the attorneys of Woodburn and Wedge. Ryan's Express also argued that curing the conflict of interest via screening is not possible in this case because Nevada Rules of Professional Conduct 1.10(e)(1) allows screening only when the disqualified lawyer did not have "a substantial role in or primary responsibility for the matter that causes the disqualification." Furthermore, Ryan's Express argued that, as a matter of public policy, protecting the reputation of the settlement program outweighs Amador's right to choose any counsel.

Amador countered by arguing that Fey is of the highest integrity and would never compromise the program. Amador also claimed that disqualification of the firm would "impose substantial hardship" in their pending appeal. Finally, Amador contends that RPC 1.12 – permitting the screening of mediators, arbitrators, and former judges to prevent imputed

¹ By Richard A. Andrews

disqualification – applies to the case and Woodburn and Wedge utilized significant screening procedures.

The Court reaffirmed the authority of the Court to govern the lawyers appearing before it.² It stated that settlement judges have duties of confidentiality and avoidance of conflicts of interest, duties that remain in effect after the settlement proceedings conclude. In addition, settlement judges must avoid the appearance of impropriety. The Court held that Frey is disqualified and that Woodburn and Wedge are also disqualified unless the firm can prove that Frey was “timely and adequately screened” per RPC 1.12(c).

In considering the screening process, the Court weighed the competing interests of one client’s right to choice of counsel against another client’s desire to prevent the leak of confidential information. Because the settlement program is court-sponsored, any improper behavior will reflect poorly on the judicial process. At the same time, disqualification of law firms without exception could deter attorneys from serving as settlement judges and would restrict a client’s choice of counsel. Ultimately, the Court held that screening may be used to cure imputed disqualification.

The Court went on to discuss the factors to be considered when determining whether a firm has adequately screened its lawyers. The burden of proof is on the party seeking to cure disqualification with screening. The party must show that the screening is appropriate and that the disqualified attorney is timely and appropriately screened. The Court, considering factors used by other courts, put forth five factors, not exhaustive: (1) instructions given to ban communication between the disqualified attorney and the firm; (2) restrictions on access to files; (3) the size and structure of the firm; (4) the likelihood of interaction between the disqualified lawyer and others in the firm; and (5) the timing of the screening measures.

Despite the submission of affidavits by Amador, the Court concluded that additional fact finding is required to determine whether the screening measures of Woodburn and Wedge rebut imputed disqualification. The Court asserted that the district courts are superior at answering questions of fact due to their experience.

Conclusion

The Court remanded the motion to the district court for an evidentiary hearing on the sufficiency of the screening measures used by Woodburn and Wedge. Accordingly, the Court deferred ruling on the motion to disqualify until the district court’s findings are concluded.

² State Bar of Nevada v. Claiborne, 104 Nev. 115, 126, 756 P.2d 464, 471 (1988).