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Nevada Law Journal

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Recommended Citation

McDonnell, Patrick C., "Summary of Merits Incentives v. Dist. Ct., 127 Nev. Adv. Op. No. 63" (2011).
Nevada Supreme Court Summaries. 225.
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Merits Incentives v. Dist. Ct., 127 Nev. Adv. Op. No. 63 (October 6, 2011)¹
CIVIL PROCEDURE – Discovery Disclosures
LEGAL ETHICS – Notification/Disqualification

Summary

An original petition for writ of mandamus challenging a district court’s denial of a motion to disqualify counsel who had reviewed confidential documents sent to him, unsolicited, from an anonymous source.

Disposition/Outcome

Petition denied because the attorney who reviewed the confidential documents fulfilled his ethical duties by giving prompt notification to opposing counsel through NRCP 16.1. The Court also adopted a notification requirement to apply in situations where the attorney receives documents or evidence sent to him by an anonymous source or a third party unrelated to the litigation. Finally, the Court adopted factors to aid a district court in determining whether to grant a motion to disqualify an attorney who has received an opposing party’s privileged information yet played no part in obtaining that information. Using those factors, the Court concluded that the district court did not abuse its discretion in refusing to disqualify.

Factual and Procedural History

Bumble and Bumble, LLC, (“Bumble”) filed a lawsuit against Merits Incentives, LLC, Ramon DeSage and Cadeau Express (collectively “petitioners”). Bumble subsequently received an anonymous package from Lebanon on Sept. 24, 2009. The package contained a disk and a note stating that the disk should be forwarded to Bumble’s counsel in Las Vegas, John Mowbray of Fennemore Craig, P.C. On Oct. 15, 2009, Mowbray served on petitioners a supplemental NRCP 16.1 mandatory pretrial discovery disclosure that identified the disk and noted its date of receipt by Bumble from an unidentified source. The disclosure included a copy of the disk and copy of the envelope in which it arrived, which bore Lebanese stamps and the phrase “[h]ighly [c]onfidential.” On Oct. 19, 2009, Bumble served an amended supplemental NRCP 16.1 disclosure on petitioners and provided another identical copy of the disk.

On Nov. 6, 2009, Bumble served petitioners with a second request for production listing more than 500 documents that were on the disk, and requesting authentication and hard copies of some of the documents. On Jan. 11, 2010, petitioners filed their response to that second request for production and generally objected, stating they already produced all documents they were obligated to produce. On Jan. 27, 2010, Bumble used some of the documents from the disk to depose one of petitioners’ employees, at which time petitioners did not object or argue that the documents were privileged.

On May 14, 2010, petitioners filed a motion in district court objecting to Bumble’s use and possession of the documents on the disk. In the motion, petitioners sought dismissal of the case with prejudice or alternatively, prohibition of Bumble’s use of “misappropriated

¹ By Patrick C. McDonnell

confidential and privileged documents”² and disqualification of Bumble’s counsel. Petitioners alleged Mowbray had received the disk from petitioners’ fired ex-employee who the district court, in a separate case, had permanently enjoined from distributing the stolen information to petitioners’ “customers manufacturers, suppliers, or business partners.”³ Petitioners further alleged Bumble failed to notify them that it had petitioners’ confidential and privileged documents and that Bumble had used that information “to gain a tactical advantage in [the] litigation.”⁴ Bumble countered that it had produced the disk in discovery and that Mowbray had not violated any of Nevada’s ethics rules.

The district court declined to dismiss the case or disqualify Mowbray and his firm, finding that Bumble and its counsel, in the NRCP 16.1 disclosure, had “conspicuously set forth” receipt of the disk. Further, neither Bumble nor its counsel had actual knowledge of the injunction against petitioners’ former employee. The court also concluded that Mowbray had not only acted reasonably and in accordance with the Nevada Rules of Professional Conduct but had gone out of his way to advise petitioners that he had the disk and its document and had given them every opportunity to object and demand return and non-use.

The district court also concluded that petitioners failed to show that any of the documents on the disk were privileged except for one – a draft affidavit. The court excluded the use of the draft affidavit, but allowed use of all other documents on the disk.

Discussion

The Supreme Court of Nevada concluded that the district court did not abuse its discretion by denying petitioners’ motion and denied the relief requested. Nevertheless, the Court considered the writ petition because it raised important issues of law that needed clarification.⁵

Petitioners argued that Mowbray violated his ethical duties. Once he realized the privileged nature of the documents on the disk, petitioners argued, Mowbray should have ceased reviewing the disk, notified the petitioners, and returned the disk (per the “cease, notify and return” rule.) The Court noted that Nevada has no “cease, notify and return” rule. The lack of such a rule, however, does not prevent a party whose privileged information has been obtained from seeking the return of that information. Here, if petitioners believed that Mowbray was acting unethically or possessed their privileged information, they should have immediately informed Mowbray of their concerns and sought return of the disk and any documents Mowbray retrieved from the disk. If Mowbray did not comply, petitioners could have sought relief from the district court in a timely manner. Indeed, the Court noted, petitioners’ counsel may have had

² The Supreme Court of Nevada noted that this was insufficient to assert a privilege. *See Nev. Power Co. v. Monsanto Co.*, 151 F.R.D. 118, 121 & n.5 (D. Nev. 1993)

³ *Merits Incentives v. Dist. Ct.*, 127 Nev. Adv. Op. No. 63 at 3 (Oct. 6, 2011).

⁴ *Id.* at 5.

⁵ A writ may issue “where an important issue of law needs clarification and public policy is served by this court’s invocation of its original jurisdiction.” *Mineral County v. State*, 117 Nev. 235, 243, 20 P.3d 800, 805 (2001) (quoting *Business Computer Rentals v. State Treasurer*, 114 Nev. 63, 67, 953 P.2d 13, 15 (1998)).

an independent responsibility to promptly object to the use of documents provided by an anonymous source under NRPC 1.3.⁶

The Court also found that Mowbray's actions did not violate NRPC 4.4(a), 4.4(b) or NRPC 8.4(d). NRPC 4.4(a) states, in pertinent part, that "[i]n representing a client, a lawyer shall not ... use methods of obtaining evidence that violate the rights of [a third] person."⁷ NRPC 4.4(b) requires prompt notification to the sender who "inadvertently sent" the lawyer documentation related to the representation of that lawyer's client.⁸ NRPC 8.4(d) states that "[i]t is professional misconduct for a lawyer to ... [e]ngage in conduct that is prejudicial to the administration of justice."⁹

The Court noted that NRPC 4.4(b) was inapplicable here because the documentation was intentionally sent to Mowbray. Furthermore, based on the language of NRPC 4.4(a) and 8.4(d), an attorney must take affirmative action, either by employing a method of obtaining evidence or engaging in certain conduct, to violate either of those rules. Here, the district court's undisputed findings of fact included that disk was sent anonymously and unsolicited and that Mowbray had no knowledge of the injunction against the ex-employee.

New Notification Requirement

Because Nevada had no ethical rules specifically governing a situation such as the one present in the instant case, the Court adopted a new notification requirement: an attorney who receives documents regarding a case from an anonymous source or from a third party unrelated to the litigation must promptly notify opposing counsel or risk being in violation of ethical duties and/or being disqualified as counsel. The notification must adequately put opposing counsel on notice that the documents were not received in the normal course of discovery. The notification must also describe, with particularity, the facts and circumstances that explain how the documents or evidence came into the possession of counsel or counsel's client.

Motion to Disqualify Factors

The Court also noted it had not previously determined what factors a district court should consider when presented with a motion to disqualify an attorney who has received an opposing party's privileged information yet played no part in obtaining that information. Accordingly, it adopted the following non-exhaustive list developed by the Supreme Court of Texas:

- 1) Whether the attorney knew or should have known that the material was privileged;
- 2) The promptness with which the attorney notifies the opposing side that he or she has received the opposing side's privileged information;
- 3) The extent to which the attorney reviews and digests the privileged information;

⁶ "A lawyer shall act with reasonable diligence and promptness in representing a client." NEV. RULES OF PROF'L CONDUCT R. 1.3 (2006).

⁷ NEV. RULES OF PROF'L CONDUCT R. 4.4(a) (2006).

⁸ NEV. RULES OF PROF'L CONDUCT R. 4.4(b) (2006).

⁹ NEV. RULES OF PROF'L CONDUCT R. 8.4(d) (2006).

- 4) The significance of the privileged information; i.e., the extent to which its disclosure may prejudice the movant's claim or defense, and the extent to which return of the documents will mitigate the prejudice;
- 5) The extent to which movant may be at fault for the unauthorized disclosure of the privileged information; [and]
- 6) The extent to which the nonmovant will suffer prejudice from the disqualification of his or her attorney.¹⁰

The Court further agreed with the Texas court that in exercising its judicial discretion, district courts “must consider all the facts and circumstances to determine whether the interests of justice require disqualification.”¹¹

Applying the factors here, the Court determined the district court did not abuse its discretion when it refused to disqualify Mowbray and his law firm. The district court found that most of the documents on the disk were not privileged, and Mowbray stated he did not review the document the court determined was privileged. Moreover, Mowbray sent petitioners' counsel a supplemental NRC 16.1 disclosure one month after Bumble received the disk. The district court prohibited use of the privileged document (the affidavit), and petitioners failed to show any prejudice resulting from the affidavit having been in Mowbray's possession. Finally, Bumble would have suffered prejudice if it had to retain new counsel because the litigation involved complex contracts and numerous entities.

Conclusion

An attorney establishes lack of intent to deceive opposing counsel or conceal possession of confidential information when he promptly and adequately discloses possession of the information pursuant to NRC 16.1. Therefore, a district court does not abuse its discretion in denying a motion to disqualify that attorney and his law firm. Moreover, an attorney who receives confidential documents related to a case from an anonymous source or from a third party unrelated to the litigation and then promptly and adequately notifies opposing counsel is not in violation of ethical duties relative to those documents. Finally, where an attorney receives privileged information of the opposing party and had no part in obtaining that information, the court will determine whether to disqualify the attorney by applying the factors adopted by the Supreme Court of Nevada.

¹⁰ *In re Meador*, 968 S.W.2d 346, 351-52 (Tex. 1998).

¹¹ *Id.* at 351.