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Summary of L.V. Dev. Assocs. V. Eighth Jud. Dist. Ct., 130 Nev. Adv. Op. 37

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PRE-TRIAL LITIGATION: DISCOVERY

Summary

The Court determined whether NRS 50.125² applies to depositions.

Disposition

In *Las Vegas Sands Corp. v. Eighth Judicial Dist. Court*, 130 Nev. __, __, 319 P.3d 618, 623 (2014), the Supreme Court concluded 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." Here, the Court concluded that this interpretation of NRS 50.125 applies not only to in-court hearings, but also to depositions.

Factual and Procedural History

While conducting discovery, KB Home took the deposition of George Holman. Prior to his deposition, Holman testified that he had reviewed two memoranda prepared by his attorneys, as well as his own handwritten notes, in order to refresh his memory. These memoranda, along with Holman's notes, summarized conversations between Holman and his attorneys. KB Home then moved for production of the documents, but Holman refused based on the attorney-client privilege and the work-product doctrine.

On the second day of the deposition, KB Home again asked about the contents of the documents and the purpose of reviewing them. Holman again responded that he reviewed the documents to refresh his memory. However, Holman refused to divulge the contents of the documents based on privilege.

KB Home filed a motion to compel production of the documents based on NRS 50.125, arguing that this provision applied to depositions as well as in-court hearings. The district court granted the motion, but KB Home filed a motion for reconsideration. This was referred to the discovery commissioner, who recommended full production of all documentation. The district court affirmed this recommendation and order production of the full unredacted version of the documentation.

The proceedings were stayed by the district court while LVDA sought writ relief from the Nevada Supreme Court. LVDA argued that KB Home (1) did not lay a sufficient foundation to invoke NRS 50.125, (2) NRS 50.125 does not serve as a waiver of the attorney-client privilege,

¹ By Ryan Becklean.

² NRS 50.125(1) provides:

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.

and (3) NRS 50.125 does not serve as a waiver of the work-product doctrine

Discussion

The court noted that it was within their discretion to consider the writ petition because a writ of prohibition is an appropriate remedy to correct an order that compels disclosure of privileged information.

Standard of Review

The court noted that the parties dispute the interpretation of NRS 50.125. Furthermore, statutory interpretation is subject to de novo review. When a statute's language is clear, the court will apply it. However, when the language is ambiguous, the court will look to legislative history.

KB Home laid a proper foundation to invoke NRS 50.125

LVDA argued that KB Home could not lay the proper foundation for invoking NRS 50.125 because KB Home did not establish the extent to which the documents were used to refresh Holman's memory. LVDA pointed to *Sipsas v. State*, a case in which the Nevada Supreme Court held that a photograph was improperly admitted because it was not used to refresh a witness's memory.³ However, the court found that KB Home laid the proper foundation by asking Holman why he reviewed the memoranda and what impact the memoranda had on his memory.

NRS 50.125 serves as a waiver of the attorney-client privilege and the work-product doctrine when a witness reviews such writings to refresh his or her recollection prior to testifying

LVDA also argued that the attorney client privilege and the work-product doctrine superseded NRS 50.125. LVDA relied on NRS 47.020(2), which states that the attorney client privilege and the work-product doctrine apply "at all stages of the proceedings."⁴ However, the Court disagreed by referencing the recent case of *Las Vegas Sands Corp. v. Eighth Judicial District Court*.⁵ In *Las Vegas Sands Corp.*, the court analyzed NRS 50.125 and held that "Nevada district courts lack discretion to halt the disclosure of privileged documents when a witness uses the privileged documents to refresh his or her recollection prior to testifying."⁶ However, the court noted that the application of the term "hearing" to depositions was unclear and first addressed whether NRS 50.125 applied to depositions as well as in-court hearings.

³ 102 Nev. 119, 123, 716 P.2d 231, 233 (1986).

⁴ NEV. REV. STAT. § 47.020.

⁵ 130 Nev. 14, 319 P.3d 618 (2014).

⁶ *Id.* at 28.

NRS 50.125's "hearing" language applied to depositions as well as to in-court hearings.

The court noted that the definition of the terms "hearing" and "deposition" overlapped in that both are official gatherings at which evidence is taken. Accordingly, the court looked to the legislative history behind NRS 50.125 but found that there was no discussion as to whether the Nevada Legislature intended depositions to be included within the term "hearing".⁷ Federal courts interpreting FRE 612 have concluded that the rule applies to depositions and deposition testimony by operation of FRCP 30(c), which provides that "examination and cross-examination of a deponent proceeds as they would at trial under the Federal Rules of Evidence."⁸ Because courts have interpreted Rule 612 to apply to depositions and deposition testimony, the court held that "NRS 50.125 applies to depositions and deposition testimony as well as to in-court hearings by operation of NRCP 30(c)." Given that depositions proceed as permitted at trial, the Court could "see no reason why writings used to refresh the memory of a witness before or during a deposition should be treated differently than those used by a witness before or at 'the trial.'"

Conclusion

Reviewing a document for the purposes of refreshing one's memory allows an adverse party to admit the document into evidence, even if the review takes place in the context of a deposition. In this case, "KB Home is entitled to know the contents of those memoranda in order to properly cross-examine Holman as to their accuracy, truthfulness, and their influence on his testimony."

⁷ See Hearing on S.B. 12 Before the Senate Judiciary Comm., 56th Leg. (Nev., Feb. 10, 1971); Hearing on S.B. 12 Before the Joint Senate & Assembly Judiciary Cons., 56th Leg. (Nev., Feb. 11, 1971) (addressing concerns regarding various proposed rules of evidence, but not addressing the provisions of NRS 50.125).

⁸ See, e.g., *Sporck v. Fell*, 759 F.2d 312, 317 (3d Cir. 1985); *Heron Interact, Inc. v. Guidelines, Inc.*, 244 F.R.D. 75, 76 (D. Mass. 2007); *Magee v. Paul Revere Life Ins. Co.*, 172 F.R.D. 627, 637 (E.D.N.Y. 1997); *James Julian, Inc. v. Raytheon Co.*, 93 F.R.D. 138, 144 (D. Del. 1982).