

IN THE SUPREME COURT OF THE STATE OF NEVADA

HANNAH IRSFELD, ESQ. AND
IRSFELD & ASSOCIATES,
Petitioners,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK, AND THE HONORABLE
MARK R. DENTON, DISTRICT JUDGE,
Respondents,

and

DONALD V. ALLEN; FRONTIER
PARTNERS A/K/A FRONTIER GROUP;
DAVID ROBB; OCEANO DE DIOS, S.A.;
CHRIS CHANT; AND ORPHALESE
HOLDINGS, INC.,
Real Parties in Interest.

No. 53487

FILED

MAR 17 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

JOHN H. BREBBIA, ESQ.,
Petitioner,

vs.

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK, AND THE HONORABLE
MARK R. DENTON, DISTRICT JUDGE,
Respondents,

and

DONALD V. ALLEN; HANNAH
IRSFELD, ESQ.; IRSFELD &
ASSOCIATES; FRONTIER PARTNERS
A/K/A FRONTIER GROUP; DAVID
ROBB; OCEANO DE DIOS, S.A.; CHRIS
CHANT; AND ORPHALESE
HOLDINGS, INC.,
Real Parties in Interest.

No. 53595

ORDER GRANTING IN PART AND DENYING IN PART PETITIONS
FOR WRITS OF MANDAMUS

These consolidated original petitions for writs of mandamus or prohibition challenge district court orders that compel petitioners Hannah Irsfeld and John H. Brebbia to respond to deposition questions regarding their legal representation of real parties in interest Donald Allen and Orphalese Holdings, Inc. (OHI).

This matter concerns the confidential nature of attorney-client communications between petitioners and OHI in a corporate setting and the ability of real parties in interest Frontier Partners, David Robb, Oceano de Dios, S.A., and Chris Chant (collectively, the Oceano Parties) to depose petitioners concerning their legal representation of former corporate clients. Allen, former president and CEO of OHI, entered into a series of exchange agreements with Frontier Partners and Robb, purporting to transfer ownership of OHI to Oceano de Dios, S.A. (OD). The OHI and OD board of directors consisted of Allen, Robb, and Chant.

Allen began to suspect Robb and Chant of “suspicious activity” and of taking “questionable actions.” Consequently, he commenced the underlying action against the Oceano Parties. Robb and Chant, composing a majority of the board of directors of both OHI and OD, waived the attorney-client privilege on behalf of OHI in regard to petitioners. Fearful of subjecting themselves to a malpractice claim for disclosing privileged information, petitioners refused to respond to certain deposition questions. Ultimately, the district court granted a motion to compel petitioners to respond to questions about: (1) petitioners’ communications with Allen in his capacity as president of OHI; (2) petitioners’ communications with Victoria Jin in her capacity as an officer of and general counsel for OHI; (3) documents exchanged between petitioners and officers of OHI; (4) documents recovered from Allen and Jin’s OHI

computers after the district court ordered those computers to be returned to OHI; and (5) documents that Allen's substituted counsel, Vincent A. Consul, received from Brebbia and subsequently produced, allegedly inadvertently, in response to a discovery request.

These petitions for writs of mandamus or prohibition followed, requesting that we vacate the district court's order granting the Oceano Parties' motion to compel. We conclude that extraordinary relief is warranted only with regard to the documents that petitioner Irsfeld claims were produced inadvertently.

Communications and documents exchanged between petitioners and Allen and Jin in their corporate capacities

This court may issue a writ of mandamus to "compel the performance of" a legal duty, see NRS 34.160, "or to control a manifest abuse . . . of discretion." Cote H. v. Dist. Ct., 124 Nev. ___, ___, 175 P.3d 906, 908 (2008). A writ of prohibition is available "when a district court acts without or in excess of its jurisdiction." Id. at ___, 175 P.3d at 907; see also NRS 34.320. Both mandamus and prohibition writs "are extraordinary remedies," and whether either writ is issued is within this court's discretion. Cote H., 124 Nev. at ___, 175 P.3d at 908.

NRS 49.095 encompasses Nevada's attorney-client privilege, which protects the confidentiality of communications between a client and his lawyer. However, applying the attorney-client privilege to a corporate context presents a unique challenge in determining who has the authority to waive or assert the privilege. Wardleigh v. District Court, 111 Nev. 345, 351, 891 P.2d 1180, 1184 (1995). Typically, the attorney-client privilege belongs to the corporation, exercised through its current management. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343, 348 (1985). Thus, "when control of a corporation passes to new

management, the authority to assert and waive the corporation's attorney-client privilege passes as well." Id. at 349.

We conclude that the district court did not abuse its discretion in determining that an attorney-client relationship existed between petitioners and OHI because they executed a retainer agreement, OHI paid legal fees to petitioners, and Allen communicated information to petitioners on OHI's behalf. See Todd v. State, 113 Nev. 18, 24-25, 931 P.2d 721, 725 (1997); NRS 49.095. We further conclude that the district court did not abuse its discretion when it determined that, through the OHI board's waiver of the attorney-client privilege, the Oceano Parties can discover what Allen and Jin communicated in their corporate capacities to petitioners. The district court's order is not as broad as petitioners assert, as it confines the Oceano Parties' deposition of petitioners to questions about information communicated to and documents exchanged with OHI by Allen and Jin only in their corporate capacities. Thus, extraordinary relief concerning petitioners' duty to respond to deposition questions regarding their representation of Allen, individually, is unnecessary. The Oceano Parties cannot waive that noncorporate attorney-client relationship.¹ Therefore, we conclude that petitioners have failed to demonstrate that extraordinary relief is warranted with regard to the first four categories of communication identified above. Accordingly, as to

¹We note that the record demonstrates that petitioners did not represent Jin in her individual capacity; thus, any communication between Jin and OHI was conducted by Jin in her capacity as an officer of and general counsel for OHI.

these issues, we deny the writs of mandamus or prohibition in both Docket No. 53487 and Docket No. 53595.

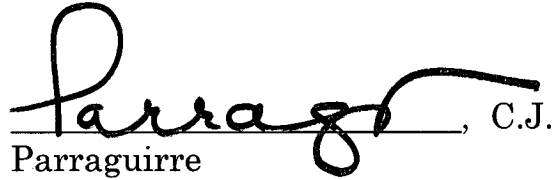
Inadvertent disclosure of documents

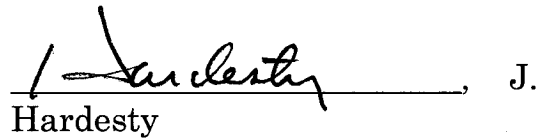
As we recognized in Wardleigh, “[i]f improper discovery were allowed, the assertedly privileged information would irretrievably lose its confidential and privileged quality and petitioners would have no effective remedy, even by a later appeal.” 111 Nev. at 350-51, 891 P.2d at 1183-84. The attorney-client privilege may be waived implicitly or explicitly, including through the inadvertent disclosure of documents and information. Gomez v. Vernon, 255 F.3d 1118, 1131 (9th Cir. 2001). However, when such inadvertent production occurs, “the privilege will be ‘preserved if the privilege holder has made efforts reasonably designed to protect the privilege.’” Id. at 1131-32 (quoting U.S. v. De La Jara, 973 F.2d 746, 750 (9th Cir. 1992) (internal quotation marks omitted)).

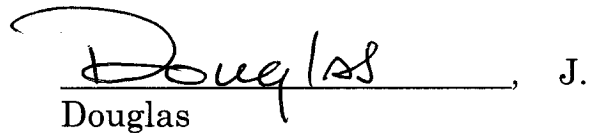
Despite the Oceano Parties’ argument to the contrary, there is no evidence in the record demonstrating that the district court considered and determined whether Allen’s substituted counsel inadvertently produced privileged documents in response to the Oceano Parties’ discovery request. Thus, we conclude that the district court abused its discretion in failing to make a finding regarding whether the documents were inadvertently produced and still protected by the attorney-client privilege. Accordingly, we grant the petition for a writ of mandamus in Docket No. 53487 to the extent that petitioner seeks extraordinary relief to preclude the district court from proceeding with its discovery order requiring petitioners to respond to deposition questions about inadvertently produced documents. The clerk of this court shall issue a writ of mandamus in Docket No. 53487 only, instructing the district court to conduct a hearing to determine whether the documents in question are

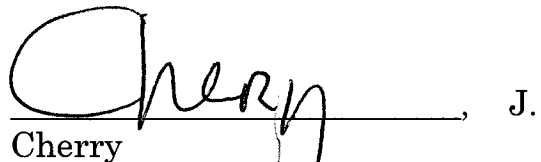
protected by the attorney-client privilege and, if so, whether the documents were inadvertently produced and whether that inadvertent disclosure constitutes a waiver of the attorney-client privilege with respect to those documents.

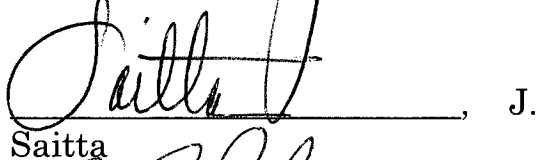
It is so ORDERED.

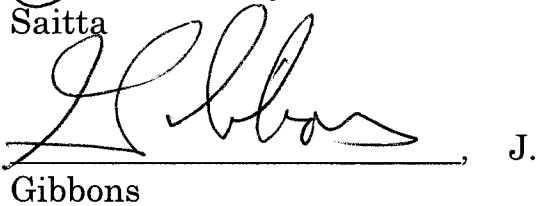
 , C.J.
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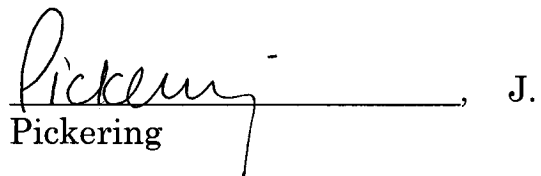
 , J.
Hardesty

 , J.
Douglas

 , J.
Cherry

 , J.
Saitta

 , J.
Gibbons

 , J.
Pickering

cc: Hon. Mark R. Denton, District Judge
Alverson Taylor Mortensen & Sanders
Snell & Wilmer, LLP/Las Vegas
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McDonald Carano Wilson LLP/Las Vegas
Eighth District Court Clerk