

IN THE SUPREME COURT OF THE STATE OF NEVADA

IN RE: CITYCENTER CONSTRUCTION
AND LIEN MASTER LITIGATION

No. 57186

MGM MIRAGE DESIGN GROUP, A
NEVADA CORPORATION;
CITYCENTER LAND, LLC, A NEVADA
LIMITED LIABILITY COMPANY;
CITYCENTER HARMON HOTEL
HOLDINGS, LLC, A NEVADA LIMITED
LIABILITY COMPANY; CITYCENTER
VDARA DEVELOPMENT, LLC, A
NEVADA LIMITED LIABILITY
COMPANY; CITYCENTER VDARA
CONDO HOTEL HOLDINGS, LLC, A
NEVADA LIMITED LIABILITY
COMPANY; THE CRYSTALS AT
CITYCENTER, LLC, A NEVADA
LIMITED LIABILITY COMPANY;
CITYCENTER VEER TOWERS
DEVELOPMENT, LLC, A NEVADA
LIMITED LIABILITY COMPANY; ARIA
RESORT & CASINO HOLDINGS, LLC,
A NEVADA LIMITED LIABILITY
COMPANY; CITYCENTER BOUTIQUE
HOTEL HOLDINGS, LLC, A NEVADA
LIMITED LIABILITY COMPANY;
CITYCENTER BOUTIQUE
RESIDENTIAL DEVELOPMENT, LLC,
A NEVADA LIMITED LIABILITY
COMPANY; MANDARIN ORIENTAL
LAS VEGAS, LLC, A DELAWARE
LIMITED LIABILITY COMPANY; AND
MANDARIN ORIENTAL
MANAGEMENT (USA), INC., A
DELAWARE CORPORATION,
Petitioners,
vs.

FILED

OCT 19 2011

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

THE EIGHTH JUDICIAL DISTRICT
COURT OF THE STATE OF NEVADA,
IN AND FOR THE COUNTY OF
CLARK; AND THE HONORABLE
ELIZABETH GOFF GONZALEZ,
DISTRICT JUDGE,
Respondents,
and
PERINI BUILDING COMPANY, AN
ARIZONA CORPORATION,
Real Party in Interest.

ORDER GRANTING PETITION FOR A WRIT OF MANDAMUS

This is an original petition for a writ of mandamus challenging a district court order disqualifying counsel from participation. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

The law firm of Morris Peterson serves as counsel to petitioners MGM Mirage Design Group, CityCenter Land, LLC, and a host of other petitioners (collectively, CityCenter) in the underlying litigation against real party in interest Perini Building Company. Morris Peterson also represents Queensridge Towers, LLC, in an unrelated suit against Perini.

During the Queensridge litigation, counsel for Queensridge and Perini negotiated an electronically stored information search protocol, pursuant to a confidentiality and protective order governing the production of confidential materials, which would segregate Queensridge-related information from CityCenter-related information. Morris Peterson hired Stroz Friedberg, LLC, a third-party computer forensic company, to create a secure database in order to facilitate access and review during discovery. However, Stroz Friedberg failed to follow the established search protocol, resulting in two attorneys and a paralegal from Morris

Peterson accessing 142 documents that had been identified by Stroz Friedberg as potentially related to the CityCenter litigation.

Thereafter, Perini filed a motion to disqualify Morris Peterson from representing CityCenter in the underlying litigation. The district court ordered that the three Morris Peterson employees who accessed the allegedly privileged documents be precluded from involvement and must be screened in the CityCenter litigation as Perini had incurred prejudice by the disclosure of the privileged information. Subsequently, CityCenter filed a motion to reconsider the disqualification of the three Morris Peterson employees. After the district court performed an in camera review of approximately 80 documents, it denied the motion to reconsider finding that CityCenter failed to present any new evidence or law.

CityCenter now petitions this court for extraordinary writ relief requesting that this court vacate district court's order disqualifying the three employees of Morris Peterson from involvement in the CityCenter litigation as CityCenter has a direct and substantial interest in deciding its counsel of choice during trial. We conclude that the district court manifestly abused its discretion in disqualifying the employees of Morris Peterson. Accordingly, we grant the petition.

Standard of review

"A writ of mandamus is properly used to challenge a district court's order disqualifying counsel." Brown v. Dist. Ct., 116 Nev. 1200, 1206, 14 P.3d 1266, 1271 (2000). "A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion." Nevada Yellow Cab Corp. v. Dist Ct., 123 Nev. 44, 49, 152 P.3d 737, 740 (2007); NRS 34.160. The district court has broad discretion in attorney disqualification matters,

and this court will not overturn district court's decision absent a manifest abuse of that discretion. Yellow Cab, 123 Nev. at 54, 152 P.3d at 743.

Attorney disqualification

CityCenter contends that the district court abused its discretion in disqualifying three members of Morris Peterson as it has a direct and substantial interest in deciding its counsel of choice during trial. Specifically, CityCenter argues that access to allegedly privileged documents that were inadvertently produced by a third-party is not enough to disqualify members of Morris Peterson.

We recently determined the factors that a district court should consider when presented with a motion to disqualify an attorney who has inadvertently received an opposing party's allegedly privileged information in Merits Incentives, LLC v. Dist. Ct., 127 Nev. ___, ___ P.3d ___ (Adv. Op. No. 63, Oct. 6, 2011). In determining whether the district court abused its discretion in disqualifying a party's counsel, we adopted the factors espoused by the Supreme Court of Texas in In re Meador, 968 S.W.2d 346, 351-52 (Tex. 1998). See Merits, 127 Nev. at ___, ___ P.3d at ___. The nonexhaustive list of factors includes:

- 1) [W]hether 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 its privileged information;
- 3) the extent to which the attorney reviews and digests the privileged information;
- 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 that prejudice;

5) the extent to which movant may be at fault for the unauthorized disclosure; [and]

6) the extent to which the nonmovant will suffer prejudice from the disqualification of his or her attorney.

Id. at ___, ___ P.3d at ___; Meador, 968 S.W.2d at 351-52; see In re Estate of Myers, 130 P.3d 1023, 1027 (Colo. 2006). Therefore, “in exercising its judicial discretion, the district court ‘must consider all the facts and circumstances to determine whether the interest of justice require disqualification.’” Merits, 127 Nev. at ___, ___ P.3d at ___ (quoting Meador, 968 S.W. 2d at 351).

Applying the above factors, we disagree with the district court’s decision to disqualify members of Morris Peterson from participation in the suit underlying this petition. Here, Morris Peterson acted competently and reasonably to safeguard confidential client information from inadvertent and unauthorized disclosure by entering into the confidentiality and protective order in the Queensridge litigation that Stroz Friedberg was bound to follow. Based on the confidentiality and protective order, Morris Peterson would not have reasonably known that the material that it allegedly accessed was privileged as it took reasonable precautions to prevent such information from disclosure. The record is clear that the ultimate culprit of the unauthorized disclosure is Stroz Friedberg, not Morris Peterson.

Once the inadvertent disclosure was uncovered, Morris Peterson did not have access to the secure database for more than nine months. Moreover, access does not necessarily mean review and digestion, especially when it relates to electronically stored information. Also, it does not appear that the information in the allegedly privileged documents will significantly prejudice Perini in the CityCenter litigation. Further,


CityCenter will suffer prejudice, including an immense financial impact, from the disqualification because the three employees of Morris Peterson have already spent considerable time on the underlying case, which involves complex contractual issues and numerous entities. We will not be blind to the fact that removal of three members of Morris Peterson as counsel in the underlying case will very probably result in a loss to Morris Peterson of fees in the hundreds of thousands of dollars. See Cronin v. District Court, 105 Nev. 635, 643 n.1, 781 P.2d 1150, 1155 n.1 (1989) (Springer, J., dissenting), disapproved of on other grounds by Nevada Yellow Cab Corp. v. Dist. Ct., 123 Nev. 44, 54 n.26, 152 P.3d 737, 743 n.26 (2007). Such a fine is painful as a consequence for accessing information inadvertently and caused by no fault of its own.


“Without doubt, there are situations where a lawyer who has been privy to privileged information improperly obtained from the other side must be disqualified, even though the lawyer was not involved in obtaining the information.” Merits, 127 Nev. ___, ___ P.3d at ___ (quoting Meador, 968 S.W. 2d at 351). This is not one of those situations. The conduct of Morris Peterson and its employees was not egregious and not violative of Nevada’s professional rules of conduct. See RPC 1.6(a) and 4.4(b). Additionally, “the equities do not favor severing the attorney-client relationship between” the disqualified attorneys at Morris Peterson and CityCenter. Brown, 116 Nev. at 1206, 14 P.3d at 1270. Accordingly, upon balancing the interests of Morris Peterson, CityCenter, and Perini, “the sanctions awarded by the trial court in this unusual set of circumstance[s] were not justified.” State Compensation Ins. Fund v. WPS, Inc., 82 Cal. Rptr. 2d 799, 806 (Ct. App. 1999). Therefore, we conclude that the district


court manifestly abused its discretion in granting in part, Perini's motion to disqualify Morris Peterson from representing CityCenter.¹


Accordingly, we²

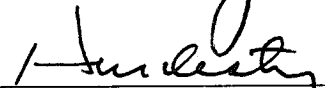
ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDAMUS instructing the district court to vacate its order disqualifying two attorneys and a paralegal from the law firm of Morris Peterson.

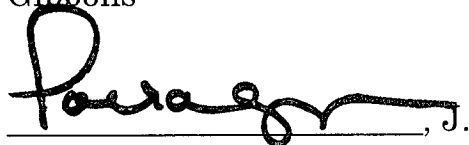

_____, C.J.
Saitta


_____, J.
Douglas


_____, J.
Cherry


_____, J.
Gibbons


_____, J.
Hardesty


_____, J.
Parraguirre

¹In light of our order granting CityCenter's petition, we vacate our order granting a stay of the underlying litigation entered on January 14, 2011.

²The Honorable Kristina Pickering, Justice, voluntarily recused herself from participation in the decision of this matter.

cc: Hon. Elizabeth Goff Gonzalez, District Judge
Bailey Kennedy
McDonald Carano Wilson LLP/Las Vegas
Martin & Allison, Ltd.
McDonald Carano Wilson LLP/Reno
Lemons, Grundy & Eisenberg
Eighth District Court Clerk