138 Nev., Advance Opinion 82

IN THE SUPREME COURT OF THE STATE OF NEVADA

JANE NELSON,
Petitioner,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE SUSAN JOHNSON, DISTRICT JUDGE,
Respondents,
and
MUHAMMAD SAEED SABIR, M.D.; AND PIONEER HEALTH CARE, LLC,
Real Parties in Interest.

No. 84006

FILED
DEC 22 2022
ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

Original petition for writ of mandamus challenging a district court order denying a motion to disqualify counsel.

Petition denied.

Breeden & Associates, PLLC, and Adam J. Breeden, Las Vegas, for Petitioner.

McBride Hall and Robert C. McBride and Sean M. Kelly, Las Vegas, for Real Parties in Interest.

BEFORE THE SUPREME COURT, CADISH AND PICKERING, JJ., AND GIBBONS, Sr. J.[1]

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[1]The Honorable Mark Gibbons, Senior Justice, participated in the decision of this matter under a general order of assignment.

OPINION

By the Court, CADISH, J.:

Petitioner challenges a district court order denying her motion to disqualify real parties in interest's law firm based on an alleged conflict of interest resulting from that firm hiring a paralegal who had previously worked for petitioner's attorney. Petitioner argues that the facts, including that the paralegal worked on petitioner's case while employed by petitioner's attorney, require automatic disqualification and she need not show actual prejudice for such disqualification. Alternatively, petitioner argues that the district court improperly declined to hold an evidentiary hearing to determine the sufficiency of the other firm's screening practices.

While we elect to entertain this writ petition because it is the appropriate mechanism to challenge an order denying a motion to disqualify counsel and it presents important legal issues needing clarification, we nevertheless deny writ relief. We conclude that automatic disqualification was not required despite the paralegal's significant work on the case at the prior firm because petitioner failed to show any actual disclosure of confidences or ineffectiveness of the screening measures implemented by real parties in interest's firm. Thus, the district court acted within its discretion by denying the motion to disqualify. Given that there were no specific factual or credibility disputes, we further conclude the district court did not abuse its discretion by ruling on the motion without an evidentiary hearing.

FACTS AND PROCEDURAL HISTORY

McBride Hall represents real parties in interest Dr. Muhammad Saeed Sabir and Pioneer Health Care, LLC (collectively, Sabir) in a medical malpractice action brought by petitioner Jane Nelson. Nelson's

attorney, Adam Breeden, owns a small, solo practice known as Breeden & Associates, PLLC. Kristy Johnson worked full time as his sole paralegal and assistant for roughly four years. In that role, Johnson worked closely with Breeden, as he purportedly shared his mental impressions and evaluations of every case with her.

While Johnson was employed by Breeden & Associates, Breeden represented plaintiffs in two cases for which McBride Hall acted as defense counsel, including Nelson's underlying malpractice case against Sabir. While Nelson's case was ongoing, Johnson interviewed with and ultimately began working as a paralegal for McBride Hall. Upon notice of Johnson's departure, Breeden asked McBride Hall whether it intended to withdraw from the matters Johnson worked on at his firm. McBride Hall responded that it did not intend to withdraw and, instead, detailed the various screening measures imposed on Johnson as part of her employment.

The stated screening mechanisms first required a conflicts check to ensure that Johnson would be screened off any conflicting matters. Before beginning her position, McBride Hall further informed Johnson that she could not discuss any of the cases she worked on at Breeden's firm, including Nelson's case, with any staff at McBride Hall. As stated in her affidavit, Johnson agreed. The affidavit also indicated that McBride Hall (1) blocked Johnson's access to the Nelson computer file, (2) locked her out of the physical file, (3) instructed all staff not to discuss Nelson's case with Johnson, (4) circulated two memos to all staff detailing these screening mechanisms, and (5) assigned Johnson to different cases while another paralegal was assigned to the Nelson case.

Nelson moved to disqualify McBride Hall from representing Sabir given Johnson's purported direct involvement in the pleadings,

filings, communications, and discovery and her knowledge of Breeden's legal conclusions on Nelson's case. Nelson argued that Johnson's employment presented a paradigmatic case for imputed disqualification. Johnson's intimate knowledge, Nelson argued, posed a significant risk to Nelson's confidential information that should render McBride Hall presumptively disqualified from continued representation. Relying on Nevada caselaw, she further maintained that Sabir could overcome this presumption only if they met their burden of showing sufficient screening, and that *Ryan's Express Transportation Services, Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 279 P.3d 166 (2012), mandated an evidentiary hearing to ascertain the sufficiency of such screening. Accordingly, Nelson asked the district court to either (1) hold an evidentiary hearing and issue findings of fact as to the sufficiency of the screening mechanisms or (2) rule that McBride Hall is immediately disqualified under the facts at bar. In response, Sabir contended that the screening mechanisms were effective under existing caselaw to prevent imputed disqualification. In addition, they claimed that they would suffer undue prejudice upon McBride Hall's disqualification when there was no allegation or evidence that their counsel acquired privileged or confidential information about Nelson's case, such that Nelson would be prejudiced by McBride Hall's continued representation.

Following a nonevidentiary hearing, the district court denied the motion to disqualify McBride Hall. It noted both that McBride Hall properly screened Johnson and that Nelson did not establish any specific prejudice she would experience in light of this screening. Nelson now seeks a writ of mandamus instructing the district court to either grant her

disqualification motion or vacate its ruling and hold an evidentiary hearing to make findings of facts and conclusions of law.

DISCUSSION

We elect to entertain the writ petition

A writ of mandamus is appropriate to "compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion." *Nev. Yellow Cab Corp. v. Eighth Judicial Dist. Court*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007). A petition for mandamus relief is generally a proper means to challenge a district court order regarding disqualification of a lawyer. *See Liapis v. Second Judicial Dist. Court*, 128 Nev. 414, 418, 282 P.3d 733, 736 (2012). Nelson contends, therefore, that we should consider the petition on its merits and for the additional reason that it concerns an important issue regarding the scope of imputed disqualification of nonlawyers. *See City of Mesquite v. Eighth Judicial Dist. Court*, 135 Nev. 240, 243, 445 P.3d 1244, 1248 (2019) (noting that this court may appropriately exercise its discretion to consider a writ petition when "an important issue of law needs clarification" (quoting *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008))). We agree and thus elect to entertain the petition.

Given McBride Hall's screening mechanisms, the district court did not err in denying the motion

District courts have broad discretion in determining whether disqualification is required in a particular case. *Leibowitz v. Eighth Judicial Dist. Court*, 119 Nev. 523, 529, 78 P.3d 515, 519 (2003). Sabir maintains that our caselaw explicitly permits the type of screening utilized here. Nelson urges us to instead recognize automatic disqualification due to Johnson's previous work on the case.

As a threshold matter, Nevada's ethics rules governing the legal profession generally prohibit representation of a client whose interests are adverse to those of a former client in the "same or substantially related matter." *See* RPC 1.9(a). This disqualification rule is based on a presumption that confidences were shared during the prior representation. *See Ryan's Express*, 128 Nev. at 295, 279 P.3d at 170 (observing that "ethical principles and public policy considerations . . . lead us to impose a presumption of shared confidence"). Imputation arises based on a second presumption that such confidences are shared with members of the new firm. *See id.* at 295 n.2, 279 P.3d at 170 n.2 (recognizing that the imputation provisions of our ethical rules presume "that an attorney takes with him or her any confidences gained in a former relationship and shares them with the firm").

Nonlawyer employees, like the attorneys with whom they work, receive confidential information in the course of employment and thereby stand in a fiduciary relationship with the client. *See* 2 Ronald E. Mallen, *Legal Malpractice* § 18:53 (2022 ed.). We first recognized this principle in *Ciaffone v. Eighth Judicial District Court*, in which we denied writ relief to a plaintiff who challenged a district court decision applying imputed disqualification to her attorney based on the attorney's employment of a nonlawyer who previously worked on the same matter for the defendant's firm. 113 Nev. 1165, 1166-67, 1170, 945 P.2d 950, 951-53 (1997), *overruled in part by Leibowitz*, 119 Nev. at 532, 78 P.3d at 521.

Our holding stood on a reading of former ethics rules SCR 160(2) and SCR 187.[2] *Id.* at 1167-68, 945 P.2d at 952-53. SCR 160(2)

[2]In 2006, these rules were revised and are now contained in RPC 1.10 and RPC 5.3, respectively.

imputed disqualification to lawyers associated with a lawyer already disqualified for involvement in the "same or a substantially related matter" and in possession of confidential information and communications. And SCR 160(2) did not permit screening to remedy this conflict of interest. *See id.* at 1168, 945 P.3d at 952 ("[T]his court has taken the position in SCR 160(2) that *lawyer screening* is prohibited."). Meanwhile, SCR 187 mandated that partners and lawyers with direct supervisory authority "make reasonable efforts" to ensure that a nonlawyer's "conduct is compatible with the professional obligations of the lawyer." *Id.* at 1168, 945 P.2d at 952-53. Reading the rules together in *Ciaffone*, we held that SCR 160(2) and SCR 187 subjected nonlawyers to the same imputed disqualification rules as lawyers, such that screening could not cure a nonlawyer's imputed conflict of interest. *Id.* at 1168-69, 945 P.2d at 953 (declining to "carve out an exception allowing screening of nonlawyers in situations where lawyers would be similarly disqualified").

We partially overruled that holding in *Leibowitz*. In doing so, we sought to balance client confidentiality interests against nonlawyer employment interests. *Leibowitz*, 119 Nev. at 531-32, 78 P.3d at 520-21. While still applying SCR 160(2) to nonlawyers, we deemed "imputed disqualification . . . a harsh remedy" for nonlawyers because a nonlawyer, unlike an attorney, does not have the opportunity to practice their "profession regardless of an affiliation to a law firm." *Id.* at 532, 78 P.3d at 521.[3] With this new perspective, we delineated the screening procedures a firm should utilize when hiring a nonlawyer employee who had access to

[3]We note that Nevada's revision of the model rules of professional conduct in 2006 explicitly permits screening of an attorney, not just nonlawyers, to cure a conflict of interest in certain circumstances. *See* RPC 1.10(e); RPC 1.12(c).

adversarial client files, including its "absolute duty to screen the nonlawyer employee from the adversarial cases irrespective of the nonlawyer employee's actual knowledge of privileged or confidential information." *Id.* We then provided a nonexhaustive list of screening requirements, including (1) cautioning the nonlawyer employee "not to disclose any information relating to the representation of a client of the former employer"; (2) instructing the nonlawyer employee not to work on matters on which they worked in prior employment, or on which they have "information relating to the former employer's representation"; and (3) ensuring that the nonlawyer employee does not work on matters on which they worked during the prior employment absent client consent. *Id.* at 533, 78 P.3d at 521 (quoting *In re Bell Helicopter Textron, Inc.*, 87 S.W.3d 139, 145-46 (Tex. Ct. App. 2002)).

Yet, *Leibowitz* did not suggest that screening is always available to resolve imputed disqualification. Absent the affected client's consent, we observed that disqualification is necessary where either (1) "information relating to the representation of an adverse client has in fact been disclosed [to the new employer]" or (2) "screening would be ineffective or the nonlawyer [employee] necessarily would be required to work on the other side of a matter that is the same as or substantially related to a matter on which the nonlawyer [employee] has previously worked." *Id.* at 533, 78 P.3d at 521-22 (alterations in original). Indeed, we pointed out that disqualification is warranted where the nonlawyer employee has acquired the former client's confidential information, "unless the district court determines that screening is sufficient to safeguard the former client from disclosure" of such information. *Id.* at 533, 78 P.3d at 522. In this assessment, we announced that district courts should balance

"the individual right to be represented by counsel of one's choice" against "each party's right to be free from the risk of even inadvertent disclosure of confidential information," "the public's interest in the scrupulous administration of justice," and "the prejudices that will inure to the parties as a result of the [district court's] decision." *Id.* at 534, 78 P.3d at 522 (alteration in original) (quoting *Brown v. Eighth Judicial Dist. Court*, 116 Nev. 1200, 1205, 14 P.3d 1266, 1269-70 (2000)).

Here, the parties do not dispute Johnson's involvement in this case at Breeden & Associates. But mere involvement—even extensive involvement—does not warrant automatic disqualification. Such disqualification is warranted where: (1) information about the representation of the adverse client was disclosed to the new employer, or (2) screening would be ineffective or the nonlawyer would be required to work on the other side of the same matter. *See Leibowitz*, 119 Nev. at 534, 78 P.3d at 521-22. Nelson does not allege that either circumstance is present here. Nor does the record indicate that Johnson disclosed any confidential information to McBride Hall. Rather, Johnson's affidavit confirms that she did not disclose any such information and complied with McBride Hall's screening measures. These measures closely track those set out in *Leibowitz*. Indeed, McBride Hall prohibited Johnson from discussing the matter from the start of her employment, ensured that Johnson would not work on the case, and blocked her access to any of the files related to the case. These mechanisms were timely and satisfy *Leibowitz*'s "instructive minimum." *See id.* at 532, 78 P.3d at 521.

It is true that Johnson's substantial work on the same case at Breeden & Associates, the limited time elapsed after she left, and McBride Hall's representation of a client adverse to Nelson may weigh against the

adequacy of screening measures. *See Leibowitz*, 119 Nev. at 534, 78 P.3d at 522 (directing courts to consider, among other factors, "the substantiality of the relationship between the former and current matters," "the time elapsed between the matters," how involved the nonlawyer employee was in the former matter, and "whether the old firm and the new firm represent adverse parties in the same proceeding" (internal quotations omitted)). Even so, the district court found that the screening measures were adequate, and we decline Nelson's invitation to adopt a rule of automatic disqualification absent specific claims of prejudice based on actual disclosure of confidential information or demonstrated ineffectiveness of screening measures, as outlined in *Leibowitz*. Nelson did not specifically allege—much less show—that Johnson disclosed information to McBride Hall about Nelson's case, was working on the defense side of the case at McBride Hall, or had access to Nelson's file at McBride Hall.[4] Thus, Johnson's involvement in Nelson's case at Breeden & Associates alone does not entitle Nelson to immediate disqualification of McBride Hall. Accordingly, the district court did not abuse its discretion in denying the disqualification motion.

The district court did not abuse its discretion in ruling on the motion without holding an evidentiary hearing

Nelson argues that *Ryan's Express* requires an evidentiary hearing and findings of fact and conclusions of law on a disqualification

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[4]While Nelson argues that the district court improperly placed the burden on her by requiring her to demonstrate actual prejudice in order to prevail on her motion to disqualify, the district court's analysis is in accord with our instructions in *Leibowitz* to grant immediate disqualification only if this required showing of an actual disclosure of confidences or work on the case was made.

motion. She asserts that the requirement applies to disqualification motions concerning both lawyers and nonlawyers. Sabir maintains that any requirement in *Ryan's Express* is limited to an attorney's imputed conflict of interest.

In *Ryan's Express*, we stated that "[w]hen presented with a dispute over whether a lawyer has been properly screened, Nevada courts *should* conduct an evidentiary hearing to determine the adequacy and timeliness of the screening measures on a case-by-case basis." 128 Nev. at 298, 279 P.3d at 172 (emphasis added). Nevertheless, *Ryan's Express* leaves the decision to disqualify in the district court's discretion. *See id.* at 299, 279 P.3d at 172 ("[T]he consideration of the adequacy of screening is within the sound discretion of the district court."). So, too, is the decision to hold an evidentiary hearing. *See id.* Generally, evidentiary hearings should be utilized where "factual questions are not readily ascertainable," or if "witnesses or questions of credibility predominate." *See United Commercial Ins. Serv., Inc. v. Paymaster Corp.*, 962 F.2d 853, 858 (9th Cir. 1992). Therefore, upon a motion to disqualify, an evidentiary hearing might be necessary to engage in the "delicate task" of balancing the parties' and the public's interests. *See Leibowitz*, 119 Nev. at 534, 78 P.3d at 522. Likewise, it might be necessary to assess the sufficiency of screening. *See id.* (providing a seven-factor test to determine whether screening of a nonlawyer was effective); *see also Ryan's Express*, 128 Nev. at 297, 279 P.3d at 171 (offering a five-factor test to determine whether screening of an attorney was effective). Thus, where fact and credibility determinations are necessary to the resolution of either question, the trial court should hold an evidentiary hearing. But determining whether such issues exist to warrant holding an evidentiary hearing is a matter in the district court's discretion.

We decline to intrude on this discretion here. To the extent *Ryan's Express* imposes an evidentiary hearing requirement in cases concerning attorneys—if at all[5]—it does not apply here, where a nonlawyer's employment is at issue. Rather, our disqualification cases direct district courts to consider various factors in determining the sufficiency of screening of nonlawyers. *See Leibowitz*, 119 Nev. at 534, 78 P.3d at 522; *see also Ryan's Express*, 128 Nev. at 297-99, 279 P.3d at 171-72. A district court may find an evidentiary hearing necessary to aid in this determination. Here, it did not.

We do not consider this decision to be an abuse of discretion. While it was undisputed that Johnson had knowledge of the case from her work at Breeden & Associates, Nelson did not assert that McBride Hall's representations that Johnson did not disclose information or work on the case there were false. And Nelson does not dispute that McBride Hall implemented extensive screening mechanisms that square with those outlined in *Leibowitz*, such that the district court could adequately consider the effectiveness of such screening. Given the lack of specific factual or credibility disputes, the district court did not abuse its discretion in deciding the matter without an evidentiary hearing. *See Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 243, 257, 235 P.3d 592, 601 (2010) (holding that the district court did not abuse its discretion in declining to hold a full

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[5]We note that use of the word "should" ordinarily does not impose a mandatory requirement. *See, e.g., Brown v. State*, 138 Nev., Adv. Op. 44, 512 P.3d 269, 279-80 & n.12 (2022) (explaining that although the district court "should" make certain findings on the record, it does not necessarily err in failing to do so).

evidentiary hearing "since the record was sufficient for the court to make its findings").

CONCLUSION

Though we entertain this writ petition, we decline to provide the relief Nelson seeks. Nevada permits screening of nonlawyers as a means to cure the nonlawyer's imputed conflict of interest. Because McBride Hall instituted sufficient screening mechanisms and there is no evidence that Johnson divulged information relating to the representation of Nelson, automatic disqualification was not necessary. Thus, the district court did not abuse its discretion in denying the motion to disqualify. Additionally, under these circumstances, the district court did not abuse its discretion by ruling on the disqualification motion without holding an evidentiary hearing. Accordingly, we deny the writ petition.

_____, J.
Cadish

We concur:

_____, J.
Pickering

_____, Sr. J.
Gibbons