IN THE SUPREME COURT OF THE STATE OF NEVADA

ROGER HERDA AND SHERYLE HERDA, INDIVIDUALS; BARBARA WALSH, AN INDIVIDUAL; WINIE SWINGLE, AN INDIVIDUAL; WRAIJEAN CRANE, AN INDIVIDUAL; EDWARD HYNES, AN INDIVIDUAL; RICHARD SHUEY AND SHERI SHUEY, HUSBAND AND WIFE; CARYLE GIANCOLA AND CAROLINE GIANCOLA, HUSBAND AND WIFE; ROBERT VUOCOLO AND MERCEDES VUOCOLO, HUSBAND AND WIFE; NICHOLAS MANASCO, AN INDIVIDUAL; JACK JENNINGS MATTHEWS, AN INDIVIDUAL; FRANK WHITMER AND SANDRA WHITMER, HUSBAND AND WIFE; THOMAS HERDA AND ANNA HERDA, HUSBAND AND WIFE; RICHARD SEAMAN TRUST; WILLIAM DOWNES AND EVA DOWNES, HUSBAND AND WIFE; JANET A. KIMURA; AND CHRISTINE EARIXON,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND THE HONORABLE STEPHEN L. HUFFAKER, DISTRICT JUDGE,
Respondents,
and
MILLEN DEVELOPMENT, AN ENTITY FORM UNKNOWN; RICHARD B. MILLEN, AN INDIVIDUAL; AND MARY A. MILLEN, AN INDIVIDUAL,
Real Parties in Interest.

No. 39299

FILED

JUL 16 2002

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

02-12141

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus challenges a district court order disqualifying petitioners' counsel, Schulman & Grode. Petitioners have no plain, speedy and adequate remedy at law,[1] and may challenge the district court's disqualification decision by writ petition.[2] We may, at our discretion,[3] issue a writ of mandamus to compel the district court to perform a required act,[4] or to control an arbitrary or capricious exercise of discretion.[5] We have reviewed the petition, answer and reply,[6] and all attached documents, and we conclude that our intervention in this matter is warranted.

Petitioners own condominiums in Cabrillo Terrace, Henderson, Nevada, and are members of the Cabrillo Terrace Owners Association. Real parties in interest Richard and Mary Millen, doing business as Millen Development, developed and constructed Cabrillo Terrace, and own (or owned) 30 of the project's 70 condominiums. As

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[1]NRS 34.170.

[2]See Cronin v. District Court, 105 Nev. 635, 639 n.4, 781 P.2d 1150, 1152 n.4 (1989) (noting that mandamus is properly used to challenge a district court order disqualifying counsel).

[3]Smith v. District Court, 107 Nev. 674, 677, 818 P.2d 849, 851-52 (1991).

[4]NRS 34.160.

[5]Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

[6]We grant petitioners' motion for permission to file a reply. The clerk of this court shall file the reply that was provisionally submitted on May 15, 2002.

condominium owners, the Millens are also members of the Owners Association. Richard and Mary were both on the Association's 5-member Board of Directors when the underlying action was commenced, but apparently only Mary is presently on the Board. The Association retained the Law Offices of Schulman & Grode in late 2000 to pursue money damages for construction defects in the Association's common areas. The Board apparently voted to proceed with litigation against the developers, but when the litigation issue was submitted to the Association in June 2001 for a vote, the Millens cast their 30 votes against litigation and the remaining Association members voted 28-12 against litigation.

Thereafter, petitioners asked Schulman & Grode to represent them in an action against the developers to recover the costs of repairing the common areas, and Schulman & Grode withdrew as counsel for the Association. In August 2001, Schulman & Grode commenced the underlying construction defects action by filing a class action complaint on behalf of petitioners and the other members of the Association, against the Millens, Millen Development, and the Association itself.

The Millen defendants moved the district court for an order disqualifying Schulman & Grode because the firm had represented the Association in the months leading up to the lawsuit and was, they argued, precluded by SCR 159 from representing the plaintiff condominium owners in the suit against the Association. Petitioners opposed the motion on the basis that their interests were not adverse to the Association's. Petitioners asserted that they had named the Association as a nominal defendant so that the court could order the Association to grant them access to common areas for investigation and testing. Petitioners further asserted that they filed the lawsuit to recover repair costs for the

Association, and except for reasonable attorney's fees and costs, all damages recovered would be delivered to the Association (or someone chosen by the court, if the Millens continued to control the Association) to remedy common areas damaged by construction defects. The district court granted the motion and disqualified Schulman & Grode.

Petitioners then moved to voluntarily dismiss the Association without prejudice to remedy any perceived conflict. Petitioners argued that dismissing the Association would cure any conflict because the Association was a separate entity from the Millen defendants, incorporated in 1992, and Schulman & Grode had never represented the Millen defendants, never obtained any confidential information from them and was not taking a position materially adverse to its former client, the Association. The district court granted the motion and dismissed the Association from the lawsuit without prejudice. A week later the court dismissed the class action aspect of petitioners' complaint, and again granted the motion to voluntarily dismiss the Association. In its order, the court expressed its concern that Schulman & Grode's continued representation of the plaintiffs presented a continuing problem. According to the court:

> Schulman & Grode appear to have a conflict of interest as they still have members of the Homeowners Association, whom they once represented, within the case and Defendants, Richard B. Millen and Mary A. Millen, are developers and own several lots, they are a major part of the Homeowners Association. There exists a conflict and there is an appearance of impropriety.

Petitioners unsuccessfully moved the district court to reconsider its disqualification ruling, then filed this writ petition challenging the ruling.

District courts are responsible for controlling the conduct of attorneys practicing before them,[7] and have broad discretion in determining whether disqualification is required in a particular case.[8] Courts deciding attorney disqualification motions are faced with the delicate and sometimes difficult task of balancing competing interests: the individual right to be represented by counsel of one's choice, each party's right to be free from the risk of even inadvertent disclosure of confidential information and the public's interest in the scrupulous administration of justice.[9] Doubts should generally be resolved in favor of disqualification;[10] however, parties should not be allowed to misuse motions for disqualification as techniques of harassment or delay.[11]

SCR 159 provides:

> A lawyer who has formerly represented a client in a matter shall not thereafter:
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> 1. Represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents, preferably in writing, after consultation; or

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[7]Cronin, 105 Nev. at 640, 781 P.2d at 1153.

[8]Robbins v. Gillock, 109 Nev. 1015, 1018, 862 P.2d 1195, 1197 (1993).

[9]See Hull v. Celanese Corp., 513 F.2d 568, 570 (2d Cir. 1975).

[10]Cronin, 105 Nev. at 640, 781 P.2d at 1153; Hull, 513 F.2d at 571.

[11]See Flo-Con Systems, Inc. v. Servsteel, Inc., 759 F. Supp. 456, 458 (N.D. Ind. 1990).

> 2. Use information relating to the representation to the disadvantage of the former client except as Rule 156 would permit with respect to a client or when the information has become generally known.

The rule, which protects client confidentiality and loyalty by prohibiting a lawyer from changing sides, is derived from ABA Model Rules of Professional Conduct Rule 1.9, and comments to the Model Rules may be consulted for guidance in interpreting and applying SCR 159.[12]

According to the comments to Model Rule 1.9, the former appearance of impropriety standard has been rejected in favor of fact-based tests to determine whether a lawyer's duties of confidentiality and loyalty to a former client will likely be compromised by the subsequent representation—in short, the fundamental question is whether the subsequent representation can be justly regarded as a changing of sides. Here, Schulman & Grode's involvement with the condominium owner plaintiffs cannot be justly regarded as a changing of sides in the construction defects lawsuit; the firm has always been aligned against the developers with respect to the alleged defects in the common areas.

Schulman & Grode represented the Association, a separate corporate entity comprised of all condominium owners. Schulman & Grode was retained by the Association to recover the costs of repairs needed in common areas; however, when the Association declined to sue the developers for construction defects, Schulman & Grode undertook representation of individual condominium owners to recover the costs of repairs needed in common areas. SCR 159 would prohibit Schulman &

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[12]SCR 150.

Grode's representation of the condominium owner plaintiffs in the construction defects lawsuit against the developers only if the condominium owners' interests are materially adverse to the Association's interests. They are not. The condominium owner plaintiffs and the Association share a common interest—recovering the costs of repairing common area construction defects from the developers.

The Millens' multiple roles—as Association members and Directors, as well as developers—created a conflict of interest for them, but did not make them de facto clients of Schulman & Grode. As we explained in Wardleigh v. District Court,[13] a homeowners' association and its members are analogous to a corporation and its shareholders for purposes of deciding attorney-client relationships; mere membership in the association does not mean that homeowners are automatically or necessarily clients of the association's retained counsel. Here, Schulman & Grode never treated the Millen defendants as clients, and the Millen defendants never treated Schulman & Grode as their counsel. Richard Millen and William Crockett, the Millens' attorney, were specifically asked to leave the Association's June 2001 Board of Directors' meeting so that Schulman & Grode and the Board could carry on discussions protected by the attorney-client privilege. Since the Millens were never Schulman & Grode's clients, actual or de facto,[14] there is no prohibited conflict of interest. The Association's and petitioners' interests are not adverse to

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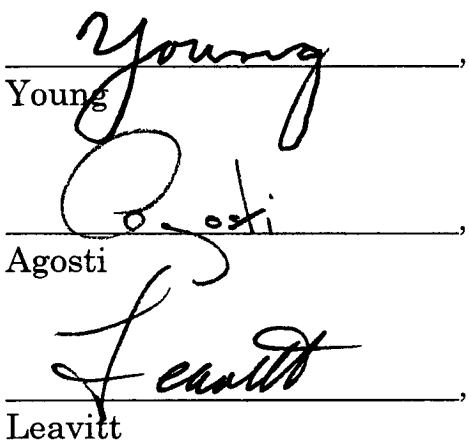
[13]111 Nev. 345, 891 P.2d 1180 (1995).

[14]Although they asserted that they were de facto clients in the district court proceedings, the Millens and Millen Development do not make that assertion in their answer to the writ petition.

each other; they are adverse only to the Millens' and Millen Development's interests as developers.

We conclude that the district court's disqualification of Schulman & Grode was arbitrary and capricious because it was apparently predicated on the erroneous conclusion that the Millens were de facto clients of Schulman & Grode and that the Millens' multiple, conflicting roles created an inescapable conflict for Schulman & Grode. Since there is no prohibited conflict of interest, we grant the petition. The clerk of this court shall issue a writ of mandamus directing the district court to vacate its order disqualifying Schulman & Grode.

It is so ORDERED.



_____, J.
Young

_____, J.
Agosti

_____, J.
Leavitt

cc: Hon. Jennifer Togliatti, District Judge
Lynch, Hopper & Salzano, LLP
Schulman & Grode, LLP
William E. Crockett
Raleigh Hunt McGarry & Drizin
Ryder & Caspino
Weil & Lee
Clark County Clerk