IN THE SUPREME COURT OF THE STATE OF NEVADA

GUADALUPE, INC., A NEVADA CORPORATION D/B/A GUADALUPE MEDICAL CENTER; AND GUADALUPE MEDICAL CENTER/ANDRACKI, M.D., LTD., A NEVADA CORPORATION,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK, AND, THE HONORABLE MICHAEL L. DOUGLAS, DISTRICT JUDGE,
Respondents,
and
MRI, INTERNATIONAL,
Real Party in Interest.

No. 39734

FILED

NOV 0 3 2003

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

ORDER GRANTING PETITION FOR WRIT OF MANDAMUS

This original petition for a writ of mandamus challenges an order of the district court denying a motion to disqualify the law firm of Moran & Associates from further representation of real party in interest, MRI, International (MRI).

Whitehead Law Office is a one-attorney law firm with two other full-time employees. On April 2, 2001, Whitehead hired paralegal Shana Simpson.

On or about May 18, 2001, Guadalupe, Inc., a client of Whitehead's, was served with a complaint from real party in interest MRI. On August 8, 2001, Simpson resigned from Whitehead. On August 15, 2002, Simpson began working for David Spurlock, an attorney with the law firm of Moran & Associates. Spurlock is the attorney of record for MRI, plaintiff in the district court case against Guadalupe.

During several phone calls to Spurlock regarding the district court case, Whitehead became suspicious that the person taking the calls at Spurlock's office was Simpson. When Whitehead asked Simpson if she was his former employee, she replied in the negative. Nonetheless, Whitehead attempted to contact Spurlock several times regarding this potential conflict of interest. After receiving no response to the telephone messages, Whitehead sent Spurlock a letter, dated August 21, 2001, addressing the issue.

On March 13, 2002, Guadalupe filed a motion in the district court to disqualify Spurlock. On April 29, 2002, the district court held a hearing on the matter. The district court denied the motion on May 3, 2002.

Petitioners seek a writ of mandamus to compel the district court to enter an order proscribing the law firm of Moran & Associates from representing MRI in the underlying matter and in any representation of other actions against the petitioners.

A writ of mandamus is an extraordinary remedy that will not issue if the petitioner has a plain, speedy, and adequate remedy at law.[1] Whether to consider a petition for mandamus is entirely within the discretion of this court.[2] The writ is generally issued "to compel [the] performance of an act" that the law requires as a duty resulting from an

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[1]See NRS 34.170.

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

office, trust or station, or to control an arbitrary or capricious exercise of discretion.[3]

This court has previously concluded that mandamus is an appropriate remedy in lawyer disqualification matters.[4]

Pursuant to our decision in Ciaffone v. District Court[5] as clarified and modified in our recent decision, Leibowitz v. District Court,[6] we conclude that the district court abused its discretion in denying the motion to disqualify Spurlock and the law firm of Moran & Associates. Under Ciaffone, a law firm is automatically disqualified under SCR 160(2) from representing a client when a nonlawyer employee of the firm gaines confidential information about an adverse client during previous employment.[7] Leibowitz overruled Ciaffone by creating a balancing test to determine if screening procedures would adequately protect the former client's confidences, thus obviating the need to disqualify the law firm.[8]

Although we declined to mandate an exhaustive list of screening requirements, our decision in Leibowitz adopted the following minimum requirements:

> 1. "The newly hired nonlawyer [employee] must be cautioned not to disclose any

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[3]NRS 34.160; see Wardleigh v. District Court, 111 Nev. 345, 350, 891 P.2d 1180, 1183 (1995); Round Hill Gen. Imp. Dist. v. Newman, 97 Nev. 601, 637 P.2d 534 (1981).

[4]Ciaffone v. District Court, 113 Nev. 1165, 1167, 945 P.2d 950, 952 (1997).

[5]113 Nev. 1165, 945 P.2d 950.

[6]119 Nev. ___, ___ P.3d ___ (Adv. Op. No. 57, November 3, 2003).

[7]Ciaffone, 113 Nev. at 1168, 945 P.2d at 952-53.

[8]Liebowitz, 119 Nev. at ____, ____ P.3d at ____.

information relating to the representation of a client of the former employer."

2. "The nonlawyer [employee] must be instructed not to work on any matter on which [he or] she worked during the prior employment, or regarding which [he or] she has information relating to the former employer's representation."

3. The new firm should take . . . reasonable steps to ensure that the nonlawyer [employee] does not work in connection with matters on which [he or] she worked during the prior employment, absent client consent [i.e., unconditional waiver] after consultation."[9]

We also noted in Leibowitz that disqualification is always required—absent unconditional waiver by the affected client—under the following circumstances:

1. "[W]hen information relating to the representation of an adverse client has in fact been disclosed [to the new employer]"; or, in the absence of disclosure to the new employer,

2. "[W]hen 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."[10]

Here, no screening was instituted and the employee is working in a similar capacity for the new client as she was working for the former client on the same case.

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[9]Id. at ___, ___ P.3d at ___; see also In re Bell Helicopter Textron Inc., 87 S.W.3d 139, 145-46 (Tex. Ct. App. 2002); ABA Comm. On Ethics and Prof'l Responsibility, Informal Op. 1526 (1988) [hereinafter Informal Op. 1526].

[10]Id. (footnote omitted) (quoting In re Bell Helicopter, 87 S.W.3d at 146); see also Informal Op. 1526, supra note 9.

Although the district court found that Simpson did not obtain any confidential information about Guadalupe while employed by Whitehead, substantial evidence does not support this finding. Rather, substantial evidence in the record indicates that Simpson actually obtained privileged or confidential information in the course of her prior employment.

Simpson claims she performed absolutely no work on any cases that were in litigation during her employment with Whitehead and that her involvement with Guadalupe involved preparing and filing public information documents. Simpson averred she never obtained confidential information. However, Guadalupe produced substantial evidence to the contrary.

According to Whitehead, Simpson completed the following tasks on the case: (1) calendaring of hearings, (2) file opening and organization, (3) telephone conferences with defendant regarding pending action, (4) correspondence to defendants regarding pending action, (5) billing defendants for time expended on pending action, and (6) filing of pleadings in the pending action. Simpson's supervisor while at Whitehead, Angela Lau, stated that Simpson was involved in handling the case between Guadalupe and MRI while she was employed at Whitehead.

Additionally, Guadalupe secretary, Freddy Aldana, stated that Simpson contacted his office on several occasions to discuss the MRI action and to request information necessary for preparing a defense. Aldana also stated that Simpson sent several confidential materials to his office relating to the MRI action. Further, Guadalupe secretary, Cecilia Aldana, stated that she had spoken with Simpson on several occasions regarding the pending action with MRI. Freddy Aldana also asserted that Simpson had full knowledge of the pending action and alerted him of court filings and the case status.

Facsimile cover sheets sent from Whitehead's office to Cecilia and Freddie Aldana show that Simpson was the person who transmitted facsimiles to the Guadalupe offices. According to the Aldanas, these facsimiles contained confidential materials related to the pending action with MRI.

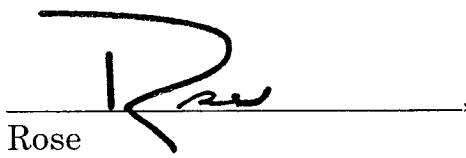
Simpson and Spurlock both claim that Simpson was prevented from working on the case involving MRI after her employment with Moran & Associates began. However, several letters and facsimiles sent from Spurlock to Whitehead regarding the case indicate that Simpson was the person who prepared or sent the documents. Further, Angela Lau, from Whitehead's office, stated that Simpson was responsible for facilitating phone conversations about the case between Spurlock's office and Whitehead's office.

Based on our decision in Leibowitz, we conclude that disqualification is required. Simpson's attempts to conceal her involvement with the case, the facimilies and billing information, and the failure to screen Simpson from any matter involving Guadalupe after being informed that Simpson had performed some services for Guadalpe constitute substantial evidence that Simpson obtained confidential knowledge about Guadalupe during her employment with Whitehead. Moreover, because no screening occurred, any doubt regarding the confidential nature of Simpson's involvement with Guadalupe should be resolved in favor of Guadalupe.[11] Disqualification is warranted because: (1) a substantial relationship exists between the current matter and Simpson's prior employment, (2) Simpson went immediately from her

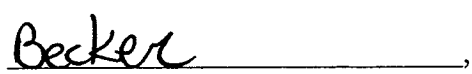
[11]Cronin v. District Court, 105 Nev. 635, 640, 781 P.2d 1150, 1153 (1989) (doubts should generally be resolved in favor of disqualification).

employment at Whitehead to employment with Moran & Associates, (3) Simpson worked for MRI attorney of record Spurlock on the same matter as the prior employment, (4) the nature of Simpson's involvement in the former matter creates a reasonable possibility that she actually obtained privileged and confidential information in an adversarial matter,[12] and (5) no measures were taken by Simpson's current employer to screen her from contact with the adversarial matter. Accordingly, we

ORDER the petition GRANTED AND DIRECT THE CLERK OF THIS COURT TO ISSUE A WRIT OF MANDMUS instructing the district court to VACATE its order denying the motion to disqualify the law firm of Moran & Associates and to enter an order disqualifying the firm.



_____, J.
Rose



_____, J.
Becker

cc: Hon. Michael L. Douglas, District Judge
Jeffrey J. Whitehead
Moran & Associates
Clark County Clerk

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[12]Id. at 641, 781 P.2d at 1153.

LEAVITT, J., with whom AGOSTI, C.J., agrees, concurring:

I concur in the result, but disagree with the new rule, as set forth in Leibowitz v. District Court, allowing screening for nonlawyer employees who change firms.

If client confidences might have been disclosed to a lawyer who changes firms, the new firm is disqualified from representing an adverse party.[1] A court need not inquire into "whether an attorney actually acquired confidential information in the prior representation."[2] Further, "Nevada law does not authorize screening when lawyers move from one private firm to another."[3]

In Ciaffone v. District Court, we concluded that disqualification of the new firm is required when "a nonlawyer employee, in possession of privileged information, accepts employment with a firm who represents a client with materially adverse interests."[4] Moreover, we held that screening was ineffective to prevent disqualification.[5] We reasoned that "[t]o hold otherwise would grant less protection to the confidential and privileged information obtained by a nonlawyer than that obtained by a lawyer. No rationale . . . justifies a lesser degree of

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[1]Robbins v. Gillock, 109 Nev. 1015, 1018, 862 P.2d 1195, 1197 (1993) (citing Commonwealth Ins. Co. v. Graphiz Hot Line, Inc., 808 F. Supp. 1200, 1204 (E.D.Pa. 1992)).

[2]Id.

[3]Ciaffone v. District Court, 113 Nev. 1165, 1168, 945 P.2d 950, 952 (1997).

[4]Id. at 1168, 945 P.2d at 953.

[5]Id. at 1169, 945 P.2d at 953.

protection for confidential information simply because it was obtained by a nonlawyer as opposed to a lawyer."[6]

I believe that this is the better-reasoned rule. This court should continue to emphasize the "'court's duty to safeguard the sacrosanct privacy of the attorney-client relationship which is necessary to maintain public confidences in the legal profession and to protect the integrity of the judicial process.'"[7]

There are no greater safeguards for screening nonlawyers than lawyers. As illustrated by one authority, "'[i]n the end there is little but the self-serving assurance of the screening-lawyer foxes that they will carefully guard the screened-lawyer [and nonlawyer] chickens.'"[8]

Therefore, although I agree that the writ petition should be granted in this case, I disagree with the reasoning.

_____, J.
Leavitt

I concur:

_____, C.J.
Agosti

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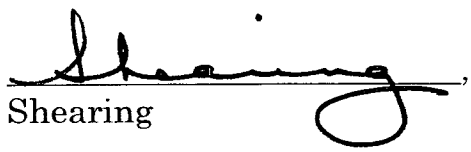
[6]Id. at 1168, 945 P.2d at 953.

[7]Id. at 1169, 945 P.2d at 953 (quoting Panduit Corp. v. All States Plastic Mfg. Co., 744 F.2d 1564, 1576 (Fed. Cir. 1984)).

[8]Cardona v. General Motors Corp., 942 F.Supp. 968, 977-78 (D. N.J. 1996) (quoting Charles W. Wolfram, Modern Legal Ethics § 7.6.4, at 402 (West Hornbook Series 1986)).

SHEARING, J., with whom MAUPIN, J., agrees, dissenting:

I would deny the petition for writ of mandamus. I believe that there was substantial evidence to support the district court's finding that Simpson did not obtain any confidential information about Guadalupe while employed by Whitehead. This court should defer to the finding of the district court that considered the evidence and was able to judge the credibility of witnesses. Despite the documentary evidence, which indicated Simpson had some contact with the Guadalupe case, the district court could well have concluded that her duties had nothing to do with any substantive aspect of the case.



Shearing, J.

I concur:

Maupin, J.

GIBBONS, J., dissenting:

I disagree with the majority. The district court properly denied the disqualification of Spurlock and his employer, Moran and Associates (Moran), as counsel for MRI International, Inc. As a matter of law, I believe that Moran performed sufficient screening when it hired Simpson under the guidelines in my concurrence in Leibowitz v. District Court.[1]

The district court conducted a hearing on the motion before denying Guadalupe's motion to disqualify. I infer that the district court found that Moran specifically instructed Simpson not to conduct any work on the file and prohibited her from working on the case. Based on that hearing, the district court implicitly determined there was sufficient screening. Consequently, the district court denied Guadalupe's motion to disqualify.

Screening occurs when a newly hired employee is prevented from working on a specific case about which the employee might have privileged information.[2] The policy behind screening is to avoid imputed disqualification of counsel under SCR 160. Screening of an employee is permitted to prevent conflicts of interest.[3] We have held that "if the

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[1]119 Nev. ___, ___ P.3d ___ (Adv. Op. No. 57, November 3, 2003).

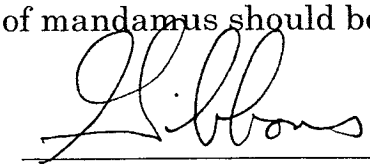
[2]SCR 161; SCR 187.

[3]Ciaffone v. District Court, 113 Nev. 1165, 1169, 945 P.2d 950, 953 (1997), overruled in part and clarified by Leibowitz, 119 Nev. at ___, ___ P.3d at ___, (Adv. Op. No. 57, November 3, 2003).

nonlawyer employee never obtained confidential information as defined by SCR 156 and 159, no ethical problem arises requiring disqualification."[4]

While working with the Whitehead law firm, Simpson performed the duties of a receptionist. She sat at the front desk, answered incoming phone calls, and performed basic filing. She had no knowledge of the instant litigation. To ensure there would be no conflict, Moran instructed Simpson not to conduct any work on the MRI v. Guadalupe case. Therefore, Moran sufficiently screened Simpson from the case where a potential conflict existed. Moran should not be disqualified because Simpson did not obtain any confidential information related to the litigation.

The petition for a writ of mandamus should be denied.



_____, J.
Gibbons

[4]Id. at 1169 n.3, 945 P.2d at 953 n.3.