APPELLATE BRIEFS

By: Paul Georgeson, McDonald Carano Wilson

ATTORNEY DISQUALIFICATION

In a recent case, the Nevada Supreme Court clarified when an attorney and his new firm should be disqualified based on the attorney's employment at a previous firm. In *New Horizon Kids Quest III, Inc. v. Eighth Jud. Dist. Ct.*, 133 Nev. Adv. Op. 14 (April, 2017), the Court was asked to consider whether an attorney and his current firm should be disqualified from representing the Plaintiff in a case where the attorney's prior firm represented the opposing party in a previous and separate case.

In *New Horizon*, the attorney at issue worked in a law firm as an associate in 2007 when that firm represented New Horizon. However, the attorney did not work on that case and never obtained any confidential information about New Horizon while he was at the firm. A few years later, the attorney left his old firm and started at a new firm. Several years after that, the new firm was retained to represent a Plaintiff in a case filed against New Horizon. At some point in the litigation, both the new firm and New Horizon realized that the attorney at issue had previously worked for the firm that represented New Horizon in a prior action. New Horizon moved to disqualify the Plaintiff's law firm. In response to the motion, the attorney at issue submitted an affidavit indicating that, while at the previous firm, he was not involved in any way with the litigation relating to New Horizon and that he never obtained any confidential information about New Horizon. Another attorney at the old firm also confirmed those statements in a separate affidavit.

The District Court denied the motion to disqualify the attorney or the new firm. The District Court concluded that because the attorney never obtained confidential information about New Horizon while working at his old firm, the new firm did not have to be disqualified. In response, New Horizon filed a Petition for Writ of Mandamus with the Supreme Court.

In reviewing the petition, the Supreme Court first noted that a Petition for Writ of Mandamus was the appropriate procedure for challenging the District Court's decision. The Court noted that it has consistently held that Mandamus is the appropriate vehicle for challenging Orders that relate to the disqualification of counsel. Thus, the Court confirmed that the Writ was properly before it.

Next, the Court noted that it pays substantial deference to a District Court's familiarity with the facts of the case at issue to determine if disqualification is warranted. It applies an abuse of discretion standard to issues of attorney disqualification and it grants the District Court broad discretion to decide those issues.

The Court then turned to the applicable Rules of Professional Conduct. Beginning with Rule 1.9(b) of the RPC, the Court noted that a lawyer cannot knowingly represent a person in the same or a substantially related matter in which a firm with which the lawyer formerly was associated had previously represented the client: "1) whose interests are materially adverse to that person and; 2) about whom the lawyer had acquired information protected by Rules 1.6 and 1.9(c) that is material to the matter. . .". The Court further noted that, pursuant to RPC 1.10(a), if an attorney is disqualified under RPC 1.9, that disqualification is imputed to the new law firm. However, the Court did note that imputed disqualification of the new law firm can be overcome in some circumstances, such as by implementing certain screening and notice procedures.

The Court then turned to the issue of whether the attorney acquired confidential information about New Horizon while working at his prior law firm. The Court noted that the requirement that the attorney actually acquire confidential information about the former firm's client is not presumed. Instead, the District Court must make a factual inquiry. In addition, if the District Court finds that the attorney never obtained confidential information and is therefore not personally disqualified, then the issue of imputed disqualification of the new firm does not apply.

In reviewing the record, the Court held that the District Court did not abuse its discretion in determining that the attorney did not obtain confidential information about New Horizon as a result of his work at the prior firm. Therefore, the Court found that the District Court did not abuse its discretion in denying the Motion for Disqualification. Then with the finding that the individual lawyer was not disqualified, the Court concluded that it did not have to evaluate issues of imputation of disqualification to the new firm.

In analyzing the issue, the Court looked to comments from the American Bar Association. Noting that the applicable ABA Model rule is identical to the Nevada Model Rule, the Court found that the comments to the ABA Model Rules were instructive. Quoting from the Model Rule comments, the Court noted that if a lawyer with one firm acquires no

knowledge or information relating to a particular client of that firm, and the lawyer later joined another firm, neither the lawyer individually nor the second firm is disqualified from representing another client in the same or related matter even though the interest of the two clients conflict. The Court also noted in prior rulings that with respect to non-lawyer disqualification, where it has found that the mere access to confidential information, without proof that the person at issue actually obtained confidential information, is insufficient to warrant disqualification.

I have had the pleasure of working my entire career at one law firm. However, that is appearing more and more to be an unusual circumstance. Any time a lawyer moves from one firm to another, it is both necessary and important to conduct thorough reviews of conflict checks. However, even the most thorough conflict check is unlikely to alert the firm to the situation that occurred in New Horizon. Therefore, it is good to know that if a firm hires a new attorney, it will not be disqualified just because that attorney worked at a prior firm that represented an adverse party, so long as the attorney did not obtain confidential information about the adverse party while working there.

Paul Georgeson is a partner at McDonald Carano and practices primarily in the areas of commercial litigation, construction law, and appellate law. He is a member of the firm's Appellate Practice Group and regularly handles appeals and writ proceedings in state and federal courts.

Judge Sanctions Both Sides After Data Exposure by NonLawyer

by Ira Victor, Chief Digital Forensic Analyst

Maybe you heard about an insurance case in which both sides got sanctioned over inadvertent exposure of confidential information – facilitated by a nonlawyer associate. This story skims the surface of a deep reservoir filled with unhappy tales about the many ways electronically stored information (ESI) can get away from you

For legal practitioners, putting privileged information into the hands of employees is a fact of life. Outside investigators, expert witnesses, and other third-party service providers are another necessity.

Habeas Hard Drive will share some thoughts on tightening control of ESI when it travels though many hands, but first, here's the story.

The relevant cast of characters are: Attorneys for the Plaintiff (Harleyville), an insurance company seeking a ruling to support denial of a claim on a fire that was deliberately set; An investigator for the parent company, Nationwide Insurance (Thomas Cesario); The National Insurance Crime Bureau, an entity that supports the insurance industry by collecting and providing crime data (NICB); NICB's employee (Wes Rowe); Defense attorneys for the claimant (Defense). In a passive role, we have the file-sharing site Box, Inc. (Box), used as a convenient method for storing and sharing information electronically.

Investigator Cesario was working for Nationwide, parent company of Plaintiff insurance company Harleyville. Cesario uploaded a video of the fire scene to the file-sharing site Box. He then provided a hyperlink for access to the Box site via email to Rowe at the NICB.

There was no password for the Box account, only the link. The email from Cesario to Rowe contained a routine confidentiality notice, including a prohibition on copying or distribution of the material. Rowe accessed the Box site twice, and downloaded the video once.

Months later, Cesario uploaded some additional material intended for review by Harleyville attorneys, consisting of the insurance claim file and the fire investigation file. He also provided the same hyperlink he'd sent to NICB. No password. Just click and view.

Several weeks later, Defense issued a subpoena ordering NICB to produce the entire file related to the fire. In response, they received the files, but also received a copy of the email from Cesario to Rowe containing the link to the Box account. Despite the confidentiality notice, Defense reviewed the contents without notifying the opposing legal team that they'd received potentially privileged information.

The exposure of the documents was revealed to Harleyville after several months, when it received a thumb drive from Defense with documents that included its own privileged data.

Harleyville then moved, unsuccessfully, to have Defense disqualified.

But Judge Pamela Meade Sargent slammed both sides. Harleyville had waived privilege by failing to take reasonable steps to protect privileged data, she said. The judge characterized the unsecured Box account as the digital equivalent of leaving the case files on a park bench.

Defense was errant as well, she said, and was ordered to pick up the tab for the ruling.

The pertinent portion is reproduced on the Habeas Hard Drive website, as an addendum to this article. http://bit.ly/2pDDhPd, or you can read the entire decision at http://bit.ly/2oMqpVy.

HOW A BUSINESS ASSOCIATE AGREEMENT CAN BE USEFUL

Information has a way of slipping its leash, and the data security folklore is full of stories about costly, devastating third-party screw-ups, and fatal mistakes by employees, whether well-intentioned or otherwise.

For employees the answer is training, supervision, and leading by example with best practices for handling ESI. But for outsiders, with whom you have no daily influence, Habeas Hard Drive recommends litigators adopt a practice by medical providers, who also deal with a wide variety of outsiders, and also have ultimate responsibility for HIPAA violations.

In healthcare, a "Business Associates Agreement" is used to put third parties on notice of their obligation to protect confidential healthcare information. Similarly, law firms should obtain agreements from vendors and other third parties which make explicit the obligation to protect privileged and confidential information. The agreement establishes that confidential information is to be used only in the course of performing specific tasks for which the contractor was engaged by the law firm. It should also spell out technical requirements for safeguarding the information from misuse, and the consequences for failure to do so. This puts the law firm and the business association on track to comply with relevant legal ethical duties.

IMPROVE INFORMATION GOVERNANCE

The Harleyville story, and similar incidents that end up in the headlines

Continued on page 14