

## Alerts

### Nevada Supreme Court Adopts Disqualification Rule for Use of Information From Anonymous Source

November 3, 2011

*Lawyers for the Profession® Alert*

*Merits Incentives, LLC v. The Eighth Judicial District Court of the State of Nevada*, \_\_\_ P.3d \_\_\_, 2011 WL 4634159 (2011)

#### Brief Summary

The Nevada Supreme Court held that a lawyer who received and used information regarding a case from an anonymous source should not be disqualified because he had promptly notified opposing counsel of the anonymous disclosure and did not review any privileged information contained in it.

#### Complete Summary

In a lawsuit between a manufacturer and a distributor, the manufacturer's lawyer received (from an anonymous mailer who happened to be the distributor's former employee), confidential information about the distributor. Shortly thereafter, the attorney notified the distributor that he had received the information. The distributor did not immediately object, but later sought to disqualify the lawyer based on his use of the information. The trial court declined to disqualify the attorney, but did exclude him from using the one document which appeared to contain privileged information. The distributor sought a writ of *mandamus* compelling disqualification.

The Nevada Supreme Court denied the writ and clarified the proper analysis for disqualification. The Court first noted that the lawyer did not violate any ethical rules. Nev. R. Prof'l Cond. 4.4(b), which governs inadvertent disclosure, did not apply because the disclosure was from an anonymous third party, not the opposing party/counsel, and was intentional rather than inadvertent. Moreover, Nev. R. Prof'l Cond. 4.4(a) (prohibiting methods of obtaining evidence that violate the rights of a third person), and Nev. R. Prof'l Cond. 8.4(d) (prohibiting conduct prejudicial to the administration of justice), did not apply because those rules require some affirmative action by the attorney. Here the lawyer had passively obtained the information.

Absent controlling authority, the high court used Nev. R. Prof'l Cond. 4.4(b), by analogy, to adopt a requirement that attorneys who receive information regarding a case anonymously must promptly notify opposing counsel or risk an

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ethical violation and/or disqualification. For circumstances where such information contains privileged materials, the Court adopted a multifactor approach used by the Texas Supreme Court for determining the disqualification question. That nonexhaustive list of factors includes:

- (1) Whether the attorney knew or should have known that the material was privileged;
- (2) the promptness with which the lawyer 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 lawyer.

The Court held that the trial court had not abused its discretion by refusing to disqualify the attorney because the lawyer had promptly notified opposing counsel of the anonymous disclosure and had declined to review the one privileged document.

### **Significance of Opinion**

The law surrounding inadvertent disclosure has been developing rapidly and somewhat inconsistently throughout the country. To the extent that jurisdictions may look to inadvertent disclosure for guidance in the realm of anonymous disclosure (as the Court did here), lawyers should take that context into account when deciding how to handle the materials—especially when disqualification or attorney discipline may be at stake.

For more information, please contact your regular [Hinshaw](#) attorney.

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