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SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

Desert Mountain Club, Inc., Plaintiff, vs. Thomas Clark and Barbara Clark, husband and wife, Defendants.	Case No. CV2014-015334 **NON-PARTY ROBERT JONES, II'S:** **1) REPLY IN SUPPORT OF MOTION FOR A PROTECTIVE ORDER[1]; AND** **2) RESPONSE TO MOTION TO STRIKE** (Hon. Dawn Bergin) (Oral Argument Requested)

Introduction

Non-party Robert Jones, II and his counsel, Christopher A. LaVoy, did exactly what they should have under the circumstances. They notified defendants in writing before Mr. Jones's deposition of his contractual confidentiality obligations. They sought to address the issue in advance. Defense counsel ignored the letter from Mr. Jones's counsel. Plaintiff's counsel also wrote defense counsel about the confidentiality issue and also did not receive a response. The morning of the deposition, defense counsel refused to

[1] Defendants did not serve Non-party Robert Jones, II with a copy of their response to Mr. Jones's motion for a protective order. This is confirmed by the service list for their response.

discuss the confidentiality issue. *See* R. Jones, II Depo. at 5:14-6:10; 9:22-11:3.[2] He declared, "Daryl Williams does not agree to confidentiality." *See id*. at 6:4-5. The other attorneys proposed that defendants allow Mr. Jones to designate parts of his testimony confidential subject to defendants' right to later challenge the confidentiality designation. *See id*. at 5:21-24. This would have allowed the deposition to go forward without restriction. Defense counsel refused even this. Defense counsel's non-communicative, uncompromising, and combative approach is what led to this motion to compel proceeding. Defendants' request for attorneys' fees under Rule 37 fails because their attorney did not meet the basic requirement of "personal consultation and good faith efforts" to resolve the matter. Ariz. R. Civ. P. 37(a)(2)(C).

Argument

I. DEFENDANTS' MOTION TO STRIKE SHOULD BE DENIED.

Defendants have moved to strike Mr. Jones's motion for a protective order based on alleged "ethical improprieties" by his counsel, Christopher A. LaVoy. Defs.' Mot. to Strike & Resp. to Mot. for Protective Order, filed 6/4/2015, at 1:28. Defendants contend Mr. LaVoy has a conflict of interest representing Mr. Jones based on Mr. LaVoy's brief no-charge consultation with a prospective client, Ronald Yelin, earlier this year. Mr. Yelin is not a party in this case.

A. The Motion To Strike Violates Rule 7.1(f).

A motion to strike is only permitted if "expressly authorized by statute or other rule, or if it seeks to strike any part of a filing or submission on the ground that it is prohibited, or not authorized, by a specific statute, rule, or court order." Ariz. R. Civ. P. 7.1. No statute or rule approves a motion to strike as a means of enforcing the ethical rules. Mr. Jones had authority to move for a protective order under Rule 26(c)(7).

[2] A copy of the transcript for Mr. Jones's deposition is attached to Defendants' Motion to Strike and Response to Non-party Robert Jones, II Motion for Protective Order, filed on June 4, 2015.

B. Defendants Lack Standing.

The well-established rule in Arizona is that "only a client or a former client has standing to challenge legal representation on grounds of conflict of interest." *State ex rel. Romley v. Superior Court in & for Cnty. of Maricopa*, 181 Ariz. 378, 380, 891 P.2d 246, 248 (App. 1995); *see also State v. Garaygordobil*, 89 Ariz. 161, 164, 359 P.2d 753, 755 (1961) ("[T]the only ones entitled to object to such representation on the ground of conflicting interests is one who holds the relation of client to an attorney who undertakes to represent conflicting interests").

Defendants do not contend they consulted with Mr. LaVoy. They contend non-party Ron Yelin did. Defendants seek to assert Mr. Yelin's interests, which they lack standing to do.

C. There Is No Conflict.

The applicable rule is ER 1.18, not ER 1.9. Entitled "Duties to Prospective Client," ER 1.18 provides in relevant part:

> A lawyer . . . shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be ***significantly harmful*** to that person ***in the matter*** . . . .

Ariz. R. S. Ct., Rule 42, ER 1.18(c) (emphasis added).[3]

[3] Prospective clients "receive some but not all of the protection afforded" former clients under ER 1.9. "[U]nder paragraph (c), the lawyer is not prohibited from representing a client with interests adverse to those of the prospective client in the same or a substantially related matter unless the lawyer has received from the prospective client information that could be significantly harmful if used against the prospective client in the matter." *Id*., Editor's Notes, cmt. "This is a higher standard for the person to meet than is found in ER 1.9 (Duties to Former Clients), making it harder for the prospective client to disqualify the once-prospective lawyer." David D. Dodge, *Disclaimers, Good Faith and the Prospective Client*, ARIZ. ATT'Y, February 2012, at 10; *see also* RESTATEMENT (THIRD) OF LAW GOVERNING LAW § 15 (2000) ("Thus, . . . [the] prohibition exists only when the lawyer has received from the prospective client information that could be significantly harmful to the prospective client in the matter."); *State ex rel. Thompson v. Dueker*, 346 S.W.3d 390, 396 (Mo. App. 2011) ("Thus, one of

The question under ER 1.18 is whether the information Mr. LaVoy received from Mr. Yelin in the consultation could be "significantly harmful" to Mr. Yelin "in the matter." *Id*. The answer is no for multiple reasons.

First, Mr. LaVoy's appearance in this case is temporary and limited in scope to seeking a protective order on Mr. Jones's behalf. Mr. Jones's motion for a protective order does not go to the merits of the controversy, but concerns his contractual confidentiality obligations to his former employer.

Second, even if the merits were in play, Mr. Yelin would not be bound by the outcome. Mr. Yelin is not a party in this case. His rights on are not being adjudicated. He is free to re-litigate everything.

Third, none of the documents that Mr. Yelin provided to Mr. LaVoy for the consultation could harm him. The club already has copies of its bylaws, other membership documents, and the demand letter it sent Mr. Yelin. The strategy e-mail that Mr. Yelin forwarded to Mr. LaVoy, entitled "Points Favoring the Defendants," was *not* drafted by Mr. Yelin as defendants falsely imply[4], but rather by Gary W. Moselle, a former club member whose retirement hobby is following and publicly commenting on

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the primary differences between Rule 4–1.9 and Rule 4–1.18 is that representation is not barred by Rule 4–1.18 unless the lawyer has received from the prospective client information that could be significantly harmful if used in the matter") (internal quotation marks omitted).

[4] Paragraph 7 of Mr. Yelin's declaration falsely implies that Mr. Yelin wrote the strategy e-mail to Mr. LaVoy. It is carefully worded to give the false impression that the e-mail is a privileged attorney-client communication between Mr. Yelin and Mr. LaVoy regarding strategy. Defendant's counsel submitted Mr. Yelin's declaration, including paragraph 7, without correction or clarification. Defendant's counsel has engaged in similarly misleading conduct in the past. *See Richards v. Holsum Bakery, Inc.*, No. CV09-00418-PHX-MHM, 2009 WL 3740725, at *4 (D. Ariz. Nov. 5, 2009) ("There is no doubt that Mr. Williams behaved unethically, and with over 20 years of experience as an attorney, he should have known better. . . . Mr. Williams and Plaintiff misled Defendants and this Court. Such deceptive behavior is unacceptable and it will not be tolerated."), *reconsideration denied*, 2011 WL 676900, at *6 (D. Ariz. Feb. 23, 2011).

this case. Mr. Moselle runs the website www.desertmountaingolfscam.com. Upon information and belief, Mr. Moselle blasted the unsolicited e-mail to hundreds of club members, including Mr. Yelin. Mr. Yelin forwarding Mr. Moselle's widely disseminated e-mail to undersigned counsel does not transform it into a privileged attorney-client communication. In fact, defendants themselves produced a copy of Mr. Moselle's e-mail with their Rule 26.1disclosure statement. Defendant's argument that Mr. Moselle's e-mail and other publicly available documents must be protected is groundless.

Fourth, defendants have not identified any information shared verbally with Mr. LaVoy that could be used to "significantly harm" Mr. Yelin "in the matter." Ariz. R. S. Ct., Rule 42, ER 1.18(c).[5]

Defendants' theory of harm seems to be that undersigned counsel is interfering with Mr. Yelin's desire to acquire information that might potentially aid him in evaluating his legal rights. However, "in order for information to be deemed 'significantly harmful'. . . , disclosure of that information cannot be simply detrimental in general to the former prospective client, but the harm suffered must be prejudicial in fact to the former prospective client within the confines of the specific matter in which disqualification is sought." *O Builders & Associates, Inc. v. Yuna Corp. of NJ*, 19 A.3d 966, 976 (N. J. 2011); *see also Burch & Cracchiolo, P.A. v. Myers*, No. 1 CA-SA 15-0013, 2015 WL 3511835, at *7 (Ariz. App. June 4, 2015) (discussing *O Builders* decision); *Dueker*, 346 S.W.3d at 396 (holding that "speculative or hypothetical claims of harm are not enough"); *People v. Shepherd*, 26 N.E.3d 964, 974, ¶ 33 (Ill. App. 2015)

[5]The burden is on the movant to establish the prospective client shared confidential information with the attorney that could significantly harm the prospective client in the matter. *See Burch & Cracchiolo, P.A.*, 2015 WL 3511835, at *7 (holding that "party seeking disqualification bears the burden of demonstrating why the disqualification is warranted"); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 15 cmt. *c* (2000) ("When a tribunal is asked to disqualify a lawyer based on prior dealings with a former prospective client, that person bears the burden of persuading the tribunal that the lawyer received such information.").

(reversing trial court's finding of ethical violation because "speculation was not enough to establish that a violation of Rule 1.18 occurred").

Defendants cite *Foulke v. Knuck*, 162 Ariz. 517, 784 P.2d 723 (App. 1989), but it is inapposite. *Foulke* construes ER 1.9, not ER 1.18. *Id*. at 521, 784 P.2d at 727. ER 1.18 superseded ER 1.9 as to prospective clients.

D. Mr. Jones Should Be Awarded Fees.

Mr. Jones should be award his reasonable attorneys' fees incurred in responding to defendant's motion to strike. The motion is procedurally and substantively groundless and paragraph 7 of Mr. Yelin's declaration affirmatively attempts to mislead the Court (*see supra* at 4 n.4). *See* Ariz. R. Civ. P. 11(a); A.R.S. § 12-349(A)(2)&(3).

II. MR. JONES'S MOTION FOR PROTECTIVE ORDER SHOULD BE GRANTED.

Defendants criticize Mr. Jones for only generally describing the deposition questions and not giving transcript cites. The reporter had not completed the transcript when Mr. Jones filed his motion for a protective order. Specific citations are below.

A. Sensitive Personnel Matters

Defense counsel asked Mr. Jones why an employee of the former club owner left and whether he was fired. *See* R. Jones, II Depo. at 24:9-27:9. This falls within Mr. Jones's contractual confidentiality obligation to his former employer. *See* Employment Agreement §§ 8 ("Employee shall not disclose . . . confidential information acquired by . . . [him] in the performance of the Work"), & 4 (defining "Work" to include "Club Operations" and "training and oversight of all personal matters"); Confidential General Release Agreement § 13 ("You shall continue to abide by Section 8 of the Employment Agreement.").

The protective order analysis has two steps. The first step is determining whether the deposition question sought relevant information (*i.e.*, was it reasonably calculated to lead to the discovery of admissible evidence). *See* Ariz. R. Civ. P. 26(b). Assuming

relevance, the second step is determining what, if any, protection should be granted under Rule 26(c)(7). Protection might vary from prohibiting the question to limiting the dissemination of the answer.

The analysis stops at the first step as to sensitive personnel matters. Defendants do not contend in their response that such information is relevant. An articulable theory of relevance is required to trump a confidentiality agreement. Defendants present none.

Therefore, the Court should either prohibit questioning into why employees were hired or fired or, alternatively, limit disclosure of such information to those with a need to know for purposes of the litigation.

B. Other Club Members

Defendants asked Mr. Jones how much new members paid for their memberships. *See* R. Jones, II Depo. at 31:20-32:3; 57:2-10. This relates to Mr. Jones's current employment and thus does not implicate his contractual confidentiality obligation to his former employer. However, Mr. Jones's employment agreement with plaintiff also includes a confidentiality clause. With respect to questions seeking information within this confidentiality clause, plaintiff proposed a compromise. Plaintiff proposed that Mr. Jones answer the questions, subject to plaintiff having the right to designate an answer confidential, and defendants having the right to later challenge plaintiff's confidentiality designation. *See* R. Jones, II Depo. at 5:21-24. This was a reasonable approach that would have allowed the deposition to go forward, but defendants refused. *See* Ariz. R. Civ. P. 30(d), Committee Cmt. to 1991 Amendment ("The Committee intends that there be professional cooperation between counsel in regulating the . . . scope of depositions.").

As noted in *Catrone v. Miles*, 215 Ariz. 446, 160 P.3d 1204 (App. 2007), "the interests in confidentiality may typically be satisfactorily protected by . . . an order limiting disclosure of the information to those with a need to know for purposes of the litigation." *Id*. at 456, 160 P.3d at 1214. Defendants will not agree to this because they

want to post Mr. Jones's deposition on the website www.desertmountaingolfscam.com. They assert the public's right of access to judicial records, but discovery is not a judicial record. *See Lewis R. Pyle Mem'l Hosp. v. Superior Court of Arizona In & For Gila Cnty.*, 149 Ariz. 193, 197, 717 P.2d 872, 876 (1986). Mr. Jones cited *Lewis* in his motion, but defendants do not address the case in their response.

As with the personnel information, defendants make no attempt in their response to establish the relevancy of their questioning concerning membership payments.

Therefore, the Court should either prohibit questioning into membership payments or, alternatively, limit disclosure of such information to those with a need to know for purposes of the litigation.

C. Club Policies And Procedures

Defense counsel repeatedly asked Mr. Jones about the prior club's membership pricing and pricing strategy. The prior club was owned by Mr. Jones's former employer, who later sold its assets to the current member-owned club. *See* R. Jones, II depo. at 65-6- 68-6; 70:16-71-11; 72:2-73:3; 74:22-75:9; 75:21-76-22; 77:3-6; 78:5-10; 79:18-80:5; 80:25-81:3; 81:13; 82:19-21.

The prior club's pricing and pricing strategies are subject to Mr. Jones's confidentiality obligation to his former employer. Pricing qualifies as "confidential information acquired by [Mr. Jones]. . . in the performance of . . . [his] Work." Employment Agreement §§ 4, 8; Confidential General Release Agreement § 13. Pricing is matter of the old club's policies and procedures.

Again, defendants make no attempt in their response to establish the relevance of the prior club's pricing and pricing strategies to this dispute. This dispute turns on the operative agreements between the new club and defendants. Defendants do not articulate any theory of relevance in their response.

Therefore, the Court should either prohibit questioning into the old club's pricing and pricing strategies or, alternatively, limit disclosure of such information to those with a need to know for purposes of the litigation.

III. MR. JONES WAS ALLOWED TO REFUSE TO ANSWER.

A deponent is allowed to refuse to answer a question based on privilege. *See* Ariz. R. Civ. P. 26(b)(1)(A) ("[p]arties may obtain discovery regarding any matter, *not privileged*, which is relevant") (emphasis added); Ariz. R. Civ. P. 26(c)(7) (authorizing protective order to protect "confidential . . . commercial information"). A deponent may adjourn a deposition to file a motion for a protective order to protect privileged information. *See* Ariz. R. Civ. P. 30(d). Mr. Jones did nothing wrong in refusing to answer and promptly moving for a protective order.

Conclusion

For the foregoing reasons, the Court should deny defendants' motion to strike and grant Mr. Jones's motion for a protective order.

DATED this 17th day of June, 2015.

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