DIVISION ONE
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RUTH A. WILLINGHAM, CLERK
BY: sls

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STEVEN CARROLL DEMOCKER, Petitioner, v. THE HONORABLE GARY E. DONAHOE, Judge of the SUPERIOR COURT OF THE STATE OF ARIZONA, in and for the County of YAVAPAI, Respondent Judge, STATE OF ARIZONA, Real Party in Interest.	No. 1 CA-SA 12-0095 DEPARTMENT A Yavapai County Superior Court No. P1300CR201001325 **DECISION ORDER**

This special action was considered by Presiding Judge Ann A. Scott Timmer, and Judges Patricia K. Norris and Donn Kessler during a regularly scheduled conference held on May 24, 2012. After consideration, and for the reasons that follow,

IT IS ORDERED that the Court of Appeals, in the exercise of its discretion, accepts jurisdiction in this special action. Petitioner Steven Carroll DeMocker has no adequate remedy by appeal because production of the documents at issue will purportedly cause the harm he is endeavoring to stop: continued violations of his Sixth Amendment rights. *See Salvation Army v.*

Bryson, ___ Ariz. ___, ___, ¶ 1, 273 P.3d 656, 657 (App. 2012) (noting "a special action 'is the proper means to seek relief' when a party believes a trial court has ordered disclosure of material protected by a privilege or work product shield'") (citations omitted).

IT IS FURTHER ORDERED denying relief. For the following reasons, we reject DeMocker's contention that the superior court abused its discretion by ordering him to produce the documents at issue, even with the restriction ordered by the court concerning dissemination. *See State v. Fields*, 196 Ariz. 580, 582, ¶ 4, 2 P.3d 670, 672 (App. 1999) (holding this court reviews order compelling disclosure of documents for an abuse of discretion).

(1) This court previously ordered the superior court to conduct an evidentiary hearing to determine whether DeMocker suffered prejudice from the Yavapai County Attorney's Office's ("YCAO") intrusion upon his right to counsel and, if so, to fashion a remedy. Without the ability of YCAO's counsel, Jones, Skelton & Hochuli ("Jones Skelton"), to review the documents at issue, YCAO would be deprived of the opportunity to determine whether and to what extent DeMocker was prejudiced and then effectively argue the impact of disclosure to the superior

court. Indeed, adoption of DeMocker's position would mean that while he and the superior court have copies of the documents, YCAO, the party bearing the burden of proving lack of prejudice, would be forced to argue the impact of disclosure of documents its counsel had not viewed.

(2) Adoption of DeMocker's position could also hamper the court's ability to make the detailed findings required by *State v. Warner*, 150 Ariz. 123, 129, 722 P.2d 291, 297 (1986), and this court's prior decision order. DeMocker asserts Jones Skelton should be limited to asking witnesses questions like "what they remember, what they saw, what they did with it, who told them to do it, who told them how to dispose of it" without showing them the referenced documents. As YCAO points out, however, the documents were viewed approximately three years ago and memories of what occurred have likely faded. Without an opportunity to view the documents they previously saw, witnesses may not be able to recall much about what occurred, potentially masking critical information regarding YCAO's motives, uses made of the documents, benefits to YCAO, and the like. *See id.*

(3) Any prejudice experienced by DeMocker from the intrusion into the attorney-client relationship occurred when YCAO personnel viewed the ex parte documents. On the record

before us, DeMocker has not persuaded us that a second review of those same documents by the same people will cause him new harm.[1] DeMocker speculates that "new memories" will be made by reviewing documents, but that potential consequence exists when witnesses prepare for a hearing and recollections are refreshed through conversation about events. Moreover, DeMocker acknowledges that the witnesses should be permitted to refresh their recollections with the disputed documents, albeit in the context of a confidential courtroom setting where his counsel can assess reactions.

(4) YCAO's attorneys are not ethically required to share the produced documents with YCAO, as DeMocker asserts. Although DeMocker mentions agency principles to support this assertion, he does not cite agency authorities. Instead, he relies primarily on Arizona Rule of Professional Conduct ("ER") 1.4, which requires a lawyer to regularly and promptly communicate with the client, "comply with reasonable requests for information," and ensure the client has sufficient

[1] At the evidentiary hearing, the superior court may consider whether any of these people are still YCAO employees and whether they are slated to have future involvement in the DeMocker prosecution in determining the existence of prejudice and, as necessary, an appropriate remedy.

explanation of a case to make informed decisions. But comment 7 to ER 1.4 provides "court orders governing litigation may provide that information supplied to a lawyer may not be disclosed to the client. ER 3.4(c)[2] directs compliance with such . . . orders." Thus, Jones Skelton may ethically refuse any requests for the documents from YCAO because the superior court has ordered it to only show the documents to witnesses who previously viewed them and solely for purposes of the evidentiary hearing.

DeMocker attaches an expert declaration from an ethics attorney, who opines: (1) DeMocker's counsel cannot ethically turn over the documents because doing so would violate prior orders from the superior court and this court's decision order, (2) Jones Skelton must ethically share the documents with YCAO, and (3) YCAO's current and former employees' knowledge is imputed to the entire office. The expert affidavit does not persuade us to reach a different conclusion. The superior court's order compelling production solves any ethical dilemma Jones Skelton may have in turning over the documents due to prior court orders, and this court's prior decision order does

[2] "A lawyer shall not: . . . (c) knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists."

not prohibit production for purposes of the evidentiary hearing. Also, as explained, Jones Skelton is not ethically required to turn over the documents to YCAO in light of the restrictions contained in the court's order.[3] And whether the employees' knowledge is imputed to the entire YCAO office is irrelevant as any imputation already occurred when the documents were originally viewed; a review of documents previously read will not affect imputation.

Therefore, for the foregoing reasons, although we accept jurisdiction, we deny relief.

/s/
Ann A. Scott Timmer, Presiding Judge

CONCURRING:

/s/
Patricia K. Norris, Judge

/s/
Donn Kessler, Judge

[3] The expert witness also cites Restatement (Third) of the Law Governing Lawyers § 46(2) (2000), which provides a lawyer must produce documents to a current or former client concerning the representation "unless substantial grounds exist to refuse." Comment c to § 46 clarifies that adherence to a court order prohibiting production constitutes such a ground.