In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-21-00315-CV

IN RE STATE OF TEXAS, JERRY PATTERSON AS (FORMER) COMMISSIONER OF THE GENERAL LAND OFFICE OF THE STATE OF TEXAS, AND COMMISSIONER GEORGE P. BUSH, RELATORS

ORIGINAL PROCEEDING

May 9, 2022

MEMORANDUM OPINION

Before QUINN, C.J., and PIRTLE and DOSS, JJ.

In this original proceeding, Relators—the State of Texas, Jerry Patterson as (former) Commissioner of the General Land Office of the State of Texas, and Commissioner George P. Bush—seek a writ of mandamus ordering Respondent, the Honorable Curt W. Brancheau, judge of the 84th District Court of Hutchinson County, Texas, to vacate his order denying the State's motion to disqualify the law firm of Kelly, Hart & Hallman, LLP, and its attorneys from representing the Plaintiffs (Riemer)[1] in the

[1] According to the State's petition, the following are Real Parties in Interest and Plaintiffs in the underlying action: Jimmy Glen Riemer, Richard Coon, Jr., June Meetze Coon Trust, Hap Johnson Royalty Co., LLC, W.R. Edwards, Jr. d/b/a W.R. Edwards, Jr. Oil and Gas, Billy Paul Riemer, Scharron Ann Riemer, Jimmy Greene, Trustee, Randall Black, Joan B. Vernon, Linda Lamar, Theresa Gail Elliott, Robert Lee Sanders, Cathryn Coon Doughtie, Lonita Dawn James, Deborah Lynn Schumann, Sherry Anne Thompson, James Dean Greene, Carla Sue Puentes and Wanda Eakin.

underlying matter and render an order of disqualification. Based on the following analysis we deny the State's petition.

Background

The underlying lawsuit involving a real property dispute along the Canadian River was filed in 1993. Over the years, we have considered various interlocutory matters raised by the parties.[2] The law firm Kemp Smith, LLP, undertook representation of the State in the underlying case in 2013, and is represented in part by attorneys Ken Slavin, Mark Osborn, and Deborah Trejo. Kelly Hart appears to have begun representing Riemer as early as 2003 and has expended some 4,000 hours of work in the case for Riemer. According to Kelly Hart attorney Bill Warren, Kelly Hart performed most of the "yeoman's work" for Riemer in the case.

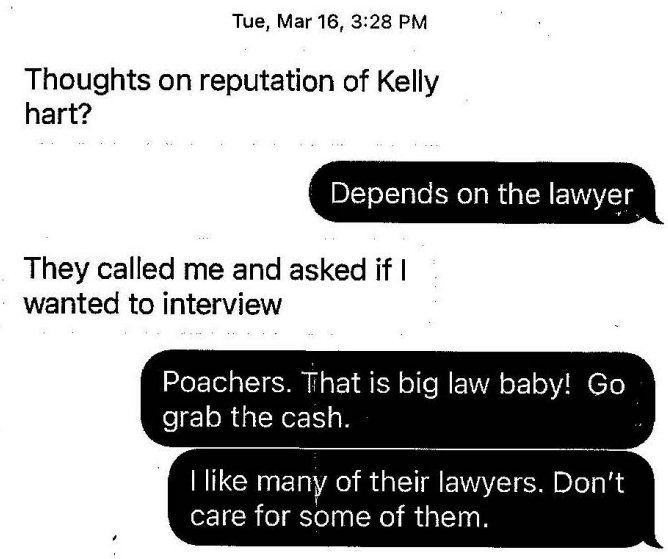
Joseph Austin was hired to practice law with Kemp Smith after his graduation from law school in 2016. Slavin was Austin's supervising attorney and mentor at Kemp Smith. The two were also friends. Kemp Smith invoices indicate that on April 20 and 24, 2017, Austin billed a total of one hour for work in the underlying case. The firm declines to say the work Austin performed, but the invoices refer to some discovery matter and a telephone call with the client.

Austin terminated employment with Kemp Smith in July 2019 and moved to Fort Worth, where he practiced law for the Padfield & Stout, LLP firm for slightly less than two years. On March 8, 2021, upon the referral of another Kelly Hart attorney, Warren and

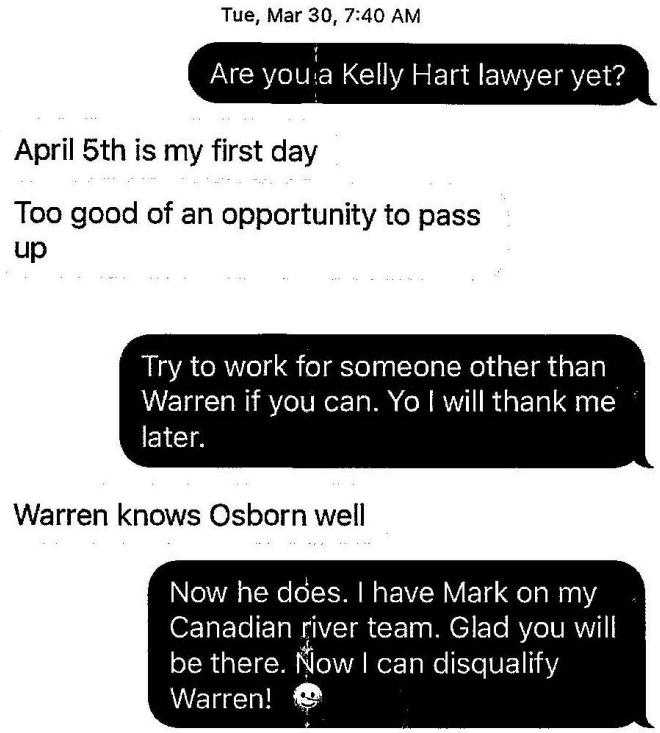
[2] *See State v. Riemer,* 94 S.W.3d 103 (Tex. App.—Amarillo 2002, no pet.); *Riemer v. State,* 342 S.W.3d 809 (Tex. App.—Amarillo 2011)*, rev'd,* 392 S.W.3d 635 (Tex. 2013); *Riemer v. State,* 452 S.W.3d 491 (Tex. App.—Amarillo 2014, pet denied); *State v. Riemer,* 571 S.W.3d 441 (Tex. App.—Amarillo 2019, no pet.).

Austin met for lunch to discuss Austin's potential employment with Kelly Hart. During the meeting, Austin told Warren he previously worked for Kemp Smith, and Warren acknowledged knowing Slavin and Osborn. Warren also told Austin about the underlying litigation.

On March 16, 2021, Kelly Hart offered Austin a position in the firm. Austin contacted Slavin by text, where the two exchanged messages about working for Kelly Hart. Screen captures from Slavin's phone evidence his response to Austin's inquiry:



Austin accepted Kelly Hart's employment offer on March 16, 2021. Two weeks later, Slavin reached out to Austin to follow-up on whether Austin accepted the offer. Again, as evidenced from Slavin's phone:



At the hearing on the State's motion to disqualify, Slavin testified that "Go grab the cash," meant he was advising Austin to accept the job with Kelly Hart. Regarding the comment, "Glad you will be there. Now I can disqualify Warren!" Slavin said he intended to communicate that "disqualification could occur." He said the comment "was my humorous way to raise the issue before [Austin] started to actually work for them in the hopes that, if he hadn't talked to them about the possible conflict, that he would." According to Slavin, the smiley face emoji was included to be "my humorous way to raise the issue because he was going to work in five days."

On April 7, 2021, Slavin again texted Austin to inquire about his "new digs" and to offer advice about working for a particular Kelly Hart attorney. During this exchange, Slavin never mentioned to Austin any perceived conflict of interest or potential for disqualification. Five days later, Warren informed Osborn during a telephone call that Kelly Hart had hired Austin. Osborn praised Austin as a good worker and stated he and

Austin attended the same church in El Paso. Again, no comments were made about disqualifying Kelly Hart.

Between March 16, 2021 (the day Slavin and Austin initially texted about the Kelly Hart position) and July 16, 2021 (the day the State filed its motion to disqualify), attorneys for the parties continued pretrial preparation, including stipulations of the acreage of each affected section of land, extending pretrial deadlines, and other matters.

On July 16, 2021, the State filed its motion to disqualify Kelly Hart from representing Riemer in the underlying litigation. Riemer responded arguing, among other things, that the State waived its "supposed right to disqualify." On September 28, 2021, the trial court conducted an evidentiary hearing. By order signed October 27, 2021, the court denied the motion to disqualify.

The State initiated this original proceeding on December 21, 2021.

Standards

Mandamus is an extraordinary remedy, *In re Sw. Bell Tel. Co.,* 235 S.W.3d 619, 623 (Tex. 2007) (orig. proceeding), and ordinarily issues only to correct a clear abuse of discretion when there is no adequate remedy by appeal. *In re Prudential Ins. Co. of Am.,* 148 S.W.3d 124, 135-36 (Tex. 2004) (orig. proceeding). Error in denying a motion to disqualify an attorney is an abuse of discretion for which there is generally no adequate remedy on appeal. *See In re Murrin Bros. 1885, Ltd.,* 603 S.W.3d 53, 57 (Tex. 2019) (orig. proceeding). Mandamus proceedings are "meant for circumstances 'involving manifest and urgent necessity and not for grievances that may be addressed by other remedies.'" *Id.* at 57 (quoting *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (orig.

proceeding) and *Holloway v. Fifth Court of Appeals*, 767 S.W.2d 680, 684 (Tex. 1989) (orig. proceeding)).

"Mandamus relief is only appropriate when the relators have established that only one outcome in the trial court was permissible under the law." *Murrin Bros. 1885*, 603 S.W.3d at 56-57 (citations omitted). *See also In re RSR Corp*., 568 S.W.3d 663, 665 (Tex. 2019) (orig. proceeding) ("An appellate court cannot substitute its judgment for that of the trial court and may not set aside the trial court's findings as arbitrary and unreasonable unless the trial court could reasonably have reached only one decision." (citing *Walker*, 827 S.W.2d at 839-40). Moreover, an appellate court may not substitute its own judgment for that of the trial court. *In re Nitla S.A. De C.V.*, 92 S.W.3d 419, 422 (Tex. 2002) (orig. proceeding). This forecloses review of matters that depend on the trial court's resolution of disputed questions of fact. *Brady v. Fourteenth Court of Appeals,* 795 S.W.2d 712, 714 (Tex. 1990) (orig. proceeding) (op. on reh'g). If a material issue before the trial court requires resolution of a factual dispute, an appellate court in a mandamus proceeding errs in resolving that issue. *In re Acadia Ins. Co.,* 279 S.W.3d 777, 779 (Tex. App.—Amarillo 2007, orig. proceeding).

Attorney disqualification is a severe remedy. *Spears v. Fourth Court of Appeals,* 797 S.W.2d 654, 656 (Tex. 1990) (orig. proceeding). "It can result in immediate and palpable harm, disrupt trial court proceedings, and deprive a party of the right to have counsel of choice." *Nitla,* 92 S.W.3d at 422. "[C]ourts must adhere to an exacting standard when considering motions to disqualify [counsel] so as to discourage their use as a dilatory trial tactic." *Spears,* 797 S.W.2d at 656. Although the State, as is common, relies on alleged violations of the Texas Disciplinary Rules of Professional Conduct as its

primary ground for disqualifying Kelly Hart,[3] "the disciplinary rules are merely guidelines—not controlling standards—for disqualification motions." *Nitla*, 92 S.W.3d at 422.

Disqualification of counsel is not self-executing upon a conflict of interest. *See Murrin Bros. 1885*, 603 S.W.3d at 57 (cleaned up) (holding that a court "must consider all the facts and circumstances to determine whether the interests of justice require disqualification.") Even if the record shows that a lawyer has violated a disciplinary rule, "the party requesting disqualification still 'must demonstrate that the opposing lawyer's conduct caused actual prejudice that requires disqualification.'" *In re Luecke*, 569 S.W.3d 313, 317 (Tex. App.—Austin 2019) (orig. proceeding) (quoting *Nitla*, 92 S.W.3d at 422). In addition, the trial court should also consider "the extent to which the nonmovant will suffer prejudice from the disqualification of his or her attorney." *Murrin Bros. 1885*, 603 S.W.3d at 57. "Prejudice to the nonmovant may arise in the form of an increased financial burden in obtaining substitute counsel that is not already familiar with the case, the denial of a nonmovant's right to be represented by the counsel of its choice, and the use of disqualification as a dilatory tactic." *In re Fenenbock*, No. 08-19-00248-CV, 2020 Tex. App. LEXIS 2592, at *26-27 (Tex. App.—El Paso Mar. 27, 2020) (orig. proceeding).

[3] Rule 1.09(a) provides:

> (a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:
>
> > (1) in which such other person questions the validity of the lawyer's services or work product for the former client;
> >
> > (2) if the representation in reasonable probability will involve a violation of Rule 1.05; or
> >
> > (3) if it is the same or a substantially related matter.

TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 1.09(a)(2),(3), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (TEX. STATE BAR R. art. X, § 9).

The "right" to disqualify also can be waived through the passage of time[4] and by conduct.[5] Waiver of the right to disqualify counsel "presents a fact issue concerning 'a matter or question of intention.'" *See In re RSR Corp.*, 568 S.W.3d at 666 (quoting *Ford v. Culbertson*, 158 Tex. 124, 308 S.W.2d 855, 865 (1958)).

Analysis

Relators argue that disqualification of Kelly Hart is mandatory because two irrebuttable presumptions lead to the conclusion that Austin has communicated confidential information regarding his Kemp Smith client to Kelly Hart. "For attorneys, there is an irrebuttable presumption they gain confidential information on every case at the firm where they work (whether they work on them or not), and an irrebuttable presumption they share that information with the members of a new firm." *In re Mitcham,* 133 S.W.3d 274, 276 (Tex. 2004) (orig. proceeding) (per curiam) (cleaned up). *See also In re Thetford,* 574 S.W.3d 362, 373 (Tex. 2019) (orig. proceeding) (observing the Supreme Court of Texas has "repeatedly said that lawyers who violate the conflict-of-interest rules must be disqualified because there is an irrebuttable presumption that a lawyer obtains a client's confidential information during representation."). Relators reason that this case is similar to one addressed by the Supreme Court of Texas demonstrating when disqualification of the firm is required. *Henderson v. Floyd*, 891 S.W.2d 252 (Tex. 1995) (per curiam).

[4] "As a rule, '[a] party who fails to file its motion to disqualify opposing counsel in a timely manner waives the complaint.'" *In re Epic Holdings, Inc.*, 985 S.W.2d 41, 52 (Tex. 1998) (orig. proceeding) (quoting *Vaughan v. Walther*, 875 S.W.2d 690, 690 (Tex. 1994) (orig. proceeding) (per curiam).

[5] *See also RSR Corp.*, 568 S.W.3d at 666 ("Inppamet timely sought disqualification but made a tactical, yet erroneous, decision to abandon [*In re Meador,* 968 S.W.2d 346 (Tex. 1998) (orig. proceeding)] as a basis for obtaining disqualification as a remedy.").

Relators' mandamus petition does not discuss the Supreme Court's recent holding in *Murrin Bros. 1885*, requiring the party seeking disqualification of counsel to prove how it would be prejudiced if the firm is not disqualified. 603 S.W.3d at 53. Relators instead direct the Court to the "irrebuttable presumption" that their facts, defenses, and legal strategies will be shared with Riemer and opposing counsel. Relators recognize that if their petition is granted, Riemer will be deprived of a nearly twenty-year relationship with its counsel of choice and that the decision "will work a hardship on [Riemer]." (alteration added).

Regarding alleged waiver of the right to disqualify, Relators' mandamus petition focuses on the three-month passage of time between the discovery of the alleged conflict of interest and the filing of the motion to disqualify. The petition does not address the evidence suggesting that Relators' counsel invited the conduct of which it now complains. "Waiver is the intentional relinquishment of a right actually known, or intentional conduct inconsistent with claiming that right." *Ulico Cas. Co. v. Allied Pilots Ass'n,* 262 S.W.3d 773, 778 (Tex. 2008). "Having the opportunity, a party may evidence waiver by conduct of such a nature as to mislead the opposite party into an honest belief that the waiver was intended or assented to." *Shaver v. Schuster,* 815 S.W.2d 818, 824 (Tex. App.—Amarillo 1991) (citing *Alford, Meroney & Co. v. Rowe,* 619 S.W.2d 210, 213 (Tex. Civ. App.—Amarillo 1981, writ ref'd n.r.e.). Waiver is largely a question of intent, and evidence of waiver depends on the surrounding facts and circumstances. *Jernigan v. Langley,* 111 S.W.3d 153, 156 (Tex. 2003) (per curiam). Courts have long held that when there exists an attorney-client relationship, the acts of the attorney bind the client. *See Gracey v. West*, 422 S.W.2d 913, 916 (Tex. 1968); *Dow Chem. Co. v. Benton*, 163 Tex. 477, 357 S.W.2d 565, 567-68 (1962).

Judge Brancheau heard evidence that attorney Slavin, knowing of his firm's multi-year daily battle with Kelly Hart as opposing counsel in this litigation, encouraged his former associate to "Go grab the cash." Slavin acknowledged this statement was intended to communicate that Austin should accept employment with Kelly Hart. Once Austin "grab[bed] the cash" (i.e., accepted the job), Slavin announced, "Glad you will be there. Now I can disqualify Warren! [emoji smiley face]."

Relators explain that Slavin's message was offered as a "warning about the conflict" in hopes that Austin would reconsider his employment decision. We do not believe the trial court was required to interpret the text exchange in the same way, particularly in light of the context of the entire communications and the relationship between Slavin and Austin. Slavin testified his initial instructions were for Austin to take the job with Kelly Hart. Immediately prior to his comment about disqualifying Warren, Slavin confirms, "Glad you will be there."

But that is not all, for Slavin's alleged "warning" about disqualification was followed by a smiley-face emoji, which is prone to multiple interpretations.[6] For example, a federal court in Virginia held that a party's inclusion of a smiley face emoticon alongside the statement that the party had a "spy" on the inside lent support for a conclusion that the statement "clearly intended to be playful." *MicroStrategy, Inc. v. Bus. Objects, S.A.*, 331 F. Supp. 2d 396, 404 (E.D. Va. 2004). A Montana court reached a similar conclusion when finding the presence of a smiley face emoji following an attorney's offer "to stipulate my client is guilty. :)" *See United States v. Christensen*, No. CR 06-085-BLG-RFC, 2013 U.S. Dist. LEXIS 52464, at *5 (D. Mont. 2013). In another instance, a New Jersey court

[6] *See* Eric Goldman, *Emojis and the Law,* 93 WASH. L. REV. 1227 (2018).

determined a reasonable jury could find that inclusion of smiley face emojis in an email discussing the plaintiff's termination constitutes "evidence that the decisionmakers at [the company] were happy to be able to terminate Plaintiff." *Apatoff v. Munich Re Am. Servs.*, No. 11-7570 (RBK/KMW), 2014 U.S. Dist. LEXIS 106665, at *35 (D.N.J. 2014).[7] Finally, in yet another lawsuit, both the Illinois district court and the Seventh Circuit Court of Appeals appear to conclude a smiley emoji had no meaning independent from the words accepting a settlement offer. *Compare Dean v. REM Staffing*, No. 20 cv 0235, 2021 U.S. Dist. LEXIS 164158, at *2 (N.D. Ill. May 10, 2021) (granting motion to enforce settlement agreement when party responded to email message with "Yes, I accept. Dear," complete with a smiley emoji)*, with Dean v. REM Staffing*, No. 21-1875, 2021 U.S. App. LEXIS 25717, at *1 (7th Cir. Aug. 26, 2021) (omitting reference to the emoji in its discussion of the facts and holding "No other interpretation is plausible" other than the words accepting the offer to settle).

It is possible that the emoji was indeed intended to soften the blow of Slavin's warning about the disqualifying consequence of working for Kelly Hart. But in context, the trial court could have conceived at least three other reasonable interpretations:

- *I could disqualify Warren, but I won't*;
- *I intend to disqualify Warren and it makes me happy*; or
- *Gotcha*.

[7] *See also Arnold v. Reliant Bank*, 932 F. Supp. 2d 840, 854 (M.D. Tenn. 2013) (referring to smiling emoticon in addition to plaintiff's written statements as evidence suggesting plaintiff did not perceive work environment to be hostile). In another matter, the smiley emoji included in an attorney's motion was interpreted by a legal blog as the "most menacing smiley emoticon ever," and became relevant in the attorney disciplinary hearing. *See In re Oladiran*, No. MC-10-0025-PHX-DGC, 2010 U.S. Dist. LEXIS 106385, at *9 n.1 (D. Ariz. 2010) (order suspending attorney from practice of law as sanction); *see also* https://bit.ly/38Qod8W (accessed May 5, 2022).

We need not determine what Slavin actually intended. Judge Brancheau had sufficient evidence to consider, and reject, Relator's argument that Slavin was discouraging Austin from taking employment at Kelly Hart or announcing an intent to disqualify the firm. Whether Relators intentionally waived their ability to disqualify Kelly Hart by conduct depends on Judge Brancheau's resolution of fact-driven questions. *See Shaver,* 815 S.W.2d at 825. We are prohibited from resolving questions of disputed issues of fact in our mandamus review. *In re E.S.,* No. 07-19-00323-CV, 2019 Tex. App. LEXIS 11228, at *5 (Tex. App.—Amarillo Dec. 30, 2019) (mem. op.) (citing *In re Angelini,* 186 S.W.3d 558, 560 (Tex. 2006) (orig. proceeding)).

Conclusion

Notwithstanding Relator's allegation that Austin violated the disciplinary rules when he accepted employment at Kelly Hart, we note that Judge Brancheau, as factfinder, was compelled to resolve issues of material fact regarding factors for and against disqualifying the firm, and whether Relators waived the "right" to disqualify opposing counsel. We are unable to conclude that Judge Brancheau abused his discretion in denying the State's motion. The State's petition is denied.

Lawrence M. Doss
Justice