# NO. 12-15-00254-CV

# IN THE COURT OF APPEALS

# TWELFTH COURT OF APPEALS DISTRICT

# TYLER, TEXAS

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| ***IN RE: INNOVATION RESOURCE*** | ***§*** | |
| ***SOLUTION, LLC,*** | ***§*** | ***ORIGINAL PROCEEDING*** |
| ***RELATOR*** | ***§*** | |

***MEMORANDUM OPINION***

Relator, Innovation Resource Solution, LLC (IR), requests a writ of mandamus directing the respondent to vacate her April 13, 2015 order disqualifying its counsel in the underlying proceeding. The respondent is the Honorable Deborah Oakes Evans, sitting in the 3rd Judicial District Court of Anderson County, Texas. The real parties in interest are Calvin B. Smith, Connie M. Smith, and Branding Iron Investments, LLC.

## BACKGROUND

On February 21, 2014, the Smiths filed a suit to quiet title requesting declaratory relief and attorney's fees against IR. They alleged in their petition that IR filed a "Notice of Unimproved Property Contract" in the Anderson County public records, by which IR claimed a right to purchase certain real property that the Smiths own. The Smiths averred that this document is not a contract to purchase the property because it was not executed by all of the necessary parties. Thus, they alleged that IR's claim is "invalid, unenforceable, or without right." Approximately nine months later, Jeffrey L. Coe, as attorney for IR, filed an appearance and a counterclaim in the case.

The Smiths filed a motion to disqualify Coe. They alleged that Calvin Smith had consulted with Coe regarding IR's filing for record an unsigned page of an earnest money contract that had the effect of slandering title to the Smiths' real property. They alleged further that the current lawsuit is "exactly" the action Coe recommended and is now opposing on IR's

behalf. The trial court conducted a hearing on the motion at which certain emails introduced by the Smiths were admitted into evidence.

The trial court granted the Smiths' motion to disqualify Coe. In its order, the trial court included a finding that the former matter in which Coe represented Calvin Smith is substantially related to the Smiths' suit against IR. The order also includes findings that

> (1) Calvin Smith consulted with Jeffrey L. Coe regarding the alleged Earnest Money Contract that is now in dispute in this matter and for which Innovation Resource Solution, LLC now sues for breach of the contract; and
>
> (2) Jeffrey L. Coe advised Calvin Smith to file a motion to remove an invalid lien which is now the basis of Calvin Smith's claim against Innovation Resource Solution, LLC.

IR filed this original proceeding challenging the trial court's order.

## PREREQUISITES TO MANDAMUS

Generally, mandamus is appropriate only when the trial court clearly abused its discretion and the relator has no adequate remedy by appeal. *See* ***In re Reece***, 341 S.W.3d 360, 364 (Tex. 2011) (orig. proceeding). However, there is no adequate remedy by appeal when a trial court erroneously grants an order disqualifying counsel. ***In re Sanders***, 153 S.W.3d 54, 56 (Tex. 2004) (orig. proceeding). Therefore, to be entitled to mandamus relief when that occurs, the relator must show only that the trial court abused its discretion. *See* ***id***.

## DISCIPLINARY RULE 1.09

Without prior consent, an attorney who has formerly represented a client in a matter may not represent another person in a matter adverse to the former client if the matters are the same or substantially related. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.09(a)(3), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (West 2013) (TEX. STATE BAR R. art. X, § 9). Two matters are "substantially related" when "a genuine threat exists that a lawyer may divulge in one matter confidential information obtained in the other because the facts and issues involved in both are so similar." ***In re EPIC Holdings, Inc.***, 985 S.W.2d 41, 51 (Tex. 1998) (orig. proceeding). If an attorney works on a matter, an irrebuttable presumption arises that the attorney obtained confidential information during the representation. ***In re Columbia Valley***

***Healthcare Sys., L.P.***, 320 S.W.3d 819, 824 (Tex. 2010) (orig. proceeding). The movant bears the burden of proving that a party's attorney should be disqualified. ***In re Meador***, 968 S.W.2d 346, 350 (Tex. 1998) (orig. proceeding).

**NO EVIDENCE TO SUPPORT DISQUALIFICATION**

IR argues that the Smiths did not produce any evidence requiring Coe's disqualification.

IR has provided a record from the hearing on the Smiths' motion to disqualify, which includes the emails admitted into evidence at the Smiths' request. The earliest email was sent on February 11, 2014, at 3:35 p.m. by Coe to Calvin Smith and reads in pertinent part as follows:

> Mr. Smith,
>
> You sent me everything I need to file the motion to remove the improper/invalid lien. Just need to make payment arrangements and I will file this tomorrow. I will need you to sign the verified pleading. I have court in the District Court on Friday and will approach the judge with the order then and get it signed and filed and back to you.
>
> Jeffrey L. Coe

In its mandamus petition, IR states that on August 22, 2014, the Smiths secured an ex parte "Judicial Finding of Fact and Conclusion of Law Regarding a Documentation or Instrument Purporting to Create a Lien or Claim." The proceeding was docketed as trial court cause number 3-42239, and styled ***In Re: a Purported Lien or Claim Against Calvin B. Smith and Connie M. Smith***. According to IR, the February 11 email is part of a series of emails between Smith and Coe pertaining to the ex parte proceeding, which IR contends is unrelated to the Smiths' suit to quiet title (trial court cause number 3-42109).

Other emails admitted into evidence reflect that, on February 13, 2014, (two days after Coe's email to Calvin Smith), an escrow assistant with Texas First Title Company, LLC sent Calvin Smith a Release of Earnest Money Contract. The subject of the email was "Release of EMC." On the same day, the assistant's email was forwarded from Smith's email address to Mark Mullin's email address. Later that day, Mark Mullin informed Tim Wagner, an IR representative, by email that "[i]n answer to your question about what are you being asked to do, the title company is asking that you execute this document and have it notarized." The subject of this email was also "Release of EMC."

On February 14, 2014, at 1:28:15 p.m., Tim Wagner sent an email to "Calvin & Mark" in which he informed them that IR was willing to "entertain a monetary settlement" for a release of its claim. Wagner also told them that IR had suffered damages and was entitled to purchase the land according to the contract or be compensated, and would pursue its claim if no settlement was reached. Approximately three hours later on the same date, Smith informed Coe by email that "[w]e thought we had this all worked out, but looks like we are wrong." Smith stated that he had spoken to "Jackson Hanks" and wanted to make sure "we get this handled so his underwriters will issue a title policy on the cash sale." In an email dated February 17, Coe informed Smith that he would "get in touch with Jackson." The subject of these three emails was "Release of EMC."

**The Ex Parte Proceeding**

Texas Government Code Section 51.903 created an expedited procedure for certain persons, including one who owns real property, to file a motion for a court to determine if a filed instrument asserting an interest in or claim against the real property is fraudulent. *See* TEX. GOV'T CODE ANN. § 51.903 (West 2013). This section authorizes the filing of a motion styled "In Re: A Purported Lien or Claim Against (Name of Purported Debtor)," along with proper documentation, for review by a district judge, who determines the status of the filed document without hearing any testimonial evidence. *See* ***id***. The style of cause number 3-42239 and the February 11 email from Coe to Calvin Smith indicate that the Smiths sought judicial review of a recorded document they believed created a fraudulent lien or claim against their real property.

The subject of the underlying suit to quiet title, cause number 3-42109, is a "Notice of Unimproved Property Contract" filed by IR that the Smiths contend is fraudulent and creates a cloud on their title to the affected real property. Neither the Smiths' motion for judicial review nor the ex parte finding and conclusion were admitted into evidence at the hearing. Moreover, the February 11 email does not identify the party who filed the purported lien or claim, nor does it identify the affected real property. Therefore, we cannot determine from the record IR provided that the two causes are "substantially related." *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.09(a)(3).

**Prior Hearing**

We note, however, that at the hearing on the Smiths' motion, the respondent referred to a prior hearing on the disqualification issue "at which I made my initial decision." The Smiths' attorney and Coe, as IR's attorney, acknowledged that the hearing had been conducted, that the respondent had, at that time, reviewed the emails that are in the mandamus record here, and that the respondent issued an order that Coe was disqualified. The Smiths' attorney also stated that the order was vacated later "so we could [have another hearing] and get [the emails into evidence.]"

The reporter's record of the prior hearing was not provided in this proceeding. However, IR previously sought mandamus relief from the trial court's prior order disqualifying Coe. *See generally* ***In re Innovation Res. Solution, LLC***, No. 12-15-00015-CV, 2015 WL 971286 (Tex. App.–Tyler Mar. 4, 2015, orig. proceeding) (mem. op.) (per curiam).[1] The reporter's record of the prior hearing was filed in that mandamus proceeding. We will therefore take judicial notice of our record in that proceeding. *See* ***Humphries v. Humphries***, 349 S.W.3d 817, 820 n.1 (Tex. App.–Tyler 2011, pet. denied) (appellate court may take judicial notice of its own records in same or related proceeding involving same or nearly same parties).

According to the reporter's record, the prior hearing was conducted on December 8, 2014, which was before the Smiths filed their motion to disqualify.[2] Coe explained that after he filed his appearance for IR, the Smiths' attorney called his attention to a possible conflict of interest because of Coe's prior consultation with Calvin Smith. Thereafter, Coe found some communications from Smith by which he sent Coe documentation regarding a purported lien that had been filed. According to Coe, Smith was looking for an attorney to file an ex parte action to have the lien removed from the property, but Smith never brought him any money. Coe stated further that Smith had apparently hired his current attorneys and "they did the same thing, but in addition to doing the removal they went ahead and filed a suit for slander of title, which Mr. Smith and I had never discussed." Coe described Smith's communication "[discussing] the

[1] This proceeding was dismissed as moot on the relator's motion after the trial court vacated its order.

[2] Coe acknowledged at the hearing that no motion to disqualify had been filed. He stated, however, that "we're tendering this to the Court for the Court to decide whether – if the Court believes that based on that . . . there's been some sort of attorney-client relationship created, then – basically we're leaving it to the Court's discretion to do whatever the Court feels is appropriate concerning the case."

removal of the invalid lien with me, which was ultimately signed, is unappealable and is finished . . . ."

The trial court asked whether the matter was "done," to which the Smiths' attorney responded as follows:

> Oh, no, Your Honor, that's not done. We're – that's what the hearing is going to be on. This thing is scheduled for trial in January. The hearing is on the second part of that. The first, the Court removes the lien as ex parte, and then if there's no appeal, the second part is we're entitled to seek damages and attorney's fees for that same thing, and that's what we're doing on January 23rd. . . .
>
> . . . .
>
> And my client certainly feels there's a conflict because he revealed confidential information to Mr. Coe during his discussions with him, told him what had happened, gave him copies of the documents, had – there's several email discussions back and forth about it. He feels like it's unfair now for Mr. Coe to now be on the other side of the case. . . .

Before the court signed the prior disqualification order, Coe submitted the subject emails for in camera review.

The emails admitted at the second hearing show both proceedings relate to a filed document that created an alleged invalid lien or claim against real property owned by the Smiths. The question that cannot be answered by reading the emails is whether the two proceedings pertain to the same document. The attorney's statements at the first hearing confirm that they do.[3] Thus, both matters pertain to a single document filed by IR that the Smiths contend constituted an invalid lien or claim against their real property and created a cloud on their title.

IR contends, however, that Coe's disqualification constitutes an abuse of discretion because the Smiths did not show actual prejudice. It is true that a showing of actual prejudice is required in some instances. *See, e.g.*, ***Sanders***, 153 S.W.3d at 57(showing of actual prejudice

[3] Ordinarily, an attorney's statements must be made under oath to constitute evidence. ***Banda v. Garcia***, 955 S.W.2d 270, 272 (Tex. 1997). But the opponent of the testimony can waive the oath requirement by failing to object when the opponent knows or should know that an objection is necessary. *See* ***id***. Here, neither attorney took an oath. But the statements of both attorneys were factual in nature and related to whether the two matters in question were substantially related. Because neither attorney objected to the other's statements, the oath requirement was waived, and the trial court could consider the attorney's statements as evidence. *See* ***In re Reeder***, No. 12-15-00206-CV, 2016 WL 402536, at *3-4 (Tex. App.–Tyler Feb. 3, 2016, orig. proceeding) (not yet released for publication); *see also* ***Banda***, 955 S.W.2d at 272 (holding that oath requirement for attorney was waived by failure to object because opponent knew or should have known attorney's statements were attempt to prove existence and terms of settlement agreement).

required for disqualification under disciplinary rule 3.08); ***In re Nitla S.A. de C.V.***, 92 S.W.3d 419, 423 (Tex. 2002) (orig. proceeding) (disqualification not required where counsel had reviewed privileged document that trial court ordered produced but movant failed to show actual prejudice). However, we have found no case, and IR has not cited one, requiring a showing of actual prejudice before an attorney can be disqualified under Rule 1.09.

In sum, the ex parte proceeding and the suit to quiet title pertain to the same document, which was filed by IR. The common issue in the proceedings is whether the document created an invalid lien or claim against real property owned by the Smiths. And Coe is irrebutably presumed to have acquired confidential information from Smith because he performed work related to the ex parte proceeding.[4] *See* ***Columbia Valley***, 320 S.W.3d at 824. The trial court reasonably could have found that the matters are substantially related, i.e., that a genuine threat exists that confidential information obtained in one matter might be divulged in the other because the facts and issues involved in both are so similar. *See* ***EPIC Holdings***, 985 S.W.2d at 51. Therefore, we hold that the trial court did not abuse its discretion in ordering that Coe is disqualified from representing IR in the underlying proceeding.

## DISPOSITION

Because IR has not shown an abuse of discretion by the trial court, we ***deny*** IR's petition for writ of mandamus.

**GREG NEELEY**
Justice

Opinion delivered March 31, 2016.
*Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.*

(PUBLISH)

[4] Ultimately Coe did not file the ex parte proceeding. But he consulted with Smith about filing it, received documents from Smith that he needed to prepare the motion required by Texas Government Code Section 51.903, and had additional communications with Smith (and possibly Jackson Hanks) about the status of the dispute.

# COURT OF APPEALS

# TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

# JUDGMENT

**MARCH 31, 2016**

**NO. 12-15-00254-CV**

**INNOVATION RESOURCE SOLUTION, LLC,**
Relator
V.

**HON. DEBORAH OAKES EVANS,**
Respondent

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**ORIGINAL PROCEEDING**

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ON THIS DAY came to be heard the petition for writ of mandamus filed by **INNOVATION RESOURCE SOLUTION, LLC**, who is the relator in Cause No. 3-42109, pending on the docket of the 3rd District Court Judicial District Court of Anderson, Texas. Said petition for writ of mandamus having been filed herein on October 16, 2015, and the same having been duly considered, because it is the opinion of this Court that a writ of mandamus should not issue, it is therefore CONSIDERED, ADJUDGED and ORDERED that the said petition for writ of mandamus be, and the same is, hereby **denied**.

By *per curiam* opinion.
*Panel consisted of Worthen, C.J., Hoyle, J. and Neeley, J.*