NO. 12-15-00307-CV

IN THE COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT

TYLER, TEXAS

IN RE:	***§***	
KELLY BRADY,	***§***	***ORIGINAL PROCEEDING***
RELATOR	***§***	

MEMORANDUM OPINION

By petition for writ of mandamus, Kelly Brady challenges the trial court's order denying her motion to disqualify counsel for real parties in interest, JKS Travel, Inc., d/b/a Travel Masters and Sharon K. Howell.[1] We deny the petition.

BACKGROUND

Brady worked as a travel agent for Travel Masters. Howell is president and chief executive officer of Travel Masters. While working for Travel Masters, Brady signed a covenant not to compete. A few months before the covenant not to compete expired, Brady resigned from Travel Masters.

Thomas Bryant, a friend of Brady, agreed to set up a limited liability corporation for a travel agency and have Brady serve as his employee. Brady, on behalf of Bryant, contacted James Gillen, and asked that Gillen complete the paperwork to form the limited liability corporation. Later, Brady contacted Gillen and asked that Gillen complete paperwork to effectuate an assignment of the corporation from Bryant to Brady. Gillen performed both tasks.

Brady had concerns regarding whether she was paid properly at Travel Masters, whether she was subject to a noncompetition agreement, and whether Howell made disparaging remarks

[1] The respondent is the Honorable Christi Kennedy, Judge of the 114th Judicial District Court, Smith County, Texas.

about her. Brady sued Travel Masters and Howell. Travel Masters and Howell filed an answer and counterclaim.

Gillen's law partner, Roger Anderson, represented Travel Masters and Howell in Brady's suit against them. Brady filed a motion to disqualify both Gillen and Anderson from the case, asserting that Gillen had represented her in a substantially related matter. Travel Masters and Howell disagreed that Gillen's work for Brady was related to her suit against Travel Masters and Howell. After an evidentiary hearing, the trial court denied Brady's motion.

Brady then filed a petition for writ of mandamus in which she alleged that the trial court abused its discretion in denying her motion.

AVAILABILITY OF MANDAMUS

Generally, mandamus is appropriate only when the trial court clearly abused its discretion and the relator lacks an adequate appellate remedy. *See* ***Canadian Helicopters Ltd. v. Wittig***, 876 S.W.2d 304, 305 (Tex. 1994). However, on motions to disqualify counsel, appeal is an inadequate remedy. ***Nat'l Med. Enter., Inc. v. Godbey***, 924 S.W.2d 123, 133 (Tex. 1996) (orig. proceeding). Therefore, to be entitled to mandamus relief in disqualification cases, the relator must show only that the trial court abused its discretion. *See* ***id***.

A trial court abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law or if it clearly fails to correctly analyze or apply the law. ***In re Cerberus Capital Mgmt., L.P.***, 164 S.W.3d 379, 382 (Tex. 2005) (orig. proceeding). This standard has different applications in different circumstances. ***Walker v. Packer***, 827 S.W.2d 833, 839 (Tex. 1992) (orig. proceeding). When reviewing the trial court's resolution of factual issues or matters committed to its discretion, we may not substitute our judgment for that of the trial court. ***Id.*** Thus, we cannot set aside the trial court's finding unless it is clear from the record that the trial court could have reached only one decision. ***In re Nitla S.A. de C.V.***, 92 S.W.3d 419, 422 (Tex. 2002) (orig. proceeding). Our review of the trial court's determination of the legal principles controlling its ruling is much less deferential. ***Walker***, 827 S.W.2d at 849. This is because a trial court has no discretion in determining what the law is or applying the law to the facts. ***Id.***

DISQUALIFICATION OF COUNSEL

Brady contends that Gillen and Anderson should be disqualified from serving as counsel for Travel Masters and Howell because Gillen has represented Brady in a substantially related matter.

Applicable Law

"Disqualification of counsel is a severe remedy." ***Spears v. Fourth Court of Appeals***, 797 S.W.2d 654, 656 (Tex. 1990) (orig. proceeding). For "many reasons," motions to disqualify should not be granted liberally. ***In re Columbia Valley Healthcare Sys., L.P.***, 320 S.W.3d 819, 825 (Tex. 2010) (orig. proceeding). It can result in immediate and palpable harm, disrupt trial court proceedings, and deprive a party of the right to have its counsel of choice. ***Nitla***, 92 S.W.3d at 422. The Texas Disciplinary Rules of Professional Conduct do not determine whether former counsel should be disqualified in any subsequent litigation, but they provide guidelines and suggest the relevant considerations. ***Cimarron Agr., Ltd. v. Guitar Holding Co., L.P.***, 209 S.W.3d 197, 201 (Tex. App.—El Paso 2006, no pet.). Technical compliance with ethical rules might not foreclose disqualification, and conversely a violation of ethical rules might not require disqualification. ***In re Users Sys. Servs., Inc.***, 22 S.W.3d 331, 334 (Tex.1999) (orig. proceeding).

In considering a motion to disqualify, the trial court must strictly adhere to an exacting standard to discourage a party from using the motion as a dilatory trial tactic. ***Nitla***, 92 S.W.3d at 422. The burden is on the movant to establish with specificity a violation of one or more of the disciplinary rules. ***Spears***, 797 S.W.2d at 656. Mere allegations of unethical conduct or evidence showing a remote possibility of a violation of the disciplinary rules will not suffice to merit disqualification. ***Id.***

As pertinent to the issues before us, Rule 1.09 of the Texas Disciplinary Rules of Professional Conduct provides that, 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 if it is the same or a substantially related matter. TEX. DISCIPLINARY RULES PROF'L CONDUCT R. 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). Rule 1.09 does not absolutely prohibit a lawyer from representing a client in a matter adverse to a former client. *See* ***id***. 1.09(a); *see also* ***id***. 1.09, cmt. 3, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G, app. A (West 2013). Instead,

it prohibits the adverse representation, except with prior consent, where the party seeking disqualification shows the existence of any of the three circumstances enumerated in subparagraph (a). *See* ***id***. 1.09(a) & cmt. 3. Although "substantially related" is not defined in the rule, "it primarily involves situations where a lawyer could have acquired confidential information concerning a prior client that could be used either to that prior client's disadvantage or for the advantage of the lawyer's current client or some other person." ***Id***. 1.09, cmt. 4B. If an attorney works on a matter, an irrebuttable presumption arises that the attorney obtained confidential information during the representation. ***Columbia Valley***, 320 S.W.3d at 824.

Application

Brady and Gillen had different remembrances of their interactions with each other. Brady said she told Gillen she was under a covenant not to compete with Travel Masters and did not know if that covenant not to compete had expired. Brady further claimed that she told Gillen she was not given pay stubs by Travel Masters. Finally, Brady claimed she told Gillen that Howell had made derogatory comments about her.

Brady contended Gillen told her that he had represented Travel Masters and Howell in the past and thus could not represent Brady in any claim against Travel Masters and Howell. She recognized that Gillen did not do any legal work on her behalf regarding her claims against Travel Masters and Howell. Brady conceded that the only work Gillen did was the paperwork to form the limited liability corporation for Bryant. Brady further conceded that everything she told Gillen is contained in the allegations she made in her petition against Travel Masters and Howell.

Gillen testified that he had no discussions with Brady regarding her pay stubs from Travel Masters, compensation she received from Travel Masters, or any disputes she had with Travel Masters. He conceded that Brady told him she had worked at Travel Masters. But he stated that he immediately told Brady that he represents Travel Masters and did not want to know anything about her dealings with Travel Masters. He testified that Brady's dealings with Travel Masters had nothing to do with the creation of the limited liability corporation, and the formation of the limited liability corporation was his only obligation.

Gillen also testified that Brady contacted him later and asked him to prepare paperwork so the limited liability corporation could be transferred into her name. Gillen recalled that he prepared an assignment of membership interest that would transfer Bryant's interest to Brady

upon Bryant's signature. However, he does not know whether Bryant executed. According to Gillen, he had no other dealings with Brady.

Gillen clearly testified that he never represented Brady with regard to any aspect of her dispute with Travel Masters or Howell. Gillen further testified that Brady never communicated any confidential information to him regarding the issues involved in her claims against Travel Masters and Howell. His work for Brady was limited to the preparation of the paperwork necessary to create a limited liability corporation and an assignment of the interest in that limited liability corporation.

All Brady established was that Gillen performed two simple transactional tasks that are completely unrelated to the present litigation. Gillen in no way assisted Brady with any aspect of her litigation against Travel Masters and Howell. The trial court impliedly found that Gillen's prior work for Brady was not substantially related to Brady's litigation with Travel Masters and Howell. The record supports the implied finding. Therefore, the implied finding is not an abuse of discretion. Accordingly, the trial court could have reasonably concluded that Gillen and Anderson should not be disqualified from representing Travel Masters and Howell.

DISPOSITION

Because Brady has not shown an abuse of discretion, we ***deny*** her petition for writ of mandamus.

BRIAN HOYLE
Justice

Opinion delivered March 23, 2016.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.

(PUBLISH)

COURT OF APPEALS

TWELFTH COURT OF APPEALS DISTRICT OF TEXAS

JUDGMENT

MARCH 23, 2016

NO. 12-15-00307-CV

KELLY BRADY,
Relator
V.
HON. CHRISTI J. KENNEDY
Respondent

ORIGINAL PROCEEDING

ON THIS DAY came to be heard the petition for writ of mandamus filed by **KELLY BRADY**, who is the relator in Cause No.15-1812-b, pending on the docket of the 114th Judicial District Court of Smith County, Texas. Said petition for writ of mandamus having been filed herein on December 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**.

Brian Hoyle, Justice.
Panel consisted of Worthen, C.J., Hoyle, J., and Neeley, J.