

THOUGHT LEADERSHIP

News

## TWIA WINS MANDAMUS RELIEF REGARDING ALLEGED ATTORNEY CONFLICT ON HURRICANE IKE DOCKET

Newsbrief

12 NOV 2013

TWIA and its appellate team obtained mandamus relief last Thursday from Houston's First Court of Appeals on an alleged attorney conflict issue. In *In re Texas Windstorm Insurance Association*, ---S.W.3d ---, No. 01-13-00123-CV, 2013 WL 5947342 (Tex. App.—Houston [1<sup>st</sup> Dist.] Nov. 7, 2013), a group of Hurricane Ike plaintiffs' lawyers sought to disqualify MDJW from representing TWIA in its Hurricane Ike cases. Plaintiffs' counsel, led by The Mostyn Law Firm, alleged MDJW had a conflict in representing TWIA in violation of Disciplinary Rule 1.09 because of an email from Chris Martin to a single plaintiffs' attorney, Craig Eiland from 2009. In a lengthy disqualification hearing last December and January, Martin testified that Eiland (a member of the Texas House of Representatives and a practicing attorney) had a long history of asking free legal questions to "Professor Martin," as Eiland called him, and in 2009 asked him about a case which Eiland said at the time had been settled against TWIA and which Eiland was being subsequently criticized for his settlement. MDJW was retained by TWIA in August 2012 to serve as coordinating counsel to resolve thousands of Hurricane Ike claims filed by Mostyn and others against TWIA. In December 2012, Mostyn alleged Martin was acting as both an attorney and an expert witness for not only Eiland but also the entire Plaintiffs' Steering Committee in all of its TWIA litigation. Mostyn alleged that Eiland had sought Martin's legal advice on certain broad aspects of hurricane claim handling, and that by providing some free advice, MDJW became Eiland's attorney as well as an attorney for the entire Plaintiffs' Steering Committee. Martin testified that was a ludicrous assertion because he and his firm had been defending several of the state's largest insurers in more than a thousand Hurricane Ike cases since 2008 and he couldn't and wouldn't ever serve as an expert witness much less legal counsel for the same lawyers suing all of the firm's insurance clients in Hurricane Ike cases. Martin also testified that Eiland served as plaintiffs' counsel in multiple Ike suits over the past four years defended by Martin and the firm and never previously alleged a conflict existed because one didn't exist.

The Court of Appeals acknowledged the importance of preventing motions to disqualify from being used as tactical weapons in litigation, noting they could potentially be misused as a method of removing opposing counsel viewed as "dangerously competent." Due to the harsh consequences of disqualification, and the possibility of misuse, the Court noted the movant bears the burden to establish the violation with specificity and demonstrate actual prejudice and the trial court must adhere to an exacting standard in ruling on such motions.

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Although the question of whether Eiland and MDJW had ever formed an attorney-client relationship was hotly contested in the trial court, the Court of Appeals assumed for the purpose of mandamus that an attorney-client relationship existed and that its scope embraced Eiland's legal strategies regarding Hurricane Ike claims. Nevertheless, the Court of Appeals concluded that nothing in MDJW's representation of TWIA was personally adverse to Eiland, the alleged former client. Rather, the representation was only adverse to Eiland's current clients, "a situation that exists in everyday adversarial lawsuits and is not the concern of Rule 1.09." The court further found that the other movants, none of whom were MDJW's former clients, had made no showing of any actual prejudice.

Additionally, the court found MDJW's putative former representation of Eiland and its current representation of TWIA were not "substantially related" as is required by the Disciplinary Rules. The court observed that the "substantially related" test requires *specific* factual similarities, and a movant seeking disqualification must show more than a "mere similarity in the types of claims and defenses involved." The court concluded that MDJW's relationship with Eiland was a "lawyer-to-lawyer consultation" and there was no evidence it was "substantially related" to any of the claims being asserted by Eiland's current clients. The court considered mere similarities in the types of claims asserted and the fact that the cases all arose from Hurricane Ike insufficient to meet the "substantially related" test.

Justice Dale Wainwright of Bracewell & Giuliani (former justice on the Texas Supreme Court) served as lead counsel for TWIA in the mandamus and gave the oral argument. He was assisted by Levon Hovnatanian, Kevin Cain and the entire appellate team at MDJW in the mandamus.

Our thanks go out to Texas Windstorm Insurance Association and the Commissioner of the Texas Department of Insurance who backed us throughout this dispute as well as to everyone who helped with the mandamus, especially former Justice Dale Wainwright, for his great leadership and insight as lead counsel for the mandamus proceeding.