TEXAS COURTS
A SURVEY

CASES & MATERIALS

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TABLE OF CONTENTS

CHAPTER 1
INTRODUCTION TO TEXAS COURTS

CHAPTER 2
THE TEXAS TRIAL COURTS

CHAPTER 3
PERSONAL JURISDICTION

CHAPTER 4
VENUE

CHAPTER 5
PLEADING

CHAPTER 6
JOINDER

CHAPTER 7
SCOPE OF DISCOVERY

CHAPTER 8
DISCOVERY MECHANICS

CHAPTER 9
DISCOVERY SANCTIONS

CHAPTER 10
EXPERTS

CHAPTER 11
SUMMARY JUDGMENTS

CHAPTER 12
SETTINGS & TRIAL

CHAPTER 13
THE JURY

CHAPTER 14
JURY CHARGE

CHAPTER 15
VERDICTS

CHAPTER 16
JUDGMENTS AND POST JUDGMENT MOTIONS

CHAPTER 17
APPEALS

CHAPTER 18
DEFAULTS AND DISMISSALS

CHAPTER 19
COMPLEX LITIGATION

CHAPTER 20
SETTLEMENTS

CHAPTER 1. INTRODUCTION TO TEXAS COURTS

A. The Texas Rules of Civil Procedure

Read Rules 1, 3a; Tex. Const. art. V § 31; Gov't Code § 22.004.

Texas civil practice is primarily governed by the Texas Rules of Civil Procedure, the rules promulgated by the Texas Supreme Court pursuant to its rulemaking power.[1] Pursuant to that grant of power, the Supreme Court adopted the Texas Rules of Civil Procedure in 1941. The Rules were generally amended every two years, although no amendments were made from 1990 to 1997. Since 1990, the Supreme Court and its Advisory Committee have been working on dramatic changes to the Rules, particularly in the areas of discovery, sanctions, the jury charge, and appellate procedure. New appellate rules and a new summary judgment rule became effective September 1, 1997. New discovery rules became effective January 1, 1999. Significant rule changes were made in response to the 2003 tort reform legislation.

Although the original 1941 Texas Rules of Civil Procedure ("TRCP") were adopted in response to the same movement that produced the Federal Rules of Civil Procedure (adopted in 1939), and the Federal Rules were used somewhat as a guide, significant differences exist between the two. A quick look through the table of contents to the Texas Rules of Civil Procedure shows the first difference between the Texas and Federal Rules—there are many more rules in Texas than in the federal courts. On first glance, the Texas rules appear to be well-organized. Further study will reveal, however, that while the organization may have made sense in 1941, the many amendments since have created a hodgepodge of rules. Often, a series of rules share the same number, but are entirely unrelated. For instance, Rule 166 governs pretrial conferences and Rule 166a governs summary judgments. Large groups of rules are missing, having been repealed for one reason or another, such as the separate codification of the Texas Rules of Appellate Procedure ("TRAP"). Moreover, although many of the rules are quite modern, others are clearly antiquated, causing only confusion in today's practice.

Many Texas courts also have a set of local rules that further define practice before them. The Texas Supreme Court adopted the current version of Rule 3a after determining that many courts had unwritten local rules, known only to the judges and local lawyers who practiced before them, that changed significant deadlines set out in the Texas Rules of Civil Procedure. Local rules often establish local procedures for handling the court's docket, pretrial matters and motions dealing with such matters as default judgments and withdrawal of counsel.[2] Rule 3a requires all local rules to be published and approved by the Supreme Court, and prohibits local rules that alter the time limits imposed by the Texas Rules of Civil Procedure.[3] It is extremely important that you become familiar with the local rules applicable to any court in which you practice. Nearly every county has a set of local rules and there is little uniformity.

Texas civil practice is also governed by a number of statutes. Most of these statutes can be found in the Texas Civil Practice and Remedies Code ("CPRC") and the Government Code.

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1 The Rules Enabling Act of 1939, now codified as GOV'T CODE § 22.004.

2 *See e.g.,* United Business Machines v. Southwestern Bell Media, Inc., 817 S.W.2d 120 (Tex. App.—Houston [1st Dist.] 1991, no writ) (approving Harris County local rules that allowed sanctions to be imposed after written submission without oral hearing).

3 *See* United Marketing Technology, Inc. v. First USA Merchant Services, Inc., 812 S.W.2d 608, 611 (Tex. App.—Dallas 1991, writ denied) (holding that Dallas Civil District Court local rule allowing amended pleading only with leave of court not less than 14 days before trial is inconsistent with TRCP 63 and violates TRCP 3a).

Sometimes, the legislative agenda differs from the rules promulgated by the Supreme Court. For example, in the 1995 legislative session significant changes were made to the venue statutes, effective for cases filed on or after September 1, 1995. The *rules* concerning venue, however, have not been revised. A sanctions bill also became law in 1995, creating significant conflicts with the sanctions practice that is now part of the rules.

Appellate practice in Texas is governed by the Texas Rules of Appellate Procedure ("TRAP"), which were adopted in 1997, and apply to both civil and criminal appeals. Before 1997, the civil appellate rules were contained in the Texas Rules of Civil Procedure. The appellate rules present more of a "cookbook" approach than do the civil rules—they provide a fairly detailed description of what one has to do when appealing a case.

The Texas Rules of Evidence ("TRE") govern the admission of evidence at trial. However, a few of these affect civil procedure (such as the rules governing privilege). Thus, some of these rules are also included in the materials.

B. The Adversary System and Civil Procedure

To understand any system of civil procedure, one must have a basic understanding of the adversary process, an essential element in the American judicial system. In an adversary system, neutral and passive decision-makers adjudicate disputes after hearing evidence and arguments presented by both sides. The parties and their client-dedicated legal representatives, rather than the judge, control much of the progress of the proceedings. They gather and evaluate facts and legal theories and present them to the decision-maker in the most persuasive manner possible. The system thus creates competition between the parties, encouraging each to marshal all of the law and facts favorable to its side and to attack unreliable information presented by the opponent. Although the incentives created are not so much to seek the truth as to seek success for their partisan position, in theory the competition between the two sides results in a complete and accurate account of the dispute. The adversary system creates incentives to thoroughly investigate, but it also creates incentives to keep the results of investigations confidential to prevent any benefit from accruing to the opponent. Thus, although investigation and analysis of the facts underlying the dispute are encouraged, the newly uncovered facts are only selectively made available to the fact-finder.

The rules of procedure govern this adversary system and often make choices that may seem somewhat arbitrary. In order to succeed in a lawsuit, these rules of procedure must be obeyed. Sometimes a party is rewarded with victory in the dispute despite the true merits of the case. Rule 1 of the TRCP, however, proclaims that "[t]he proper objective of rules of civil procedure is to obtain a just, fair, equitable and impartial adjudication of the rights of litigants under established principles of substantive law. To the end that this objective may be attained with as great expedition and dispatch and at the least expense both to the litigants and to the state as may be practicable, these rules shall be given a liberal construction." This book will explore whether our rules of civil procedure have achieved these goals of justice and efficiency.

C. An Overview of Texas Pretrial Procedure

Pretrial procedure is the process by which parties prepare for the trial in which their dispute will be resolved. While a trial may last only a few days or weeks, the pretrial portion of modern civil procedure usually consumes months or, more likely, years. During the pretrial portion, the case is likely to be settled by agreement between the parties. Thus, the primary purpose, to prepare for trial, is often forgotten.

Before a lawsuit is commenced, the plaintiff has to make many decisions. Most importantly, the plaintiff must decide that filing suit is worth the time, effort, and expense that it will cost to pursue it. Litigation is only one of many dispute resolution processes, and is perhaps the most expensive and time-consuming. It usually should be resorted to only when other informal methods of dispute resolution have failed.

Assuming that the decision to pursue litigation has been made, the litigant must decide in which court to bring the action. First, the plaintiff must determine which courts have subject matter jurisdiction over the dispute, and choose the forum accordingly. As you will see, some of the Texas trial courts have limited subject matter jurisdiction, governed by a complicated statutory scheme. The plaintiff must also determine in which of the 254 Texas counties suit should be filed. This concept, called venue, is also governed by statute, and usually gives the plaintiff several options from which to choose.

The suit is commenced when the plaintiff files its pleadings, called the "Plaintiff's Original Petition," rather than the "Complaint" as it is called in most other courts. In this written document, the plaintiff identifies the defendant and gives the defendant notice of the claims being asserted against it. The plaintiff can bring multiple claims against multiple parties. The defendant is brought within the power of the court when the defendant is served with process and a copy of the plaintiff's pleadings. Texas courts have power over all persons who reside in Texas as well as limited power over nonresidents. Therefore, if the plaintiff seeks to sue a nonresident, the question of personal jurisdiction must be considered.

Following service of process, the defendant must respond to the petition, usually by filing an answer that denies the plaintiff's allegations, and sets forth any defensive allegations upon which the defendant wants to rely. These pleadings (the petition and answer) provide the blueprint of the lawsuit, from which decisions regarding relevance are determined in discovery and at trial. When the rules were originally promulgated, pleadings were the primary vehicle by which parties obtained information from their opponents about the litigation. Accordingly, the rules provide a vehicle for the defendant to ask the plaintiff to plead more specifically. In addition, the defendant may want to contest the court's subject matter jurisdiction, personal jurisdiction, or venue. The rules provide for special pleadings that have the specific purpose of objecting to the assertion of jurisdiction or venue. Last, but not least, the defendant may want to bring in additional parties or assert his own claims against the plaintiff. There are rules of procedure allowing for each of these as well.

The most time-consuming pretrial matter is discovery, where the parties formally obtain information relevant to the lawsuits from the other parties to the lawsuit and from nonparties. Over time, the scope of discovery has broadened substantially, seeking to reveal the relevant facts and prohibit trial by surprise. Broad discovery has significant implications for pleading practice—as more facts are revealed through discovery, the use of pleadings as a tool to reveal facts becomes superfluous.

The Texas rules set out particular permitted forms of discovery. Parties can take oral depositions of parties and witnesses (where the lawyers question a witness under oath, and the proceedings are recorded and transcribed for later use). Parties can also make inquiries to other parties through written interrogatories (written questions that require a written answer made under oath). One of the most useful discovery vehicles is the request for documents and things (where parties are required to produce requested and relevant documents and things for inspection and copying). The rules also provide for various privileges and exemptions from discovery, which, when properly asserted by the responding party, can protect that party from having to disclose particular information in discovery. Because our system uses the adversary system to accumulate facts in discovery, disputes over discovery have become the rule rather than the exception. The Texas Rules of Civil Procedure provide detailed guidelines for the resolution of these disputes.

D. An Overview of Texas Trial and Appellate Procedure

The advocate in a jury trial must cultivate a split personality. He or she is almost always working the case at two levels, trying to coax a favorable verdict out of the jury while at the same time making a record of trial court errors so that the case can be reversed if the result is bad. These objectives do not always live in harmony. Often, trial counsel is so caught up in the demands of the moment—where to go with the witness when the court has excluded critical testimony, for example—that the need to "preserve error" is forgotten until it is too late.[4] Sometimes the emphasis on persuasion causes counsel to deliberately forego the preservation of error. An improper closing argument may be even more damaging if highlighted by objection. Repeated objections, though sometimes necessary, can be seen by the jury as a suspicious bent toward concealment. If you make the right objection every time you can to "protect the record" you will undoubtedly have preserved all errors for appeal—where you will surely need them, the judge and jury having long since decided that you are a pettifogger intent on defeating an open trial. In a typical trial no more than two or three bad rulings will be critical. The rest will be harmless (that is, not reversible error) and can be seen as such when they occur. So it is that the best advocates, who know how to preserve error, sometimes decide not to do it.

It is perhaps unfair, but it is the case that almost everything that goes wrong at a trial can and will be laid at the feet of the judge. Why? Because the judge's control of the trial is both preventative and curative. The judge can prevent unfairness by excluding certain evidence before it comes in, for example, or by preparing a correct charge, or, in some cases, by granting a motion for directed verdict and ending the trial early. But the judge can sometimes *cure* unfairness after the fact by such actions as striking improper comments and instructing the jury to disregard them, admonishing overzealous counsel, declaring a mistrial, or taking the case away from an errant jury. And, at the end of the day, when the trial is over and the jury has gone home, the court can cure *all* trial errors by ordering a new trial and starting over.

Procedure is not advocacy and knowledge of procedure does not aid in persuasion. In fact, procedural rules are often devised precisely for the purpose of blunting persuasion that is effective because it goes past the limits of fair disputation. Advocacy is salesmanship. It attempts to win the

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[4] The term "preserving error" places an unfortunate emphasis on the negative. We should be concerned with stamping out error rather than preserving it. What is meant, of course, is that the errors which occurred during the trial are preserved in the record for appellate review.

favor of the court or jury and to make them do what the advocate wants. Procedural rules set the boundaries for advocacy, controlling and channeling it into an orderly (and presumably fair) contest and providing appellate recourse to those aggrieved by the trial court's actions. The trial counsel's mission is to use advocacy to win, but failing that, to protest errors with the required formalities so that the record will support a reversal on appeal. This secondary or conditional goal—preserving a basis for reversal if the verdict goes the wrong way—sometimes tempts counsel to ignore ethical obligations and to "seed the record with error" or "sandbag"; that is, to hide the real objection in a barrage of bogus complaints, so that the judge is tricked into overruling it. The judge's error can then form the basis of a reversal if the sandbagger loses, giving his client the chance to return to fight another day. One of the missions of procedure is to protect the judge—and the system—from such deception.

So, procedure sets the rules and advocacy operates within them to persuade. Many procedural disputes lie almost entirely within the trial court's discretion. The court will decide on whatever grounds it wishes, constrained only by some rather vague prohibitions against completely arbitrary behavior. If it wants to consider irrelevancies or appeals to emotion or even competing hairstyles it will do so.[5] Advocacy is an art, and whatever persuades—within the limits of ethical behavior—is right. If you think you can persuade the judge by reciting *Hiawatha*, you're welcome to do it. Therefore, once we have identified a matter for decision as one within the court's discretion we will have little more to say about it. We will leave the techniques of persuading the judge to advocacy courses and will concentrate instead on the rules and strictures which the trial court must follow or else risk reversal.

What should be the criteria for overturning the judgment of the trial court? The litigant is entitled to a fair trial but not necessarily a perfect one. The system will not compel a second contest simply because inconsequential mistakes were made in the first. The soccer concept of "no harm no foul" informs the idea of harmless error. Unless the mistake was "calculated to cause and probably did cause" an improper judgment; that is, unless it changed the outcome of the case, the error will be said to be harmless and there will be no reversal. The harmless error rule is ignored in some situations where the system presumes that there is harm and the judgment will be reversed.

But there is another reason that not all errors are fatal. Many legitimate complaints about trial conduct are waived. Trial counsel is charged with seeing that his client's rights are protected by placing on the record the right protest at the right time and in the right form. The idea of "fundamental" or "incurable" error—a mistake requiring reversal even though no one complained of it at the time it was made—has almost completely disappeared.

Before an appellate court will reverse a trial court's actions it will want to see (1) that counsel clearly pointed out what the court was doing wrong (or was about to do wrong), (2) that counsel gave the "grounds" for the complaint—the rule or precept being violated, (3) that counsel told the court how to avoid or correct the error (unless that was clear from the nature of the protest), and (4) that the court clearly rejected the protest (e.g., overruled an objection). None of this counts for anything, of course, if it does not appear in the written record that goes to the appellate court.

These general requirements for preserving error are no more than common sense would suggest. In certain instances, however, the requirements are more detailed. The rules and cases require that the complainant follow a step-by-step sequence of motions and related actions. The best advocates, in time, master these requirements and it is important to do so. But those who must react

[5] This is merely an example. In practice almost all judges will make a good faith attempt to decide discretionary matters in accordance with accepted standards.

immediately to an adverse ruling made in the heat of battle would do well to be sure the record reflects at least that the judge was told precisely what was wrong, told which rule or precept made it wrong, and then told how to fix it, and that the judge then refused to take the appropriate action.

In determining how to deal with adverse rulings or findings a careful advocate must answer some hard questions. Is the offending action one in which the court or the jury has unlimited discretion? Broad discretion? Limited discretion? Almost no discretion? Are there only two courses available either of which the trial court can take with impunity? Or is there a single right ruling, all others being wrong and potentially reversible? Furthermore, if the ruling is wrong, either as an error of law or an abuse of discretion, can it be shown to have changed the outcome? Is it a ruling that may, under special circumstances, give rise to a kind of presumed harm which overrides the usual harmless error rule? Is the complaint that the jury has acted contrary to the evidence before it and, if so, what curative action is available to the court? And finally, must an appellate review await the conclusion of the case or is the error one that may be corrected by *mandamus* or some form of interim appeal?

It may seem that this book gives short shrift to appellate procedure. But in fact, the book addresses appellate issues in every chapter. An appellate lawyer's job is not only to ensure that appellate deadlines are satisfied and the brief is written. She must also ensure that error is preserved, the record is complete, and the standards of review are well understood—all things that are included throughout this book.

E. Quick Note on Materials

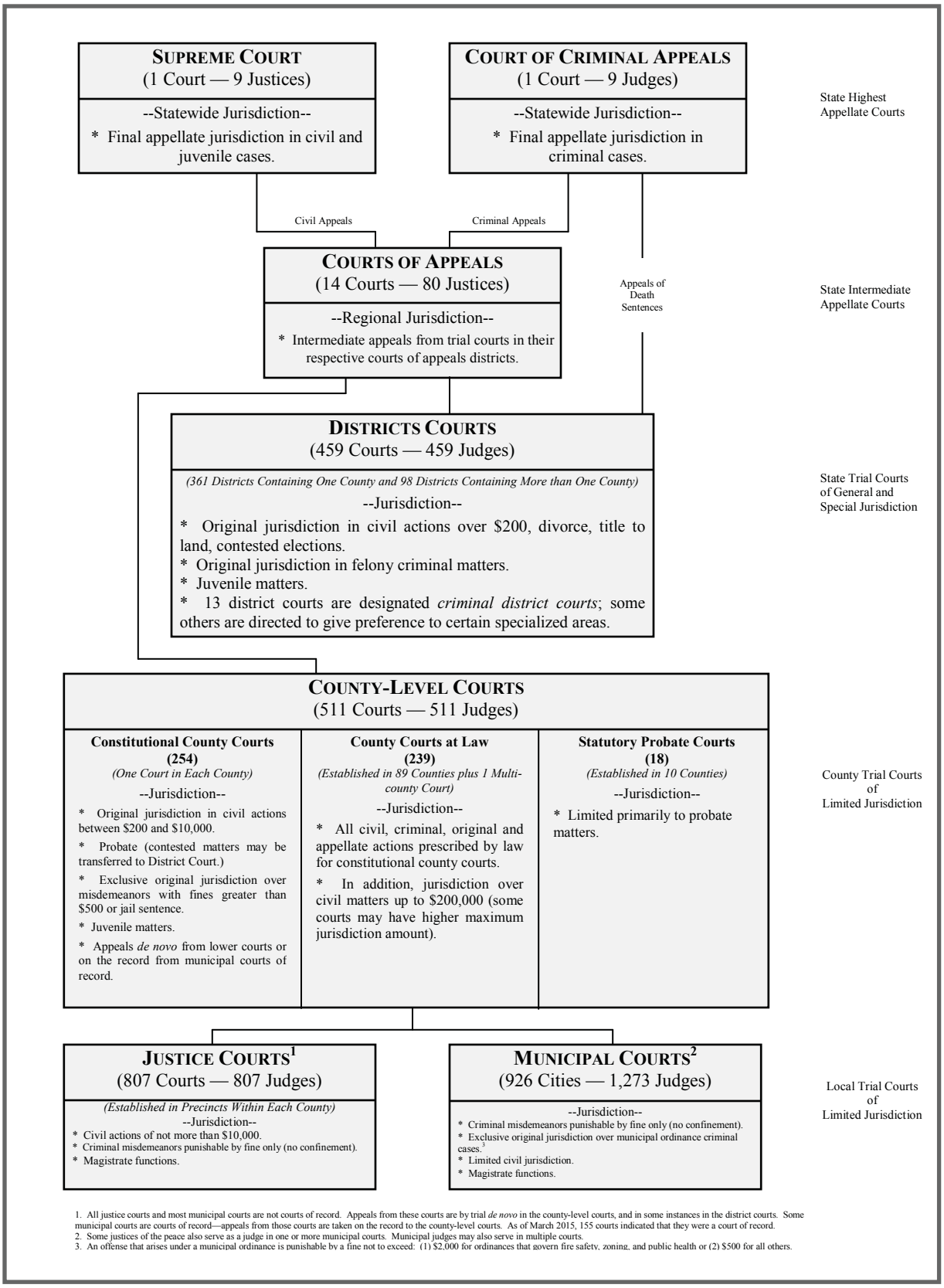
In addition to this casebook, you should also have a copy of the Texas Rules of Civil Procedure, Appellate Procedure and Evidence, and the statutes that are discussed here. It is important to have a current version.

Throughout this book, "Rule ___" refers to one of the Texas Rules of Civil Procedure, which will also be abbreviated as "TRCP." The appellate rules will be abbreviated as "TRAP," and the evidence rules will be abbreviated as "TRE." The statutes will be referred to by the name of the Texas statutory code from which the statute comes (i.e. "Government Code"), but the Texas Civil Practice and Remedies Code will usually be referred to as "CPRC."

The opinions in the text are substantially edited from the original. Footnotes and string cites are often deleted without noting the deletion. Large text deletions are noted with "* * *". However, occasionally courts use "* * *" as an indication of a break in the opinion. Texas Supreme Court opinions are used whenever possible, and the Texas Supreme Court is often referred to as the "Supreme Court."

CHAPTER 2. THE TEXAS TRIAL COURTS

A. Court Structure of Texas



1. All justice courts and most municipal courts are not courts of record. Appeals from these courts are by trial *de novo* in the county-level courts, and in some instances in the district courts. Some municipal courts are courts of record—appeals from those courts are taken on the record to the county-level courts. As of March 2015, 155 courts indicated that they were a court of record.
2. Some justices of the peace also serve as a judge in one or more municipal courts. Municipal judges may also serve in multiple courts.
3. An offense that arises under a municipal ordinance is punishable by a fine not to exceed: (1) $2,000 for ordinances that govern fire safety, zoning, and public health or (2) $500 for all others.

1. *The Civil Subject Matter Jurisdiction of the Texas Trial Courts*

Read Tex. Const., art. V, §§ 1, 3, 31; art. II, § 1; see Appendix.

The preceding chart[1] makes the Texas trial court system look fairly straightforward. In fact, the chart is highly simplified. The Texas Constitution provides that the judicial power of the state "shall be vested in one Supreme Court, in one Court of Criminal Appeals, in the Courts of Appeals, in District Courts, in County Courts, in Commissioner's Courts, in Courts of Justices of the Peace, and in such other courts as may be provided by law."[2] The legislature has created a number of courts pursuant to this grant of power, so the Texas trial court system is made up of a patchwork of constitutional and statutory provisions. Thus, Texas has two types of courts: constitutional courts (courts created by the Texas Constitution) and statutory courts (courts created by legislative enactment). Each newly created statutory court has its own enabling legislation that provides the court with its unique subject matter jurisdiction. As the 2008 Report of the Court Administration Task Force of the State Bar of Texas put it:[3]

> The Texas Constitution and statutes establish a four-tiered system of state courts: district courts, constitutional county courts, statutory county courts, and justice of the peace courts. Each court was intended to have its own jurisdiction, consistent between the counties, generally based upon the severity of the civil or criminal issues in question. The system, however, actually presents a patchwork array of courts with significant overlapping jurisdiction that differs from county to county. A court in one county may have completely different jurisdiction from the identically named court in the next county. To understand a particular court's jurisdiction, no less than six sources must be consulted. First, one must look to the Texas Constitution, then to the general statutory provision for all courts on a particular level, then to the specific statutory provision that authorizes the individual court, then to statutes creating other courts in the county which may affect the jurisdiction of the court in question, then to statutes dealing with specific subject matters (e.g., the Family Code), and finally to local rules that may specify a subject matter preference for particular courts (e.g., child protection cases). If this exercise can frustrate a licensed Texas attorney, surely the average Texan is bewildered.

This complicated system of courts has been criticized throughout Texas history, and there have been multiple attempts to address the structural problems that have plagued Texas courts.[4] Reform was recommended by the Citizens' Commission on the Texas Judicial System in a report issued in January 1991 and the State Bar Court Administration Task Force in October 2008. Some of these recommendations were passed by the Texas Legislature at the very end of the Special Session of June 2011, effective September 1, 2011.

How did we end up with this bewildering array of courts with differing subject matter jurisdictions? The Texas trial court system was developed for an essentially rural population.

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1 COURT STRUCTURE OF TEXAS, prepared by the Texas Office of Court Administration. *See* www.txcourts.gov.

2 TEX. CONST. art. V, § 1.

3 State Bar of Texas, *Court Administration Task Force Report,* Oct. 2008, http://www.texasbar.com/Content/ContentGroups/Judiciary/Supreme_Court_of_Texas/Court_Administration_Task_Force_Report.htm.

4 *See e.g.*, C. Raymond Judice, *The Texas Judicial System: Historical Development and Efforts Towards Court Modernization*, 14 S. TEX. L.J. 295, 314 (1973); Thomas M. Reavley, *Court Improvement: The Texas Scene*, 4 TEX. TECH. L. REV. 269, 269-270 (1973).

Counties were the basic governmental units, and the Constitution provides that each county has a county court. The county judge was the chief administrative officer of the county as well as the judge of the county court. The legislature gave the county court jurisdiction over probate matters and relatively minor civil litigation. Smaller areas within a county were served by justices of the peace who served as magistrates for various duties, such as conducting marriages and resolving breaches of the peace and petty civil disputes. District courts were the courts of general jurisdiction (having jurisdiction over all matters not within the jurisdiction of the county and justice courts). The legislature created enough to serve the population, which meant that one district court might serve several counties; and, perhaps because lawyers were scarce on the frontier, only district court judges were required to be lawyers.

As the state became more populous, the legislature created more courts. Most newly created district courts, which are funded by the state, served a single metropolitan area; now many counties have several district courts, and some of these district courts are limited to a particular specialty, such as the family and criminal district courts in Dallas and Harris County. However, some district courts still have jurisdiction over multiple counties.[5] The legislature also created new statutory courts, primarily county courts at law and probate courts to relieve the county judge of some or all the judicial duties of office. Over time, county courts at law were created to assist with the increasing caseloads of district courts as well. If the county needed another court and was willing to provide the needed resources, the legislature would create a county court at law (funded by the county) rather than a district court (largely funded by the state). Therefore, while all county courts at law have the same minimum subject matter jurisdiction, a number of them have more jurisdiction.[6] For example, the maximum amount in controversy jurisdiction of the county courts at law range from $200,000 (the minimum as of September 1, 2011) to $500,000 to $750,000 to $1 million to the unlimited dollar amount of the district court. One can never be certain of the full jurisdiction of a statutory court without consulting its own enabling statute.

The best way to determine whether a particular court has subject matter jurisdiction over a particular controversy is to check the amount in controversy. If the amount in controversy is within the court's jurisdictional limits, it has jurisdiction *unless* the particular type of controversy is excluded from its jurisdiction or another court has been granted exclusive jurisdiction over the controversy. Finally, be sure the court can grant the type of relief that you are requesting.

a. *Local Trial Courts of Limited Jurisdiction*

Read Rules 500-510; Gov't Code §§ 27.031, .032, .033; §§ 28.001, .002, .003, 30.00003.

(1) *Justice Courts*

Justice courts are the lowest ranking civil courts.[7] They have amount in controversy jurisdiction for amounts from $0.01 to a maximum of $10,000, and their jurisdiction is exclusive for amounts of $200 and less.[8] Their original jurisdiction is concurrent with district and county courts in civil cases involving more than $200 (county court) or more than $500 (the district

5 *See* In re McGuire, 134 S.W.3d 406 (Tex. App.—Waco 2004, no pet.)(stating that both the 278th and 87th district courts had jurisdiction over Leon County). See also www.txcourts.gov for an updated map of all Texas district courts.

6 *See* GOV'T CODE §25.003.

7 TEX. CONST. art. V; GOV'T CODE § 27.031-032.

8 TEX. CONST. art. V, §19.

court) up to the $10,000 Justice court limit.[9] Appeal from a judgment of the justice court is to the county court where a trial de novo is held, which can then be appealed to the court of appeals.[10] In cases involving claims for debt, an appeal may be taken to the statutory county court or, if there is no statutory county court within the jurisdiction, the district court.[11]

Justice courts have unique and exclusive original jurisdiction over forcible entry and detainer cases. Generally known as "FED", they are brought to determine the right of possession of premises, almost always involving landlord-tenant disputes. A claim for unpaid rent or damages is not part of the justice court's FED case and cannot be heard at the justice court level if the amount in controversy is outside the justice court's jurisdiction.[12] Moreover, the district court has exclusive jurisdiction if title to real property is at issue.[13]

Justice courts can grant relief as follows: They can foreclose mortgages and enforce liens on *personal* property, so long as the amount in controversy is within their jurisdiction.[14] They can issue writs of attachment, garnishment, and sequestration in cases otherwise within their jurisdiction.[15] They cannot issue injunctions or writs of mandamus or hear suits on behalf of the state for penalties, forfeitures, and escheats; and they cannot hear suits for divorce, defamation, declaration of title to land, or enforcement of liens on land.[16]

The Texas Supreme Court adopted new rules governing justice courts, effective August 31, 2013. The rules abolish the former division of the Justice Courts into a Small Claims Court and a Justice Court and take other steps to simplify Justice Court procedure. The new rules divide cases into four categories: (1) Small claims cases for damages of $10,000 or less, excluding statutory interest and court costs, but including attorney's fees; (2) Claims for debt payment of $10,000 or less, excluding statutory interest and court costs but including attorney's fees; (3) Repair and remedy suits brought by a residential tenant under the Texas Property Code to enforce a landlord's duty to repair or remedy a condition that materially affects the physical health and safety of an ordinary tenant, with a related claim for damages of $10,000 or less; (4) Eviction cases by a landlord to recover possession of real property under the Texas Property Code, with a related claim for unpaid rent of $10,000 or less.[17]

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9 GOV'T CODE § 27.031.

10 *See* Rule 506.

11 *See* Rule 509.8.

12 *See* Rule 500.3.

13 *See* Mitchell v. Armstrong Capital Corp., 911 S.W.2d 169 (Tex. App.—Houston [1st Dist.] 1995, writ denied); Martinez v. Daccarett, 865 S.W.2d 161 (Tex. App.—Corpus Christi 1993, no writ); Orange Laundry Co. v. Stark, 179 S.W.2d 841, 842 (Tex. App.—Amarillo 1944, no writ).

14 GOV'T. CODE § 27.031(a)(3).

15 GOV'T CODE § 27.032.

16 GOV'T CODE §§ 27.031(b); 27.032.

17 *See* Rule 503.3.

(2) *Municipal Courts*

Municipal courts serve primarily as the lowest-ranking *criminal* courts with exclusive jurisdiction over criminal cases that arise under the ordinances of the municipality and are punishable by a fine not to exceed $2,000 in all cases arising under ordinances that govern fire safety, zoning, or public health and sanitation or $500 in all other cases arising under a municipal ordinance.[18] Municipal courts have concurrent jurisdiction with the justice court in criminal cases that are punishable by fine only.[19] They have very narrow civil jurisdiction for the purpose of enforcing certain municipal ordinances.[20]

b. *Constitutional County Courts*

Read Gov't Code §§ 26.021, .022, .041, .043, .044, .050, .051.

Article 5, §16 of the Texas Constitution provides for the creation of county courts with jurisdiction "as provided by law." Therefore, their full jurisdiction is set forth in the statutes.[21]

Constitutional county courts have amount in controversy jurisdiction over amounts in excess of $200 ($200.01) through $10,000.[22] Therefore, they have concurrent jurisdiction with justice courts ($200.01-$10,000) and district courts ($500.01-$10,000). In some counties, they may have probate jurisdiction (outlined below). The constitutional county courts also have appellate jurisdiction over cases originating in justice or small claims court where the amount in controversy exceeds $20. All appellate review is by trial de novo.[23]

Constitutional county courts can grant the following relief: injunctions, mandamus, certiorari and all other writs necessary to enforce their jurisdiction.[24] They cannot hear suits for defamation, divorce, eminent domain, for forfeiture of a corporate charter, for the right to property valued at $500 or more and levied on under a writ of execution, for sequestration or attachment, for recovery of land, to enforce liens on land, or suits by the state for escheat.[25]

c. *District Courts*

Read Gov't Code §§ 24.007-.011.

District courts are the courts of general jurisdiction in Texas, presumed to have jurisdiction unless a contrary showing is made.[26] They have "residual jurisdiction"—by constitutional mandate they have jurisdiction in all cases unless exclusive jurisdiction is conferred on some other court.[27] Often the district court's "residual jurisdiction" can be determined only by checking the jurisdiction granted to other courts serving the same county or counties.

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18 TEX. CODE CRIM. PROC. art. 4.14(a) (2009); TEX. GOV'T CODE § 29.003.

19 TEX. CODE CRIM. PROC. art. 4.14(b) (2009); TEX. GOV'T CODE § 29.003.

20 TEX. GOV'T CODE § 30.00005(d).

21 *See* GOV'T CODE §§ 26.042-44, 26.051, 26.101-.354; CPRC §§ 51.001-002, 61.021-022.

22 GOV'T CODE §§ 26.042(a), 27.031(a)(1).

23 TEX. CONST. art. V., § 6, CPRC §51.001; GOV'T CODE § 28.052.

24 TEX. CONST. art. V, § 16; GOV'T CODE §§ 26.044, 26.051; CPRC §§ 61.021, 62.021, 63.002, 65.021.

25 GOV'T CODE § 26.043.

26 Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71, 75 (Tex. 2000).

27 *See* TEX. CONST. art. V, § 8; GOV'T. CODE §§ 24.007-008, 24.011.

2011 legislation attempted to make clear that the lower limit of the district court's jurisdiction is $500.01.[28] But because the statute does not confer exclusive jurisdiction of cases with an amount in controversy below $500, district courts continue to have jurisdiction over cases over $200. There is no upper limit to the district court's amount-in-controversy jurisdiction and district courts can grant all types of relief.

d. *Statutory or Legislative Courts*

By virtue of the Constitution's grant of legislative power to "establish such other courts as it may deem necessary," the Legislature has from time to time created special statutory courts.[29] The Legislature can create a statutory court with limited jurisdiction or jurisdiction equal to the constitutional dimensions of a district court.[30] The legislature may not, however, reduce the constitutional jurisdiction of a district court.[31]

(1) *County Courts at Law*

Read Gov't Code §§ 25.0001, .0003, .0004.

As noted above, each of these courts is created by a separate statute and with distinct jurisdictional parameters. In order to determine the exact jurisdiction of a county court at law, one must consult Chapter 25 of the Government Code for the specific statute that created the court.[32] GOV'T. CODE § 25.0003 provides some *minimum* jurisdictional parameters for statutory county courts. It gives all statutory county courts jurisdiction over civil cases in which the amount in controversy exceeds $500 but does not exceed $100,000 (excluding interest, punitive damages, attorney's fees, and costs), and over worker's compensation appeals, regardless of the amount in controversy,[33] as well as the jurisdiction of a constitutional county court (making the amount in controversy jurisdiction extend from $200.01 to $100,000).

(2) *Probate Courts*

Read Probate Code § 3(e), (f) and (g), § 4, § 5, § 5A, § 5B.

Even the Texas Supreme Court admits that, "Texas probate jurisdiction is, to say the least, somewhat complex."[34] The constitutional county court has general probate jurisdiction,[35] but it is often delegated by statute to other courts, usually the county court at law or a statutory court that only exercises probate jurisdiction called the "probate court." One jurisdictional scheme applies for counties that have a statutory probate court (any court to which probate jurisdiction is

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28 GOV'T CODE § 24.007(b)(as amended, effective Sept. 1, 2011). Before the amendment, there was some question concerning whether the lower limit was $200.01 or $500.01. *See* Dubai Petroleum Co. v. Kazi, 12 S.W.3d 71, 75 n.4 (Tex. 2000)(noting uncertainty about the district court's jurisdictional minimum).

29 TEX. CONST. art. V, § 2.

30 *See* Cook v. Nelius, 498 S.W.2d 455, 456 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ)(noting the civil jurisdiction of the court has not been extended by statute and dismissing the criminal case for want of jurisdiction).

31 Lord v. Clayton, 352 S.W.2d 718, 721-22 (Tex. 1962).

32 *See e.g.,* GOV'T. CODE § 25.0732 (El Paso); Comancho v. Samaniego, 831 S.W.2d 804 (Tex. 1992).

33 Thus, the amount in controversy jurisdiction of the county court at law ranges from in excess of $200 through $100,000.

34 *See* Palmer v. Coble Wall Trust Co., 851 S.W.2d 178 n.3 (Tex. 1992).

35 PROBATE CODE § 4.

delegated); another applies to those without a statutory probate court (the constitutional county court is the only one with probate jurisdiction).

(a) *Counties with No Statutory Probate Court*

In the counties in which there is no statute expressly giving probate jurisdiction to any court, the constitutional county court exercises general probate jurisdiction. Probate matters are handled in the constitutional county court until the matter becomes contested, in which case the county judge may (and on motion of a party, must) assign a sitting statutory probate judge to hear the contested matter or transfer the contested matter to the district court.[36] If the county has a county court at law in addition to the constitutional county court, the county court at law exercises both the probate jurisdiction of the constitutional county court, and the district court's jurisdiction to hear contested probate matters.[37] The court's amount in controversy jurisdiction for civil cases does not limit its probate jurisdiction.[38]

(b) *Counties with Statutory Probate Court*

In the counties in which a statute gives probate jurisdiction to a particular court, *either* that court (which is called the statutory probate court) *or* the constitutional county court may hear probate matters. But, if a probate matter filed in the constitutional county court becomes contested, the county judge may (and on motion of a party must) transfer the entire proceeding to the statutory probate court which will hear the matter as if originally filed there.[39]

(c) *Jurisdiction of the Statutory Probate Court*

All probate courts with original probate jurisdiction have "the power to hear all matters *incident to* an estate,"[40] matters in which the controlling issue is the settlement, partition, or distribution of an estate. Furthermore, the Probate Code grants to probate courts the jurisdiction to hear actions by or against a personal representative in probate, whether or not such matter is "appertaining to or incident to an estate."[41]

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36 PROBATE CODE § 5(b).

37 *See* GOV'T. CODE §§ 25.0003(c)(2); 25.1863.

38 Hailey v. Siglar, 194 S.W.3d 74 (Tex. App.—Texarkana 2006, pet. denied).

39 *See* PROBATE CODE § 5(c).

40 PROBATE CODE §§ 5(e), 5A; Seay v. Hall, 677 S.W.2d 19, 25 (Tex. 1984).

41 *See* PROBATE CODE §§ 5A(b), (c), and (e). This provision was added to the Probate Code by the Legislature in response to the Supreme Court decision in Seay v. Hall*, supra*. In Palmer v. Coble Wall Trust Co.*,* 851 S.W.2d 178 (Tex. 1992), the Texas Supreme Court held that under the amended statute, so long as a personal representative is a defendant, probate courts have jurisdiction over the matter, without respect to whether the suit is "appertaining to or incident to" an estate. *Id.* Therefore, the probate court has jurisdiction over wrongful death and survival actions brought by the decedent's estate's personal representative. The probate court also has jurisdiction over a divorce proceeding where one party to the divorce is a ward of the probate court and the proceeding directly impacts the "assimilation, distribution, and settlement" of the ward's estate through issues such as property division and child support. In re Graham, 971 S.W.2d 56 (Tex. 1998, orig. proceeding). However, the probate court does not have jurisdiction over a writ of garnishment proceeding against an heir to an estate because it is neither "incident" nor "appertaining to" the estate; the writ does not affect *how* the estate is administered, only *where* the funds should be directed. Falderbaum v. Lowe, 964 S.W.2d 744 (Tex. App.—Austin 1998, no pet.).

The probate court has "dominant jurisdiction" over any matters "appertaining to or incident to an estate pending" in that court. As a result, a claim filed in any other court that is "appertaining to or incident to" an estate under probate in the probate court is subject to dismissal upon the filing of a plea to the jurisdiction.[42] Furthermore, probate courts can transfer to themselves cases pending in other courts which are "appertaining to or incident to" an estate already under the probate court's jurisdiction or in which personal representative is a party.[43]

(3) *Eminent Domain Jurisdiction*

Read Prop. Code §§ 21.001-.003; 21.013.

The Property Code gives concurrent jurisdiction over eminent domain matters to the county court at law and the district court.[44] If the eminent domain proceeding involves a question of title or some other matter that the county court at law cannot adjudicate, the county court at law judge must transfer the case to the district court.[45] The county court at law has primary responsibility over eminent domain matters. Therefore, if the county has a county court at law, the case should be filed there.[46]

2. *Calculating Amount in Controversy*

The amount in controversy is determined by the amount that the plaintiff seeks to recover. Thus, when the jurisdictional statute values the amount in controversy on the amount of damages "alleged" by the plaintiff, the amount in controversy is determined by the pleadings. Rule 47(b) requires the petition to state that the damages sought are within the jurisdictional limits of the court, which is sufficient to put the case within the court's jurisdiction. The rule also provides that the opponent can object to the general allegation and require the pleading party to "specify the maximum amount claimed," which must be within the jurisdictional limits of the court. Or if there is no jurisdictional pleading, the court should look at the amount in controversy proved at trial.[47] All damages are included in the amount in controversy, even though some of the claimed damages are "speculative" and not likely to be recovered.[48]

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42 *See* Speer v. Stover, 685 S.W.2d 22, 23 (Tex. 1985).

43 PROBATE CODE § 5B. *See* Gonzalez v. Reliant Energy, Inc., 159 S.W. 3d 615 (Tex. 2005) (holding probate court cannot transfer survivor action when probate court not in county of proper venue); In re SWEPI, L.P., 85 S.W.3d 800 (Tex. 2002) (finding probate court lacked authority to transfer case that was not "appertaining to or incident to" decedent's estate).

44 PROP. CODE §§ 21.001-003.

45 *See* Christian v. City of Ennis, 830 S.W.2d 326 (Tex. App.—Waco 1992, no writ) (county court at law erred in ruling on motion to strike intervention that required determination of title to real property at issue). But note that county courts at law in some counties may be given the jurisdiction to determine title to real property in eminent domain matters by statute.

46 PROP. CODE § 21.013.

47 Peek v. Equipment Service Co., 779 S.W.2d 802 (Tex. 1989).

48 *See* United Services Automobile Association v. Brite, 215 S.W.3d 400, 402 (Tex. 2007) (holding that claims for recovery of front pay are included in amount in controversy although they were speculative and not likely recoverable).

a. ***Multiple Parties***

Ordinarily the claims of multiple plaintiffs against a single defendant are aggregated—the separate claims are added together to determine the amount in controversy.[49] However, aggregation should not apply to divest a court of jurisdiction on counterclaims asserted by multiple defendants.[50] On the other hand, if one plaintiff asserts separate, independent and distinct, though joinable, claims against multiple defendants, each claim is judged on its own and must independently satisfy the jurisdictional standards.[51]

b. ***Other General Rules for Calculating Amount in Controversy are as follows:***

(1) Include attorney's fees and punitive damages.[52] Note, however, that Government Code §25.0003(c), which fixes minimum jurisdictions for county courts at law, and some other jurisdictional statutes *exclude* attorney's fees, penalties, and statutory or punitive damages from amount in controversy.[53]

(2) Include interest, except interest "eo nomine", interest as interest. The jurisdictional statutes specifically exclude "interest" in determining the amount in controversy.[54] However, only interest *eo nomine* is actually excluded. Interest "as damages" *is* included. Interest *eo nomine* is interest sought in litigation that is provided for by a specific agreement or a statute for the detention of money. It is considered part of the debt to be recovered, although, strangely, it is not counted as part of the amount in controversy. Interest "as damages" is interest recoverable in addition to the amount of the debt as damages resulting from the failure to pay a sum when due. Equitable pre-judgment interest is considered interest "as damages."[55]

(3) Do not include costs of court. Filing fees, deposition costs, etc., that are taxed against the losing party at the end of the litigation are not part of the amount in controversy.[56]

(4) Multiple claims. A court can assert jurisdiction over claims *below* its minimum limits when they arise from the same transaction as the primary case.[57] The converse is not true: a court cannot acquire jurisdiction over claims in excess of its maximum jurisdictional limit.

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49 Texas City Tire Shop, Inc. v. Alexander, 333 S.W.2d 690, 693 (Tex. Civ. App.—Houston 1960, no writ); Tejas Toyota, Inc. v. Griffin, 587 S.W.2d 775, 776 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.); Box v. Assoc. Inv. Co., 389 S.W.2d 687, 689 (Tex. Civ. App.—Dallas 1965, no writ).

50 Smith v. Clary Corp., 917 S.W.2d 796 (Tex. 1996).

51 Borrego v. del Palacio, 445 S.W.2d 620, 622 (Tex. Civ. App.—El Paso 1969, no writ).

52 *See* Bybee v. Fireman's Fund Ins. Co., 331 S.W. 2d 910 (Tex. 1960) (attorney's fees included in amount in controversy).

53 *See* Sears, Roebuck & Co. v. Big Bend Motor Inn, Inc., 818 S.W.2d 542 (Tex. App.—Fort Worth 1991, writ denied) (attorney's fees and treble damages available under DTPA properly excluded from amount in controversy under GOV'T CODE § 25.2222 which excludes attorney's fees and "mandatory damages and penalties").

54 *See* GOV'T CODE §§ 25.003; 26.042; 27.031.

55 Barnes v. U.S. Fidelity and Guaranty Company, 279 S.W.2d 919, 921 (Tex. Civ. App.—Waco 1955, no writ).

56 MCDONALD & CARLSON, TEXAS CIVIL PRACTICE § 3.26.

57 Andel v. Eastman Kodak Company, 400 S.W.2d 584, 586 (Tex. Civ. App.—Houston 1966, no writ).

(5) Amendments increasing or decreasing claim. If the pleadings properly set out an amount in controversy within the court's jurisdictional limits, subsequent amendments *increasing or decreasing* the plaintiff's claim have no effect upon the court's jurisdiction if the increase is the result of the passage of time.[58] If, however, the amendments involve damages which could have been claimed at the time of the original filing, the amendment will defeat the court's jurisdiction. If a plaintiff has asserted a single claim, but alleged multiple theories of recovery, jurisdiction is determined by looking to the theory that would yield the largest award.[59]

(6) Non-monetary relief. Often, a suit for non-monetary relief will have no amount in controversy. Then, jurisdiction is in the district court under its residual jurisdiction.[60] When a recovery or foreclosure on property is sought in addition to monetary damages, the amount in controversy is the greater of the fair market value of the property sought or the amount of the underlying debt.

In re UNITED SERVICES AUTOMOBILE ASSOCIATION
307 S.W.3d 299
(Tex. 2010)

CHIEF JUSTICE JEFFERSON delivered the opinion of the Court.

Texas has some 3,241 trial courts[1] within its 268,580 square miles. Jurisdiction is limited in many of the courts; it is general in others. *Compare* TEX. GOV'T CODE § 25.0021 (describing jurisdiction of statutory probate court), *with id.* § 24.007-.008 (outlining district court jurisdiction); *Thomas v. Long,* 207 S.W.3d 334, 340 (Tex.2006) (noting that Texas district courts are courts of general jurisdiction). We have at least nine different types of trial courts,[3] although that number does not even hint at the complexities of the constitutional provisions and statutes that delineate jurisdiction of those courts. *See* OFFICE OF COURT ADMINISTRATION, 2008 ANNUAL REPORT, TEXAS JUDICIAL SYSTEM, SUBJECT-MATTER JURISDICTION OF THE COURTS *passim* (2008), *available at http:// www. courts. state. tx. us/ pubs/ AR 2008/ jud branch/2a-subject-matter-*

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58 *See* Mr. W. Fireworks Inc. v. Mitchell*,* 622 S.W.2d 576 (Tex. 1981); Flynt v. Garcia*,* 587 S.W.2d 109, 110 (Tex. 1979) (additional delinquent amounts that accrued under terms of agreement from date suit filed to trial date did not oust court of jurisdiction).

59 Lucey v. Southeast Texas Emergency Physician Assn.*,* 802 S.W.2d 300, 302 (Tex. App.—El Paso 1990, writ denied).

60 Super X Drugs, Inc. v. State*,* 505 S.W.2d 333, 336, (Tex. Civ. App.—Ft. Worth 1974, no writ).

1 Texas Courts Online Home Page, *http:// www. courts. state. tx. us/* (all Internet materials as visited March 24, 2010 and copy available in Clerk of Court's file). This figure includes municipal courts, whose jurisdiction is generally limited to criminal matters, although they may also hear certain civil cases involving dangerous dogs. *See* TEX. HEALTH & SAFETY CODE § 822.0421. [Editor's Note: only to determine that a dog is dangerous.] It also includes statutory probate courts.

3 Those courts include district courts, criminal district courts, constitutional county courts, statutory county courts, justice of the peace courts, small claims courts, statutory probate courts, and municipal courts. They also include family district courts which, although they are district courts of general jurisdiction, have primary responsibility for handling family law matters. OFFICE OF COURT ADMINISTRATION, 2008 ANNUAL REPORT, TEXAS JUDICIAL SYSTEM, SUBJECT-MATTER JURISDICTION OF THE COURTS 1, 3-18 (2008), *available at http:// www. courts. state. tx. us/ pubs/ AR 2008/ jud branch/2a-subject-matter-jurisdiction-of-courts.pdf*.

jurisdiction-of-courts.pdf;[4] GEORGE D. BRADEN ET AL., THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 367 (1977). Statutory county courts (of which county courts at law are one type)[5] usually have jurisdictional limits of $100,000, *see* TEX. GOV'T CODE § 25.0003(c)(1), unless, of course, they do not, *see, e.g.,* TEX. GOV'T CODE §§ 25.0732(a) (El Paso County), 25.0862(a) (Galveston County), 25.0942(a) (Gregg County), 25.1322(a) (Kendall County), 25.1802(a) (Nueces County), 25.2142(a) (Smith County); *see also Sultan v. Mathew,* 178 S.W.3d 747, 756 (Tex. 2005) (HECHT, J., dissenting) (observing that "[m]onetary jurisdictional limits on statutory county courts are generally from $500 to $100,000, but they vary widely from county to county, and many such courts have no monetary limits"). Appellate rights can vary depending on which court a case is filed in, even among trial courts with concurrent jurisdiction, and even when the same judge in the same courtroom presides over two distinct courts. *See, e.g., Sultan,* 178 S.W.3d at 752 (holding that there was no right of appeal to courts of appeals from cases originating in small claims courts, but recognizing that justice court judgment would be appealable); *see also id.* at 754-55 (HECHT, J., dissenting) (noting that the same justice of the peace hears small claims cases and justice court cases).[6] Consider the five-step process involved in determining the jurisdiction of any particular trial court:

> [R]ecourse must be had first to the Constitution, second to the general statutes establishing jurisdiction for that level of court, third to the specific statute authorizing the establishment of the particular court in question, fourth to statutes creating other courts in the same county (whose jurisdictional provisions may affect the court in question), and fifth to statutes dealing with specific subject matters (such as the Family Code, which requires, for example, that judges who are lawyers hear appeals from actions by non-lawyer judges in juvenile cases).

OFFICE OF COURT ADMINISTRATION, SUBJECT-MATTER JURISDICTION OF THE COURTS at 1.

Our court system has been described as "one of the most complex in the United States, if not the world." BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS, at 367; *see also Continental Coffee Prods. Co. v. Cazarez,* 937 S.W.2d 444, 449 (Tex. 1996) (voicing "concern[ ] over the difficulties created for the bench, the bar, and the public by the patchwork organization of Texas' several trial courts"); *Sultan,* 178 S.W.3d at 753 (HECHT, J., dissenting) (noting that Texas courts' "jurisdictional scheme . . . has gone from elaborate . . . to Byzantine"); *Camacho v. Samaniego,* 831 S.W.2d 804, 807 n. 4, 811 (Tex. 1992) (stating that "confusion and inefficiency are endemic to a judicial structure with different courts of distinct but overlapping jurisdiction" and observing that "there are still more than fifty different jurisdictional schemes for the statutory county courts"); TEXAS JUDICIAL COUNCIL, ASSESSING JUDICIAL WORKLOAD IN TEXAS' DISTRICT COURTS 2 (2001), *available at http:// www. courts. state. tx. us/ tjc/ TJC Reports/Final Report.pdf*

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[4] In a page-and-a-half, this report explains the subject matter jurisdiction of our appellate courts. OFFICE OF COURT ADMINISTRATION, SUBJECT-MATTER JURISDICTION OF THE COURTS at 1-2. The remainder of the eighteen-page, dual column, single-spaced document identifies, in painstaking detail, the various jurisdictional schemes governing our trial courts. *Id.* at 3-18.

[5] TEX. GOV'T CODE § 21.009(2) (" 'Statutory county court' means a county court created by the legislature under Article V, Section 1, of the Texas Constitution, including county courts at law, county criminal courts, county criminal courts of appeals, and county civil courts at law, but does not include statutory probate courts as defined by Section 3, Texas Probate Code.").

[6] Section 28.053 of the Government Code, at issue in *Sultan,* was recently amended to allow appeals to the court of appeals from de novo trials in county court on claims originating in small claims court. *See* Act of June 19, 2009, 81st Leg., R.S., ch. 1351, section 8, 2009 Tex. Gen. Laws 4274, 4274.

(observing that " 'the Texas trial court system, complex from its inception, has become ever more confusing as ad hoc responses are devised to meet the needs of an urban, industrialized society' " (quoting CITIZENS' COMMISSION ON THE TEXAS JUDICIAL SYSTEM, REPORT AND RECOMMENDATIONS INTO THE TWENTY-FIRST CENTURY 17 (1993))).

Proposals to modernize this antiquated jurisdictional patchwork have failed, but the Legislature has attempted to address one of its most worrisome aspects. In 1931, the Legislature passed "[a]n act to extend the period of limitation of any action in the wrong court." Act approved Apr. 27, 1931, 42d Leg., R.S., ch. 81, 1931 Tex. Gen. Laws 124, 124, current version at TEX. CIV. PRAC. & REM. CODE § 16.064. This statute tolls limitations for those cases filed in a trial court that lacks jurisdiction, provided the case is refiled in a proper court within sixty days of dismissal. TEX. CIV. PRAC. & REM. CODE § 16.064(a). The tolling provision does not apply, however, to those cases in which the first filing was made with "intentional disregard of proper jurisdiction." *Id.* § 16.064(b). We must decide today whether the plaintiff intentionally disregarded the jurisdictional limits applicable to county courts at law in Bexar County. Because we conclude that he did, in a way that cannot be cured by ordinary appellate review, we conditionally grant relief.

I. Background

James Steven Brite sued USAA, his former employer, alleging that it had illegally discriminated against him based on his age, violating the Texas Commission on Human Rights Act (TCHRA). *See generally United Servs. Auto. Ass'n v. Brite,* 215 S.W.3d 400 (Tex.2007) ("*Brite I* "). He filed suit in the Bexar County Court at Law No. 7, which has jurisdiction concurrent with that of the district court in "civil cases in which the matter in controversy exceeds $500 but does not exceed $100,000, excluding interest, statutory or punitive damages and penalties, and attorney's fees and costs, as alleged on the face of the petition . . . ." TEX. GOV'T CODE § 25.0003(c)(1). Brite asserted in his original petition that his damages exceeded the $500 statutory minimum, but he did not plead that his damages were below the $100,000 maximum. He pleaded that "[i]n all reasonable probability, [his] loss of income and benefits will continue into the future, if not for the balance of [his] natural life" and sought "compensation due Plaintiff that accrued at the time of filing this Petition" (back pay), "the present value of unaccrued wage payments" (front pay), punitive damages, and attorney's fees. *Id.*

Before limitations expired, USAA filed a plea to the jurisdiction, contending that Brite's damage claims exceeded the $100,000 jurisdictional limit of the statutory county court, excluding interest, statutory or punitive damages, and attorney's fees and costs. USAA argued that because Brite's annual salary was almost $74,000 when he was terminated, his front pay and back pay allegations alone exceeded the county court's jurisdictional maximum. Brite opposed, and the trial court twice denied, USAA's jurisdictional plea. Shortly thereafter, Brite amended his petition to seek damages of $1.6 million, and subsequently claimed in discovery responses that " 'his lost wages and benefits in the future, until age 65, total approximately $1,000,000.00.' " After a jury trial, the trial court awarded Brite $188,406 in back pay, $350,000 in front pay, $300,000 in punitive damages, $129,387 in attorney's fees, and prejudgment interest.

A divided court of appeals affirmed the trial court's judgment. We reversed, concluding that the amount in controversy at the time Brite filed suit exceeded $100,000, depriving the county court at law of jurisdiction over the matter. We dismissed the underlying suit for want of jurisdiction.

Within sixty days of our judgment dismissing the county court case, Brite refiled his claim in Bexar County district court. [The trial court denied defendant's summary judgment motion on the

statute of limitations defense and the court of appeals denied mandamus relief.] USAA now petitions this Court for mandamus relief.

* * *

IV. Was Brite's first suit filed with "intentional disregard of proper jurisdiction"?

Section 16.064 will not save a later-filed claim if the first action was filed "with intentional disregard of proper jurisdiction." TEX. CIV. PRAC. & REM. CODE § 16.064(b). USAA contends that is what happened here, while Brite asserts that a jury must decide whether he intended to evade jurisdiction, given that he vigorously denies doing so. We agree with USAA.

Noting "[t]he importance of simplifying Court procedure," the Texas Judicial Council in 1930 drafted the tolling statute. *See* SECOND ANNUAL REPORT OF THE TEXAS CIVIL JUDICIAL COUNCIL TO THE GOVERNOR AND SUPREME COURT, Bill No. 6, at 10-12 (1930). The Legislature made a single change-extending the refiling period from thirty to sixty days-and passed the bill. In its recommendation accompanying the bill, the Council noted

> [t]hat the wrong court is frequently and in good faith chosen by capable lawyers, [as] evidenced by the hundreds of cases cited in the annotations upon the subject given in Vernon's Annotated Texas Statutes, 9 pages upon Justice Court, 17 pages upon county court and 29 pages upon district court jurisdiction.

SECOND ANNUAL REPORT, at 11. The Council explained that the Texas bill was based on a Kentucky statute that tolled limitations for actions "commenced in due time and in good faith" in a court that lacked jurisdiction. *Id.* (citing CARROLL'S KY. STAT. § 2545 (1922)). The Council stated that its bill was "like that of Kentucky in substance, but . . . a definition of 'good faith' [is] supplied." *Id.* at 11-12. It is that definition that is at issue here.

As we noted in *Brite I,* "[t]he jurisdictional statute for county courts at law values the matter in controversy on the amount of damages 'alleged' by the plaintiff . . . ." *Brite I,* 215 S.W.3d at 402-03 (quoting TEX. GOV'T CODE § 25.0003(c)(1)). Here, Brite's petition omitted the statement required by our rules-that the "damages sought are within the jurisdictional limits of the court," TEX. R. CIV. P. 47(b)—and instead pleaded only that his damages exceeded $500. Brite has never contended that he was unaware of or confused about the county court's jurisdictional limitation. While such confusion would be understandable, as other statutory county courts (even those in one county adjacent to Bexar County)[10] have no such restriction, he instead argued that "the amount in controversy should not be calculated by the damages originally sued for, but instead by the amount of damages that, more likely than not, the plaintiff would recover." *Brite I,* 215 S.W.3d at 402. We rejected that argument, concluding that "[t]he amount in controversy in this case exceeded $100,000 at the time Brite filed suit."

The parties disagree about the proper standard for intentional disregard under the tolling statute, which requires that USAA "show[ ] in abatement that the first filing was made with intentional disregard of proper jurisdiction." TEX. CIV. PRAC. & REM. CODE § 16.064(b). Brite contends that intent is always a fact issue, inappropriate for resolution on summary judgment, while USAA asserts it has met its burden through circumstantial evidence of Brite's intent and that Brite is charged with knowledge of the law. We have never before addressed this issue.

We agree, in part, with USAA. Once an adverse party has moved for relief under the "intentional disregard" provision, the nonmovant must show that he did not intentionally

[10] *See* TEX. GOV'T CODE § 25.1322(a) (providing that county courts at law in Kendall County have concurrent jurisdiction with the district court); *see also* TEXAS ALMANAC 2010-11, at 221, 306.

disregard proper jurisdiction when filing the case. As it is the nonmovant who has this information, he should bear the burden of producing it.

We disagree, however, that a plaintiff's mistake about the court's jurisdiction would never satisfy the requirement. Section 16.064's intent standard is similar to that required for setting aside a default judgment, *see Craddock v. Sunshine Bus Lines, Inc.,* 134 Tex. 388, 133 S.W.2d 124, 126 (1939) (requiring new trial if defendant proves three elements, the first of which is that default was neither intentional nor due to conscious indifference), and we have held that a mistake of law may be a sufficient excuse. Moreover, section 16.064 was drafted precisely because "capable lawyers" often make "good faith" mistakes about the jurisdiction of Texas courts.

But while the tolling statute protects plaintiffs who mistakenly file suit in a forum that lacks jurisdiction, it does not apply to a strategic decision to seek relief from such a court-which is what happened here. Because Brite unquestionably sought damages in excess of the county court at law's jurisdiction, it matters not that he subjectively anticipated a verdict within the jurisdictional limits. For that reason, limitations was not tolled. His second suit, filed long after the expiration of the two year statute, is therefore barred.

V. Is USAA entitled to mandamus relief?

Finally, we must decide whether mandamus relief is appropriate. Deciding whether the benefits of mandamus outweigh the detriments requires us to weigh public and private interests, recognizing that-rather than categorical determinations—"the adequacy of an appeal depends on the facts involved in each case." *In re McAllen Med. Ctr., Inc.,* 275 S.W.3d 458, 469 (Tex. 2008); *In re The Prudential Ins. Co. of Am.,* 148 S.W.3d 124, 136-37 (Tex. 2004).

In *CSR Ltd. v. Link,* 925 S.W.2d 591, 596-97 (Tex. 1996), we conditionally granted mandamus relief ordering the trial court to grant CSR's special appearance in a toxic tort case. We held that "extraordinary circumstances" (namely the enormous number of potential claimants and the most efficient use of the state's judicial resources) warranted extraordinary relief, even though it was typically unavailable for the denial of a special appearance.

And although "mandamus is generally unavailable when a trial court denies summary judgment, no matter how meritorious the motion," that rule is based in part on the fact that "trying a case in which summary judgment would have been appropriate does not mean the case will have to be tried twice"—a justification not applicable here. USAA has already endured one trial in a forum that lacked jurisdiction (and then a subsequent appeal to the court of appeals and this Court) and is facing a second trial on a claim that we have just held to be barred by limitations. Two wasted trials are not "[t]he most efficient use of the state's judicial resources." Denying mandamus relief here would thwart the legislative intent that non-tolled TCHRA claims be brought within two years (as well as the tolling provision's inapplicability to suits filed with intentional disregard of proper jurisdiction), and we should not "frustrate th[at] purpose[ ] by a too-strict application of our own procedural devices."

Because the extraordinary circumstances presented here merit extraordinary relief, we conditionally grant the writ and direct the trial court to grant USAA's motion for summary judgment. We are confident the trial court will comply, and our writ will issue only if it does not.

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3. *Procedure for Raising Lack of Subject Matter Jurisdiction*

a. *Plea to the Jurisdiction*

It is astounding that the subject matter jurisdiction of the trial courts is so difficult to determine when the consequences are so important—a court without subject matter jurisdiction has no power to act and any actions taken are void. The proper challenge to a court's subject matter jurisdiction is a "plea to the jurisdiction,"[61] not a "motion to dismiss", as in federal court. (There is no "motion to dismiss" in the Texas Rules of Civil Procedure, although courts and litigants often act as if there is.) A motion for summary judgment may also be used to raise lack of subject matter jurisdiction.[62] Because a court without subject matter jurisdiction has no power over the controversy, subject matter jurisdiction can be raised at any time, by the parties or by the court. The court must dismiss the case because it has no power to do anything else. If the case was filed in the wrong court in good faith, the statute of limitations is tolled for 60 days from the date of dismissal to allow the plaintiff to refile in the proper court.[63]

b. *Appeal/Mandamus*

Plaintiff can appeal from a trial court's determination of lack of subject matter jurisdiction and the resultant dismissal and, if successful, the appellate court will remand for a full trial. If, however, the trial court erroneously asserts jurisdiction, defendant's only remedy is an appeal after final judgment, except that "governmental units" asserting immunity are allowed an interlocutory appeal by statute.[64] The Texas Supreme Court has held that mandamus is not available for review of a trial court's determination of subject matter jurisdiction before a trial on the merits.[65] But the mandamus standards have changed, and mandamus might be allowed in the appropriate case.[66]

c. *No Waiver*

Subject matter jurisdiction is unusual in that it cannot be waived. It can be raised for the first time on appeal or, even later, when the judgment is being attacked collaterally (in a separate proceeding). This is sometimes called "fundamental error." A court lacking jurisdiction over subject matter has no power over the controversy and must dismiss. Unless there is some statutory scheme involving subordinate and dominant jurisdictions (e.g., eminent domain[67] and probate[68] jurisdiction), a court without jurisdiction may not transfer the case, but can only dismiss so that the case can be refiled.

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61 *See* Rule 85.

62 Thomas v. Long, 207 S.W.3d 334 (Tex. 2006).

63 CPRC § 16.064.

64 *See* CPRC § 51.014(8) (1997 amendment). Moreover, immunity from suit, an issue of subject matter jurisdiction, can be raised for the first time in an interlocutory appeal. Rusk County State Hospital v. Black, 392 S.W.3d 88 (Tex. 2012).

65 Bell Helicopter Textron Inc. v. Walker, 787 S.W.2d 954, 955 (Tex. 1990). *But see* Geary v. Peavy, 878 S.W.2d 607 (Tex. 1994); In re Graham, 971S.W.2d 56 (Tex. 1998, orig. proceeding) (competing jurisdiction in family law disputes addressed by mandamus).

66 *See* In re McAllen Med. Ctr., Inc., 275 S.W.3d 458, 469 (2008).

67 PROP. CODE § 21.001.

68 PROP. CODE § 5b.

4. *Standing, Ripeness and Immunity*

Subject matter jurisdiction is not limited to issues concerning whether the type of case and amount in controversy fit the limits set out in the court's creating statute. A court does not have subject matter jurisdiction when the plaintiff lacks standing, when the suit is not yet ripe for decision, and when the defendant is immune from suit (as distinguished from immune from liability). Often, these issues involve complex factual inquiries far different from the amount in controversy type issues.

5. *Cases Filed in the Texas Courts*

What kinds of cases are filed in the Texas courts? First of all, the numbers are decreasing—in 2014, civil case filings were at their lowest number since 2004. The 2014 annual report of the Office of Court Administration[69] reports that in 2014, 847,000 civil, criminal, and juvenile cases were added to the dockets of the state's 458 district courts. Civil cases accounted for 25% of all cases filed during 2014, and criminal cases accounted for nearly 32% of all cases added. Family law cases (including divorce proceedings) comprised almost 40% of the cases filed. The majority of criminal cases were drug offenses (drug possession, sale, and manufacture. Juvenile cases comprise the balance of cases filed.

Of civil cases filed in 2014, almost 30% were tax collection cases. 20% were debt and contract cases, 20% were civil cases related to criminal matters, and 15% injury or damage cases. How many of these civil cases went to trial? In 2014, overall, only 0.5% of civil cases went to a jury and 15% were tried to a judge without a jury.

Usually, 11,000 to 12,000 appeals are filed in the courts of appeals, about half of them civil cases, and this remained true in 2014. The Supreme Court of Texas disposed of 827 petitions for review in 2014, and granted only 93 of them, the lowest number in 30 years.

Problems

What court or courts have jurisdiction in the following situations? Explain your answer.

1.(a) A landlord wants to evict a tenant for nonpayment of rent and to recover $12,000 in rent owed.

(b) If filed in justice court, what happens if the alleged tenant responds that she is the owner of the property and the alleged landlord has no right to the property?

2. A divorce action with an estate worth no more than $500.

3. A creditor wants to file suit to recover a debt of $400 and to foreclose on the automobile that is worth $20,000 that secures the debt.

4. Trespass to try title action. (*See* Rules 783-809. What is the purpose of this special proceeding?)

5. The plaintiff alleges that he was bitten by the defendant's dog. The plaintiff files suit to recover $300 for medical expenses and to enjoin the defendant from letting the dog out.

6. Two plaintiffs, each suing to recover $20,000 (two separate debts) against a single defendant.

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[69] Found at www.txcourts.gov.

7. In a class action, each of 50 named plaintiffs (purporting to represent a class of 10,000 plaintiffs) claims $200 damages from a single defendant.

8. A single plaintiff sues two defendants for $4500 each (two promissory notes).

9.(a) A creditor sues to recover the amount due under the terms of a promissory note. She seeks to recover $495 principal; $50 interest charged until the date the debt was due as provided in the note; $1000 interest from the date the note was due until suit was filed; and $1000 attorney's fees.

(b) Does your answer change if the case doesn't go to trial for another 4 years and immediately before trial the plaintiff amends her pleadings to seek another $3000 in interest that has accrued during the time the case has been pending and an additional $1000 in attorney's fees that have accrued during this time?

10.(a) The county wants to put a road through a piece of property. The county has offered $10,000 for the property it seeks to condemn, but the owner has refused, claiming the property is worth more.

(b) Does your answer change if everyone agrees that the property is worth $10,000, but there is a dispute over who gets the money because two parties each claim that they own the property?

11.(a) Probate of a will.

(b) If one of the assets of the estate is the deceased's survival action concerning the accident in which he died, where can that action be tried?

(c) The beneficiaries of the will want to file suit against the personal representative of the estate for fraud committed against the estate.

B. Judges in Texas

1. *Judicial Administration*

The Texas Supreme Court has constitutional responsibility for the efficient administration of the judicial system and possesses the authority to make rules of administration applicable to the courts.[1] Under the direction of the chief justice, the Office of Court Administration aids the Supreme Court in carrying out its administrative duties by providing administrative support and technical assistance to all courts in the state.

The chief justice of the Supreme Court, presiding judge of the Court of Criminal Appeals, chief justices of each of the 14 courts of appeals, and judges of each of the trial courts are generally responsible for the administration of their respective courts. Furthermore, there is a local administrative district judge in each county, as well as a local administrative statutory county court judge in each county that has a statutory county court. In counties with two or more district courts, a local administrative district judge is elected by the district judges in the county for a term not to exceed two years.[2] Similarly, in counties with two or more statutory county courts, a local administrative statutory county court judge is elected by the statutory county court judges for a term not to exceed two years. The local administrative judge is charged with

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1 TEX. CONST., art. V, §31.

2 GOV'T CODE, §§74.091, 74.0911.

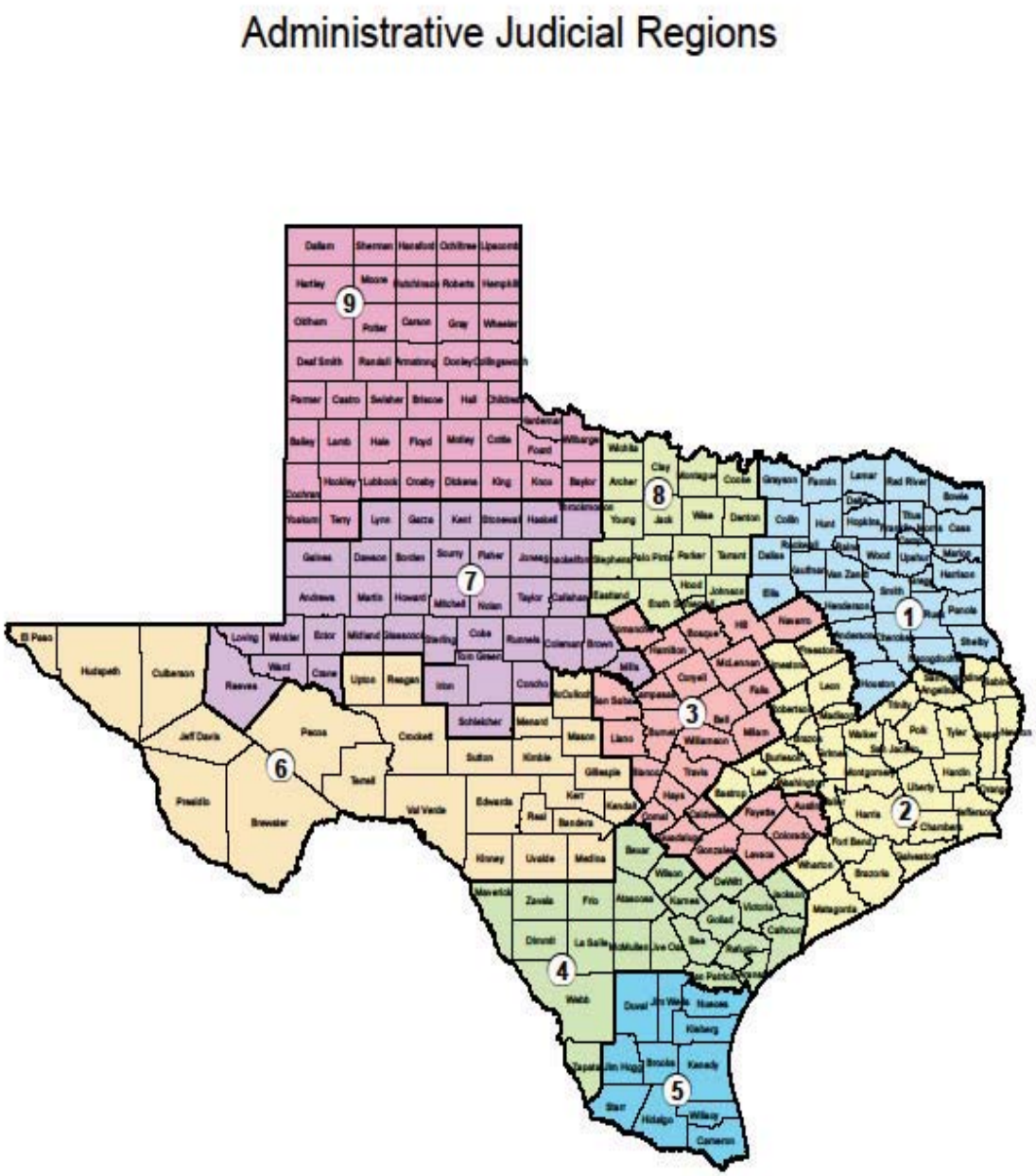
implementing the local rules of administration, supervising the expeditious movement of court caseloads, and other administrative duties.[3]

In addition to these locally elected administrative judges, the Governor, with the advice and consent of the Senate, appoints presiding judges for each of nine administrative judicial regions to aid in the administration of the trial courts of the state. A map of the administrative regions appears on the next page. The appointed presiding judge must be one of the active or retired district judges in the region, or a retired appellate court judge who has district court experience residing in each region. The presiding judge of an administrative judicial region may assign a judge to handle a case or docket of an active judge in the region who is unable to preside (due to recusal, illness, vacation, etc.) or who needs assistance with a heavy docket or docket backlog. These "assigned judges" may be active judges of other courts in the region or may be individuals residing in the region who used to serve as active judges.[4]

The chief justice of the Supreme Court may convene periodic conferences of the chief justices of the courts of appeals, as well as periodic conferences of the nine presiding judges to ensure the efficient administration of justice in the courts of the state.

3 GOV'T CODE, §74.092 (detailing administrative responsibilities of local administrative judge).

4 GOV'T CODE, §§74.054, 74.056, 74.057 (discussing assignment of judges).


Administrative Judicial Regions
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2. *Disqualification and Recusal*

Read Rule 18a, 18b; Tex. Const. Art. V., § 11; Gov't Code § 74.053; CPRC § 30.016.

In Re UNION PACIFIC RESOURCES COMPANY
969 S.W.2d 427
(Tex. 1998)

CHIEF JUSTICE PHILLIPS delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE ENOCH, JUSTICE SPECTOR, JUSTICE OWEN, JUSTICE ABBOTT, and JUSTICE HANKINSON join.

In this case, the court of appeals conditionally issued a writ of mandamus compelling the trial court to vacate its order denying a recusal motion. *Monroe v. Blackmon*, 946 S.W.2d 533 (Tex. App.—Corpus Christi 1997). Because the complaining party has an adequate remedy by appeal, mandamus was improper. We therefore conditionally grant the petition for writ of mandamus. We express no opinion regarding whether the trial court abused its discretion in denying the recusal motion.

Jeffrey Lee Monroe and Gena Jo Monroe sued Union Pacific Resources Company and other defendants for personal injury damages. The Monroes moved to recuse the trial judge, the Honorable Max Bennett. The Monroes alleged, as grounds for recusal, that Carlos Villareal, a partner in the law firm representing Union Pacific in the underlying lawsuit, was currently representing Judge Bennett, in his official capacity, in an unrelated lawsuit. The Monroes alleged that Judge Bennett's impartiality might reasonably be questioned because of the attorney-client relationship with Mr. Villareal. Judge Bennett declined to recuse himself. Pursuant to Texas Rule of Civil Procedure 18a(d) Judge Bennett forwarded the motion to recuse to the presiding judge for the administrative judicial district. The presiding judge appointed the Honorable Robert Blackmon, Nueces County district judge, to hear the recusal motion. After a hearing at which Judge Bennett appeared and testified, Judge Blackmon granted the motion ordering Judge Bennett's recusal. Judge Bennett then wrote to Judge Blackmon requesting a rehearing on the recusal matter. In response to Judge Bennett's request, Judge Blackmon held another hearing and reversed his ruling. In response to this second ruling, the Monroes petitioned the court of appeals for writ of mandamus to direct Judge Blackmon to vacate his order and grant the motion for recusal. The court of appeals sitting en banc divided evenly on the petition, and the Chief Justice of this Court assigned the Honorable Alfonso Chapa, Retired Chief Justice of the Fourth Court of Appeals, to the case. *See* TEX. GOV'T CODE § 74.003(b); TEX. R. APP. P. 41.2(b). With Justice Chapa sitting, the court of appeals conditionally granted the Monroes' petition for writ of mandamus. Union Pacific then sought mandamus relief from this Court.

Judges may be removed from a particular case either because they are constitutionally disqualified, TEX. CONST. art. V, § 11, because they are subject to a statutory strike, TEX. GOV'T CODE § 74.053(d), or because they are recused under rules promulgated by this Court. TEX. R. CIV. P. 18a, 18b; TEX. R. APP. P. 16. The grounds and procedures for each type of removal are fundamentally different. *See generally* Kilgarlin & Bruch, *Disqualification and Recusal of Judges*, 17 ST. MARY'S L.J. 599 (1986). When a judge continues to sit in violation of a constitutional proscription, mandamus is available to compel the judge's mandatory disqualification without a showing that the relator lacks an adequate remedy by appeal. This makes sense, because any orders or judgments rendered by a judge who is constitutionally disqualified are void and without effect. Likewise, on timely objection, the disqualification of an

assigned judge who is not a retired judge is mandatory under section 74.053(d) of the Texas Government Code and any orders entered by a trial judge in a case in which he is disqualified are void. Therefore, the objecting party is also entitled to mandamus relief without a showing that there is no adequate remedy by appeal.

In contrast, the erroneous denial of a recusal motion does not void or nullify the presiding judge's subsequent acts. While a judgment rendered in such circumstances may be reversed on appeal, it is not fundamental error and can be waived if not raised by proper motion. Recognizing this distinction, our Rules of Civil Procedure expressly provide for appellate review from a final judgment after denial of a recusal motion. *See* TEX. R. CIV. P. 18a(f). If the appellate court determines that the judge presiding over the recusal hearing abused his or her discretion in denying the motion and the trial judge should have been recused, the appellate court can cure any harm by reversing the trial court's judgment and remanding for a new trial before a different judge. This procedure is no different than the correction of any trial court error through the normal appellate process. As we have observed, "an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ . . . . [T]he 'delay in getting questions decided through the appellate process . . . will not justify intervention by appellate courts through the extraordinary writ of mandamus.' " *Walker v. Packer*, 827 S.W.2d 833, 842 (Tex. 1992).

The court of appeals abused its discretion by issuing writ of mandamus when the complaining party has an adequate remedy by appeal. *See* TEX. R. CIV. P. 18a(f). We therefore conditionally grant the petition for writ of mandamus and direct the court of appeals to withdraw its order conditionally granting writ of mandamus against the trial court. TEX. GOV'T CODE § 22.002(a).

JUSTICE HECHT delivered a concurring opinion.

JUSTICE GONZALEZ did not participate in the decision.

Notes & Questions

1. *Constitutional Disqualification*. TEX. CONST. art. V, § 11 provides: "No judge shall sit in any case wherein he may be interested, or where either of the parties may be connected with him, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when he shall have been counsel in the case." Should any of these situations arise, the judge is said to be constitutionally disqualified from sitting. Notice that the disqualification standards set out in Rule 18b(1) are identical to those stated in the Constitution. Any order involving judicial discretion by a constitutionally disqualified judge is "absolutely void" or a "nullity."[1] Thus, disqualification cannot be waived, and can be raised at any point in the proceeding, for the first time on appeal, or by collaterally attacking the order issued by the disqualified judge. Grounds for disqualification are narrow and seldom invoked.

2. *Recusal*. The rules provide for broader grounds for removing a judge called "recusal." Actually, Rule 18b contains grounds for both disqualification and recusal. The grounds for recusal, set out in Rule 18b(2) are different from those for disqualification. For instance, a judge who is biased or prejudiced concerning the subject matter or a party involved in a proceeding is not *disqualified,* but the bias or prejudice may be grounds for recusal. The orders rendered by a

[1] Freedom Communications, Inc. v. Coronado, 372 S.W.3d 621, 624 (Tex. 2012); Buckholts Indep. School Dist. v. Glaser, 632 S.W.2d 146, 148 (Tex. 1982).

trial judge who should be recused are not void—they are simply reviewable on appeal. And recusal, unlike disqualification, may be waived.

3. *Statutory strikes*. Judges may also be disqualified from sitting if a party files a proper statutory strike under § 74.053 of the Texas Government Code. This statutory strike may be used only to disqualify a retired or former judge who has been assigned to a particular court as a visiting judge—a judge assigned to hear matters filed in a court to which the judge has not been elected or appointed.

4. *Procedure.* Rule 18a contains the procedure that must be followed when filing a motion for disqualification or recusal. Read it carefully. Remember, for non-constitutional "recusals," not constitutional "disqualifications," any complaint is waived if not made timely in writing.[2] Also note that after a motion is filed, if the judge refuses to voluntarily recuse himself or herself from the case, the judge under attack must request the presiding judge to assign another judge to hear the motion.[3] Except for "good cause," the judge may take no further action in the case once the motion is filed until after the motion has been resolved in favor of allowing the judge to proceed. Because trial procedures stop, a frivolous recusal motion may be used as a stalling mechanism. To limit this tactic, CPRC § 30.016 allows a judge to continue to preside over a case after a tertiary (third or subsequent) recusal motion. (The statute is invoked whether the motion is the first against a third new judge or the third against the same judge.)[4] In this situation, the parties go forward with simultaneous "parallel" proceedings: both the trial in the primary cause of action and the recusal/disqualification hearing. If it is found that that the judge should be recused, what happens in the trial court? It is likely that the trial proceeding must be started over.

5. *Availability of mandamus.* What is "mandamus" and why might a party seek mandamus? We will address that issue more broadly later. But be sure that you understand what *In re Union Pacific* holds with respect to mandamus in the context of disqualification and recusal.

6. *Judge Bennett's mandamus proceeding.* The mandamus proceeding in which the Hunt Hermansen firm represented Judge Bennett raises another interesting event in Texas procedure. Here is what happened: Counsel represented approximately 700 Peruvian plaintiffs claiming injuries from exposure to toxic gases and chemicals, and filed 17 lawsuits in Nueces County. Each petition named different groups of plaintiffs, and each was randomly assigned to one of the eight district courts in the county. The first was assigned to Judge Bennett's court; the last (and only the last) was assigned to the 105th. Two hours later, counsel filed an amended petition in the 105th adding approximately 700 plaintiffs and instructed the clerk to issue citation for service upon the defendants in that case. Five days later counsel filed motions to nonsuit the other 16 lawsuits. Judge Bennett did not sign the order of nonsuit in the case pending in his court, but instead signed a "Sua Sponte Order Abating Dismissal and Setting Hearing on Transfer, Consolidation and Sanctions." Meanwhile, the defendants removed all of the cases to federal

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[2] Pettit v. Laware, 715 S.W.2d 688 (Tex. Civ. App.—Houston 1986, writ ref'd n.r.e.); Buckholts Indep. School Dist. v. Glaser, 632 S.W.2d 146 (Tex. 1982).

[3] Rule 18a (c) and (d); McLeod v. Harris, 582 S.W.2d 772 (Tex. 1979). The "presiding judge" has administrative duties over the courts in the administrative judicial region. *See* Court Administration Act, GOV'T. CODE §§ 74.001 et seq. The presiding judge is appointed by the Governor. *See* State Bar of Texas, *Court Administration Task Force Report,* Oct. 2008, http://www.texasbar.com/Content/ContentGroups/Judiciary/Supreme_Court_of_Texas/Court_Administration_Task_Force_Report.htm (recommending changes to method of selection of presiding judge).

[4] As an additional disincentive: the party making the tertiary motion will be assessed the opposing party's costs and attorney's fees if the motion is denied. CPRC § 30.016(c).

court where they were dismissed on grounds of forum non conveniens. Nevertheless, Judge Bennett held his sanctions hearing, and ordered plaintiffs' counsel to pay $10,000 each as sanctions for abusing the judicial process. The San Antonio Court of Appeals overturned the sanctions order, holding that Judge Bennett did not have the power to sanction after the motion for nonsuit was filed. The Texas Supreme Court reversed, upholding the sanctions order.[5]

7. *"Interested" judge.* A judge is "interested" in a case, and thus constitutionally disqualified, "if an order or judgment in the case will directly 'affect him to his personal or pecuniary loss or gain.' "[6] The court further noted that, even in cases where a judge may not be legally subject to disqualification, the judge's "sense of propriety" is often a good reason for voluntary recusal. However, in *Sun Oil Co. v. Whitaker,*[7] Justice Walker recused himself from a case involving Sun Oil Co. because he and his family owned land under a Sun Oil lease which was due to be renegotiated shortly. Despite Justice Walker's misgivings, the remaining Justices said in a per curiam opinion: "We hold that Justice Walker is qualified to participate in the decision of this cause on rehearing and, further, that it is his duty to serve." Does the result satisfy the "direct pecuniary or personal interest" test the court announces? The court noted that the case presented "other considerations" preventing Justice Walker's voluntary recusal when he was not constitutionally disqualified. The court was evenly divided, and Justice Walker's vote was needed to break the tie. Does this make his participation even more problematic?

8. *After-acquired knowledge.* Suppose you try a case against X Company before Judge Snarley. You lose and a judgment is rendered against your client, Y Company, for $100,000. No appeal is taken and the judgment becomes final. Six months later, you learn that Judge Snarley owned 60 shares of X Company at the time of trial. Is there anything you can do at this late date? The judge is "interested" and thus constitutionally disqualified. Therefore, the judgment is "absolutely void," "a nullity," and may be collaterally attacked.[8] However, this consequence does not attach to recusals based on non-constitutional grounds, and they may be waived by failure to timely protest. What is to be done if a non-constitutional basis for recusal is discovered after the trial is completed? For instance, what if it was determined after judgment that the trial judge was the first cousin to a party's attorney, and related to that attorney's client "in the fourth degree?"[9] Should the opponent be given the opportunity to raise it at that time? Should such a situation be excepted from the time periods mandated in Rule 18b? What if the lawsuit was pending in a rural county with a small population, and the parties had been in business together for almost 50 years?[10] Do you see any problem with allowing a party to raise such a point after the trial is completed?

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5 *See* In Re Bennett, 960 S.W.2d 35 (Tex. 1997).

6 Freedom Communications, Inc. v. Coronado, 372 S.W.3d 621, 624 (Tex. 2012)(holding that a judge who took a bribe for denying defendant's motion for summary judgment was "interested" and constitutionally disqualified). *See also* Rio Grande Valley Gas Co. v. City of Pharr, 962 S.W.2d 631 (Tex. App.—Corpus Christi 1997, petition dism'd w.o.j.) (holding that the judge's status as taxpayer alone is not sufficient to rise to the level of interest necessary for constitutional disqualification).

7 483 S.W.2d 808 (Tex. 1972).

8 *See* Fry v. Tucker, 202 S.W.2d 218 (Tex. 1947).

9 *See* Sun Exploration and Production Co. v. Jackson, 783 S.W.2d 202 (Tex. 1989)(SPEARS, J. concurring)(stating that the trial judge who was related to each of the defendants in the fourth degree should have disclosed the familial relationships).

10 *Id*. (GONZALEZ, J. concurring).

9. *Judge as counsel in the case.* The disqualification affecting a judge who has been a counsel in the case operates to disqualify a judge whose law firm has been a counsel while he was a member.[11]

10. *Proof of judicial bias.* Bias relevant to recusal must be from an extra-judicial source. That is, it cannot be proven from the judge's conduct during the case in which the question is raised.[12]

11. *Degrees of kinship—consanguinity (blood relatives).* Under Rule 18b(1)(c) and (2)(g), the judge may not be related to a party by affinity (marriage) or consanguinity (blood) within the third degree nor to an attorney in the case within the first degree.[13]

12. *Degrees of kinship—affinity (relatives by marriage).* The judge and the judge's spouse are related by affinity in the first degree, but other relationships are treated as if the judge had the same relatives as the spouse. So, if the spouse and X are related in the third degree of consanguinity (that is, by blood), then the judge and X are related in the third degree of affinity.[14]

CAPERTON
v.
A. T. MASSEY COAL COMPANY, INC.
United States Supreme Court
129 S.Ct. 2252 (2009)

JUSTICE KENNEDY delivered the opinion of the Court.

In this case the Supreme Court of Appeals of West Virginia reversed a trial court judgment, which had entered a jury verdict of $50 million. Five justices heard the case, and the vote to reverse was 3 to 2. The question presented is whether the Due Process Clause of the Fourteenth Amendment was violated when one of the justices in the majority denied a recusal motion. The basis for the motion was that the justice had received campaign contributions in an extraordinary amount from, and through the efforts of, the board chairman and principal officer of the corporation found liable for the damages.

Under our precedents there are objective standards that require recusal when "the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable." Applying those precedents, we find that, in all the circumstances of this case, due process requires recusal.

I

In August 2002 a West Virginia jury returned a verdict that found respondents A. T. Massey Coal Co. and its affiliates (hereinafter Massey) liable for fraudulent misrepresentation, concealment, and tortious interference with existing contractual relations. The jury awarded

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11 Tesco American, Inc. v. Strong Industries, Inc., 221 S.W.3d 550 (Tex. 2006); In re O'Connor, 92 S.W. 3d 446 (Tex. 2002).

12 *See* Dow Chem. Co. v. Francis, 46 S.W.3d 237 (Tex. 2001) (judicial remarks during trial ordinarily do not support bias or impartiality challenge); Grider v. Boston Co., 773 S.W.2d 338 (Tex. App.—Dallas 1989, writ den.).

13 GOV'T CODE § 573.025.

14 *Id*.

petitioners Hugh Caperton, Harman Development Corp., Harman Mining Corp., and Sovereign Coal Sales (hereinafter Caperton) the sum of $50 million in compensatory and punitive damages.

In June 2004 the state trial court denied Massey's post-trial motions challenging the verdict and the damages award, finding that Massey "intentionally acted in utter disregard of [Caperton's] rights and ultimately destroyed [Caperton's] businesses because, after conducting cost-benefit analyses, [Massey] concluded it was in its financial interest to do so." In March 2005 the trial court denied Massey's motion for judgment as a matter of law.

Don Blankenship is Massey's chairman, chief executive officer, and president. After the verdict but before the appeal, West Virginia held its 2004 judicial elections. Knowing the Supreme Court of Appeals of West Virginia would consider the appeal in the case, Blankenship decided to support an attorney who sought to replace Justice McGraw. Justice McGraw was a candidate for reelection to that court. The attorney who sought to replace him was Brent Benjamin.

In addition to contributing the $1,000 statutory maximum to Benjamin's campaign committee, Blankenship donated almost $2.5 million to "And For The Sake Of The Kids," a political organization formed under 26 U. S. C. §527. The §527 organization opposed McGraw and supported Benjamin. Blankenship's donations accounted for more than two-thirds of the total funds it raised. This was not all. Blankenship spent, in addition, just over $500,000 on independent expenditures-for direct mailings and letters soliciting donations as well as television and newspaper advertisements-" 'to support … Brent Benjamin.' "

To provide some perspective, Blankenship's $3 million in contributions were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own committee. *Id.,* at 288a. Caperton contends that Blankenship spent $1 million more than the total amount spent by the campaign committees of both candidates combined. Brief for Petitioners 28.

Benjamin won. He received 382,036 votes (53.3%), and McGraw received 334,301 votes (46.7%). App. 677a.

In October 2005, before Massey filed its petition for appeal in West Virginia's highest court, Caperton moved to disqualify now-Justice Benjamin under the Due Process Clause and the West Virginia Code of Judicial Conduct, based on the conflict caused by Blankenship's campaign involvement. Justice Benjamin denied the motion in April 2006. He indicated that he "carefully considered the bases and accompanying exhibits proffered by the movants." But he found "no objective information . . . to show that this Justice has a bias for or against any litigant, that this Justice has prejudged the matters which comprise this litigation, or that this Justice will be anything but fair and impartial." *Id.,* at 336a-337a. In December 2006 Massey filed its petition for appeal to challenge the adverse jury verdict. The West Virginia Supreme Court of Appeals granted review.

In November 2007 that court reversed the $50 million verdict against Massey. The majority opinion, authored by then-Chief Justice Davis and joined by Justices Benjamin and Maynard, found that "Massey's conduct warranted the type of judgment rendered in this case." It reversed, nevertheless, based on two independent grounds-first, that a forum-selection clause contained in a contract to which Massey was not a party barred the suit in West Virginia, and, second, that res judicata barred the suit due to an out-of-state judgment to which Massey was not a party. *Id.,* at 345a. Justice Starcher dissented, stating that the "majority's opinion is morally and legally wrong." Justice Albright also dissented, accusing the majority of "misapplying the law and introducing sweeping 'new law' into our jurisprudence that may well come back to haunt us."

Caperton sought rehearing, and the parties moved for disqualification of three of the five justices who decided the appeal. Photos had surfaced of Justice Maynard vacationing with Blankenship in the French Riviera while the case was pending. Justice Maynard granted Caperton's recusal motion. On the other side Justice Starcher granted Massey's recusal motion, apparently based on his public criticism of Blankenship's role in the 2004 elections. In his recusal memorandum Justice Starcher urged Justice Benjamin to recuse himself as well. He noted that "Blankenship's bestowal of his personal wealth, political tactics, and 'friendship' have created a cancer in the affairs of this Court." Justice Benjamin declined Justice Starcher's suggestion and denied Caperton's recusal motion.

The court granted rehearing. Justice Benjamin, now in the capacity of acting chief justice, selected Judges Cookman and Fox to replace the recused justices. Caperton moved a third time for disqualification, arguing that Justice Benjamin had failed to apply the correct standard under West Virginia law-*i.e.*, whether "a reasonable and prudent person, knowing these objective facts, would harbor doubts about Justice Benjamin's ability to be fair and impartial." Caperton also included the results of a public opinion poll, which indicated that over 67% of West Virginians doubted Justice Benjamin would be fair and impartial. Justice Benjamin again refused to withdraw, noting that the "push poll" was "neither credible nor sufficiently reliable to serve as the basis for an elected judge's disqualification."

In April 2008 a divided court again reversed the jury verdict, and again it was a 3-to-2 decision. Justice Davis filed a modified version of his prior opinion, repeating the two earlier holdings. She was joined by Justice Benjamin and Judge Fox. Justice Albright, joined by Judge Cookman, dissented: "Not only is the majority opinion unsupported by the facts and existing case law, but it is also fundamentally unfair. Sadly, justice was neither honored nor served by the majority." The dissent also noted "genuine due process implications arising under federal law" with respect to Justice Benjamin's failure to recuse himself.

Four months later-a month after the petition for writ of certiorari was filed in this Court-Justice Benjamin filed a concurring opinion. He defended the merits of the majority opinion as well as his decision not to recuse. He rejected Caperton's challenge to his participation in the case under both the Due Process Clause and West Virginia law. Justice Benjamin reiterated that he had no " ' direct, personal, substantial, pecuniary interest' in this case.' Adopting "a standard merely of 'appearances,' " he concluded, "seems little more than an invitation to subject West Virginia's justice system to the vagaries of the day-a framework in which predictability and stability yield to supposition, innuendo, half-truths, and partisan manipulations."

II

It is axiomatic that "[a] fair trial in a fair tribunal is a basic requirement of due process." As the Court has recognized, however, "most matters relating to judicial disqualification [do] not rise to a constitutional level." The early and leading case on the subject is *Tumey* v. *Ohio*, 273 U. S. 510 (1927). There, the Court stated that "matters of kinship, personal bias, state policy, remoteness of interest, would seem generally to be matters merely of legislative discretion."

The *Tumey* Court concluded that the Due Process Clause incorporated the common-law rule that a judge must recuse himself when he has "a direct, personal, substantial, pecuniary interest" in a case. This rule reflects the maxim that "[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity." Under this rule, "disqualification for bias or prejudice was not permitted"; those matters were left to statutes and judicial codes. Personal bias or prejudice "alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause."

As new problems have emerged that were not discussed at common law, however, the Court has identified additional instances which, as an objective matter, require recusal. These are circumstances "in which experience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable."

* * *

III

. . . This problem arises in the context of judicial elections, a framework not presented in the precedents we have reviewed and discussed.

Caperton contends that Blankenship's pivotal role in getting Justice Benjamin elected created a constitutionally intolerable probability of actual bias. Though not a bribe or criminal influence, Justice Benjamin would nevertheless feel a debt of gratitude to Blankenship for his extraordinary efforts to get him elected. That temptation, Caperton claims, is as strong and inherent in human nature as was the conflict the Court confronted in *Tumey* and *Monroeville* when a mayor-judge (or the city) benefited financially from a defendant's conviction, as well as the conflict identified in *Murchison* and *Mayberry* when a judge was the object of a defendant's contempt.

Justice Benjamin was careful to address the recusal motions and explain his reasons why, on his view of the controlling standard, disqualification was not in order. In four separate opinions issued during the course of the appeal, he explained why no actual bias had been established. He found no basis for recusal because Caperton failed to provide "objective evidence" or "objective information," but merely "subjective belief" of bias. Nor could anyone "point to any actual conduct or activity on [his] part which could be termed 'improper.' " In other words, based on the facts presented by Caperton, Justice Benjamin conducted a probing search into his actual motives and inclinations; and he found none to be improper. We do not question his subjective findings of impartiality and propriety. Nor do we determine whether there was actual bias.

* * *

The difficulties of inquiring into actual bias, and the fact that the inquiry is often a private one, simply underscore the need for objective rules. Otherwise there may be no adequate protection against a judge who simply misreads or misapprehends the real motives at work in deciding the case. The judge's own inquiry into actual bias, then, is not one that the law can easily superintend or review, though actual bias, if disclosed, no doubt would be grounds for appropriate relief. In lieu of exclusive reliance on that personal inquiry, or on appellate review of the judge's determination respecting actual bias, the Due Process Clause has been implemented by objective standards that do not require proof of actual bias. In defining these standards the Court has asked whether, "under a realistic appraisal of psychological tendencies and human weakness," the interest "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented."

We turn to the influence at issue in this case. Not every campaign contribution by a litigant or attorney creates a probability of bias that requires a judge's recusal, but this is an exceptional case. We conclude that there is a serious risk of actual bias-based on objective and reasonable perceptions-when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.

Applying this principle, we conclude that Blankenship's campaign efforts had a significant and disproportionate influence in placing Justice Benjamin on the case. Blankenship contributed some $3 million to unseat the incumbent and replace him with Benjamin. His contributions eclipsed the total amount spent by all other Benjamin supporters and exceeded by 300% the amount spent by Benjamin's campaign committee. Caperton claims Blankenship spent $1 million more than the total amount spent by the campaign committees of both candidates combined.

* * *

Whether Blankenship's campaign contributions were a necessary and sufficient cause of Benjamin's victory is not the proper inquiry. Much like determining whether a judge is actually biased, proving what ultimately drives the electorate to choose a particular candidate is a difficult endeavor, not likely to lend itself to a certain conclusion. This is particularly true where, as here, there is no procedure for judicial factfinding and the sole trier of fact is the one accused of bias. Due process requires an objective inquiry into whether the contributor's influence on the election under all the circumstances "would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." In an election decided by fewer than 50,000 votes (382,036 to 334,301), Blankenship's campaign contributions-in comparison to the total amount contributed to the campaign, as well as the total amount spent in the election-had a significant and disproportionate influence on the electoral outcome. And the risk that Blankenship's influence engendered actual bias is sufficiently substantial that it "must be forbidden if the guarantee of due process is to be adequately implemented."

The temporal relationship between the campaign contributions, the justice's election, and the pendency of the case is also critical. It was reasonably foreseeable, when the campaign contributions were made, that the pending case would be before the newly elected justice. The $50 million adverse jury verdict had been entered before the election, and the Supreme Court of Appeals was the next step once the state trial court dealt with post-trial motions. So it became at once apparent that, absent recusal, Justice Benjamin would review a judgment that cost his biggest donor's company $50 million. Although there is no allegation of a *quid pro quo* agreement, the fact remains that Blankenship's extraordinary contributions were made at a time when he had a vested stake in the outcome. Just as no man is allowed to be a judge in his own cause, similar fears of bias can arise when-without the consent of the other parties-a man chooses the judge in his own cause. And applying this principle to the judicial election process, there was here a serious, objective risk of actual bias that required Justice Benjamin's recusal.

. . . On these extreme facts the probability of actual bias rises to an unconstitutional level.

IV

Our decision today addresses an extraordinary situation where the Constitution requires recusal. Massey and its *amici* predict that various adverse consequences will follow from recognizing a constitutional violation here-ranging from a flood of recusal motions to unnecessary interference with judicial elections. We disagree. The facts now before us are extreme by any measure. The parties point to no other instance involving judicial campaign contributions that presents a potential for bias comparable to the circumstances in this case.

* * *

One must also take into account the judicial reforms the States have implemented to eliminate even the appearance of partiality. Almost every State—West Virginia included-has adopted the American Bar Association's objective standard: "A judge shall avoid impropriety and the appearance of impropriety." The ABA Model Code's test for appearance of impropriety is

"whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired."

* * *

These codes of conduct serve to maintain the integrity of the judiciary and the rule of law. The Conference of the Chief Justices has underscored that the codes are "[t]he principal safeguard against judicial campaign abuses" that threaten to imperil "public confidence in the fairness and integrity of the nation's elected judges." This is a vital state interest: . . . It is for this reason that States may choose to "adopt recusal standards more rigorous than due process requires."

. . . Because the codes of judicial conduct provide more protection than due process requires, most disputes over disqualification will be resolved without resort to the Constitution. Application of the constitutional standard implicated in this case will thus be confined to rare instances.

* * *

The judgment of the Supreme Court of Appeals of West Virginia is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

CHIEF JUSTICE ROBERTS, with whom JUSTICE SCALIA, JUSTICE THOMAS, and JUSTICE ALITO join, dissenting.

I, of course, share the majority's sincere concerns about the need to maintain a fair, independent, and impartial judiciary-and one that appears to be such. But I fear that the Court's decision will undermine rather than promote these values.

* * *

Today, however, the Court enlists the Due Process Clause to overturn a judge's failure to recuse because of a "probability of bias." Unlike the established grounds for disqualification, a "probability of bias" cannot be defined in any limited way. The Court's new "rule" provides no guidance to judges and litigants about when recusal will be constitutionally required. This will inevitably lead to an increase in allegations that judges are biased, however groundless those charges may be. The end result will do far more to erode public confidence in judicial impartiality than an isolated failure to recuse in a particular case.

* * *

II

In departing from this clear line between when recusal is constitutionally required and when it is not, the majority repeatedly emphasizes the need for an "objective" standard. The majority's analysis is "objective" in that it does not inquire into Justice Benjamin's motives or decision making process. But the standard the majority articulates—"probability of bias"—fails to provide clear, workable guidance for future cases. At the most basic level, it is unclear whether the new probability of bias standard is somehow limited to financial support in judicial elections, or applies to judicial recusal questions more generally.

But there are other fundamental questions as well. With little help from the majority, courts will now have to determine:

1. How much money is too much money? What level of contribution or expenditure gives rise to a "probability of bias"?

2. How do we determine whether a given expenditure is "disproportionate"? Disproportionate *to what*?

3. Are independent, non-coordinated expenditures treated the same as direct contributions to a candidate's campaign? What about contributions to independent outside groups supporting a candidate?

4. Does it matter whether the litigant has contributed to other candidates or made large expenditures in connection with other elections?

5. Does the amount at issue in the case matter? What if this case were an employment dispute with only $10,000 at stake? What if the plaintiffs only sought non-monetary relief such as an injunction or declaratory judgment?

6. Does the analysis change depending on whether the judge whose disqualification is sought sits on a trial court, appeals court, or state supreme court?

7. How long does the probability of bias last? Does the probability of bias diminish over time as the election recedes? Does it matter whether the judge plans to run for reelection?

8. What if the "disproportionately" large expenditure is made by an industry association, trade union, physicians' group, or the plaintiffs' bar? Must the judge recuse in all cases that affect the association's interests? Must the judge recuse in all cases in which a party or lawyer is a member of that group? Does it matter how much the litigant contributed to the association?

9. What if the case involves a social or ideological issue rather than a financial one? Must a judge recuse from cases involving, say, abortion rights if he has received "disproportionate" support from individuals who feel strongly about either side of that issue? If the supporter wants to help elect judges who are "tough on crime," must the judge recuse in all criminal cases?

10. What if the candidate draws "disproportionate" support from a particular racial, religious, ethnic, or other group, and the case involves an issue of particular importance to that group?

* * *

These are only a few uncertainties that quickly come to mind. Judges and litigants will surely encounter others when they are forced to, or wish to, apply the majority's decision in different circumstances.

* * *

It is an old cliché, but sometimes the cure is worse than the disease. I am sure there are cases where a "probability of bias" should lead the prudent judge to step aside, but the judge fails to do so. Maybe this is one of them. But I believe that opening the door to recusal claims under the Due Process Clause, for an amorphous "probability of bias," will itself bring our judicial system into undeserved disrepute, and diminish the confidence of the American people in the fairness and integrity of their courts. I hope I am wrong.

I respectfully dissent.

JUSTICE SCALIA's dissenting opinion is omitted.

Notes & Questions

1. *Campaign contributions in Texas.* All judges in Texas are elected through partisan elections, and each election, especially the Texas Supreme Court's state-wide elections, can cost vast amounts of money. Most of the political contributions for these elections come from lawyers who practice before the court and litigants who either have or may have cases pending there. Thus, it should be of no surprise that allegations of bias and political favoritism are rampant in our system. The partisan election of judges in Texas had long been criticized, and judicial election reform has been on the legislative agenda several times.[1] The judicial election bills have never gotten far in the legislature, however. Many do not agree that any proposed system is any better than the current one. What are the benefits of our current system?

2. *Judicial elections after Caperton*. How may *Caperton* affect judicial politics in Texas? Will we see a rush of "*Caperton* motions" for recusal as Chief Justice Roberts fears? How will the trial courts deal with them? The excerpt reprints only the first ten of forty questions that "quickly came to mind" to the Chief Justice. Similar questions remain unanswered anytime that a new procedural rule is announced. Should rules and judicial opinions attempt to answer all of these questions or is it better to leave the answers to the lower courts?

3. *Recusal after Caperton*. Thus far Texas has held to the view that campaign contributions from lawyers or litigants do not justify a disqualification under the Texas or United States Constitution.[2] In the appeal of the famous Texas case of *Texaco v. Pennzoil*, where Pennzoil was awarded a multi-billion dollar judgment, Texaco claimed that its due process rights were violated because of campaign contributions. The record showed that Pennzoil's lead counsel, Joe Jamail, had contributed $10,000 to the judge's campaign after the lawsuit was filed and assigned to the judge's court. Moreover, Mr. Jamail served on the judge's campaign steering committee. The court found no due process violation. Might the result be different under *Caperton*?

4. *Non-constitutional grounds for recusal.* In *Caperton*, the United States Supreme Court notes that most campaign contribution recusal cases will be decided under the state's standards for recusal rather than the Constitution. The Texas decisions rejecting disqualification for campaign contributions did not address the broader recusal grounds stated in Rule 18b, which was adopted after the cases were tried. Do you see any non-constitutional grounds in Rule 18b on which a judge might be asked to step aside if one of the lawyers made a large contribution to the judge's reelection campaign and served on the judge's steering committee? Could impartiality reasonably be questioned under these circumstances? *See* Rule 18b(2)(a). Could it be argued that the judge has a "financial interest or other interest" in that a victory for his former campaign supporters would enhance their ability to contribute more money in the next campaign? *See* Rule 18b(2)(e).

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[1] For a discussion of these proposals, *see, e.g.,* Chief Justice Wallace Jefferson, The State of the Judiciary in Texas (Feb. 11, 2009); C. Bleil*, Can a Twenty-First Century Texas Tolerate Its Nineteenth Century Judicial Selection Process?*, 26 ST. MARY'S L.J. 1089 (1995): Hill, *Taking Texas Judges Out of Politics: An Argument for Merit Election*, 40 BAYLOR L. REV. 339, (1988); O.W. Johnson and L. Johnson Urbis, *Judicial Selection in Texas: A Gathering Storm?*, 23 TEX. TECH L. REV. 525 (1992); *But see*, District Judge T. Poe and T.R. Clark, *Elections Still Work Best*, HOUSTON CHRONICLE, March 24, 1996, at 1.

[2] *See* J-IV Investment Co. v. David Lynn Machinery Co., 784 S.W.2d 106 (Tex. Civ. App.—Dallas 1990, no writ); Texaco v. Pennzoil Co., 729 S.W.2d 768 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.), *cert. denied* 485 U.S. 994 (1988). River Road Neighborhood Ass'n v. South Texas Sports, Inc., 673 S.W.2d 952 (Tex. Civ. App.—San Antonio 1984, no writ).

Does it matter if the contribution exceeds the limits of the Election Code?[3] The Supreme Court Advisory Committee has considered amendments to Rules 18a and 18b that would address these issues, but none have been adopted.

5. *After* Caperton. In *Williams-Yulee v. Florida Bar*,[4] the United States Supreme Court applied Caperton, and upheld a state's regulation of judicial campaign financing. The Court held that the First Amendment permits the Florida Bar's ban on personal solicitation of campaign funds by judicial candidates because Florida's interest in preserving public confidence in the integrity of its judiciary was compelling.

***In re* CANALES**
52 S.W.3d 698
(Tex. 2001)

JUSTICE ENOCH delivered the opinion of the Court.

In these consolidated mandamus petitions, we must decide whether real party in interest Cynthia Barrera's objection to a visiting judge under section 74.053 of the Texas Government Code was timely although not made until after the judge had heard and ruled on pretrial matters in the case. Because we conclude that the statute contemplates that objections be made before the first hearing over which the visiting judge is to preside in a case rather than to a particular assignment order, Barrera's objection was untimely and the trial court properly rejected it. The court of appeals therefore abused its discretion in conditionally granting Barrera a writ of mandamus.

On April 27, 1999, Barrera sued relators Judge Terry A. Canales and the county of Jim Wells in the 79th Judicial District Court of Jim Wells County. Canales, who is the district judge of that court, accordingly requested that the matter be assigned to another judge. By order of May 24, 1999, the presiding judge of the Fifth Administrative Judicial Region assigned visiting Judge Woody Densen to preside over the 79th District Court in Jim Wells County from May 24, 1999 to May 26, 1999. A separate order dated the same day assigned Judge Densen to preside over the 79th District Court in Brooks County from May 27, 1999 to May 29, 1999.

On May 25, 1999, Judge Densen heard and granted Canales's motion for a protective order in the underlying case. Two days later, on May 27, Judge Densen conducted a telephone hearing with the parties, in which he denied Barrera's motion to quash her deposition.

On July 9, 1999, the presiding judge issued another assignment order, this time assigning Judge Densen specifically to preside over the underlying case. On August 13, 1999, Barrera for the first time filed an objection to Judge Densen's assignment, invoking section 74.053 of the Texas Government Code. Judge Densen overruled her objection on August 20, 1999. That same day, Judge Densen granted Canales's motion for summary judgment against Barrera and severed the claims against Canales into a separate case. Thereafter, Judge Densen sustained the County's plea to the jurisdiction and dismissed the case with prejudice.

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[3] *See* Election Code § 251.001 *et seq*.

[4] 135 S.Ct. 1653 (2015).

Barrera petitioned the court of appeals for a writ of mandamus based on Judge Densen's refusal to remove himself from the case. The court of appeals concluded that Judge Densen's authority under the first assignment order expired on May 26 and that the June 9 order was necessary for him to preside further over the case. Because the two assignment orders were distinct, the court reasoned, Barrera's objection complied with section 74.053's requirement that objections be filed before the first hearing over which the assigned judge is to preside as long as Judge Densen had not taken any action under the second assignment. Thus, the court of appeals instructed Judge Densen to disqualify himself from any further proceedings in the case and declared void the orders he entered after Barrera filed her objection. Canales and the County then sought our review by mandamus.

* * *

The Court Administration Act, chapter 74 of the Government Code, divides the state into nine administrative judicial regions and empowers the presiding judge of each region to assign visiting judges to the courts in that region. Section 74.053 of that Act allows the parties to a civil case to object to an assigned judge and sets out the procedure for doing so:

> (a) When a judge is assigned under this chapter, the presiding judge shall, if it is reasonable and practicable and if time permits, give notice of the assignment to each attorney representing a party to the case that is to be heard in whole or in part by the assigned judge.
>
> (b) If a party to a civil case files a timely objection to the assignment, the judge shall not hear the case . . . .
>
> (c) An objection under this section must be filed before the first hearing or trial, including pretrial hearings, over which the assigned judge is to preside.[7]

* * *

If an objection is timely, the assigned judge's disqualification is automatic. When an assigned judge overrules a timely objection to his assignment, all of the judge's subsequent orders are void and the objecting party is entitled to mandamus relief. This Court has never before considered whether an objection would be timely in the circumstances presented here.

Canales and the County contend that Barrera waived her objection to Judge Densen because she waited to file it until after he had conducted two pretrial hearings. The statute, they argue, dictates that objections be filed before the assigned judge presides over any matter in the case, independent of the extent of the judge's authority under a particular assignment order. Otherwise, parties could "test out" a judge and then object if they disagree with the judge's preliminary rulings. Alternatively, Canales and the County maintain that Judge Densen's authority under the May 24 assignment order extended to the entire case, so that the June 9 assignment order was superfluous and did not give Barrera another opportunity to object.

Barrera counters that her objection was timely because she filed it before Judge Densen conducted any hearings under the authority of the June 9 assignment order. She argues that Judge Densen's authority under the first assignment order expired on May 26, and that he had no authority thereafter to act in the case until he received a new assignment. Because a new assignment was necessary, she reasons, a new opportunity to object arose.

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[7] TEX. GOV'T CODE § 74.053(a)-(c).

To resolve this issue, we turn to section 74.053. When we construe a statute, our primary goal is to ascertain and give effect to the Legislature's intent in enacting it. If a statute is clear and unambiguous, we need not resort to rules of construction or other aids to construe it. Even then, however, we may consider, among other things, the statute's objectives, its legislative history, and the consequences of a particular construction.

The statute's plain language convinces us that Canales and the County read it accurately. To begin with, section 74.053(a) requires notice (if practicable) to the parties to any case "that is to be heard in whole *or in part* by the assigned judge." And section 74.053(c) says that "[a]n objection under this section must be filed *before the first hearing or trial, including pretrial hearings,* over which the assigned judge is to preside." Finally, if a party files a timely objection, section 74.053(b) provides that the assigned judge "shall not hear the case." Read together, these sections preclude the argument that a new chapter 74 assignment order carries with it a new right to object. The statute explicitly recognizes the possibility that a visiting judge may be assigned to preside over only part of a case. Yet it does not say that objections must be filed before the judge presides over any hearing *under the assignment.* It says, rather, that to be timely an objection must be filed before the judge presides over *any* hearing. There is simply no basis in the statute to tie the timeliness of an objection to a judge's authority under any given assignment order.

This conclusion is reinforced by the statute's legislative history and objectives. Section 74.053 first came into being in 1985 as part of the Court Administration Act.[16] That Act's purpose was to provide a statewide framework for court administration and case management, in order to give the civil courts greater control over their dockets and speed the progress of cases through the court system. As originally enacted, section 74.053 did not restrict the number of objections that parties could make to visiting judges.

In 1987, the Legislature limited each party to one objection per case, to prevent either side from being able to put off trial indefinitely by filing one objection after another. In 1991, the statute was amended again to allow unlimited objections to former judges who are not retired judges. Legislators discussing both of these changes expressed concern that the visiting judge system was being abused because judges who were defeated in elections were continuing to sit as visiting judges. Section 74.053 answers that concern by protecting a party's interest in having its case heard by the locally-elected judge instead of one who had been rejected by the voters. The Legislature balanced this interest against its desire to create a uniform system of administration and prevent delay by carefully limiting the right to object.

Construing the statute to permit objections to a second assignment after the assigned judge has presided over some part of the case upsets this balance and is inconsistent with the statute's objectives in several ways. First, it increases delay and disrupts the judicial process if a party can remove a judge without cause in the middle of a case. And in many cases, whether an objection is timely would depend on interpreting the assignment order involved. Consequently, we would sacrifice a straightforward application of the statute for one that would inevitably cause even more delay while the parties argue about the scope of assignment orders.

Moreover, section 74.053 protects only a party's interest in having a locally-elected judge hear its case—not a party's ability to choose which judge will sit. As soon as a party knows that a visiting judge has been appointed, that party knows that the locally-elected judge will not hear at least part of the case. An immediate objection thus furthers the policy concerns reflected in section 74.053. Allowing either party to sample the visiting judge first doesn't. Of course, we

16 *See* Court Administration Act, 69th Leg., R.S., ch. 732, § 2, 1985 Tex. Gen. Laws 2534.

recognize that in this case Barrera has no interest in having her case tried by the locally-elected judge of Jim Wells County, whom she is suing. But we can't read the statute contrary to its language and legislative history on that basis.

The statute means exactly what it says. An objection to a judge assigned under chapter 74 is timely if it is filed before the very first hearing or trial in the case, including pretrial hearings, over which the assigned judge is to preside—without regard to the terms of the particular order under which the judge is assigned. The statute does not confer a new opportunity to object when a visiting judge who has already heard matters in the case is reassigned by a new assignment order. Once an assigned judge has heard any matter in a case, the parties have waived the right to object to that judge under section 74.053 of the Government Code.

Because Barrera's objection was untimely, Judge Densen did not abuse his discretion in overruling it. We therefore conditionally grant the writ of mandamus against the court of appeals. The writ will issue only if the court of appeals does not vacate its mandamus judgment.

Notes & Questions

1. *Who can preside?* A wide range of judges are qualified and authorized to preside in a district court. First, the "active judge" who is the current judicial officeholder of the court presides in that court.[1] Second, administrative rules provide for the appointment of "visiting judges" to preside in a court. A visiting judge may be another district judge in the county[2] or an active, former, retired or senior judge.[3] Chapter 74 of the Texas Government Code provides a number of limitations on the appointment of visiting judges, most of which we will not go into here.

2. *Striking visiting judges*. Since *Canales* and *Union Pacific* were decided, Section 74.053 has been amended. The statute now provides that each party to a civil case may assert one objection to an assigned judge, in which instance "the judge shall not hear the case."[4] Also, the parties may no longer object to an active judge—they may only object to a retired judge or a former judge.[5] But each party has unlimited objections to an assigned judge who was defeated in the judge's last judicial election.[6]

3. *Procedure.* Read GOV'T CODE § 74.053 carefully as it specifies the procedure that must be followed to object to a visiting judge. Most importantly, it requires that the objection be filed not

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1 *See* TEX. GOVT. CODE § 74.041 (defining "active judge").

2 *See* Rule 330(e); Tex. Const. Art. V,§ 11; TEX. GOVT. CODE § 24.303.

3 A "former judge" is a person who has served as an active judge in a district, statutory probate, statutory county court, or appellate court, but is not a retired judge; a "retired judge" is a retiree or person who served as an inactive judge for at least 96 months in the statutory probate or statutory county court and has retired under the retirement system; a "senior judge" is a retiree who has elected to be a judicial officer TEX. GOVT. CODE § 74.041 (definitions).

4 TEX. GOVT. CODE § 74.053(b).

5 A "former judge" either resigned or lost an election before retirement. A "retired judge" has to qualify for retirement under applicable statutes, but generally the judge must be 65 years old and have 10 years of service to be retired. *See* Mitchell Energy Corp. v. Ashworth, 943 S.W.2d 436 (Tex. 1997)(holding that a judge's status as retired or not for purposes of former § 74.053 is determined at the time the judge leaves office.)

6 Before the 2003 amendments, parties had unlimited strikes over all former judges who were not retired judges, which included those who had resigned or lost an election before retirement.

later than 7 days after the party receives the notice of the assignment or before the first hearing or trial, including pretrial hearings, over which the assigned judge is to preside, whichever is earlier.[7] An oral motion to excuse the visiting judge, followed by a hand written motion filed only after the objecting party's motion for continuance is denied is untimely.[8] The statute also requires that notice of a visiting judge's assignment be given if it is reasonable and practical to do so and if time permits.[9] However, parties have been unsuccessful in using this provision to excuse late filed objections.[10]

4. *Assignment to hear recusal motion*. The Supreme Court has held that a judge designated by the presiding judge of the administrative judicial district to hear a recusal motion under Rule 18a is an assigned judge subject to objection and mandatory disqualification under GOV'T. CODE § 74.053.[11] But a presiding judge who assigns himself to hear the recusal motion, rather than designating another judge to do so, is *not* subject to objection under Chapter 74.[12]

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[7] TEX. GOV'T CODE ANN. § 74.053(c). *See* O'Connor v. Lykos, 960 S.W.2d 96 (Tex. App.—Houston [1st Dist.] 1997, orig. proceeding) (signing of an order granting a new trial ends an assigned judge's authority; when the same judge was assigned to hear the retrial, the party's objection under Texas Government Code § 74.053 was timely where party made the objection before the first hearing in the second trial).

[8] Money v. Jones, 766 S.W.2d 307 (Tex. App.—Dallas 1989, writ denied).

[9] TEX. GOV'T CODE ANN. § 74.053(a).

[10] *See Money*, 766 S.W. 2d 307 (attorney not told of assignment when called to docket call, but hand-written objection was available). *See also* Flores v. Banner, 932 S.W.2d 500 (Tex. 1996)(objection to "any former judge" was valid despite failure to name particular judge because identity not known until judge took the bench).

[11] In re Perritt, 992 S.W.2d 444 (Tex. 1999).

[12] In re Flores, 53 S.W.3d 428 (Tex. App.—San Antonio 2001, no pet.).

C. Attorneys in Texas

1. *Professionalism*

Read the Texas Lawyers Creed; CPRC, Ch. 10; Rule 13.

Waging Unconditional Warfare: An Exasperated Court Speaks Its Mind
By Alex Wilson Albright*

On Friday, May 13, 1988, page 21 of *The New York Times* bore the headline "Bare-Knuckles Litigation Jars Many in Dallas." About the same time, readers of *Texas Lawyer* were avidly reading excerpts of deposition transcripts as if they were serials of the continuing saga of a soap opera. Since then, the soap opera has continued, with stories, both in the media and through the grapevine, of who did what to whom at a recent deposition, of the most recent motions for sanctions and of the clients who finally gave up because they no longer could pay the legal fees to keep up the battle.

What has happened to the "gentleman" trial lawyer of the past, like Atticus Finch in Harper Lee's *To Kill a Mockingbird,* who walked arm in arm with his opposing attorney after a long day of a very emotional trial? Today it appears that trial lawyers don't even speak civilly to each other. From the time the suit is filed, they often harbor such animosity toward each other that they speak as little as possible thereafter—even after the case is over.

Unlike Atticus Finch, the 1980s civil "litigator" accepts and uses abusive litigation tactics. He makes unnecessary contentions directed at the party opponent and his attorney to promote motions, hearings, discovery and animosity. He employs sharp practices such as using hypertechnical definitions of words used in discovery requests as a method for withholding obviously discoverable information, refusing to come to any agreement with opposing counsel concerning discovery and other matters, no matter how trivial, and scheduling depositions and hearings at times he knows are terribly inconvenient for opposing counsel and his client.

He frequently challenges the legitimacy of officers of the court by filing motions to disqualify law firms and presiding judges. He routinely arrives late for meetings and depositions. He engages in generally abusive and unprofessional behavior that costs clients huge sums of money, but does nothing to further the resolution of the case on its merits. Although not all trial lawyers who represent clients in large commercial cases act like this, most have been subjected to such conduct from opposing counsel and have faced the dilemma of whether to respond in kind, often under pressure from an harassed client to do so.

Professional dignity and integrity degenerates into a game of tit-for-tat. As a result, even the most respected attorney must admit to some failure to agree to something to which, upon reflection, he should have agreed.

We all are aware of the costs of such behavior. Attorneys' arguments in depositions take inordinate amounts of time, for which the client must pay. Frequently, the arguments are followed by motions to compel and/or motions for sanctions, including motions under Rule 11 of

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the Federal Rules of Civil Procedure, and, more recently, Rule 13 of the Texas Rules of Civil Procedure.

The client pays for the preparation of the motion and its presentation to the court. After the motions are submitted, the opposition must respond. The court may take some time to decide the issues presented.

Meanwhile, the parties are so uncooperative that discovery and resolution of the underlying dispute are stalled. The abusive lawyer's client, however, is well-prepared for the cost and delay, because it may well have been part of the overall war plan. The opposition unfortunately is forced to spend a like amount of attorney's fees or fold up his tent and go home, either by settling or filing for bankruptcy protection. Abusive tactics thus are rewarded and justice often is denied.

NORTHERN DISTRICT STRIKES BACK

The federal judges of the Northern District of Texas have had enough of these sharp practices and have taken action to stop them. On July 14, 1988, the court sat *en banc,* an extremely unusual procedure for a federal district court, to adopt "standards of litigation conduct for attorneys appearing in civil actions in the Northern District of Texas." The judges sought to address a "problem that, though of relatively recent origin, is so pernicious that it threatens to delay the administration of justice and to place litigation beyond the financial reach of litigants." *Dondi Properties Corp., et al. v. Commerce Savings and Loan Associates, et al.* No. CA3-87.1725-H. *Knight v. Protective Life Insurance Co.,* No. CA3-87.2692. __ F.R.D. __ (N.D. Tex. 1988).

Through the use of the *en banc* procedure, the court instructs the entire bar, rather than just the lawyers directly involved in a particular case, and emphasizes the importance and pervasiveness of the problem. The *en banc* opinion sets out the standards of conduct and the reasons for their promulgation, and is followed by opinions applying those standards written by the magistrate and judge before whom the specific motions in the two cases were pending.

In an admonitory opinion, the court explains that "with alarming frequency," it has found itself "refereeing abusive litigation tactics that range from benign incivility to outright obstruction." Recognizing that "justice delayed, and justice obtained at excessive cost, is often justice denied," the court notes that "our system of justice can ill afford to devote scarce resources to supervising matters that do not advance the resolution of the merits of a case; nor can justice long remain available to deserving litigants if the costs of litigation are fueled unnecessarily to the point of being prohibitive."

In an attempt to curb miscreant lawyers, the court adopts 11 standards of practice, adapted from the Dallas Bar Association's recent "Guidelines of Professional Courtesy" and "Lawyer's Creed," as well as the American College of Trial Lawyer's Code of Trial Conduct:

* * *

> [Editor's note: The standards, which are somewhat similar to those set out in the Texas Lawyer's Creed, are omitted.]

THE THREAT OF SANCTIONS

These broad standards only require attorneys to treat each other, the court, parties and witnesses in a polite, professional manner, not an onerous standard. Unfortunately, the evolution of modern litigation requires that these standards of civility be set out in a detailed writing, backed by the threat of formal sanctions if they are not obeyed.

Formal rules of conduct have become a partial substitute for an eroding sense of personal responsibility and professional community. As Grant Gilmore once said, "The better the society,

the less law there will be. In Heaven there will be no law, and the lion will lie down with the lamb . . . . The worse the society, the more law there will be. In Hell there will be nothing but law, and due process will be meticulously observed." G. Gilmore, *The Ages of American Law* 111(1977).

As formal rules and coercion become necessary to gain adherence to fundamental values of discipline, respect and integrity, the litigation process has begun to resemble Gilmore's vision of Hell.

Rather than seeing themselves as professionals with the self-imposed duty of integrity, in whose hands the search for justice lies, too many lawyers today view themselves "solely as combatants, or who perceive that they are retained to win at all costs without regard to fundamental principles of justice," the Northern District judges said in their order.

The failure of these lawyers to hold themselves to a higher ethical standard has created a distrust among lawyers and low esteem for the profession in the eyes of the public, to the detriment of our system of justice. The purpose of civil litigation, to redress legal wrongs in a civilized manner, has been displaced by other less worthy purposes.

The motivating force behind too many large, complicated business suits, is not the righting of a wrong, but an attempt to cripple the other side financially. The suit may become a weapon to compel a favorable settlement, regardless of the merits, or to push the opponent into bankruptcy, eliminating it as an effective competitor.

The judges of the Northern District confess that they do not know the reason for the "pernicious" conduct that has arisen in recent years. They speculate about a number of possibilities: the decrease in professional collegiality due to the increased size of the bar; the current emphasis on the legal profession as a business; and the failure of experienced lawyers to train new lawyers in accepted standards of conduct.

Lawyers who employ these abusive tactics successfully receive tremendous amounts of publicity in this publication and others. They develop a reputation for being "tough," exactly what many clients engaged in bitter business disputes want. They make a great deal of money. In the competitive business climate that the law practice has become, more and more attorneys are tempted to use abusive tactics to attract clients and to keep them happy.

Young lawyers, untutored in the professional traditions of civility, may be impressed by the conduct exhibited by their seemingly successful peers, and not surprisingly, they may begin to emulate it. Every shouting match and refusal to agree with another lawyer is seen by the young lawyer as another instance in which he has succeeded in the macho environment of the successful trial lawyer.

The standards set forth by the federal court make it clear that such conduct will not be tolerated. Hopefully, these standards will influence behavior, breaking the vicious nexus between obstreperous conduct and perceptions of professional success.

'SATELLITE LITIGATION'

The court specifically cautions litigants that it does not invite the type of "satellite litigation" that surrounds Rule 11, recognizing that even well-founded motions require the investment of time and money by the court, the litigants and the attorneys—time that does nothing to further the disposition of the case on its merits.

The court faces a perplexing dilemma. In order to stop the abusive conduct, sanctions must be imposed against those abusing the justice system. The opportunity for sanctions, however, invites

the filing of motions to bring abusive conduct to the court's attention. These motions require the court to focus on matters other than the merits of the case, increasing rather than decreasing the time spent on such matters.

The court responds to the dilemma by telling us that it will seldom, if ever, tolerate motions that assert violations of the *Dondi* standards. Instead, the district judges themselves will monitor these peripheral motions more closely and take action whenever they feel it is necessary.

The most important practical lesson to be learned from the *Dondi* opinion is the court's seriousness about the local rule's requirement of a conference between counsel before a motion is filed. The conference was not intended as the *pro forma* exercise it has become. It requires the active participation of counsel for all affected parties.

The court has made clear that it does not want to be deciding matters such as discovery disputes (as in *Dondi*) and whether a reply brief may be filed (as in *Knight*) that do not affect the rights of the parties and should be agreed upon easily by counsel.

In fact, one can assume that if the court feels that a meaningful conference has not been held, it may order the attorneys to meet in person, or even grant the motion, before a response to the motion can be filed. Indeed, if a conference has been held, any valid reason for the refusal to agree should be articulated in the certificate of conference to prevent the imposition of sanctions and to allow the court to focus on the real dispute.

* * *

BREATH OF FRESH AIR

The majority of trial lawyers follow these standards of conduct and are concerned about the injustice, waste and unpleasantness created by the abusive lawyer. To these lawyers this opinion comes as a breath of fresh air. The federal court has publicly stated that it is still appropriate for lawyers to behave like "gentlemen." Indeed, adherence to the standards promulgated by the Northern District does not inhibit one's effectiveness as an advocate. Effective advocacy stems from self-confidence, hard work, zealous and honest representation of a client; it is not advanced by a mechanical and routine resort to harassment and dilatory tactics.

It remains to be seen, however, whether the court's approach will be effective in curbing litigation abuse. The very existence of the standards portends a decline in a strong sense of professional community and personal sense of behavior. Thus, the standards themselves may be subject to the same abuse that they are designed to prevent, just as other rules of procedure, such as Rule 11, which were designed to curb abuse, now are themselves vehicles for abuse.

The standards will be difficult to enforce because they are quite broad. What is "courtesy," "integrity," cooperation" and "civility?" Realistically, how can a court enforce such broad moral standards? These questions may not be important, however, because the real value of the opinion may lie in its articulation, rather than its enforcement. The opinion sets a moral tone that is effective through its symbolism and teaching, in addition to the sanctions imposed for violations.

The standards tell us what we already should know in conducting our professional lives. They should instruct the inexperienced lawyer. They should prick the conscience of those experienced lawyers who either have lost or never had respect for their profession. The publication of these standards is the first punch in the long fight against the decline in professionalism. Other courts, both state and federal, should follow suit and join the fight. The courts and the bar will wrestle with the problem for a long time to come. At least the fight has begun.

Notes & Questions

Reaction to Creeds. Many courts, both state and federal, have promulgated codes or creeds to encourage civility among lawyers practicing before them. The Supreme Court of Texas has adopted the *Texas Lawyer's Creed* and *Standards For Appellate Conduct*.[1] And the oath of a person admitted to practice law in Texas now includes a promise to "conduct oneself with integrity and civility in dealing and communicating with the court and all parties.[2] There is some concern that these codes and creeds may actually provide a new arena for conflict instead of lessening conflict. First, if the codes are enforced by sanctions, they will encourage more conflict over matters that have nothing to do with the merits of the pending case. Second, they may impose standards that are somewhat different than the Rules of Professional Conduct, thus creating conflict as to which standard is applicable to a particular situation. However, most lawyers and judges think the statements have worked, resulting in far less obstreperous conduct in litigation.

2. *Withdrawal of Counsel*

Read Rules 8, 9, and 10.

MOSS
v.
MALONE
880 S.W.2d 45
(Tex. App.—Tyler 1994, writ denied)

HOLCOMB, JUSTICE.

This appeal is from a denial of a motion for new trial after the court allowed Appellant's original attorney to withdraw and Appellant being pro se, dismissed her case.

Appellant brings four points of error complaining of the trial court's actions: in allowing her original counsel to withdraw and thereafter resetting the case for trial too quickly to enable her to secure counsel and then dismissing her case in violation of the Fifth, Sixth and Fourteenth Amendments to the UNITED STATES CONSTITUTION; in granting her counsel's motion to withdraw one day prior to trial violating TEXAS RULES OF CIVIL PROCEDURE 10 and TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT 1.15; refusing to allow Appellant to put on evidence at the hearing on Appellant's motion for new trial in violation of TEXAS RULES OF CIVIL PROCEDURE 324(b)1; and in overruling Appellant's motion for new trial after evidence reflected Appellee's counsel had unduly harassed and coerced Appellant who was without counsel immediately prior to the dismissal of the case in violation of TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT 4.01, 4.03, and 4.04, thereby violating her constitutional right to trial and rendering the dismissal involuntary and void. We will reverse the case and remand it to the trial court.

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1 *See* Dubose, K., *Standards of Appellate Conduct: Insight Into Their Creation and Purpose*, 62 TEX. B. J. 558 (1999)(encouraging the use of the standards to improve the quality of life for appellate courts and practitioners).

2 GOV'T CODE §82.037(a) (amended in 2015 by S.B. 534).

While there were no statement of facts filed, from the transcript and uncontradicted statements contained in the briefs, we find the following to be the essential facts.

Appellant's son had died as a result of an accident that had occurred between a vehicle driven by Appellee and the bicycle he was riding in Van Zandt County on March 26, 1988. Appellant brought suit through her attorney, Ted Beatty, on March 23, 1990, alleging negligence on the part of Appellee which had resulted in the death of the child. It appears there had been extensive discovery at various times during the preparation of the case for trial.

On December 9, 1991, Appellee filed a request for setting asking the court to set the case on the jury docket for March or April 1992. The court complied and the case was set for jury trial on March 9, 1992. On February 5, 1992, Appellee withdrew her request for a jury and asked the case be set for trial on the nonjury docket on March 11th or 12th, 1992. On February 10, 1992, Appellant, through her attorney, paid a jury fee. On February 24, 1992, Appellee filed her motion to strike jury demand and requested a hearing on this motion, which was set on March 5, 1992. On March 2, 1992, Appellee filed her designation of exhibits and requested jury questions, instructions, and definitions in preparation for a jury trial. On March 3, 1992, Appellant did the same. On March 5, 1992, a hearing was held on Appellee's motion to strike jury demand. Appellant's attorney announced that both parties were ready for trial on the jury docket for March 9, 1992. The court however, moved the case from the jury docket and placed the case on the nonjury docket for March 12, 1992. On March 11, 1992, one day prior to the non-jury trial, Appellant's attorney filed a motion to withdraw which reads as follows:

> TED BEATTY, attorney for JEANNIE MOSS, Plaintiff in this cause, moves this court to enter an order permitting him to withdraw as counsel of record, and in support of this motion shows: There exists a material difference of opinion between Movant and Plaintiff as to the presentation of this case. The granting of this motion will not have a material adverse effect on the interests of the Defendant and will not result in an unreasonable delay in the proceedings. WHEREFORE, movant prays the court grant this motion and order that he be released as counsel of record in this cause.

A telephone conference hearing was held between Appellant's attorney, Appellee's attorney, and the court. The trial judge orally allowed Appellant's attorney to withdraw; the order was not signed until March 23, 1992. There also appears an identical second order signed by the trial judge on April 21, 1992. The court then set the case for non-jury trial on April 9, 1992. At this setting Appellant appeared without counsel, and the following transpired:

> THE COURT: 90-156, Jeannie Moss versus Jan Heard Malone. Ma'am, you mentioned the possibility of getting a lawyer.
>
> MS. MOSS: E. Ray Andrews.
>
> THE COURT: You mentioned E. Ray Andrews.
>
> MS. MOSS: I talked to him this morning.
>
> THE COURT: Have you retained him to represent you?
>
> MS. MOSS: Yes, sir, I have. He has the records. I just need some more time.
>
> THE COURT: Did he say anything about why he didn't file a motion for continuance? How long ago did you retain him?
>
> MS. MOSS: Last week.
>
> THE COURT: Mr. McSwane.

McSWANE: [Attorney for Appellee] Your Honor, I think the Court recalls the facts of this case. At the time that Mr. Beatty withdrew, when I checked back was March 10th. She was told that it would go to trial on the 9th. It had been set twice before. In fact, they had announced ready at the time of the last setting when counsel withdrew. We are ready to proceed. We are ready to go this afternoon. I mean, if she can call Mr. Andrews and he can be here, we will be ready to go.

MS. MOSS: He can't be here. When he received this date—

THE COURT: Did Mr. Beatty tell you back on March the 10th when we had a telephone conference and when I allowed him to withdraw that the case was set for today?

MS. MOSS: No, he didn't. He said he would call me and get the files to me. And I received the files in the mail a week ago. And he had a little card pinned in there that said be sure to be there on the 9th. And E. Ray said he could not possibly—

McSWANE: Your Honor, I beg to differ. She was in the room at the time the Court concluded the hearing. She came in, the Court specifically stated it was set April the 9th at the time. If I need to testify to that, I will.

MS. MOSS: I'm sorry. I did not hear that.

THE COURT: Were you in the room when Mr. Beatty was on the phone to me and Mr. McSwane?

MS. MOSS: No, sir. I just walked in as you were hanging up. He told you I just walked in.

THE COURT: We are going to call Mr. Andrews and we will take the case up in a few moments. [Brief recess.]

THE COURT: Let me see everyone again on Jeannie Moss versus Jan Heard Malone, please. We have talked to Mr. Andrews' office and he says that what he said was that if you could get a continuance that he would look over your paperwork and tell you after that whether he would take the case, not that he had been retained to represent you.

MS. MOSS: That's not what he told me because he was reading—

THE COURT: I will give you a chance to talk in just a minute. I will grant you a continuance until the 7th day of May, 1992. That's roughly thirty days from today's date. I knew when I let Mr. Beatty withdraw that we were going to get into this situation. But according to his motion, you don't want him to be your lawyer anymore and that's fine. But you have the right to a lawyer of your choice. But on May the 7th, 1992, I will write that date down for you, May the 7th, 1992, at 9 a.m., I will call the case for trial. Whether you get him or any other lawyer to represent you, be present with your lawyer and tell your lawyer the case has been pending. This is not the first setting. So he's going to have to come up here ready to try the lawsuit, not just get some sort of first setting on a hearing. Do you understand?

MS. MOSS: Yes. The reason I let Ted Beatty go is because he didn't ever notify me when he would get a letter. I would call his office. He did not do me a good job.

THE COURT: That's fine. And that's what I'm saying. That's between you and your lawyer and you have the right to have any lawyer you want to. And that's what I have done. But there won't be any other continuances. So on May 7, 1992, we will try the case.

McSWANE: I would like to have the witnesses sworn. Everyone that's present on the lawsuit styled Jeannie Moss versus Jan Heard Malone, will you stand at this time, please, if you are here on that lawsuit and raise your right hands, please. [Witnesses sworn.]

THE COURT: Ladies and gentlemen, this case has been continued until the 7th day of May, 1992. That's May 7, 1992 at 9 o'clock in the morning. At that time, the case will be tried. You will not receive any other subpoenas from any of the lawyers or from the clerk's office in this case because this case will be carried over. So you will have to come back on May 7, 1992 at 9 o'clock without having received any other paperwork or notifications. I just want to make you aware of that and please mark it on your calendar or make a note so you won't overlook it. But the case will be tried on May 7, 1992 at 9 a.m. Thank you for being present. [Hearing recessed.]

On May 7, 1992, the parties again appeared before the trial court and the following transpired:

THE COURT: Jeannie Moss and Jan Heard Malone.

MS. MOSS: May we come to the bench?

THE COURT: You may.

MS. MOSS: E. Ray couldn't be here today. He said he needed at least thirty more days and I've got the file and that whatever you wanted to do, for me to play it by ear. And if you needed to talk to him, you could call him. But he said for me to—to represent me fairly, he needed at least thirty more days because it wasn't being fair to me because he didn't know that much about the case. And that Ted was let off too quick and that the trial was set too quick after Ted was off. So I don't know.

THE COURT: The trial was set before Mr. Beatty was released. Well, we've already been through the same circumstances—

MS. MOSS: I've got the file and everything. He said, you know, whatever you thought was right, what you wanted to do so. For me just to play it by ear and go along with you and see what happens. We could just start over. He said he had no other choice. But he didn't know that much about the case and for him to—like I said, to represent me fairly. He said it wouldn't be fair to me, it wasn't fair to them.

THE COURT: What says the Defendant?

McSWANE: We are opposed to it, Your Honor.

THE COURT: Very well. The request for continuance will be overruled.

MS. MOSS: So what's going to happen, I'm going to be without a lawyer today?

THE COURT: That's correct.

MS. MOSS: I won't drop the case, I won't.

THE COURT: This Court is not going—

MS. MOSS: But he's trying to make me look like a criminal. This woman took my child away from me. And I can't—

McSWANE: Judge, we're ready.

MS. MOSS: She wants me to pay her $500.

THE COURT: You may take your seats.

[Hearing briefly recessed.]

THE COURT: 90-156, Jeannie Moss versus Jan Malone.

McSWANE: Your Honor, may we approach the bench?

THE COURT: You may.

McSWANE: Judge, it's my understanding, I won't speak for Ms. Moss. But my understanding is she wished to dismiss the case—well, I will let her speak.

MS. MOSS: Well, I'm not really happy about the decision up here and I don't want to be crucified. I don't want them to make me look like I'm bad. She's the one in the wrong. So to let everybody rest and let my son rest, I guess I will just drop it.

THE COURT: Any opposition by anyone?

McSWANE: No, Your Honor.

MR. RAY: [Attorney for Appellee] By drop, do you mean to dismiss the case, is that what you mean by dropping it?

MS. MOSS: Yes.

THE COURT: Very well. That request will be granted. Thank you. This case will be in recess.

[Hearing concluded.]

There appears in the record two orders of dismissal, one filed on May 12, 1992, and another signed on May 20, 1992. These orders to dismiss are identical except for the date. On June 5, 1992, Appellant obviously having then found counsel, filed her motion for new trial. Over Appellant's objection to the court and upon the urging of Appellee, the court did not hear any evidence but considered only the affidavits which were attached to the motion for new trial. The trial court did not rule on the motion and allowed it to be overruled as a matter of law on August 11, 1992. The trial court formally overruled the motion for new trial on October 5, 1992.

Appellant claims the court committed reversible error by granting the motion to withdraw by Appellant's former attorney one day prior to trial in violation of TEXAS RULES OF CIVIL PROCEDURE 10 and TEXAS DISCIPLINARY RULES OF PROFESSIONAL CONDUCT 1.15. The pertinent portions of Rule 10 read as follows:

> An attorney may withdraw from representing a party only upon written motion for good cause shown . . . . If another attorney is not to be substituted as attorney for the party, the motion *shall* state: that a copy of the motion has been delivered to the party; *the party has been notified in writing of his right to object to the motion; whether the party consents to the motion*; the party's last known address and all pending settings and deadlines. If the motion is granted, the withdrawing attorney shall immediately notify the party in writing of any additional settings or deadlines of which the attorney had knowledge at the time of the withdrawal and has not already notified the party. *The Court may impose further conditions upon granting leave to withdraw*. Notice or delivery to a party shall be either made to the party in person or mailed to the party's last known address by both certified and regular first class mail. If the attorney in charge withdraws and another attorney remains or becomes substituted, another attorney in charge must be designated of record with notice to all other parties in accordance with Rule 21a.

TEX. R. CIV. P. 10 (emphasis added).

The motion to withdraw failed to comply in the following regard:

(1) It does not appear that a copy of the motion was sent or attempted to be sent to Appellant; or

(2) that she had any notice of the motion being filed and being heard by the court;

(3) Appellant was not notified of her right to object to the motion;

(4) it does not appear that Appellant consented to the motion; and

(5) Appellant's last known address and all pending settings and deadlines, including a trial setting, were not given to her.

We are called upon to decide whether it is error for a court to allow an attorney to withdraw from representation of a client without complying with the provisions of Rule 10 of the TEXAS RULES OF CIVIL PROCEDURE requiring adequate notice to that client. This appears to be a case of first impression in Texas. Appellee, while acknowledging the motion to withdraw does not technically comply with Rule 10, argues that the trial court's decision to allow the withdrawal was not an abuse of discretion. And in this regard, Appellee states a reading of the above record shows that Appellant was aware of the withdrawal, acquiesced in it, and that it was her desire for Beatty to withdraw. We, however, decline to read the record with the same expansiveness. We read it to imply she had differences with her attorney because he failed to keep her apprised of settings, etc., and that she received her file from him one week prior to the April 9th setting.

In *Villegas v. Carter,* 711 S.W.2d 624 (Tex. 1986), the Supreme Court found that it was an abuse of discretion for the trial court to allow the attorney for the appellant to withdraw two days prior to the trial. The court stated that:

> [T]he right to counsel is a valuable right; its unwarranted denial is reversible error. (citations omitted) Therefore when a trial court allows an attorney to voluntarily withdraw, it must give the party time to secure new counsel and time for the new counsel to investigate the case and prepare for trial.

Villegas, 711 S.W.2d at 626.

In *Villegas,* the Appellant's file was turned over to him only six days prior to the date the case was set for hearing and that the last withdrawal of the two attorneys was only two days prior to the time he was required to proceed to trial.

The rules governing withdrawal contain provisions which are obviously placed there to protect the client's interest. In this case, the motion to withdraw as counsel, filed by Appellant's attorney, in addition to the stated defects, makes no reference to the effect of the withdrawal on his client. Allowing the attorney to improperly withdraw, however, did affect, and cause, the events which took place on April 9th and May 7th. On May 7, 1992, Appellant was involved in a lawsuit to fix liability for the death of her son, in which she was not represented by counsel against an adversary represented by at least two attorneys.

The court could have protected the Appellant's interests and ordered the attorney to continue to represent Appellant even though good cause may have existed for terminating the representation. He also could have ordered the Appellant, as a client, to have appeared with the attorney to determine the underlying facts of the withdrawal. *See* TEX. DISC. RULES OF PROF. CON. 1.15. A motion of continuance, which Appellant presented in the May 7th hearing, is within the trial court's sound discretion to either grant or deny. *State v. Crank,* 666 S.W.2d 91, 94 (Tex. 1984); *Hernandez v. Heldenfels,* 374 S.W.2d 196, 202 (Tex. 1963). While the trial court's course of action will not be disturbed unless the record discloses a clear abuse of discretion; when the ground for the continuance is the withdrawal of counsel, the movant must show that the failure to

be represented at trial was not due to their own fault or negligence. *State v. Crank,* 666 S.W.2d at 94. We find the record negates either fault or negligence on Appellant's part. Generally when movants fail to comply with TEX. R. CIV. P. 251, we will presume that the trial court did not abuse his discretion in denying the motion. *Garcia v. Texas Employers Insurance Assn.,* 622 S.W.2d 626, 630 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.). It would be unrealistic, however, to apply this presumption to lay movants, whose attorneys were allowed to withdraw. *Robinson v. Risinger,* 548 S.W.2d 762, 765 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.). This was a case of wrongful death. During both the April and May hearings it is clear that Appellant not only wished to continue her lawsuit, but that she was having problems getting another attorney to take the case because of the imminent trial setting. There is nothing in the record to suggest that Appellant was seeking delay in order to injure Appellee or that Appellant was negligent in failing to secure counsel.

We hold, under Rule 10 of the TEXAS RULES OF CIVIL PROCEDURE, the court erred in allowing Appellant's then trial counsel to withdraw with a deficient motion to withdraw without taking steps to protect this party litigant's valuable right. A fundamental element of due process is that every litigant is entitled to be heard in court by counsel of his own selection. This is a valuable right and an unwarranted denial of it is fundamental error where the litigant without negligence or default on his part is deprived of the right of counsel on the eve of trial. *See also* 17 C.J.S. *Continuances,* § 23. Under the narrow circumstances of this case, we find there was an abuse of discretion for the trial court to allow Appellant's attorney to withdraw as counsel. As our finding under the evidence available to us is dispositive of the case, we will not address the remaining points of error.

On the basis of the facts in the record of this case and the application of cited authorities to such facts, we have concluded that the judgment of the trial court should be reversed and the case remanded to the trial court for further proceedings in accordance with this opinion.

OPINION ON MOTION FOR REHEARING

In her motion for rehearing, Appellee accuses this Court of misapplying the standard of review enunciated in *Villegas v. Carter,* 711 S.W.2d 624 (Tex. 1986).

By order, on April 24, 1990, the Supreme Court amended TEXAS RULE OF CIVIL PROCEDURE 10 to be effective September 1, 1990. By that Rule change, the mandatory word "shall" imposes a duty on the trial court to require a motion to withdraw to comply with the requirements placed there to protect the party litigant. This altered the discretion trial courts may have previously enjoyed. When the trial court granted a motion to withdraw which failed to meet the mandatory requirements of Rule 10, the court abused its discretion. The court was aware that it was doing an act that would be a problem later when he said, "I knew when I let Mr. Beatty withdraw that we were going to get into this situation." (See original opinion for context). We have applied the reasoning in *Villegas* which reads:

> Before a trial court allows an attorney to withdraw, it should see that the attorney has complied with the Code of Professional Responsibility: (A) lawyer should not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled and complying with applicable laws and rules. Supreme Court of Texas, Rules Governing the State Bar of Texas art. XII, § 8 (Code of Professional Responsibility) DR 2-110(A)(2); *Smith v. State,* 490 S.W.2d 902, 909-10 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e.).

Villegas was decided in 1986. It is noted that TEXAS RULE OF CIVIL PROCEDURE 10, as amended in 1990, appears to adopt essentially the requirements of Article XII, section 8 of the then CODE OF PROFESSIONAL RESPONSIBILITY which is quoted above. The court could have made the error harmless if he had followed the guiding rules and principles of *Villegas.* That is, he should have "give[n] the party time to secure new counsel and time for the new counsel to investigate the case and prepare for trial." *Villegas,* 711 S.W.2d at 626 (emphasis added).

Appellee attributes importance to the fact that the original counsel was prepared to go to trial two days before he withdrew. However, the trial court did not sign the order allowing counsel to withdraw until March 23, 1992, and the original counsel did not release the file until after that date. Appellant had, at most, sixteen days to "secure new counsel to investigate the case and prepare for trial" before the date set for trial, April 9, 1992. The trial court must allow meaningful time for the party to find new counsel and prepare for trial.

Appellee also assigns great importance to the 57 days that elapsed between the withdrawal of counsel and the docket call on May 7, 1992. She argues that this is sufficient time to secure new counsel. We do not believe this interpretation of the record is realistic. Appellant was forced to try to find counsel to represent her in a wrongful death action within two weeks, obtain a continuance, and then "investigate the case and prepare for trial" in twenty-eight days. If the trial court had given Appellant fifty-seven straight days to "secure new counsel to investigate the case and prepare for trial" then the equities would be significantly altered.

Appellee argues that since Appellant found an attorney willing to file a motion for new trial within thirty days of the dismissal, it conclusively shows that she was not diligent and could have found counsel who would try the case during the twenty-eight days before the dismissal. We hold this argument to be without merit.

We hold that the effect of an erroneous ruling on the motion to withdraw, when combined with the failure on two occasions to give adequate time for the party to secure new counsel and prepare for trial, amounted to harmful error.

Appellee's motion for rehearing is overruled.

Notes & Questions

1. *Client's Discharge of Counsel.* The client's discharge of counsel must be distinguished from voluntary withdrawal by the attorney. In *Rogers v. Clinton,*[1] the Texas Supreme Court noted that a "client may discharge his attorney at any time even without cause." In fact, an attorney may be sanctioned for taking actions on behalf of the client after being fired.[2] However, as illustrated by *Moss,* an attorney may withdraw from representation of a client only if the requirements of Rule 10 have been satisfied. In particular, the attorney must show good cause for withdrawal in a written motion filed with the court.[3] Is it necessary for the attorney to ensure that the client has substitute counsel in order to establish good cause in the motion to withdraw? Late withdrawal of

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[1] 794 S.W.2d 9, 10 n. 1 (Tex. 1990).

[2] *See* Bloom v. Graham, 825 S.W.2d 244, 248 (Tex. App.—Fort Worth 1992, writ denied). *See also* In re News America Pub., Inc., 974 S.W.2d 97 (Tex. App.—San Antonio 1998, orig. proceeding) (opposing attorney sanctioned for meeting with party when client had not informed own counsel that counsel was discharged).

[3] *See* TRCP 10.

counsel creates problems for judges who are trying to get cases to trial. Some judges will make a lawyer stay in the case until the parties have completed alternate dispute resolution, hoping that the case will be settled.

2. *Accepting employment.* When approached to become substituted counsel, what are some important considerations? Why was Ms. Moss able to find counsel after the case had been dismissed, but unable to do so before trial?

3. *Texas disciplinary rules governing withdrawal.* The Texas Disciplinary Rules of Professional Conduct must also be considered when an attorney considers withdrawing as counsel. Rule 1.15(d) requires a lawyer who terminates representation to take reasonable steps to protect the client's interests, including:

(a) giving reasonable notice to the client;

(b) allowing time for employment of another attorney;

(c) surrendering papers and property to which the client is entitled; and

(d) refunding any advance payments not yet earned by the attorney.[4]

4. *Attorney in Charge.* Rule 57 requires all pleadings of a party represented by an attorney, including the plaintiff's petition and the defendant's answer, to be signed by at least one attorney of record in his individual name.[5] When more than one attorney represents a party, one attorney must be designated as the "attorney in charge" pursuant to Rule 8. This designation may be accomplished by default through listing such attorney's name and signature first in the signature block; or, when not listed first, the attorney in charge must be specifically designated in the pleadings. All communications from the court or other counsel with respect to the action must be sent to the attorney in charge.[6] But motions filed by attorneys other than the attorney in charge are not void.[7] What steps must be taken, if any, to change the designation of the attorney in charge? In addition, Rule 9 generally limits a party to two counsel during trial.[8] An exception may be made in "important" cases, or upon special leave of court.

5. *Disqualification*. Sometimes an opponent will move to disqualify counsel.[9] Sometimes, this motion is used as a tactic to slow down litigation and interfere with the opponent's trial preparation.

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4 *See* TDRPC 1.15(d); *see also* W. DORSANEO, 1 TEXAS LITIGATION GUIDE § 3.05 [2] (1995) [hereinafter DORSANEO].

5 *See* TRCP 57; *see also* TRCP 45.

6 See Morin v. Boecker, 122 S.W.3d 911, 914-16 (Tex. App.—Corpus Christi 2003, no pet.) (reversing judgment when notice sent to party instead of attorney in charge).

7 City of Tyler v. Beck, 196 S.W.3d 784 (Tex. 2006) (per curiam).

8 *See* TRCP 9.

9 *See e.g.* Nat'l Medical Enterprises, Inc. v. Godbey, 924 S.W.2d 123 (Tex. 1996)(finding that plaintiffs' lawyers were disqualified).