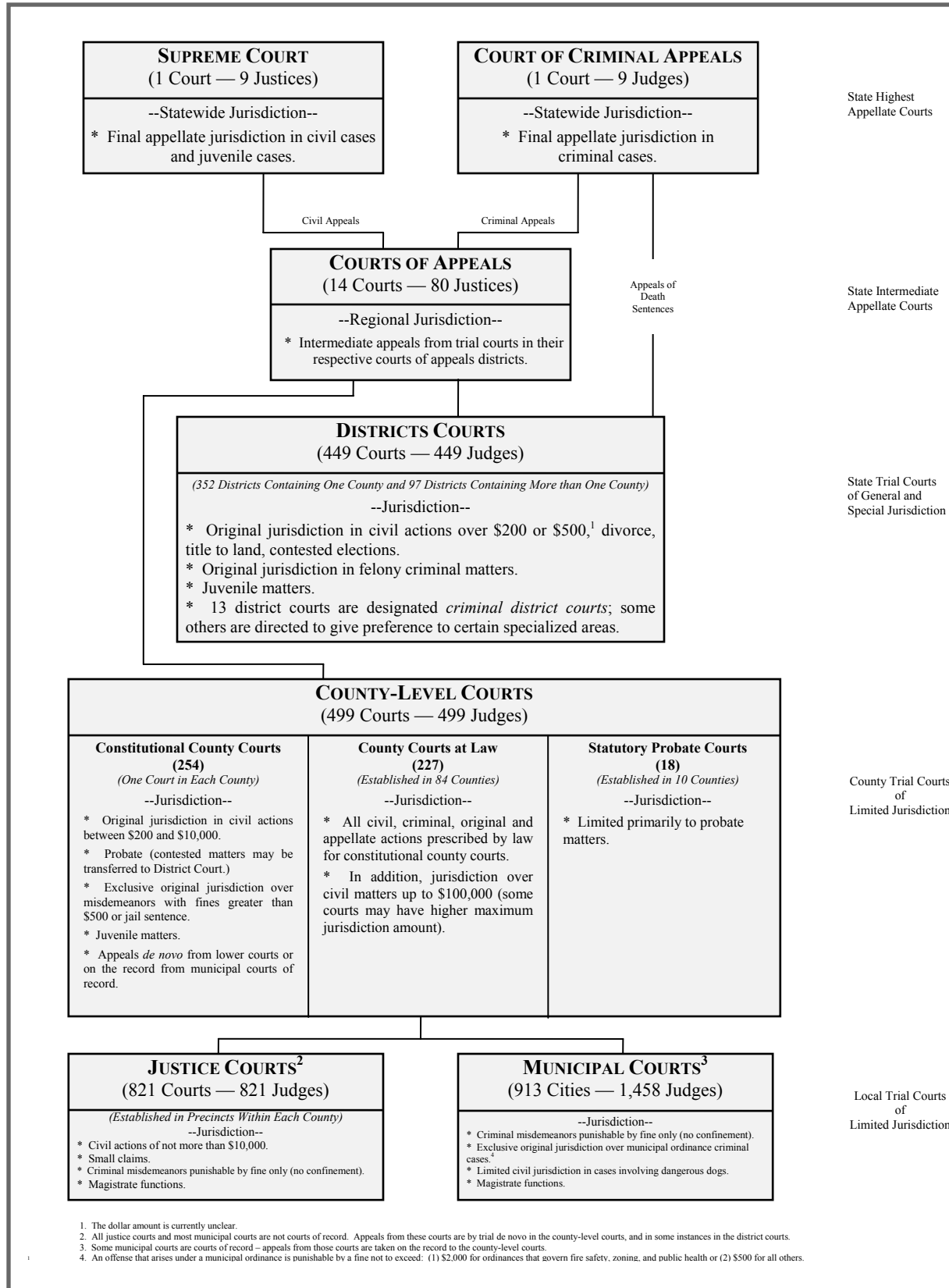


CHAPTER 2. THE TEXAS TRIAL COURTS

A. Court Structure of Texas

March 1, 2009



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 chart¹ 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.

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. 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.

¹ COURT STRUCTURE OF TEXAS, (March 1, 2009), <http://www.courts.state.tx.us/>

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.

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.⁴ 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.⁵ For example, the amount in controversy jurisdiction of the county courts at law range from \$100,000 (the minimum) 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 Gov't Code §§ 27.031, .032, .033; §§ 28.001, .002, .003, 30.00003.

(1) Justice Courts

Justice courts are the lowest ranking civil courts.⁶ 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.⁷ 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 court) up to the \$10,000 Justice court limit.⁸ Justice courts also function as small claims courts—courts of inferior jurisdiction with simplified procedures so that parties easily can represent themselves without having a lawyer when the amount does not exceed \$10,000. 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. However, there is no further appeal past the trial de novo for claims originating in the small claims court as opposed to the justice court.⁹

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

⁴ 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).

⁵ See GOV'T CODE §25.003.

⁶ TEX. CONST. art. V; GOV'T CODE § 27.031-032.

⁷ TEX. CONST. art. V, §19.

⁸ GOV'T CODE § 27.031.

⁹ *Sultan v. Mathew*, 178 S.W.3d 747, 752 (Tex. 2005)

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. Moreover, the district court has exclusive jurisdiction if title to real property is at issue.¹⁰

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.¹¹ They can issue writs of attachment, garnishment, and sequestration in cases otherwise within their jurisdiction.¹² 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.¹³

(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.¹⁴ Municipal courts have concurrent jurisdiction with the justice court in criminal cases that are punishable by fine only.¹⁵ They have very narrow civil jurisdiction for the purpose of enforcing certain municipal ordinances.¹⁶

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.¹⁷

Constitutional county courts have amount in controversy jurisdiction over amounts in excess of \$200 (\$200.01) through \$10,000.¹⁸ 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.¹⁹

Constitutional county courts can grant the following relief: injunctions, mandamus, certiorari and all other writs necessary to enforce their jurisdiction.²⁰ They cannot hear suits for

¹⁰ 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).

¹¹ GOV'T CODE § 27.031(a)(3).

¹² GOV'T CODE § 27.032.

¹³ GOV'T CODE §§ 27.031(b); 27.032.

¹⁴ TEX. CODE CRIM. PROC. art. 4.14(a) (2009); TEX. GOV'T CODE § 29.003 (2007).

¹⁵ TEX. CODE CRIM. PROC. art. 4.14(b) (2009); TEX. GOV'T CODE § 29.003 (2007).

¹⁶ TEX. GOV'T CODE § 30.00005(d) (2007).

¹⁷ See GOV'T CODE §§ 26.042-44, 26.051, 26.101-.354; CPRC §§ 51.001-002, 61.021-022.

¹⁸ GOV'T CODE §§ 26.042(a), 27.031(a)(1).

¹⁹ TEX. CONST. art. V., § 6, CPRC §51.001; GOV'T CODE § 28.052.

²⁰ TEX. CONST. art. V, § 16; GOV'T CODE §§ 26.044, 26.051; CPRC §§ 61.021, 62.021, 63.002, 65.021.

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.²¹

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.²² They have “residual jurisdiction”—by constitutional mandate they have jurisdiction in all cases unless exclusive jurisdiction is conferred on some other court.²³ But courts of general jurisdiction are presumed to have jurisdiction unless a contrary showing is made.²⁴ 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.

It appears that the lower limit of the district court’s jurisdiction is \$200.01.²⁵ 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.²⁶ The Legislature can create a statutory court with limited jurisdiction or jurisdiction equal to the

²¹ GOV’T CODE § 26.043.

²² *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 75 (Tex. 2000).

²³ *See* TEX. CONST. art. V, § 8; GOV’T. CODE §§ 24.007-008, 24.011.

²⁴ *Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 75 (Tex. 2000).

²⁵ *Arnold v. West Bend Co.*, 983 S.W.2d 365 n.1 (Tex. App.—Houston [1st Dist.] 1988, no writ). However, there is some question concerning what is the lower limit of the district court’s jurisdiction. The Tyler Court of Appeals says that the minimum jurisdictional amount is \$500.00, as it was under the 1876 Texas Constitution. *Chapa v. Spivey*, 999 S.W.2d 833 (Tex. App.—Tyler 1999, no pet.); *Pendley v. Texas Dept. of Criminal Justice*, 2001 WL 1153480 (Tex. App.—Tyler 2001, no pet. h.). However, the Texarkana and 1st Court of Appeals in Houston have held that the minimum limit is \$200.01, because it was changed as a result of a 1985 amendment to the Constitution and re-codification of the jurisdictional statute. *Artega v. Jackson*, 994 S.W.2d 342 (Tex. App.—Texarkana 1999); *Arnold v. West Bend Co.*, 983 S.W. 2d 365 (Tex. App.—Hous. [1st Dist.] 1998, pet. denied). And, to make matters more complicated, the Texas Supreme Court has signaled in several footnotes that they may think the district courts have no minimum amount in controversy limitation on jurisdiction. *See Dubai Petroleum Co. v. Kazi*, 12 S.W.3d 71, 75 n.4 (Tex. 2000)(noting that the aggregation statute “may be irrelevant to district courts, where there may no longer be a jurisdictional minimum”); *Smith v. Clary Corp.*, 917 S.W.2d 796, 799 n.3 (Tex. 1996)(noting that “again we do not consider whether district courts now have minimum jurisdictional amounts after the 1985 constitutional amendments); *Peek v. Equipment Services Co.*, 779 S.W.2d 802, 803 n.4 (Tex. 1989) (noting the 1985 amendments, but not deciding the issue). *See* TEX. CONST. art. V, § 19 (granting the justice court exclusive jurisdiction where the amount in controversy is \$200 or less). District courts have concurrent jurisdiction with justice courts (\$500.01 to \$5,000) and county courts (\$500.01-\$5000).

²⁶ TEX. CONST. art. V, § 2.

constitutional dimensions of a district court.²⁷ The legislature may not, however, reduce the constitutional jurisdiction of a district court.²⁸

(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.²⁹ 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,³⁰ 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."³¹ The constitutional county court has general probate jurisdiction,³² 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 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.³³ 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

²⁷ 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).

²⁸ *Lord v. Clayton*, 352 S.W.2d 718, 721-22 (Tex. 1962).

²⁹ See e.g., GOV'T. CODE § 25.0732 (El Paso); *Comancho v. Samaniego*, 831 S.W.2d 804 (Tex. 1992).

³⁰ Thus, the amount in controversy jurisdiction of the county court at law ranges from in excess of \$200 through \$100,000.

³¹ See *Palmer v. Coble Wall Trust Co.*, 851 S.W.2d 178 n.3 (Tex. 1992).

³² PROBATE CODE § 4.

³³ PROBATE CODE § 5(b).

hear contested probate matters.³⁴ The court's amount in controversy jurisdiction for civil cases does not limit its probate jurisdiction.³⁵

(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.³⁶

(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,”³⁷ 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.”³⁸

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.³⁹ 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.⁴⁰

³⁴ See GOV'T. CODE §§ 25.0003(c)(2); 25.1863.

³⁵ Hailey v. Siglar, 194 S.W.3d 74 (Tex. App.—Texarkana 2006, pet. denied).

³⁶ See PROBATE CODE § 5(c).

³⁷ PROBATE CODE §§ 5(e), 5A; Seay v. Hall, 677 S.W.2d 19, 25 (Tex. 1984).

³⁸ 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.).

³⁹ See Speer v. Stover, 685 S.W.2d 22, 23 (Tex. 1985).

⁴⁰ 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).

(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.⁴¹ 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.⁴² 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.⁴³

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.⁴⁴ All damages are included in the amount in controversy, even though some of the claimed damages are “speculative” and not likely to be recovered.⁴⁵

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.⁴⁶ However, aggregation should not apply to divest a court of jurisdiction on counterclaims asserted by multiple defendants.⁴⁷ 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.⁴⁸

⁴¹ PROP. CODE §§ 21.001-003.

⁴² 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.

⁴³ PROP. CODE § 21.013.

⁴⁴ *Peek v. Equipment Service Co.*, 779 S.W.2d 802 (Tex. 1989).

⁴⁵ 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).

⁴⁶ *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).

⁴⁷ *Smith v. Clary Corp.*, 917 S.W.2d 796 (Tex. 1996).

⁴⁸ *Borrego v. del Palacio*, 445 S.W.2d 620, 622 (Tex. Civ. App.—El Paso 1969, no writ).

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

(1) *Include attorney's fees and punitive damages.*⁴⁹ 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.⁵⁰

(2) *Include interest, except interest "eo nomine", interest as interest.* The jurisdictional statutes specifically exclude "interest" in determining the amount in controversy.⁵¹ 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."⁵²

(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.⁵³

(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.⁵⁴ The converse is not true: a court cannot acquire jurisdiction over claims in excess of its maximum jurisdictional limit.

(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.⁵⁵ 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.⁵⁶

(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.⁵⁷ When a

⁴⁹ See *Bybee v. Fireman's Fund Ins. Co.*, 331 S.W. 2d 910 (Tex. 1960) (attorney's fees included in amount in controversy).

⁵⁰ 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").

⁵¹ See GOV'T CODE §§ 25.003; 26.042; 27.031.

⁵² *Barnes v. U.S. Fidelity and Guaranty Company*, 279 S.W.2d 919, 921 (Tex. Civ. App.—Waco 1955, no writ).

⁵³ MCDONALD & CARLSON, TEXAS CIVIL PRACTICE § 3.26.

⁵⁴ *Andel v. Eastman Kodak Company*, 400 S.W.2d 584, 586 (Tex. Civ. App.—Houston 1966, no writ).

⁵⁵ 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).

⁵⁶ *Lucey v. Southeast Texas Emergency Physician Assn.*, 802 S.W.2d 300, 302 (Tex. App.—El Paso 1990, writ denied).

⁵⁷ *Super X Drugs, Inc. v. State*, 505 S.W.2d 333, 336, (Tex. Civ. App.—Ft. Worth 1974, no writ).

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.

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,”⁵⁸ 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.⁵⁹ 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.⁶⁰

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.⁶¹ Mandamus is not available for review of a trial court’s determination of subject matter jurisdiction before a trial on the merits.⁶²

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 domain⁶³ and probate⁶⁴ jurisdiction), a court without jurisdiction may not transfer the case, but can only dismiss so that the case can be refiled.

⁵⁸ See Rule 85.

⁵⁹ *Thomas v. Long*, 207 S.W.3d 334 (Tex. 2006).

⁶⁰ CPRC § 16.064.

⁶¹ See CPRC § 51.014(8) (1997 amendment).

⁶² *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).

⁶³ PROP. CODE § 21.001.

⁶⁴ 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. *Criticism of the System*

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.⁶⁵ Most recently, 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. However, no legislation adopting any of these recommendations has passed the Texas Legislature.

6. *Cases Filed in the Texas Courts*

What kinds of cases are filed in the Texas courts? First of all, the numbers are decreasing. The 2008 annual report of the Office of Court Administration reports that in 2008, 870,690 civil, criminal, and juvenile cases were added to the dockets of the state's 444 district courts. This was a decrease of nearly 4% from the previous year, for an average of 1,961 cases added per district judge. Civil cases accounted for 63.3% of all cases filed during 2008. While, criminal cases accounted for 32.2% of all cases added, the highest percentage in more than 20 years. Family law cases (including divorce proceedings) comprised the majority (63.1%) of the civil cases filed. The majority of criminal cases were drug offenses (drug possession, sale, and manufacture), which accounted for 32.5% of the total number of criminal cases filed.

In 2008, the Supreme Court of Texas added 138 regular causes to its docket, a 12.7% decrease from the previous year. The Supreme Court reversed the intermediate appellate court in 60.3% of the cases it granted petition for review. The Court affirmed the appellate court's decision in 7.9% of the cases, with the other 11.9% receiving mixed dispositions (i.e., affirmed in part and reversed in part). The Court of Criminal Appeals caseload consists of mostly mandatory review matters. Review of applications for post conviction habeas corpus relief in felony cases, original proceedings, and direct appeals comprised 79% of all cases added to the Court of Criminal Appeals' docket.

⁶⁵ 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).

Problems

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

1. A landlord wants to evict a tenant for nonpayment of rent and to recover \$12,000 in rent owed. 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 against a single defendant.
 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.
 9. 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. 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. 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. 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. Probate of a will.
 12. If one of the assets of the estate is the deceased's survival action concerning the accident in which he died, can that action be tried in the probate court?
 13. The beneficiaries want to file suit against the personal representative of the estate for fraud committed against the estate.
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B. Judges in Texas 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 HANNKINSON 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

¹ *Buckholts Indep. School Dist. v. Glaser*, 632 S.W.2d 146, 148 (Tex. 1982).

not *disqualified*, but the bias or prejudice may be grounds for recusal. The orders rendered by a 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,

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).

Consolidation and Sanctions.” Meanwhile, the defendants removed all of the cases to federal 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.* How much interest is enough to disqualify? In *Sun Oil Co. v. Whitaker*,⁶ the Texas Supreme Court said, “It is a settled principle of law that the interest which disqualifies a judge is that interest, however small, which rests upon a direct pecuniary or personal interest in the result of the case presented to the judge or court.”⁷ 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 voluntarily recusing himself. In that Texas Supreme Court case, 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?

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

⁶ 483 S.W.2d 808 (Tex. 1972).

⁷ The judge’s status as taxpayer alone is not sufficient to rise to the level of interest necessary for constitutional disqualification. *Rio Grande Valley Gas Co. v. City of Pharr*, 962 S.W.2d 631 (Tex. App.—Corpus Christi 1997, petition dismissed w.o.j.).

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.

2009 WL 1576573 (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

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).

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.

***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.

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

³ See Election Code § 251.001 *et seq.*

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.

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*

⁷ TEX. GOV'T CODE § 74.053(a)-(c).

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 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.

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

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 county² 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 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

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.

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).

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

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

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.).

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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 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 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.

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. *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.

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 you 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 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

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.

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

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.

D. Rulings on Pretrial Matters

1. *Pretrial Rulings and Appellate Review*

Read CPRC § 51.012, § 51.014.

SAFETY-KLEEN CORP.

v.

GARCIA

945 S.W.2d 268

(Tex. App.—San Antonio 1997, orig. proceeding)

GREEN, JUSTICE.

Relator, Safety-Kleen Corp. ("Safety-Kleen"), seeks a writ of mandamus to require the Respondent, The Honorable Ricardo H. Garcia, to set a hearing on Safety-Kleen's motion to compel answers to interrogatories, which was filed on January 20, 1997.¹ We conditionally grant the writ to compel Judge Garcia to act.

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).

¹ The real parties in interest did not file a written response and were not represented at oral argument.

PROCEDURAL HISTORY.

Safety-Kleen is one of 254 defendants originally sued by 72 plaintiffs for personal injuries allegedly caused by exposure to cement products. Safety-Kleen served the plaintiffs with its first set of interrogatories between November 14, 1996 and December 6, 1996. The plaintiffs filed a joint answer to the interrogatories on January 15, 1997. On or about January 20, 1997, Safety-Kleen filed a motion to compel contending the plaintiffs “refused to submit any of the information specifically requested by [certain] interrogatories.”²

On January 27, 1997, Safety-Kleen sent a letter to the court coordinator requesting that a hearing be set on its motion. On February 11, 1997, Safety-Kleen forwarded a second written demand to the court coordinator to set the motion for hearing. The letter notes that Safety-Kleen previously contacted the court several times regarding its request. Safety-Kleen has also included in our record an affidavit from its attorney stating that the court coordinator refused to set the motion for a hearing. The last time the court coordinator was contacted, she informed Safety-Kleen’s attorney that “no motions [would] be set for hearing until October of 1997.”

DISCUSSION.

A trial court is required to consider and rule upon a motion within a reasonable time. “When a motion is properly filed and pending before a trial court, the act of giving consideration to and ruling upon that motion is a ministerial act,” and mandamus may issue to compel the trial judge to act.

Although Judge Garcia’s refusal to act is evident in his failure to set Safety-Kleen’s motion for hearing, Judge Garcia has also expressly indicated in recorded statements made at a preliminary hearing that he will refuse to act in regard to such motions:

MR. EDWARDS [Plaintiffs’ Attorney]: Your Honor, Don Edwards. As Mr. Gonzalez was stating earlier, we have conducted discovery towards the defendants in response to their motion for transfer, and I believe—roughly, it was five to ten percent of the defendants have responded to this discovery. So at this point until the defendant—

THE COURT: I’m not responsible for the defendants not responding to your motions.

MR. EDWARDS: Yes, sir.

THE COURT: Now, don’t ask me to participate in your pretrial discovery because I’m not. I don’t have the time.

* * *

MR. KELLY [Plaintiffs’ Attorney]: * * * But the frustration of the Plaintiff is that there’s no response whatsoever. We’re being asked to go forward and prove our venue facts when there’s no corporation [sic] at all on the part of the defendants to give us those very venue facts. And that is why the motion to postpone was filed. It was filed in good faith to advise the Court that if we can have a sufficient period of time and the Court’s help in obtaining the venue.

THE COURT: No. Don’t ask for my help. You’re not going to get it. I’m not going to get involved in the discovery. That’s your problem.

² Safety-Kleen contends it is entitled to the discovery under the precedent established in *Able Supply Co. v. Moye*, 898 S.W.2d 766 (Tex. 1995). We are not called upon to address the merits of Safety-Kleen’s motion in this proceeding.

MR. KELLY: All right. The second part of my statement, if we could have efficient [sic] time at which to obtain the venue facts, then we will be able to go forward.

THE COURT: And supposedly [sic] they won't answer then what will you do?

MR. KELLY: At that point we would have to use the Court's measures and motions to compel and have hearings before the court.

THE COURT: No, no. That's exactly what I want to avoid. If you're going—Don't you even think for one minute that you're going to pretrial me to death in this case because it won't happen. I'm telling you it won't happen.

* * *

THE COURT: Okay. Anybody else? Okay. What else on this motion? Okay. Let me rule on this motion then. The Court is going to grant this motion. I'm going to give extended time for the hearing on the motion to transfer venue. It's set for when you say?

MR. GONZALEZ: February 6.

THE COURT: No. I'm going to set it. Don't tell me. Don't even suggest. You wanted a ruling from me, you're going to get it. This case is set for the motion to transfer for October the 14th. That'll give you enough time to complete everything. And if you haven't done it by then, by golly, you better get this case out of here.

MS. HOUSTON: Your Honor, could you repeat that.

THE COURT: October the 14th. That's going to be a Tuesday. Now, what other motion.

MS. HOUSTON: Thank you, Your Honor.

THE COURT: What other motion?

MR. GONZALEZ: Clarification. What was the discovery limited to?

THE COURT: I'm not going to limit any of the discovery. I'm not going to get involved in the discovery. That's up to you. Don't get me involved in that.

It is clear from the record before us that Judge Garcia simply does not want to be involved in this case:

THE COURT: Well, now venue facts should have already been investigated before you filed suite [sic]. Why are you taking my time? Listen. I didn't ask for you guys—for the Plaintiffs to file in my Court. I didn't ask for this case. I didn't beg you to file it in my Court. My god. I don't want it take it out. And if there's any legal grounds of taking this case out of here, you bet you I'm going to grant it. You bet you I'm going to grant it. I don't want this case. I'm not begging for it so don't ask me to rule on your side just because you filed it here. You weren't doing me any favors.

Despite Judge Garcia's misgivings, he is the elected official assigned to hear this cause, and neither the case law previously cited nor the Texas Code of Judicial Conduct give Judge Garcia the discretion to refuse to hear or rule on Safety-Kleen's motion within a reasonable period of time. *See* TEX. CODE JUD. CONDUCT, Canon 3 (1994), reprinted in TEX. GOV'T CODE ANN., tit. 2, subtit. G app. B (Vernon Supp. 1997) ("judge shall hear and decide matters;" "judge shall dispose of all judicial matters promptly, efficiently and fairly").

Safety-Kleen's right to discovery cannot be abated or otherwise affected by the pendency of a motion to transfer venue. TEX. R. CIV. P. 88. We therefore conditionally grant Safety-Kleen's

petition for writ of mandamus. The writ shall issue only upon certification to this court that Judge Garcia has failed to hear and rule on Safety-Kleen's motion to compel by May 12, 1997.

Concurring opinion by JUSTICE RICKOFF omitted.

POLARIS INVESTMENT MGMT. CORP.

v.

ABASCAL

892 S.W.2d 860

(Tex. 1995)

PER CURIAM.

In this original proceeding, Polaris Investment Management Corporation and others ask this Court to reverse three trial court rulings. In the underlying action, approximately 2,700 plaintiffs and plaintiff-intervenors seek damages from Polaris and its co-defendant, Prudential Securities, Inc., resulting from the sale of certain limited partnerships. Polaris challenges the trial court's selection of the trial plaintiffs, its abatement of discovery, and the propriety of venue in Maverick County. The court of appeals overruled Polaris' motion for leave to file a petition for writ of mandamus; but in a concurring opinion, a justice of that court expressed dissatisfaction with both the trial court's rulings on incidental matters and the current Texas rules governing venue. 890 S.W.2d 486. Because a writ of mandamus is granted only in very narrow and extraordinary circumstances, which are not present here, and the power to make venue changes is purely statutory, we deny Polaris leave to file a petition for writ of mandamus.

Because of the large number of plaintiffs in this case, the trial court ordered that the claims of a small group of plaintiffs proceed in an initial separate trial. Polaris alleges that the first group of trial plaintiffs was handpicked by plaintiffs' counsel without participation by defendants or any scrutiny by the trial judge. However, even if the trial judge erroneously selected the trial plaintiffs, mandamus relief is still inappropriate. The selection of trial plaintiffs is an incidental ruling, and this Court has repeatedly declined to remedy such rulings by mandamus. This Court will not abandon this well-settled principle to grant mandamus relief in the present case. To do so would severely impair the ability of trial judges to manage their dockets, and would require this Court to micromanage trials.

Similarly, Polaris' dissatisfaction with the trial court's discovery rulings cannot be properly addressed in the context of a mandamus proceeding. Polaris invites this Court to review the trial judge's decision to restrict Polaris' discovery to only those plaintiffs initially set for trial. Because the record indicates that the trial court's abatement of discovery is not of such an egregious nature that it goes to the heart of Polaris' case, we must decline this invitation. The trial judge's ruling is incidental to the trial process and does not permanently deprive Polaris of substantial rights; therefore, it cannot serve as a basis for the extraordinary remedy of mandamus.

Finally, Polaris argues that venue in Maverick County is improper. While this Court shares many of the concerns about forum shopping expressed in the concurring opinion that accompanied the court of appeals' denial of leave to file, Texas law is quite clear that venue determinations are not reviewable by mandamus.

* * *

In the present case, the proper forum for dealing with the problems articulated in Polaris' petition and in the court of appeals' concurring opinion is the Texas Legislature. Accordingly, relators' motion for leave to file a petition for writ of mandamus is overruled.

Notes & Questions

1. *Interlocutory Appeal*. Ordinarily, a party may not obtain immediate appellate review of a trial court's pretrial decision because courts of appeals generally have appellate jurisdiction only over final judgments.¹ A final judgment is a judgment that disposes of all parties and claims in a lawsuit. Therefore, review of pretrial rulings usually occurs only when the losing party appeals the judgment and points to an error that the trial judge made in a pretrial ruling that probably caused the rendition an improper judgment.²

However, if allowed by statute, immediate review may be available through an interlocutory appeal. The interlocutory appeal statute, § 51.014 of the Texas Civil Practice & Remedies Code, lists eight different orders that may be appealed immediately to the court of appeals. In this course, we will study two of those orders—orders ruling upon the special appearance³ and the plea to the jurisdiction.⁴ We will also study the interlocutory appeals currently available for venue rulings.⁵ Remember, only those orders made subject to interlocutory appeal by statute can be appealed before final judgment.

2. *Mandamus*. As we have seen, even if your order is not included in a statute allowing interlocutory appeals, you nevertheless may be able to obtain immediate review through the extraordinary writ of mandamus. Mandamus is an original proceeding in the appellate court that seeks an order compelling a state official, such as the trial judge, to refrain from acting contrary to law. To successfully obtain mandamus relief in the court of appeals when complaining about a trial court's interlocutory order, the party must show (1) a clear abuse of discretion or legal error, and (2) no adequate remedy by appeal.

3. *Safety-Kleen*. The case underlying the mandamus proceeding in *Safety-Kleen* was a toxic tort case with multiple parties. Why might Judge Garcia not want this case in his court? What is a "court coordinator"? What was the motion that the plaintiffs wanted heard? What was the relief that they sought from the judge? Why was mandamus relief appropriate? What if the judge had held the hearing but refused to rule?

4. *Polaris*. The Wall Street Journal reported that investors from all over the country joined the Texas litigation because a New York judge dismissed the plaintiff's claims for lack of merit, and that Maverick County was the chosen forum as a "matter of friendship, politics and money."⁶ Among the rulings at issue in the above opinion was the local judge's refusal to transfer the case to a different county in Texas and his choice of the estate of an elderly blind widow and a Catholic priest as the first plaintiffs to try their claims to a jury. What happened after the Supreme

¹ CPRC § 51.012.

² See TRAP 44.1.

³ See CPRC § 51.014(7).

⁴ See CPRC § 51.014(8).

⁵ CPRC § 15.003(c).

⁶ Laurie P. Cohen, The Jurors are Bountiful, WALL ST. J., NOV. 30, 1994, at A1.

Court denied mandamus? An all-Catholic, all-Hispanic jury ruled against the priest and rendered a judgment for the defendants.⁷ Soon thereafter, all the cases settled.

Why was mandamus not an available remedy in *Polaris*? In *Polaris*, both the San Antonio Court of Appeals and the Texas Supreme Court were critical of the trial judge's rulings. Nevertheless, the appellate courts refused to act to correct an "incidental" ruling of the trial court. Which rulings are "incidental" and which ones are not? What is the proper role of the appellate court in overseeing the trial judge's pretrial rulings? Is it appropriate that appellate courts review only the final judgment and reverse only if the trial judge committed a mistake that probably caused the rendition an improper judgment?⁸ All of these issues have been hotly debated, resulting in an evolution of the Texas Supreme Court's thinking over time.

WALKER

v.

PACKER

827 S.W.2d 833

(Tex. 1992)(orig. proceeding)

PHILLIPS, CHIEF JUSTICE.

* * *

Having concluded that the trial court erred in denying the discovery . . . we now must determine whether the appropriate remedy lies by writ of mandamus. "Mandamus issues only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy by law." We therefore examine whether the trial court's error in the present case constituted a clear abuse of discretion and, if so, whether there is an adequate remedy by appeal.

1. Clear Abuse of Discretion

Traditionally, the writ of mandamus issued only to compel the performance of a ministerial act or duty.

Since the 1950's, however, this Court has used the writ to correct a "clear abuse of discretion" committed by the trial court.

A trial court clearly abuses its discretion if "it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." This standard, however, has different applications in different circumstances.

With respect to resolution of factual issues or matters committed to the trial court's discretion, for example, the reviewing court may not substitute its judgment for that of the trial court. The relator must establish that the trial court could reasonably have reached only one decision. Even if the reviewing court would have decided the issue differently, it cannot disturb the trial court's decision unless it is shown to be arbitrary and unreasonable.

⁷ M. Ballard, *If This is Forum Shopping, the Plaintiff Deserves a Refund*, TEXAS LAWYER, August 7, 1995.

⁸ See TRAP 44.1.

On the other hand, review of a trial court's determination of the legal principles controlling its ruling is much less deferential. A trial court has no "discretion" in determining what the law is or applying the law to the facts. Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion, and may result in appellate reversal by extraordinary writ.

In determining whether the trial court abused its discretion in the present case, we treat the trial court's erroneous denial of the requested discovery on the sole basis of *Russell* as a legal conclusion to be reviewed with limited deference to the trial court. This is consistent with our approach in previous mandamus proceedings arising out of the trial court's interpretation of legal rules. Under this analysis, the trial court's erroneous interpretation of the law constitutes a clear abuse of discretion.

2. Adequate Remedy by Appeal

In order to determine whether the writ should issue, however, we must further decide whether the Walkers have an adequate remedy by appeal.

Mandamus will not issue where there is "a clear and adequate remedy at law, such as a normal appeal." Mandamus is intended to be an extraordinary remedy, available only in limited circumstances. The writ will issue "only in situations involving manifest and urgent necessity and not for grievances that may be addressed by other remedies." The requirement that persons seeking mandamus relief establish the lack of an adequate appellate remedy is a "fundamental tenet" of mandamus practice.

* * *

The requirement that mandamus issue only where there is no adequate remedy by appeal is sound, and we reaffirm it today. No mandamus case has ever expressly rejected this requirement, or offered any explanation as to why mandamus review of discovery orders should be exempt from this "fundamental tenet" of mandamus practice. Without this limitation, appellate courts would "embroil themselves unnecessarily in incidental pre-trial rulings of the trial courts" and mandamus "would soon cease to be an extraordinary writ." . . .

We further hold that an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ. As we observed in *Iley v. Hughes*, the "delay in getting questions decided through the appellate process . . . will not justify intervention by appellate courts through the extraordinary writ of mandamus. Interference is justified only when parties stand to lose their substantial rights." 158 Tex. at 368, 311 S.W.2d at 652.

On some occasions, this Court has used, or at least mentioned, the more lenient standard first articulated in *Cleveland v. Ward*, 116 Tex. 1, 14, 285 S.W. 1063, 1068 (Tex. 1926), that the remedy by appeal must be "equally convenient, beneficial, and effective as mandamus." This standard, literally applied, would justify mandamus review whenever an appeal would arguably involve more cost or delay than mandamus. This is unworkable, both for individual cases and for the system as a whole. Mandamus disrupts the trial proceedings, forcing the parties to address in an appellate court issues that otherwise might have been resolved as discovery progressed and the evidence was developed at trial. Moreover, the delays and expense of mandamus proceedings may be substantial. This proceeding, for example, involving rulings on collateral discovery matters, has delayed the trial on the merits for over two years. The impact on the appellate courts must also be considered. . . . We therefore disapprove of *Cleveland*, *Crane*, *Jampole* and any other authorities to the extent that they imply that a remedy by appeal is inadequate merely because it might involve more delay or cost than mandamus.

* * *

For the above reasons, we conclude that the Walkers have not established their right to relief by mandamus on either discovery matter. Therefore, we deny the Walkers' petition for writ of mandamus.

DOGGETT, JUSTICE, dissenting.

Them that's got shall get

Them that's not shall lose

—*God Bless The Child*¹

With a double standard, the majority strikes a devastating blow at the most direct method of curbing abuses of judicial power. Many judicial excesses far beyond the scope of anything alleged in this particular case will henceforth receive only an official nod and wink from the Texas Supreme Court.

Mandamus is the legal tool by which appellate courts can promptly correct arbitrary and capricious rulings by trial judges. Today's opinion announces that this remedy will be available to support concealment of the truth but not its disclosure. Mandamus is officially declared a one-way street in the Texas courts—our judiciary can help to hide but not to detect.

* * *

Today's opinion reflects the radical change in philosophy which has taken firm hold in this court—discovery is no longer a search for truth, it is merely a game of hide and seek. No longer may appellate courts intercede through mandamus even for the trial court's complete abuse of discretion in denying access to vital data; under the newly-announced double standard, intervention can, however, be accorded for those who persevere in evasion.

***In re* PRUDENTIAL INSURANCE COMPANY**

148 S.W.3d 124

(Tex. 2004)

HECHT, JUSTICE.

* * *

III

Having concluded that the parties' contractual jury waiver is enforceable, we turn to whether Prudential is entitled to relief by mandamus. Prudential must meet two requirements. One is to show that the trial court clearly abused its discretion. We have concluded as a matter of law that Prudential was entitled to enforcement of the jury waiver. Since "[a] trial court has no 'discretion' in determining what the law is or applying the law to the facts," even when the law is unsettled, the trial court's refusal to enforce the jury waiver was a clear abuse of discretion. Thus, Prudential has met the first requirement.

¹ Billie Holiday, *God Bless the Child* (Okeh Records 1941) (words and music by Arthur Herzog, Jr. & Billie Holiday).

The other requirement Prudential must meet is to show that it has no adequate remedy by appeal. The operative word, “adequate”, has no comprehensive definition; it is simply a proxy for the careful balance of jurisprudential considerations that determine when appellate courts will use original mandamus proceedings to review the actions of lower courts. These considerations implicate both public and private interests. Mandamus review of incidental, interlocutory rulings by the trial courts unduly interferes with trial court proceedings, distracts appellate court attention to issues that are unimportant both to the ultimate disposition of the case at hand and to the uniform development of the law, and adds unproductively to the expense and delay of civil litigation. Mandamus review of significant rulings in exceptional cases may be essential to preserve important substantive and procedural rights from impairment or loss, allow the appellate courts to give needed and helpful direction to the law that would otherwise prove elusive in appeals from final judgments, and spare private parties and the public the time and money utterly wasted enduring eventual reversal of improperly conducted proceedings. An appellate remedy is “adequate” when any benefits to mandamus review are outweighed by the detriments. When the benefits outweigh the detriments, appellate courts must consider whether the appellate remedy is adequate.

This determination is not an abstract or formulaic one; it is practical and prudential. It resists categorization, as our own decisions demonstrate. Although this Court has tried to give more concrete direction for determining the availability of mandamus review, rigid rules are necessarily inconsistent with the flexibility that is the remedy’s principal virtue. Thus, we wrote in *Walker v. Packer* that “an appellate remedy is not inadequate merely because it may involve more expense or delay than obtaining an extraordinary writ.” While this is certainly true, the word “merely” carries heavy freight. . . . In *In re Masonite Corp.*, 997 S.W.2d 194, 195-196 (Tex. 1999), the trial court on its own motion and without any authority whatever, split two cases into sixteen and transferred venue of fourteen of them to other counties. We held that the defendants were not required to wait until appeal to complain:

Walker does not require us to turn a blind eye to blatant injustice nor does it mandate that we be an accomplice to sixteen trials that will amount to little more than a fiction. Appeal may be adequate for a particular party, but it is no remedy at all for the irreversible waste of judicial and public resources that would be required here if mandamus does not issue.

These cases, among a great many others that could be cited, serve to illustrate that whether an appellate remedy is “adequate” so as to preclude mandamus review depends heavily on the circumstances presented and is better guided by general principles than by simple rules.¹

* * *

Prudent mandamus relief is also preferable to legislative enlargement of interlocutory appeals.² The unavailability of mandamus relief increases the pressure for expanded interlocutory

¹ See also 16 CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3934.1, at 572, 574 (1996) (stating that “[w]rit review that responds to occasional special needs provides a valuable ad hoc relief valve for the pressures that are imperfectly contained by the statutes permitting appeals from final judgments and interlocutory orders”, and that “[i]mportant questions of procedure often are difficult to review by appeal, and at times may demand appellate intervention to secure uniformity between different judges, or simply to bring the balancing perspective that appellate review is intended to provide in controlling the practices as well as the substantive decisions of trial courts.”).

² See also George C. Pratt, *Extraordinary Writs*, in 19 MOORE’S FEDERAL PRACTICE § 204.01[2][b], at 204-7 (3d ed. 2004) (“In order to meet the demands of justice in individual cases, discretionary review is preferable

appeals. For example, when this Court refused to review venue decisions by mandamus, the Legislature responded by authorizing mandamus review of all decisions involving mandatory venue provisions. When we held that the denial of a special appearance would ordinarily not warrant mandamus review, the Legislature responded by creating an interlocutory appeal from the denial of a special appearance. . . . Interlocutory appeals lie as of right and must be decided on the merits, increasing the burden on the appellate system. “Mandamus,” on the other hand, “is an extraordinary remedy, not issued as a matter of right, but at the discretion of the court. Although mandamus is not an equitable remedy, its issuance is largely controlled by equitable principles.” As a selective procedure, mandamus can correct clear errors in exceptional cases and afford appropriate guidance to the law without the disruption and burden of interlocutory appeal. Appellate courts must be mindful, however, that the benefits of mandamus review are easily lost by overuse.

The issue before us in the present case—whether a pre-suit waiver of trial by jury is enforceable—fits well within the types of issues for which mandamus review is not only appropriate but necessary. It is an issue of law, one of first impression for us, but likely to recur (it has already arisen in another case in the court of appeals, also on petition for mandamus. [citation omitted]). It eludes answer by appeal. In no real sense can the trial court’s denial of Prudential’s contractual right to have the Secchis waive a jury ever be rectified on appeal. If Prudential were to obtain judgment on a favorable jury verdict, it could not appeal, and its contractual right would be lost forever. If Prudential suffered judgment on an unfavorable verdict, Prudential could not obtain reversal for the incorrect denial of its contractual right “unless the court of appeals concludes that the error complained of ... probably caused the rendition of an improper judgment”. Even if Prudential could somehow obtain reversal based on the denial of its contractual right, it would already have lost a part of it by having been subject to the procedure it agreed to waive.

* * *

Finally, we note that other courts have granted mandamus relief to enforce contractual jury waivers, including the only other Texas court to have addressed the issue. We are not aware of a published decision denying such relief.

* * *

For these reasons, we direct respondent, the Honorable Sally Montgomery, to vacate her order of June 6, 2003, and the prior order of June 19, 2002, to grant Prudential’s motion to quash the jury demand and payment of jury fee, and to return the case to the nonjury docket. We are confident she will promptly comply. Our writ will issue only if she does not.

to enlarging by judicial interpretation the categories of interlocutory orders that are appealable as of right. General categories of orders that are appealable as of right often include many orders that should not be appealable at all. Review by extraordinary writ allows the circuit courts to retain the final judgment rule and avoid piecemeal appeals, yet be able to respond to the exceptional case that should be reviewed prior to final judgment. Thus, [mandamus] affords an avenue of relief to litigants and a tool for the courts to supervise the proper administration of justice.”).

CHIEF JUSTICE PHILLIPS, joined by JUSTICE O'NEILL, JUSTICE JEFFERSON, and JUSTICE SCHNEIDER, dissenting.

Mandamus is an extraordinary remedy available “only in situations involving manifest and urgent necessity and not for grievances that may be addressed by other remedies.” *Walker v. Packer*, 827 S.W.2d 833, 840 (Tex. 1992). . . . Although the Court’s mandamus jurisprudence has not always strictly adhered to these tenets, we have endeavored to apply them more consistently since our decision in *Walker*. Because the Court retreats from that approach today, I respectfully dissent.

* * *

Admittedly, Prudential’s appellate remedy is not as efficient or economical as mandamus, but that has never been the test.

* * *

But the Court now surprisingly suggests that the second prong of our mandamus standard has no fixed meaning. (The word “ ‘adequate’ has no comprehensive definition.”). Instead, the Court says we must weigh all the public and private interests implicated by the lower court ruling at issue and then decide on balance whether a remedy other than mandamus is adequate or not. . . .

I see no need to inject even greater uncertainty into an already difficult and frequently subjective process. In the past, we have emphasized that the writ of mandamus should not issue absent “compelling circumstances.” But today, in circumstances far from compelling, the Court uses mandamus as a substitute for appeal, an approach rejected even by the federal procedure the Court purports to emulate. Whether today’s ruling has fundamentally altered these traditional rules, or is merely an anomaly, remains to be seen.

* * *

In re McALLEN MEDICAL CENTER, INC.
2008 WL 2069837
(Tex. 2008)

JUSTICE BRISTER delivered the opinion of the Court, in which JUSTICE HECHT, JUSTICE MEDINA, JUSTICE GREEN, JUSTICE JOHNSON and JUSTICE WILLETT joined.

Appellate courts cannot afford to grant interlocutory review of every claim that a trial court has made a pre-trial mistake. But we cannot afford to ignore them all either. Like “instant replay” review now so common in major sports, some calls are so important-and so likely to change a contest’s outcome-that the inevitable delay of interim review is nevertheless worth the wait.

* * *

III. No Adequate Remedy by Appeal

Whether a clear abuse of discretion can be adequately remedied by appeal depends on a careful analysis of costs and benefits of interlocutory review.²³ As this balance depends heavily

²³ In re Prudential Ins. Co. of Am., 148 S.W.3d 124, 136 (Tex. 2004).

on circumstances, it must be guided by analysis of principles rather than simple rules that treat cases as categories.²⁴

The most frequent use we have made of mandamus relief involves cases in which the very act of proceeding to trial—regardless of the outcome—would defeat the substantive right involved. Thus we have held appeal is not an adequate remedy when it will mean:

- forcing parties to trial in a case they agreed to arbitrate;
- forcing parties to trial on an issue they agreed to submit to appraisers;
- forcing parties to a jury trial when they agreed to a bench trial;
- forcing parties to trial in a forum other than the one they contractually selected;
- forcing parties to trial with an attorney other than the one they properly chose;
- forcing parties to trial with an attorney who should be attending the Legislature; and
- forcing parties to trial with no chance for one party to prepare a defense.

In each of these cases, it was argued that no harm would come from the trial—perhaps the case would settle, and perhaps fee and interest awards could remedy the expense and delay of trying the case twice. But in each case we granted mandamus relief. Some fee and interest reimbursements are uncollectible, and some sunk costs (such as time taken from other work) are unrecoverable regardless. Further, a legal rule that no harm could possibly accrue to anyone so long as the attorneys get paid to try the case twice appears at least a little self-interested.

* * *

This holding is not (as the dissent argues) a sudden departure from *Walker v. Packer*. That case was not “seminal” as it represented not the seed of Texas mandamus jurisprudence (which stretches back almost two centuries) but an effort in 1992 to prune some of its branches. The seminal case was actually *Bradley v. McCrabb*, issued while Texas was still a republic, which held that mandamus was not limited to cases where there was “no other legal operative remedy,” but would issue when “other modes of redress are inadequate or tedious” or when mandamus affords “a more complete and effectual remedy.”

We mentioned this “more lenient standard” in *Walker*, but found it unworkable as it “would justify mandamus review whenever an appeal would arguably involve more cost or delay than mandamus.” But while rejecting a standard allowing mandamus almost always, we did not adopt a standard allowing it almost never. To the contrary, we said there would be “many situations” in which mandamus would be appropriate

In describing when an appeal would be “inadequate,” we listed several situations “[i]n the discovery context alone” that “come to mind”

By mentioning these instances only as ones that “come to mind,”⁴⁷ the Court clearly did not limit mandamus to them. And almost immediately after *Walker* we began recognizing additional instances in which an appeal would be inadequate, including:

- when a trial court refused to compel arbitration;
- when an appellate court denied an extension of time to file an appellate record;
- when a trial court refused to compel discovery until 30 days before trial;
- when a trial court denied a special appearance in a mass tort case; and
- when a trial court imposed a monetary penalty on a party’s prospective exercise of its legal rights.

²⁴ *Id.* at 137.

⁴⁷ *Id.*

The problem with defining “inadequate” appeals as each situation “comes to mind” was that it was hard to tell when mandamus was proper until this Court said so. So almost four years ago we tried to describe the public and private interest factors that courts should balance in deciding whether the benefits of mandamus outweighed the detriments in each particular case.⁵³ There is no reason this analysis should entangle appellate courts in incidental trial court rulings any more than *Walker’s ad hoc* categorical approach. . . . The balancing analysis we have followed for some years now merely recognizes that the adequacy of an appeal depends on the facts involved in each case.

The facts in this case do not involve delay and expense alone, as the dissent alleges. The Legislature determined that [medical malpractice] cases like this one were rendering health care unavailable or unaffordable in areas of Texas like the one where this case was filed. The Legislature’s insistence that plaintiffs produce adequate expert reports is almost as old as this Court’s attempt in *Walker* to define adequate appeals. We disagree with the dissent that this Court’s priorities should trump those adopted by the people through their legislative representatives.

* * *

Because the trial court abused its discretion in failing to grant the hospital’s motion to dismiss, we conditionally grant the writ of mandamus and order the trial court to vacate its order and enter a new order dismissing the plaintiffs’ claims against the hospital. We are confident the trial court will comply, and our writ will issue only if it does not.

JUSTICE WAINWRIGHT, dissenting, joined by CHIEF JUSTICE JEFFERSON and JUSTICE O’NEILL.

A whole new world

A new fantastic point of view

No one to tell us no

Or where to go

Or say we’re only dreaming. . .

It’s crystal clear

That now I’m in a whole new world with you.

BRAD KANE, *A Whole New World*, on ALADDIN (Disney 1992).

A whole new world in mandamus practice, hinted by opinions in the last few years, is here. The Court’s heavy reliance on costs and delay to support its conclusion that the hospital has no adequate remedy by appeal marks a clear departure from the historical bounds of our mandamus jurisprudence. Because the Court’s opinion in this case does not follow the standards we established in the once-seminal case of *Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992), for exercising our mandamus jurisdiction, notwithstanding the merits of the case, I respectfully dissent.

* * *

The Court creates a whole new world today, jettisoning the well-established precept that delay and expense alone do not justify mandamus review. While such costs are undesirable and should be avoided when appropriate, the requirement of an inadequate remedy on appeal served as a

⁵³ In re Prudential Ins. Co. of Am., 148 S.W.3d 124, 136 (Tex. 2004).

check on appellate entanglement in incidental trial rulings and as a guide to the bench and bar on when to seek mandamus review.

* * *

There are egregious cases that compel action by mandamus on grounds that may not fit neatly within the traditional mandamus standards established by our precedents. Such cases should be the exception; they may now have become the rule. Because the Court abandons important tenets in our traditional mandamus practice and is not authorized to act by section 22.002 of the Texas Government Code on the interlocutory trial court order, I respectfully dissent.

Notes & Questions

A trial judge's discretion. In *Walker*, the Supreme Court defined a “clear abuse of discretion” necessary for mandamus relief. The court distinguishes between the trial judge’s factual decisions and the trial judge’s application of law. A decision can be an abuse of discretion if the trial judge’s view of the facts is wholly unsupported by the evidence, or if the trial judge does not correctly apply the law to the facts. Mandamus is available if the decision was a clear abuse of discretion and there is no adequate appellate remedy.

Appellate courts also often consider whether a trial judge abused discretion in ordinary appeals. Some of a trial judge’s decisions are mandated by clear and inflexible rules that the trial court must apply as written, with no discretion in applying or modifying them. But in most situations, the law gives the trial judge discretion in interpreting and applying the legal rules. The judge committed error only if that discretion was abused.

Discretion means that within broad limits the judge has leeway or flexibility. Discretion means that on a given set of facts, one judge might rule one way and another judge another way, and either ruling would be affirmed on appeal as within the court’s discretion. In this sense, legal discretion is much like the deference given to baseball referees: when the officials make a judgment call on the field, it will not be overruled on instant replay unless the video shows clearly and indisputably that the wrong call was made. And like the baseball referee, the judgment call might be wrong because the referee made a mistake about the facts (the video replay shows that the runner’s foot was on the base when tagged) or because the referee made a mistake about the applicable rule.

The field of trial court discretion is wide and broad. But it is not unlimited, and it may be abused. Still, trial court discretion is one of the pervasive realities of litigation. As you go through this course, remember to think about whether the trial court’s decision is one of law (where there is only one correct ruling), of fact (which will be discussed in more detail later in the course) or of discretion (which can involve both law and fact).

2. Requesting Action from the Trial Court: Motions, Pleas and Other Requests

Read Rules 4, 5, 8, 21, 21a, 21b, 74, 75; TRAP 33.1.

MICHIANA EASY LIVIN' COUNTRY, INC.

v.

HOLTEN

168 S.W.3d 777

(Tex. 2005)

[James Holten bought a recreational vehicle from Michiana, an outlet store that did business only in Indiana. He sued Michiana in Texas state court for fraud, and Michiana filed a special appearance contesting personal jurisdiction. The trial court denied the special appearance, holding that Michiana was subject to the jurisdiction of the Texas courts. The Texas Supreme Court disagreed, but first the court had to deal with the absence of a record of the proceedings in the special appearance hearing.]

JUSTICE BRISTER delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE OWEN, and JUSTICE GREEN joined.

* * *

B. The Record in Pretrial Hearings

[T]he appellate record contains no reporter's record of the special appearance hearing. Though candidly conceding that no oral testimony or new exhibits were presented at that hearing, Holten nevertheless argues we must presume evidence was presented that supports the trial court's order.

It is difficult to state a bright-line rule regarding unrecorded pretrial proceedings, as they come in so many shapes and sizes. Many pretrial "hearings" take place entirely on paper, while others involve a personal appearance in court. In some the parties must file all evidence with the clerk; in others they must present it in open court; in most the manner of presentation is discretionary; in at least one the answer is unclear.

What is clear is that a reporter's record is required only if evidence is introduced in open court; for nonevidentiary hearings, it is superfluous. If all the evidence is filed with the clerk and only arguments by counsel are presented in open court, the appeal should be decided on the clerk's record alone.

The difficulty of course is that the absence of a reporter's record does not tell us whether a pretrial hearing was nonevidentiary, or evidentiary but not preserved. Presuming them all the former unfairly penalizes a party that presents evidence in open court that the other party does not bother to preserve. But presuming them all the latter would require *every* hearing to be recorded—whether evidentiary (to show what was presented) or not (to show nothing was). Besides being wasteful, this would frustrate the intent of our appellate rule requiring a reporter's record only "if necessary to the appeal."¹³

For some years now the trend has been away from full evidentiary hearings in open court for most pretrial matters. While we have generally encouraged oral hearings when arguments may be

¹³ TEX.R.APP. P. 34.1.

helpful, both the Legislature and this Court have discouraged oral presentation of testimony and evidence when they can be fairly submitted in writing. Counsel can almost always direct the trial court's attention to pertinent deposition excerpts, discovery responses, or affidavits in less time than it takes to recreate them in open court. Presuming that most pretrial proceedings are evidentiary would not only discourage this trend, but would encumber thousands of routine hearings by requiring formal proof that no proof was offered.

Accordingly, we have in the past presumed that pretrial hearings are nonevidentiary absent a specific indication or assertion to the contrary. If the proceeding's nature, the trial court's order, the party's briefs, or other indications show that an evidentiary hearing took place in open court, then a complaining party must present a record of that hearing to establish harmful error. But otherwise, appellate courts should presume that pretrial hearings are nonevidentiary, and that the trial court considered only the evidence filed with the clerk.

* * *

Either party, of course, may allege that a hearing was evidentiary, but that allegation must be specific. Merely asserting that the trial court "considered evidence at the hearing" is not enough—trial courts do that when a hearing is conducted entirely on paper, or based solely on affidavits and exhibits filed beforehand. Instead, there must be a specific indication that exhibits or testimony was presented in open court *beyond* that filed with the clerk. As the rules of professional conduct prohibit assertions that a hearing was evidentiary when it was not,²² and as events in open court can usually be confirmed by many witnesses, there is no reason to expect that such assertions will be lightly fabricated.

Our appellate rules are designed to resolve appeals on the merits, and we must interpret and apply them whenever possible to achieve that aim. Accordingly, we decline to presume the special appearance hearing here was evidentiary when everyone concedes it was not.

Notes & Questions

1. *Record*. Parties request courts to act through pleadings, motions, and other requests, most of which are covered in the rules of procedure. Courts in turn act through orders, judgments, and other rulings. These requests, rulings, and all of the evidence and circumstances relevant to the decisions made are available to the appellate court only through the "record." Thus, it is very important to get everything needed for appellate review on the record, either through a writing that is filed in the trial court's records (which ultimately becomes the "clerk's record" on appeal), or orally in front of the court reporter, whose notes of the proceedings can be transcribed and put into the appellate record (called the "court reporter's record").¹
2. *Preserving error*. Generally, an appellate court may review a trial court's judgment only for errors that have been properly "preserved" in the trial court—the party has to have asked the trial court to make the correct ruling before it complain that the trial court's action was error. TRAP 33.1 governs preservation of error. It requires "as a prerequisite to presenting a complaint for appellate review" that "the record must show" that the complaining party presented the matter to

²² Tex. Disciplinary R. Prof'l Conduct 3.03 (requiring candor toward tribunal); Tex. Lawyer's Creed: A Mandate for Professionalism IV(6) ("I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage.").

¹ TRAP 34 governs the clerk's and court reporter's record.

the trial court by a “timely request, objection, or motion” that states “the grounds for the ruling” with “sufficient specificity to make the trial court aware of the complaint” and that the trial court ruled (or if there was no ruling, the party must object to the failure to rule). There are a few errors, called “fundamental errors,” that do not require preservation. We have already addressed two important fundamental errors: subject matter jurisdiction and judicial disqualification.

3. *Reversible error.* Another general rule is that an appellate court may not reverse a trial court’s judgment for an erroneous ruling unless “the error complained of . . . probably caused the rendition of an improper judgment.” TRAP 44.1(a)(1). This is called the “harmless error rule” because it prevents reversals for harmless errors. A judgment may also be reversed if the error “probably prevented the appellant from properly presenting the case to the court of appeals.” TRAP 44.1(a)(2). There are a few errors that require reversal without a showing of harm, such as venue, and others that require a lesser showing of harm, such as jury selection.

4. *Evidentiary Record.* Why was it important for the Supreme Court to determine whether there was evidence presented at the special appearance hearing in *Michiana*? In reviewing the trial court’s decision, it had to determine what evidence was before the court and whether the decision was supported by that evidence. If there was no evidence presented at the hearing, the evidence before the court was limited to the written evidence presented with the defendant’s special appearance and the plaintiff’s response, and the appellate court should limit its review to the clerk’s record. If there had been an evidentiary hearing, but no court reporter’s record was made of that hearing (or perhaps it was made, but the complaining party did not have it transcribed and sent to the appellate court), the reviewing court has to presume that the evidence presented at the hearing supported the trial court’s decision.

5. *Filing Documents.* After drafting a motion, pleading, or other request, the party must properly *file* the document with the clerk so that it is included in the clerk’s record. Rule 21 contemplates that filing is effective upon delivery to the clerk (when the clerk has “custody and control”), who will note the date and time of filing on the document, insert the document into the court’s file, and the filing “shall be noted on the docket.” Rule 74 also allows the judge to accept papers for filing. The party filing the document should get a “file-marked copy” to keep in its own file for proof of the date of filing.

In addition to hand-delivery to the clerk’s office, filing can be accomplished by mail² or fax.³ Fax filing is not available in all counties—only those in which the Supreme Court has approved local rules providing for such filing. Fax filing is complete upon the clerk’s receipt and acknowledgment as provided by statute.⁴ If the document is sent to the proper clerk by first-class U.S. mail, filing is complete on the date of mailing, so long as the clerk receives the document within 10 days after the date that the document must be filed.⁵ The date shown on the postmark provides *prima facie* evidence of the date of mailing.⁶ To facilitate proof, should the date of

² Rule 5.

³ GOV’T CODE § 51.801-.807. Pilot programs for online filing are being conducted in several counties.

⁴ *See* GOV’T CODE § 51.804.

⁵ Rule 5. *See also* Stokes v. Aberdeen, 917 S.W.2d 267 (Tex. 1996) (mailing to proper court address is conditionally effective as mailing to proper court clerk’s address if clerk receives a copy within 10 days). Texas Worker’s Comp. Comm’n v. Hartford Accident and Indem. Co., 952 S.W.2d 949 (Tex. App.—Corpus Christi 1997, pet. denied) (mailbox rule is applicable to documents sent by first class mail only, and not those sent by private courier).

⁶ *Id.*

mailing be called into question, you might consider sending the document by certified mail, return receipt requested. This would enable you to receive a receipt with a postmark, and proof of the clerk's receipt within 10 days. Although not specified in Rule 21, electronic filing through Texas Online is available in some counties that have adopted local rules (approved by the Supreme Court) allowing it.⁷

6. *Serving Documents.* When you file a document, you must also serve it upon opposing parties.⁸ (Note that this type of service is different from service of process, by which a defendant is notified of the initial filing of a lawsuit and ordered to respond.) If the party is represented by a lawyer, you should serve it on the lawyer.⁹ Rule 21 requires all filed documents to contain a "Certificate of Service" certifying that you have served the document in accordance with the rule. If you have set a motion for hearing, you must also serve notice of that hearing to the opposing party (and certify that you have done so) not less than three days before the hearing (unless otherwise ordered).¹⁰ The failure to serve the other parties is a sanctionable offense.

Methods of service are set forth in Rule 21a: delivery; certified or registered mail, return receipt requested; or fax. Service by delivery is complete when the document is delivered to the party's agent or attorney of record; service by certified mail is complete upon deposit into the custody of the U.S. Postal Service; and fax service is complete upon receipt of the fax, except that receipt after 5:00 p.m. is complete the following day.¹¹ If the response date is calculated from the date of service, and service was provided by mail or fax, Rule 21a adds 3 days to the response time. Electronic service is not available under the rules, although parties can agree to accept service electronically.

7. *Responding to Filed and Served Documents.* The date of filing and service is important because the response date is calculated either from the date of service or the date of filing, depending upon the type of document to which the response is made. Other response dates are calculated from the date a court order is signed or other date as set forth in the rules. Often a late response is the equivalent of no response and can be devastating to your client's position. Thus, proper calculation of response dates is essential. Rule 4 sets out the rules for computation of time, and applies to *any* period of time prescribed by the rules of procedure.¹²

Under Rule 4, the day of the act or event from which you are calculating your response time *is not included* in the time you have to respond. Thus, the date of filing, service, or court order is always Day 0, not Day 1. *Do not count that day.* Then count the number of days to respond, and the last day *is included*, and is thus the day your response is due. For example, if you have 7 days from service to respond to a pleading, the date of service is Day 0, and Day 7 is the day you must respond. If the last day is a Saturday, Sunday or legal holiday, the time period runs until the next

⁷ The Office of Court Administration maintains a web page on the current status of electronic filing in Texas. See <http://www.courts.state.tx.us/jcit/Efiling/EfilingHome.asp>

⁸ Rule 21.

⁹ Rule 8.

¹⁰ Rule 21.

¹¹ Rule 21a.

¹² *Lewis v. Blake*, 876 S.W.2d 314 (Tex. 1994).

day that is not a Saturday, Sunday or legal holiday. A “legal holiday” is when the clerk’s office is officially closed, regardless of whether it is an official holiday listed in a statute.¹³

Intervening Saturdays, Sundays and legal holidays are generally counted when calculating the response date. When the response time is 5 days or less, however, do not count intervening Saturdays, Sundays, or legal holidays, except Saturdays, Sundays, and legal holidays are counted for the 3-day notice of hearing period provided for in Rule 21,¹⁴ the 3-day extension of time for service by mail or fax provided for in Rule 21a, and 5-day periods provided by the rules governing forcible entry and detainer actions.

Problems

Use the calendar reprinted on the following page. The bolded and shaded days are holidays—Labor Day, Columbus Day (observed), Columbus Day (actual).

1. A court has ordered the defendant to file a responsive document 7 days after the date the order is signed. The order shows that it was signed on August 26.
 - a. When is the response due?
 - b. If you mail the response, when is the last possible date you can mail it? If you live in Austin and the suit is pending in Harris County (regular mail sometimes takes a week to get from Austin to Houston) should you consider sending the response by Federal Express instead of the U.S. Mail?
 - c. The response is mailed on August 31, but does not reach the clerk’s office until 15 days after the due date. Do you have any recourse? What type of motion must you file? What kind of proof may you need?
2. You receive a set of interrogatories in the mail on September 12. The Certificate of Service and postmark show that your opponent mailed them by certified mail on September 8. Under Rule 197, you are required to respond 30 days “after service of the interrogatories.” What day is your response due? Does your answer change if you received the interrogatories on September 9 by Federal Express delivery? What about fax delivery?
3. The trial judge signs a judgment for defendant on September 15. The district clerk’s postcard notice to plaintiff erroneously states that the judgment was signed on September 18. The deadline for a motion for new trial is 30 days after the judgment was signed. Rule 329(a). On October 16, plaintiff’s attorney sends the motion for new trial to the district clerk by Federal Express overnight service. A copy of the motion is also mailed on October 16 to the district judge at her correct courthouse address. The clerk received the motion by Federal Express on October 17 and filed it that day. The district judge received the copy on October 19 and kept it in her office. She did not file it with the clerk. (Therefore, Rule 74 does not apply.) What is the deadline for filing the motion for new trial? Did plaintiff timely file the motion? In *Stokes v. Aberdeen Ins. Co.*, 917 S.W.2d 267, (Tex. 1996), the Texas Supreme Court held that the motion was timely filed. Can you develop an explanation that would justify such a holding?

¹³ *Miller Brewing Co. v. Villarreal*, 829 S.W.2d 770 (Tex. 1992). See also *Hernandez v. National Restoration Technologies, L.L.C.*, 211 S.W.3d 309 (Tex. 2006).

¹⁴ See Rule 4. Apparently, the drafters of Rule 4 did not intend to include the 3-day notice of hearing provision of Rule 21 in this provision. The Supreme Court Advisory Committee has recommended an amendment deleting the reference to Rule 21.

4. It's Monday morning at 9:30 a.m. You just arrived at the office and you open an envelope you find on your desk. Inside, you find a file-marked copy of a motion to compel discovery that your nasty opponent filed on Friday afternoon, with a hearing scheduled at the courthouse at 10:00 a.m. on Monday (in 30 minutes). Did your opponent give you valid notice of the hearing? Does it matter how the notice was delivered? Consider whether the notice was faxed on Friday, hand-delivered on Friday, or mailed on Friday and received in Saturday's mail.

AUGUST

S	M	T	W	T	F	S
		1	2	3	4	5
6	7	8	9	10	11	12
13	14	15	16	17	18	19
20	21	22	23	24	25	26
27	28	29	30	31		

SEPTEMBER

S	M	T	W	T	F	S
					1	2
3	4	5	6	7	8	9
10	11	12	13	14	15	16
17	18	19	20	21	22	23
24	25	26	27	28	29	30

OCTOBER

S	M	T	W	T	F	S
1	2	3	4	5	6	7
8	9	10	11	12	13	14
15	16	17	18	19	20	21
22	23	24	25	26	27	28
29	30	31				

3. *A Trial Judge's Discretion*

Some of a trial judge's decisions are mandated by clear and inflexible rules. For example, litigants are entitled to a twelve-person jury in district court, and six peremptory challenges. And the right to jury trial is absolute, upon proper request. On these and other matters the trial court must apply the rules and has no discretion in applying or modifying them.

But in most situations, the law gives a trial judge discretion in interpreting and applying the legal rules. Discretion means that within broad limits the judge has leeway or flexibility. Discretion means that on a given set of facts, one judge might rule one way and another judge another way, and either ruling would be affirmed on appeal as within the court's discretion. In this sense, legal discretion is much like the deference given to baseball referees: when the officials make a judgment call on the field, it will not be overruled on instant replay unless the video shows clearly and indisputably that the wrong call was made. And like an baseball referee, the judgment call might be wrong because the referee made a mistake about the facts (the video replay shows that the runner's foot was on the base when tagged) or because the referee made a mistake about the applicable rule.

The field of trial court discretion is wide and broad. But it is not unlimited, and it may be abused. Still, trial court discretion is one of the pervasive realities of litigation. Here are some judge's attempts to describe abuse of discretion:

***Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238 (Tex. 1985):**

The test for abuse of discretion is not whether, in the opinion of the reviewing court, the facts present an appropriate case for the trial court's action. Rather, it is a question of whether the court acted without reference to any guiding rules and principles. Another way of stating the test is whether the act was arbitrary or unreasonable. The mere fact that a trial judge may decide a matter within his discretionary authority in a different manner than an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred.

[The Supreme Court backed the trial court's imposition of death penalty sanctions for discovery abuse, concluding that the trial court did not abuse its discretion.]

***Landon v. Budinger, Inc.*, 724 S.W.2d 931 (Tex. App.—Austin, 1987, no writ):**

THE “ABUSE OF DISCRETION” STANDARD FOR APPELLATE REVIEW

It has been said that “abuse of discretion” is a concept “not easily defined.” The problem seems to be that judicial attempts to define the concept almost routinely take the form of merely substituting other terms that are equally unrefined, variable, subjective, and conclusory. [Citation to examples: “arbitrary” or “unreasonable”; “more than an error in judgment”; “harsh and arbitrary”; “mere mistake” of judgment insufficient and it must be coupled with “the additional elements of arbitrariness, capriciousness, partiality, etc.”; not merely an “error of judgment, but perversity of will, passion, prejudice, partiality, or moral delinquency.”] These substitute expressions are really no more illuminating than the original expression if either is to serve as a basis for appellate decision in a particular case standing alone. Nevertheless, the reported decisions reveal that appellate courts too often attempt to do just that—applying to “the record as a whole” the original or substitute expression to divine ultimately whether the trial court’s action in the particular case transgressed a standard of “sound judicial discretion.”³

This form of appellate review and decision has not been helpful to the parties who must frame their appellate contentions in reference to the appellate courts’ earlier decisions about what constitutes an “abuse of discretion.” It does not aid the appellate courts who struggle for consistency while applying a standard so amorphous that it means everything and nothing at the same time; nor the trial courts who must guide their conduct in future cases by what the appellate courts have said and decided in applying a standard that lacks any discernible content standing alone. The “abuse of discretion” standard represents nevertheless an essential and fundamental principle in the complex and delicate relationship between trial and appellate courts. It is susceptible of use in a way that is consistent with its importance, and to that we now turn.

In common usage, the word “discretion” signifies a power to choose among alternatives within legal bounds. This power is routinely given to government officials because government cannot be conducted without the exercise by someone of the power to choose with authority, that is to say, the power to determine, according to the official’s best judgment, what alternative is best in the circumstances. The “discretion” contemplated by the “abuse of discretion” standard is similar in that it signifies the power legally committed to a trial court to choose among alternatives: whether to issue a temporary injunction, whether to set aside a default judgment, whether to sustain a pleader’s special exception, and so forth. The standard is a review-limiting device that, within limits, immunizes from appellate revision the choice made by the trial court in a particular case. In a similar way, an administrative agency’s choice in a contested case is protected from reversal on judicial review by the “abuse of discretion” standard set forth in TEX. REV. CIV. STAT. ANN. art.

³ When applied in this manner, “abuse of discretion” has been described as:

“the noise made by an appellate court while delivering a figurative blow to the trial judge’s solar plexus The term has no meaning or idea content that I have ever been able to discern. It is just a way of recording the delivery of a punch to the judicial midriff.”

Rosenberg, *Appellate Review of Trial Court Discretion*, 79 F.R.D. 173, 180 (1975).

6252-13a, § 19(e)(6) (Supp. 1986), where it is coupled with the analogous expressions “arbitrary or capricious” and “clearly unwarranted exercise of discretion.” Needless to say, that a matter is committed to a trial judge’s discretion is never a reason for his deciding to rule one way as opposed to another.

It is fundamental, however, that neither a trial court nor an administrator may exercise authoritatively a power that is not vested in him by law; nor may he exercise a vested power in a manner that is contrary to law or reason. This adherence to legal rules, principles, and criteria is illustrated by the following statement of the Supreme Court of Texas in reference to the discretion committed to a trial court to set aside or not a default judgment, pursuant to an equitable motion for new trial:

Naturally appellate courts will differ on the delicate question of whether trial courts have abused their discretion. While trial courts have some measure of discretion in the matter, as, in truth, they have in all cases governed by equitable principles, it is not an unbridled discretion to decide cases as they might deem proper, without reference to any guiding rule or principle.

The “judicial discretion” contemplated in the standard is not “judicial impressionism,” but rather a discretion exercised in accordance with legal rules, principles, and criteria. Stated another way, “the trial court abuses its discretion when the law is misapplied to established facts”

If the trial judge exercises a power of choice given him by law, and does so in a way that is lawful in every respect, he has of course committed no legal error; and, it may not in such a case be concluded that he “abused his discretion.” His choice in the particular case is immune from appellate revision, even though the appellate court might not have made the same choice in the same circumstances. Fundamentally, however, the trial court’s choice is immune from appellate revision because it is untainted by legal error.

But the “abuse of discretion” standard also protects from appellate revision a limited range of trial-court choices even when they are marred by legal error. That is to say, the standard protects to a limited degree the trial court’s “right” to be wrong without suffering appellate revision. If the legal error committed by the trial court is not “prejudicial” or if it does not result in “injury,” the trial court’s choice does not amount to an “abuse of discretion,” which is to say it remains immune from appellate revision notwithstanding the legal error. On the other hand, the legal error is of course prejudicial or injurious where it probably caused an improper judgment in the case or prevented the appellant from making a proper presentation on appeal. This would include legal errors affecting the fairness of the proceeding as a whole.

* * *

***Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992):**

Having concluded that the trial court erred in denying the discovery based solely on *Russell*, we now must determine whether the appropriate remedy lies by writ of mandamus. “Mandamus issues only to correct a clear abuse of discretion or the violation of a duty imposed by law when there is no other adequate remedy by law.” We therefore examine whether the trial court’s error in the present case constituted a clear abuse of discretion and, if so, whether there is an adequate remedy by appeal.

1. CLEAR ABUSE OF DISCRETION

Traditionally, the writ of mandamus issued only to compel the performance of a ministerial act or duty.

Since the 1950's, however, this Court has used the writ to correct a "clear abuse of discretion" committed by the trial court.

A trial court clearly abuses its discretion if "it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law." This standard, however, has different applications in different circumstances.

With respect to resolution of factual issues or matters committed to the trial court's discretion, for example, the reviewing court may not substitute its judgment for that of the trial court. The relator must establish that the trial court could reasonably have reached only one decision. Even if the reviewing court would have decided the issue differently, it cannot disturb the trial court's decision unless it is shown to be arbitrary and unreasonable. *Johnson*,

On the other hand, review of a trial court's determination of the legal principles controlling its ruling is much less deferential. A trial court has no "discretion" in determining what the law is or applying the law to the facts. Thus, a clear failure by the trial court to analyze or apply the law correctly will constitute an abuse of discretion, and may result in appellate reversal by extraordinary writ.

In determining whether the trial court abused its discretion in the present case, we treat the trial court's erroneous denial of the requested discovery on the sole basis of *Russell* as a legal conclusion to be reviewed with limited deference to the trial court. This is consistent with our approach in previous mandamus proceedings arising out of the trial court's interpretation of legal rules. Under this analysis, the trial court's erroneous interpretation of the law constitutes a clear abuse of discretion.

Notes & Questions

1. *Legal issues vs. facts.* In *Walker*, the Supreme Court held that the court of appeals had made an erroneous legal conclusion. How does an appellate court determine whether the trial court's ruling was based upon a clearly erroneous view of the facts or an erroneous determination of controlling legal principles? In *Walker*, the Supreme Court looked to the trial court's order, which specifically said:¹

[S]uch requested discovery is improper pursuant to the rulings of the Supreme Court of Texas in *Russell v. Young*, as the potential witness is not a party to the suit and the records do not relate to the subject matter of the suit, but are sought solely for the purpose of impeachment, according to the Plaintiffs' pleadings.

What if the order had simply said, "Motion to compel discovery denied?"

2. *Discretion and proof of harm.* The last paragraph of the *Landon* excerpt reveals that if an action is not harmful it is not an abuse of discretion. Does this relieve the appellate court from applying T.R.A.P. 44.1 (the harmless error rule) in abuse of discretion cases? That is, is the element of harm

¹ Quoted in *Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992).

essential to a finding of abuse? The traditional approach is the one taken by *Landon* and earlier Texas cases: if there is no harm there is no abuse of discretion. In recent cases, however, the Supreme Court has taken to finding abuse of discretion and then inquiring separately about the requisite harm.² Since harm must be shown *somewhere*, the new approach should make no difference to the advocate.

² See *Henry S. Miller Co. v. Byrum*, 836 S.W.2d 160 (Tex. 1992).

