

No. 55073

**Before the Board of Disciplinary Appeals
Appointed by
The Supreme Court of Texas**

IN RE CHARLES CHANDLER DAVIS

*State Bar of Texas District 14-1
No. A0051113770*

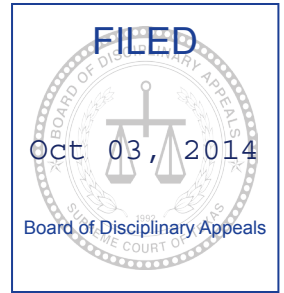
**COMMISSION FOR LAWYER DISCIPLINE'S RESPONSE TO
RELATOR'S REQUEST FOR TEMPORARY RELIEF**

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The Commission for Lawyer Discipline files this Response to Relator's Request for Temporary Relief asking the Board to deny the Request in all respects.

BACKGROUND

The disciplinary action underlying Relator's Request for Temporary Relief was scheduled for a full evidentiary hearing on September 26, 2014, in Denton, Texas. On September 25, 2014, at approximately 3:45 p.m., Davis filed a motion entitled "TRCP, Rule 18 and 18a, 18b Motion" ("Respondent's Motion"). Davis now seeks relief from the Board based on his argument that Respondent's Motion triggered a requirement for the Chair of the Evidentiary Panel to recuse himself or

refer Respondent's Motion for decision. A copy of Respondent's Motion is attached as Exhibit A.

I. On its face, Respondent's Motion did not seek the recusal of the Chair of the Evidentiary Panel.

In Respondent's Motion, Davis briefly referred to a wide variety of complaints, including a supposedly untimely just cause decision, an unexplained delay in the proceedings from September 2012 until January 2014, several panel members' self-recusals without filing motions under Rule 18a of the Texas Rules of Civil Procedure (TRCPs), the absence of an agreed discovery schedule, supposed delays in responses to Respondent's motions, Respondent's incomplete deposition of a witness in late August 2014, and defective notice by certified mail. He also complained about the supposed denial of his special exceptions, summary judgment motion, and plea in abatement "without an inquiry hearing." And he included a lengthy discussion of TRCP recusal provisions.

All of Davis's complaints were described in a conclusory manner without any supporting details. Thus, there was no basis for concluding that any of them had potential merit or that they provided any basis for delaying the evidentiary hearing.

After listing his complaints, Davis explained his reason for filing Respondent's Motion:

A dispute regarding proper service has arisen, a dispute regarding jurisdiction has arisen and after multiple phone hearings the filing of this instrument was required based upon both the failure to rule on certain matters and the rulings on certain matters and the comments regarding the failure to follow mandatory rules of both the Texas Rules of Civil Procedure and the Texas Disciplinary Rules of Civil Procedure, there has even been a dispute as to the applicable Disciplinary Rules. I am attaching for examination. This failure to restrain the changing whims of the petitioner is unseemly.

The relief requested by Davis had several components. He requested judicial notice of the entire complaint file; abatement and dismissal of the proceeding and the entry of findings of fact and conclusions of law; and notice of the entire Texas Rules of Disciplinary Procedure, including Rule 15.05 regarding time periods. Davis's prayer stated:

Pursuant to TRCP, 18, 18a and 18b, I request a hearing regarding the specific complaints of failure to follow the law and the rules, specifically the notice rules, the time line limitations of 15.05 and the Texas Rules of Disciplinary Conduct and the disregard of the defective notice sent by Petitioner. The multiple recusals and replacements outside the rules and allowing the Chief Disciplinary Counsel to run roughshod over the rights of a dues paying member in good standing of the State Bar of Texas. I have made all parties aware of these issues and sent electronic notice to all parties.

Respondent's Motion never requested the recusal of the Panel Chair. Davis's references to recusal appeared to be directed at what he believed to be the improper self-recusal of several members of the original panel. Thus, on its face, Respondent's Motion did not trigger any recusal procedure with regard to the Chair.

Davis now claims that he sought the recusal of the Panel Chair and that the TRCPs required the Chair to recuse himself or refer Respondent's Motion for determination by another person, presumably the chair of the grievance committee. He also claims that the TRCPs prohibited the Chair from taking any further action in his case. Davis's claims have no merit.

II. The disciplinary rules did not require the referral of Respondent's Motion.

Even assuming that Respondent's Motion was sufficient to put the Chair on notice that Davis sought the Chair's recusal, no provision of the disciplinary rules requires a panel chair to follow a specific procedure in considering a recusal motion, especially a clearly untimely motion filed on the eve of an evidentiary hearing in a case involving allegations of egregious misconduct. The Chair was required to act reasonably under the circumstances, and he did so. He was also required to consider the public's interest in the resolution of allegations of egregious professional misconduct without unnecessary delay.

Under the circumstances, Respondent's Motion simply did not provide a reasonable basis for canceling the evidentiary hearing at the last minute. Both parties were present for the evidentiary hearing; both complainants had traveled to Denton from Austin; members of the Evidentiary Panel had traveled to Denton from Wichita Falls; the Commission had arranged for a hearing location and for security personnel; and the Commission was ready to proceed. Thus, substantial

hardship would have resulted from a decision not to proceed with the evidentiary hearing.

III. The TRCPs do not govern recusal motions in evidentiary proceedings.

Davis ostensibly filed Respondent's Motion pursuant to TRCP 18, 18a, and 18b. While Rule 3.08 of the Texas Rules of Disciplinary Procedure (TRDPs) makes the TRCPs expressly applicable to a disciplinary action filed in district court pursuant to Part III of the TRDPs, there is no similar provision that makes the TRCPs generally applicable to evidentiary proceedings under Part II. Thus, there is no requirement for a recusal motion to be determined in strict accordance with the TRCPs.

IV. Chair Altman's Actions Did Not Conflict with the Requirements of the TRCPs

Even if TRCP 18, 18a, and 18b apply to evidentiary proceedings as Davis argues, the Chair's actions in this case did not conflict with the requirements set forth in those rules.

TRCP 18 sets forth the process to be followed when a judge dies, resigns, or becomes disabled. TEX. R. CIV. P. 18. Thus, TRCP 18 did not apply in the case at bar because none of the specified circumstances existed.

According to Davis's current arguments, he was seeking to recuse the Chair based essentially on his rulings. However, a recusal motion may not be based solely on a judge's rulings. TEX. R. CIV. P. 18a(a)(3). It must be based on a

ground set forth in TRCP 18b, and Respondent's Motion asserted no such ground. TEX. R. CIV. P. 18a(a)(2); 18b. In addition, Respondent's Motion was deficient on its face because it failed to state with detail and particularity facts that were within Davis's personal knowledge that if proven would be sufficient to justify recusal. TEX. R. CIV. P. 18a(a)(4).

TRCP 18a(b) establishes a deadline for a recusal motion. It requires that a recusal motion must be filed at least ten days before the date set for trial and as soon as practicable once the movant knows of the grounds asserted in the motion. TEX. R. CIV. P. 18a(b). Respondent neither filed his motion at least ten days before the evidentiary hearing date nor filed it as soon as practicable after he knew of the grounds asserted in his motion.

Because Respondent's motion was clearly untimely and facially defective, the TRCPs, if applicable, would not have required that the motion be referred. Rather, it would have been appropriate to immediately deny or even ignore the motion. *Barker v. Hutt*, 2012 WL 2862267 (Tex.App.—Eastland 2012, no pet.) (mem. op.) (holding that party waived right to complain about judge's failure to recuse himself by filing defective recusal motion that was not verified, was based on judge's rulings, and did not state with particularity and detail facts that would provide a valid basis for recusal); *Culver v. Culver*, 360 S.W.3d 526, 537-38 (Tex.App.—Texarkana 2011, no pet.) (holding that judgment signed after appellant

filed recusal motion was not void because unverified and untimely recusal motion does not trigger TRCP 18a recusal procedure); *Barron v. State of Tex. Att'y Gen.*, 108 S.W.3d 379, 383 (Tex.App.—Tyler 2003, no pet.) (holding that judge was not obligated to recuse or refer until party filed formal timely, written, and verified recusal motion); *Spiegner v. Wallis*, 80 S.W.3d 174, 180 (Tex.App.—Waco 2002, no pet.) (discussing cases holding that a judge's obligation to recuse himself or refer a recusal motion is not implicated unless a party files a timely, written, and verified recusal motion).

Although some cases have held that a judge must refer even a defective recusal motion, the Chair reasonably relied on an abundance of authority supporting his decision not to refer Respondent's Motion. And in light of the 2011 amendments to TRCP 18a, including the addition of a specific remedy for a judge's failure to refer a recusal motion, the remedy available to Davis was to notify the chair of the grievance committee of the failure to refer the motion. TEX. R. CIV. P. 18a(f)(3). There is no record of Davis's having notified the grievance committee chair.

Moreover, even if the Chair should have referred Respondent's Motion to the chair of the grievance committee for determination, the referral may take place now. Thus, if the Board determines that referral is required under the circumstances of this case, the Board should abate this proceeding and refer

Respondent's Motion to the grievance committee chair for immediate determination without a hearing. *See Black v. 7-Eleven Convenience Stores*, 2014 WL 902498 (Tex.App.—Austin 2014) (mem. op.) (holding that the late referral of a recusal motion and the subsequent denial of the motion can cure a judge's failure to refer). No hearing is required if a recusal motion does not comply with TRCP 18a. TEX. R. CIV. P. 18a(g)(3).

V. Mandamus relief is not available.

A party may not seek mandamus relief based on the denial of a recusal motion. TEX. R. CIV. P. 18a(j). Davis may complain about the denial of Respondent's Motion only by appealing the final judgment. *Id.*

Because mandamus relief is unavailable, the type of temporary relief normally available in a mandamus proceeding is not available here. Moreover, Davis has not properly sought mandamus relief because he has not filed a mandamus record or filed a proper mandamus petition. Thus, there is no basis for granting the temporary relief that Davis requests.

CONCLUSION AND PRAYER

Because Davis did not file a proper recusal motion, the Chair correctly denied Respondent's Motion without referring it. The Chair's actions did not constitute an abuse of discretion because they were reasonable under the

circumstances. Substantial harm would have resulted from the action that Davis now claims he sought.

Because Davis has not shown any valid basis for the temporary relief that he requests, the Commission PRAYS that the Board deny Relator's Request for Temporary Relief in all respects. Alternatively, if the Board determines that the referral of Respondent's Motion is appropriate, the Board should abate this proceeding and refer Respondent's Motion to the chair of the grievance committee for determination without a hearing. If the grievance committee chair denies Respondent's Motion, the Board should deny all relief requested by Davis and dismiss this proceeding.

RESPECTFULLY SUBMITTED,

LINDA A. ACEVEDO
CHIEF DISCIPLINARY COUNSEL

LAURA BAYOUTH POPPS
DEPUTY COUNSEL FOR ADMINISTRATION

CYNTHIA CANFIELD HAMILTON
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/s/ Cynthia Canfield Hamilton
CYNTHIA CANFIELD HAMILTON
STATE BAR CARD No. 00790419

CERTIFICATE OF SERVICE

This is to certify that the above and foregoing Response to Relator's Request for Temporary Relief has been served on Relator by email to charlie@arroyocoloradoenergy.com on the 3rd day of October 2014.

/s/ Cynthia Canfield Hamilton
CYNTHIA CANFIELD HAMILTON
SENIOR APPELLATE COUNSEL
STATE BAR OF TEXAS

Exhibit A

Commission on Lawyer Discipline

EVIDENTIARY PANEL

v.

DISTRICT 14

Charles Chandler Davis

GRIEVANCE COMMITTEE

TRCP, RULE 18 and 18a,18b MOTION

TO THE HONORABLE WILLIAM ALTMAN, PRESIDING

COMES NOW, Charles Chandler Davis, as respondent herein, and files this timely TRCP 18 and 18a,18b Recusal Motion and in support thereof submit the following:

Summary and Time Line

In May of 2011, an inquiry was commenced based upon complaints filed by two Attorneys. Over the course of the next five months the Chief Disciplinary Counsel "considered" such complaints. This was in violation of 2.10 and 2.12 of the Texas Rules of Disciplinary Procedure. Please see attached partial time line filed as Evidentiary Index, by Petitioner. You will see a beginning date of 10/10/11 for number 1. This is not correct and is not a complete evidentiary index. Please see letter dated June 8, 2011, and letter dated September 2, 2011, also attached. There are other documents, not in the index, not copied and not noticed, as of September 25, 2014. Multiple attempts have been made to the current Chairman to recognize the loss of jurisdiction or at least to conduct an inquiry into jurisdiction.

In the last forty months you will see various committee and committee chairs which have voluntarily removed themselves from this matter without an 18a motion to recuse. You will also note an unexplained gap in the so called Evidentiary Index from

September 12, 2012 until January 13, 2014, Respondent after repeated requests and motions still has no idea what occurred during this period of time. Beginning in early May of 2014, multiple motions were filed and each recusal would occur and we would commence to conduct discovery and the Disciplinary Counsel would complain, would not agree to a discovery schedule and continued on as if this was all perfectly normal.

We were left with no choice but to keep filing and have no one to rule on them. Many months were taken to respond to these motions by Petitioner. We were unable to complete a partial deposition upon Thomas M. McMurray, in late August of 2014.

Multiple motions have been denied and one motion has been granted, in the last few days, and a half day mediation has occurred by court order on the 23rd of September 2014. A dispute regarding proper service has arisen, a dispute regarding jurisdiction has arisen and after multiple phone hearings the filing of this instrument was required based upon both the failure to rule on certain matters and the rulings on certain matters and the comments regarding the failure to follow mandatory rules of both the Texas Rules of Civil Procedure and the Texas Disciplinary Rules of Civil Procedure, there has even been a dispute as to the applicable Disciplinary Rules. I am attaching for examination. This failure to restrain the changing whims of the petitioner is unseemly.

Jurisdiction and Abatement

A verified challenge to jurisdiction and verified abatement are attached to this motion. Jurisdiction has been raised on several occasions by special exception, by motion for summary judgment and plea in abatement, all motions have been overruled without an inquiry hearing. It is alleged that this failure to conduct inquiry represents an abridgment of the applicable rules and is as a matter of law an abuse of discretion.

NOTICE

As previously raised regarding the many recusals in this matter, it is a portion of this motion to recuse that there has been a serious conscious disregard of appropriate procedure when recusing voluntarily. It is requested that an examination be made of such recusals. It is possible to remove a judge from a particular case because he is constitutionally disqualified, because they are subject to a statutory strike or because they are recused under Rules promulgated by the Supreme Court. *See, In re Union Pacific Resources Co.*, 969 S.W. 2nd 427(Tex. 1998).

It is possible to acquire knowledge of specific errors inside of the 10 day rule provided for in TRCP 18a. It is possible to recuse because of rulings, and because of the lack of rulings, and the denial of constitutional due process, such filings must be specific and enumerated. *See, Gill v. Texas Dept. of Criminal Justice*, 3 S.W. 3rd 576(Tex. Houston 1st 1999).

It is an abuse of discretion to be specifically informed of a jurisdictional question through various motions and to simply deny them without an inquiry. A denial of recusal is reviewed on abuse of discretion standards. *Hoggett v. Brown*, 971 S.W. 2nd 472(Dallas 1989, writ denied).

It is a specific abuse of discretion if the trial court fails to comply with the rules provided for in Rule 18a, any and all sanctions taken by a judge are void. *Moseley v. State*, 141 S.W. 3rd 816 (Texarakana 2004, pet. ref); *Lamberti v. Tschope*, 776 S.W. 2^d 651(Dallas 1989, writ denied).

An animus or bias against a respondent may become clear in conversations in telephonic hearings or off the record. This inability to sit as a fair and neutral magistrate is difficult and emotional. A motion should never be filed without a strict examination

of the situation, the perceived or real animus and the projection of the judge of the ability to weigh and to fairly apply the law. The failure to rule upon clear matters of law or upon mandatory scheduling and notice requirements in the State of Texas may give rise to the requirement of not only a fair, neutral magistrate but the appearance of such fairness. Comments indicating that "I cannot understand how testimony could be dispositive", taken by itself may not be enough, but statements indicating impatience with inquiry, consideration and allowance for time to prepare and brief questions of law, lends itself to fundamental threshold issues concerning suitability of the officer to the task.

When such conduct is considered in light of comments by petitioner that the "rules of disciplinary procedure that were in effect in 2011 are what apply, and that the 2014 rules are not dispositive or mandatory" and finally, "I don't know how some action taken by the Chief Disciplinary Counsel three years ago would jurisdictionally have anything to do with this evidentiary hearing and setting". These were precursors to this filing.

After a courtesy notice was sent to the Chairman, he then issued another ruling.

Specific Defects

VIOLATION of Texas Rules of Disciplinary Procedure , Rules 2.10 "Classification of Inquiries and Complaints" and 2.12," Investigation and Determination of Just Cause"

The Chairman and Petitioner are furnished with the requisite copies of the current Rules of Disciplinary Procedure, with changes to February 2014. Respectfully the Petitioner has violated these mandatory rules.

Mandatory Judicial Notice

Judicial Notice under Texas Rules of Civil Evidence, Rule 201(d) of the entire file is

requested, from inception of the complaint, on May 11, 2011 until September 24, 2014. Respondent respectfully requests abatement and dismissal of this proceeding and entrance of findings and conclusions of law this matter . Respondent requests notice of the entire Texas Rules of Disciplinary Procedure, including the furnished 15.05 Effect of Time Limitations. The Chairman has failed to rule on this, as amended, and it is a mandatory notice provision of the Chief Disciplinary Counsel, who has flagrantly ignored it.

VIOLATION of Texas Rules of Disciplinary Procedure, Rule 2.09 “Notice to Parties”

The Petitioner has not been served in accordance with this rule and submits respectfully that 2.09(A, B,C) has not been observed. That notice was delivered by certified mail on two different occasions and that the second notice is not timely and does not comport with the rules. Respectfully respondent does not waive these jurisdictional defects and has filed this plea with the committee chair.

VIOLATION of TRCP 18a, a judge must recuse himself in any proceeding where the judges impartiality might reasonably be questioned. The judges failure to examine pleading, jurisdictional and failures of the petitioner and to continually overlook proper, timely filed motions and in fact disparage them verbally is unseemly. To allow many months to pass without scheduling a hearing on many pending motions showed an utter lack of concern. The judges apparent lack of concern regarding this matter or the rights of the respondent, led to a pervasive and chilling understanding of the prejudice of this individual.

The rules of disciplinary procedure protect the rights of a respondent, the State Bar and The Supreme Court of Texas protect such rights, respectfully, we are better than

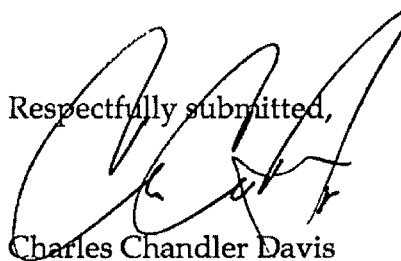
Motion to Recuse TRCP 18 and 18a

this.

PRAYER

Pursuant to TRCP, 18, 18a and 18b, I request a hearing regarding the specific complaints of failure to follow the law and the rules, specifically the notice rules, the time line limitations of 15.05 of the Texas Rules of Disciplinary Conduct and the disregard of the defective notice sent by Petitioner. The multiple recusals and replacements outside the rules and allowing the Chief Disciplinary Counsel to run roughshod over the rights of a dues paying member in good standing of the State Bar of Texas. I have made all parties aware of these issues and sent electronic notice to all parties.

Respectfully submitted,



Charles Chandler Davis

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charlie@arroyocoloradoenergy.com

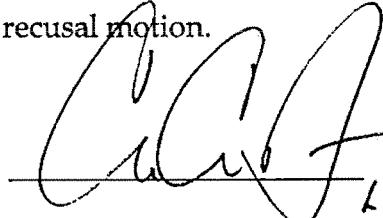
940.368.1865

CERTIFICATE OF CONFERENCE

On this the 25th day of September 2014, I called and conferenced with Ms. Lisa Holt, Esq., and attempted to stipulate. I have failed in that effort. She is opposed. I have been notified that Mr. Altman had a medical procedure but he is going to see us at the beginning of the "Evidentiary Hearing" tomorrow. This is another indication of overwhelming animus, in contradiction of the rules. This is not a formal

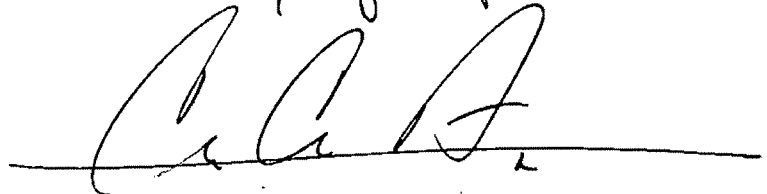
Motion to Recuse TRCP 18 and 18a

order but a retaliation for notification of the recusal motion.


Charles Chandler Davis

CERTIFICATE OF NOTICE

I have sent electronic notice to all known
parties and to the Board of Disciplinary Appeals
at 3:30 PM on the 25th day of September 2014.


05465900