Case No. _____

IN THE TENTH COURT OF APPEALS
AT WACO

In re Gloria Neal, Earl White, Michael A. White, and Betty White

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PETITION FOR WRIT OF MANDAMUS

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STATEMENT OF THE CASE

Nature of the Case:	The Relators sought the disqualification of attorneys Gaines West and Rob George, as well as the law firm of West, Webb, Allbritton & Gentry, P.C., from a lawsuit about their oil and gas interests. The foregoing attorneys and their law firm initially represented the Relators, then decided to represent adverse parties *in the same case*.
Parties in the Trial Court:	Clayton Williams Energy, Inc. was the Plaintiff in the case below, and Relators Gloria Neal, Earl White, Michael A. White, and Betty White were the Defendants. The Relators filed cross-claims against Eagleford Gas 5, LLC, LoneStar Operating, LLC, and Eli Rebich.
Trial Court:	361st District Court of Brazos County (Cause No. 14-001392-CV-361), the Hon. Steve Smith presiding.
Trial Court's Disposition:	The district court denied the motion to disqualify.

STATEMENT OF JURISDICTION

This Court my issue writs of mandamus against district and county judges in its appellate district. Texas Gov't. Code § 22.221. A district court's refusal to disqualify counsel is grounds for mandamus relief. *Nat'l Med. Enterprises, Inc. v. Godbey*, 924 S.W.2d 123, 133 (Tex. 1996).

ISSUES PRESENTED

(1) Whether attorneys Gaines West and Rob George and their law firm may appear against the Relators in a case wherein they previously represented the Relators.

(2) Whether attorneys Gaines West and Rob George may appear as counsel in a case wherein they are necessary fact witnesses.

(3) Whether the request to disqualify Gaines West, Rob George and their law firm was timely.

STATEMENT OF FACTS

The Relators seek the disqualification of their former attorneys in the case below because those attorneys withdrew from representing the Relators, then entered appearances on behalf of an adverse party *in the same case*. The underlying litigation arose after the Relators sent letters to Clayton Williams Energy, Inc. asking to be released from from oil and gas leases on mineral interests that the Relators own in Brazos County. *See* May 29, 2014 Plaintiff's Original Petition (Appx. B) and November 17, 2014 Defendants' Second Amended Answer, Counter-Claims, Third Party Claims, and Demand for a Jury Trial (Appx. C)(hereinafter "Counter-Claims"). The letters were sent at the direction of landmen working for Eli Rebich. *See* Appx. C and Affidavit of David Bowers (Exhibit D-3).[1] One of those landman assured David Bowers, a representative of the Relators, that Mr. Rebich would pay the Relators' legal fees and indemnify them against any judgment if Clayton Williams Energy should file suit against the Relators for asking to be released from the mineral leases. *See* Exhibit D-3. Subsequently, Clayton Williams Energy filed suit against the Relators, alleging that their letters clouded its title and called into question its conveyance of leases to Eagleford Gas 5, LLC. *See* Appx. B.

After the lawsuit was filed, Mr. Bowers called the landman to confirm that Mr. Rebich would pay the Relators' legal fees and indemnify them against any judgment arising from the top lease. *See* Exhibit D-3. The landman confirmed that agreement and directed the Relators to contact attorney Rob George with West, Webb, Allbritton & Gentry, P.C. *Id*. On June 13, 2014, Mr. Bowers spoke with Mr. George and told Mr.

[1] Appendix D is a true and correct copy of the Motion to Disqualify that was filed in the trial court, and its internal exhibits are identified sequentially therein as Exhibit 1, 2, 3, etc.

George that the landman said that Mr. Rebich would pay the legal fees and any adverse judgment against the Relators. *Id*. Mr. Bowers told Mr. George that the promise to pay legal fees and any adverse judgment was part of the top lease negotiations with the landman who represented Mr. Rebich. *Id*. Mr. George confirmed that Mr. Rebich would pay the Relators' legal fees and indemnify them against any adverse judgment. *Id*. Mr. George later sent an email (Exhibit D-4) confirming that Mr. Rebich would pay for the Defendants' legal fees and that Mr. George's firm would handle it. Mr. George did not mention any conflicts of interest. *Id*. He said the case would take time, and that he would need letter of engagement from Defendants. *Id*.

Another Relator spoke with Mr. George shortly thereafter, and Mr. George confirmed that Mr. Rebich would pay the legal fees for the Relators. *See* Affidavit of Michael A. White (Exhibit D-1). On June 17, 2014, Mr. George sent an e-mail to Mr. White stating as follows:

> As we discussed, Eli Rebich has agreed to cover the cost of defending this lawsuit. Our firm will be representing each of the defendants, unless a defendant hires his or her own attorney. We are working on engagement letters, which will be sent to each of the named defendants.

See Exhibit D-2. On or about June 23, 2014, the Relators signed engagement letters with West, Webb, Allbritton & Gentry, P.C. *See* Affidavit of Gloria Neal (Exhibit D-5) and Affidavit of Russell White (Exhibit D-7). On June 25, 2014, however, Mr. West sent letters to the Relators claiming that he could not represent them because of a "conflict," which he did not describe. *See* Exhibits 6 and 8.

In his June 25, 2014 letters, Mr. West wrote that, "[c]ontrary to my initial understanding, Mr. Rebich has decided that he will not be paying for the cost of the defense, or (potential) adverse judgment, in this lawsuit filed against you by Clayton Williams." See Exhibit 6 and 8. Mr. West did not give the Relators the option of paying Mr. West or his firm directly. *Id*. He nonetheless agreed to file an answer on behalf of the Relators, *id*., and he did file such an answer. *See* June 27, 2014 Original Answer (Appx. E).

On August 28, 2014, Matthew D. Doss sent a letter on behalf of the Relators to Mr. West, demanding that Mr. Rebich indemnify the Relators and pay their attorney fees. *See* Exhibit D-10. In a September 3, 2014 response, Mr. West denied that Mr. Rebich was responsible for indemnifying the Relators and paying their attorney fees. *See* Exhibit D-13. He further wrote that Mr. Rebich "has authorized me to vigorously defend any further pursuit of this matter by your clients and to press the claims he has against your clients." *Id*.

On November 17, 2014, the Relators filed a third-party petition and cross claims against Mr. Rebich. *See* Defendant's Second Amended Answer, Counterclaims, Third-Party Claims, and Demand for Jury Trial (Appx. C). On December 30, 2014, Mr. West and Mr. George filed an answer and counter claims against the Relators in this case, *i.e.*, *the same case where they had previously represented the Relators*. *See* Third-Party Defendant / Counter-Claimaint Eli Rebich's Original Answer, Special Exceptions to Petition in Intervention, and Counterclaims (Appx. F). That afternoon, attorney Bill Youngkin sent a letter to Mr. West and Mr. George demanding that they withdraw from

this case because their participation violated Rules 1.09, 1.15, and 3.08 of the Texas Disciplinary Rules of Professional Conduct. *See* Exhibit D-11. In a January 6, 2015 response, Mr. West refused to withdraw from this case, *see* Exhibit D-14, therefore on January 20, 2015 the Relators filed a motion to disqualify him, Mr. George, and their law firm. *See* Appx. D.

On February 18, 2015, the Relators argued their motion to disqualify before Judge Steve Smith of the 361st District Court of Brazos County, Texas. *See* Affidavit of Matt Doss (Appx. A). On March 6, 2015, the Relators reminded the trial court of the then-pending motion to disqualify. *See* Appx. G. On April 1, 2015, the Relators requested a ruling on their motion to disqualify. *See* Appx. H. On May 27, 2015, the Relators sent another reminder that the parties were awaiting a ruling on the motion to disqualify. *See* Appx. I. The trial court eventually signed an order denying the motion to disqualify, and that order was filed on June 19, 2015. *See* Appx. J.

ARGUMENT AND AUTHORITIES

The respondent attorneys abandoned their clients in order to represent adverse parties in the same case, and the district court erred as a matter of law by refusing to disqualify those attorneys.

The Relators seek the disqualification of Mr. West, Mr. George and their law firm on two grounds. First, Mr. West, Mr. George and their law firm are legally prohibited from "switching sides" in the same litigation. Second, Mr. West, Mr. George, and their law firm cannot appear in a case wherein Mr. West and Mr. George are essential fact witnesses. Finally, the motion to disqualify Mr. West, Mr. George, and their law firm was timely.

(1) Whether attorneys Gaines West and Rob George and their law firm may appear against the Relators in a case wherein they previously represented the Relators.

The disciplinary rules and the holdings of the Texas Supreme Court unequivocally prohibit lawyers from "switching sides" as Mr. West and Mr. George have done:

> An attorney who has previously represented a client may not represent another person in a matter adverse to the former client if the matters are the same or substantially related. *Phoenix Founders, Inc. v. Marshall*, 887 S.W.2d 831, 833 (Tex.1994) (citing *NCNB Texas Nat'l Bank v. Coker*, 765 S.W.2d 398, 399–400 (Tex.1989)); TEX. DISCIPLINARY R. PROF'L CONDUCT 1.09(a), reprinted in TEX. GOV'T CODE, tit. 2, subtit. G, app. A, (STATE BAR R. art. X, § 9). If the lawyer works on a matter, there is an irrebuttable presumption that the lawyer obtained confidential information during representation. *Phoenix Founders*, 887 S.W.2d at 833 (citing *Coker*, 765 S.W.2d at 400)...It is axiomatic that an attorney may not switch sides in the same matter, not only to protect the confidential information of a client but also to protect the integrity of the trial process and judicial system as a whole.

In re Columbia Valley Healthcare System, L.P., 320 S.W.3d 819, 824, 826 (Tex. 2010); *see also Turner v. Turner*, 385 S.W.2d 230, 236 (Tex. 1965) ("We recognize the rule that

an attorney, after accepting employment and enjoying the confidence of one client, though afterwards discharged by his client without cause, cannot in general, with propriety, accept an employment by the opposite party in the same case") and *Rio Hondo Implement Co. v. Euresti*, 903 S.W.2d 128, 131 (Tex.App.–Corpus Christi 1995, *orig. proceeding*)("When it is established that an attorney has personally represented a client and now represents another adverse to the former client in a substantially related matter, the attorney *shall* be disqualified")(emphasis added), citing *Henderson v. Floyd*, 891 S.W.2d 252, 254 (Tex.1995).

> Clients should not be put in a position where they must fret over whether the confidential information they disclosed to their previous attorney will later be used against them. *See Coker*, 765 S.W.2d at 400 (once the requirements of Rule 1.09(a)(3) are established, the court will disqualify the attorney notwithstanding any lack of suspicion that he will divulge confidential information); *Contico Int'l, Inc. v. Alvarez*, 910 S.W.2d 29, 35–36, (Tex.App.—El Paso 1995, orig. proceeding) ("In the area of use of an opposing party's confidences ... there is no need to show actual wrongdoing, or even actual use of the confidential information, in order to disqualify counsel from the representation."). Rule 1.09(a)(2) assures clients, even those clients whose attorney is involved in the multiple representation of parties, that they may freely and openly discuss all the facts of their case with their attorney and without concern that the information discussed will later be disclosed to a potential adversary. *See Coker*, 765 S.W.2d at 400. To hold otherwise would threaten the confidential nature of the attorney-client relationship.

Wasserman v. Black, 910 S.W.2d 564, 568 (Tex.App.–Waco 1995, *orig. proceeding*). In this case, the Relators or their representatives spoke with Mr. George about matters related to their dispute with Clayton Williams Energy and their dispute with Mr. Rebich. *See, e.g.*, Exhibits D-1 and D-3. Moreover, as set forth above, the law conclusively presumes that confidential information was shared between the Relators and Mr. George, Mr. West, and their firm, therefore disqualification is mandatory. Failure to disqualify

under these circumstances is grounds for mandamus relief. *See, e.g., Wasserman*, 910 S.W.2d at 569.

In his January 6, 2015 letter, Mr. West claimed that Rule 1.09 applies only when an attorney seeks to represent a new client against a former client. *See* Exhibit D-14. However, this Court held in *Wasserman* that while Rule 1.09 was "designed primarily to address situations where an attorney seeks to represent a wholly new client in litigation against a former client, ...the rule also applies under these facts where an attorney represents multiple parties and a conflict arises among them." 910 S.W.2d at 567. It is worth noting that the Relators quoted the foregoing excerpt almost verbatim in their December 30, 2014 letter to Mr. West (Exhibit D-11), but Mr. West ignored that case in his response. And *Wasserman* is squarely on point with this case: Mr. West and Mr. George originally undertook representation of all defendants in this case, then they later chose to represent some defendants against others. As the Court wrote elsewhere in *Wasserman*, "[c]lients should not be put in a position where they must fret over whether the confidential information they disclosed to their previous attorney will later be used against them." 910 S.W.2d at 567.

The court of appeals in Eastland faced a similar situation in *In re Roseland Oil & Gas, Inc.*, where an attorney originally appeared as counsel for all of the defendants, then later withdrew from representation of some of those defendants. 68 S.W.3d 784 (Tex. App. - Eastland 2001, *orig. proceeding*). The Roseland court held that the attorney was disqualified from representing his remaining clients in that case because conflicts of interest had arisen among the defendants, even though they were still on the "same side

of the counsel table":

> In a case where multiple defendants are involved, it is not unrealistic that there will be attempts to shift responsibility or blame to another defendant. See *Wasserman v. Black*, 910 S.W.2d 564, 568 (Tex.App.—Waco 1995, no writ) (Thomas, C.J., dissenting)(orig. proceeding). Here, all the defendants other than the Vandevers are still represented by Henry. This puts Henry in a precarious position in which he may be forced to make the choice between zealously representing his clients and maintaining the confidentiality of information received from his former clients the Vandevers. See *Wasserman v. Black, supra* at 568; see also *NCNB Texas National Bank v. Coker,* 765 S.W.2d 398, 400 (Tex.1989)(orig. proceeding). Clients, current and former, have a reasonable expectation that the information provided to an attorney in a professional setting is confidential in nature. See TEX. DISCIPLINARY R. OF PROF'L CONDUCT 1.05 cmt. 1, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 1998) (TEX. STATE BAR R. art. X, § 9). The fact that Henry may be placed in this position undermines the confidentiality of the attorney-client relationship, and he is disqualified from representing any defendant in this case.
>
> An attorney is also disqualified from the representation of any other party in the "same or a substantially related matter" if that matter involves a former client. TEX. DISCIPLINARY R. OF PROF'L CONDUCT 1.09(a)(3). The "same" matter generally prohibits an attorney from switching sides in a lawsuit and representing another whose interests are in conflict with those of the former client. TEX. DISCIPLINARY R. OF PROF'L CONDUCT 1.09 cmt. 4A. Here, Henry is still technically on the same side of the counsel table; but, nonetheless, the interests of his current clients are in conflict with those of his former clients, the Vandevers. As codefendants, all will be trying to shift liability to another defendant; and, thus, the interests of Henry's current clients are detrimental to those of the Vandevers.

In re Roseland Oil & Gas, Inc., 68 S.W.3d 784, 787-88 (Tex. App. 2001). In the present case, by contrast, the Relators and Mr. Rebich are *not* on the same side of the counsel table. Instead, they are expressly adverse to one another, therefore the conflict of Mr. West, Mr. George, and their law firm is unequivocal.

In the trial court, Mr. West and Mr. George essentially argued that their attorney-client relationship with the Relators was *de minimis*, but Texas law forecloses that argument. In *Clarke v. Ruffino*, for example, attorney Jay Watson had been hired by

Alfred Lehtonen only to assist with refinancing an apartment complex. 819 S.W.2d 947, 948 (Tex. App. – Houston [14th Dist.] 1991, *orig. proceeding*), writ dismissed w.o.j. (Mar. 4, 1992). About a year later, Bill Payne, an attorney with Mr. Watson's firm, entered an appearance against Mr. Lehtonen in a dispute over that property. Mr. Payne argued that it was not entirely clear that Mr. Watson had an attorney-client relationship with Mr. Lehtonen, but the *Clarke* court rejected that argument.

> Even if this was merely an accommodation or a pro forma relationship, the disciplinary rules do not permit a mere pro forma representation of a client. *Insurance Company of North America v. Westergren,* 794 S.W.2d 812, 815 (Tex.App.—Corpus Christi 1990, mandamus overruled). We, therefore, conclude that an attorney-client relationship did exist between Watson and Lehtonen.

819 S.W.2d at 949-50. Even if Mr. West thought he was only accommodating the Relators when he filed answers on their behalf, he nonetheless formed an attorney-client relationship. Moreover, he received confidential information from the Relators during the attorney-client relationship, *see* Affidavit of Michael A. White (Exhibit D-1), and that mandates disqualification regardless of whether the information was privileged. *Clarke*, 819 S.W.2d at 950.

Finally, Mr. West judicially admitted a conflict of interest with the Relators. In his motions to withdraw from representation of the Relators (Appx. K), Mr. West wrote that he needed to withdraw because of that conflict. Although Mr. West did not explain his conflict of interest with the Relators, he likewise has not explained how the conflict of interest has been remediated since that time. In fact, it has not been remediated, and the conflict that required his withdrawal also prohibits him from reappearing in the case on behalf of adverse parties.

(2) Whether Attorneys Gaines West and Rob George can appear as counsel in a case wherein they are necessary fact witnesses.

Part of the claims against Mr. Rebich pertain to his breach of the agreement to indemnify the Relators and pay their legal fees in this case, *see* November 17, 2014 Counter-Claims, thus Mr. West and Mr. George are essential fact witnesses against Mr. Rebich. As set forth above, Mr. George confirmed orally and in writing that Mr. Rebich had agreed to indemnify the Relators and pay their legal fees. The Relators therefore intend to call him to testify about his communications with Mr. Rebich wherein Mr. Rebich agreed to indemnify the Relators. In his June 25, 2014 letter, Mr. West wrote that, "[c]ontrary to my initial understanding, Mr. Rebich has decided that he will not be paying for the cost of the defense, or (potential) adverse judgment, in this lawsuit filed against you by Clayton Williams." *See* Exhibits D-6 and D-8. Obviously, this begs the question of what Mr. Rebich originally told Mr. West or Mr. George that led to Mr. West's "initial understanding," and the Relators intend to call Mr. West and Mr. George as witnesses to get the answer to that question.

Rule 3.08 and Supreme Court case law prohibit Mr. West and Mr. George from appearing as counsel under these circumstances:

> Rule 3.08 is grounded principally on the belief that the finder of fact may become confused when one person acts as both advocate and witness. *See* TEX.DISCIPLINARY R.PROF.CONDUCT 3.08 cmt. 4 (1989); *Ayres*, 790 S.W.2d at 557 n. 4. "A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof." TEX.DISCIPLINARY R.PROF.CONDUCT 3.08 cmt. 4 (1989). The rule reflects the concern that an opposing party may be handicapped in challenging the credibility of a testifying attorney. *See Ayres*, 790 S.W.2d at 557 n. 4 (citing Brown & Brown,

> Disqualification of the Testifying Advocate—A Firm Rule?, 57 N.C.L.REV. 597, 608–09 (1979)).

Anderson Producing Inc. v. Koch Oil Co., 929 S.W.2d 416, 423 (Tex. 1996).

> Other possible justifications for the rule include: (1) a testifying lawyer may be a less effective witness because he is more easily impeachable for interest; (2) a lawyer-witness may have to argue his own credibility; (3) while the role of a witness is to objectively relate facts, the role of an advocate is to advance his client's cause; and (4) an appearance of impropriety may be created when a lawyer testifies on behalf of his client. *See F.D.I.C. v. U.S. Fire Ins. Co.*, 50 F.3d 1304, 1311 (5th Cir.1995).

In re Guidry, 316 S.W.3d 729, 738 (Tex.App.–Houston [14 Dist.] 2010, *orig. proceeding*). In *Guidry*, the conflicted lawyer argued, as Mr. West and Mr. George might here, that the parties seeking disqualification could rely on a letter that he wrote without calling him as a witness. *Id*. at 740. However, the *Guidry* court rejected that argument, holding that the parties seeking disqualification were "entitled not only to offer the letter into evidence, but also to call the author as a witness to furnish testimony concerning the substance of the letter and his thought processes in preparing it..." *Id*. Accordingly, Mr. West and Mr. George must be disqualified.

(3) Whether the request to disqualify Mr. West and Mr. George was timely.

In his January 6, 2015 letter, Mr. West argued that any request for his disqualification was untimely. *See* Exhibit D-14. That argument is genuinely preposterous. It should be self-evident that you cannot disqualify an attorney from a case in which he is not participating, *i.e.*, Mr. West could not be disqualified from the underlying case until such time as he entered an appearance in that case. Mr. West and Mr. George first entered appearances on behalf of Mr. Rebich and Lonestar Operating on

December 30, 2014, *see* Appx. G, and the Relators objected *the same day*. *See* Exhibit D-11. Prior to that date, the Relators' only remedy was to file a disciplinary complaint against Mr. West and Mr. George with the State Bar of Texas.

The case law on Rule 3.08 makes this all the more clear. For purposes of Rule 3.08, Mr. West and Mr. George could continue to work on this case behind the scenes so long as they did not participate at trial, *see, e.g., In re Bahn*, 13 S.W.3d 865 (Tex.App.–Fort Worth 2000, *orig. proceeding*), thus a motion to disqualify would have been premature until such time as it became evident that they would be both trial counsel and witnesses. On the other hand, Rule 1.09 requires that they be disqualified entirely from *any* participation in this case, regardless of whether they will be witnesses. *See Wasserman*, 910 S.W.2d at 567 ("Clients should not be put in a position where they must fret over whether the confidential information they disclosed to their previous attorney will later be used against them."). Either way, the Relators could not seek disqualification until after Mr. West and Mr. George entered appearances in the underlying case, thus the motion to disqualify them was timely.

PRAYER

The Relators pray that this Court issue a writ of mandamus directing the trial court to disqualify Gaines West, Rob George, and West, Webb, Allbritton & Gentry, P.C. from participating in the case below. The Relators ask the Court to assess costs and fees against Mr. West, Mr. George, and their law firm.

Respectfully submitted

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CERTIFICATE

I certify that copies of this Petition for Writ of Mandamus, the appendices, and the record were provided on June 23, 2015 to the following individuals and attorneys for the parties via the method indicated below. I further certify that I have reviewed the petition and concluded that every factual statement in the petition is supported by competent evidence included in the appendix or record.

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