

Memorandum



To: Supreme Court Advisory Committee

From: Appellate Rules Subcommittee

Date: March 24, 2022

Re: February 17, 2022 Referral relating to TRAP disclosures for disqualification and recusal

I. Matter referred to subcommittee

Rules for Identifying Potential Disqualification and Recusal Issues. Texas Rules of Appellate Procedure 38, 52, 53, and 55 are designed to capture the information needed for disqualification and recusal purposes by requiring that petitions and briefs contain the basic information about a case, including the identity of “all” counsel. The Committee should study and make recommendations on how to strengthen the requirement of disclosure on parties and counsel at the outset so courts will have better information to make informed, reasoned decisions on disqualification and recusal. The Committee should consider whether the Court should:

- amend Rules 38, 52, 53, and 55 to clarify that “all” counsel means both current and former counsel at all levels of a proceeding;
- amend Rules 38, 52, 53, and 55 to clarify that the requirement to list the “names” of all counsel includes all firm names at which they practiced during their representation;
- amend other rules, like those governing the notice of appeal and the docketing statement in the courts of appeals, to require disclosure earlier and more often; and
- impose a duty to amend and supplement.

No materials were provided with the referral.

Jaclyn Daumier provided addition background regarding the Court’s thinking on this issue.

We think the issue is really a small tweak to TRAP 38.1(a), 52.3(a), 53.2(a), and 55.2(a) to make sure that all counsel and firms that have appeared at any stage of the proceedings are identified as counsel. This is necessary to properly evaluate potential disqualification or recusal issues.

Under the current rules for identifying parties, “all trial and appellate counsel” can be read to refer only to counsel who represented the parties at the time of the final judgment, rather than *all* counsel who have appeared at *any* stage of the proceedings.

The rules also may not be clear that the requirement to list the “names” of all counsel includes all firm names at which they practiced *during their representation*. This issue could become more problematic as attorneys move firms more often.

Finally, we might differentiate what information we need for former counsel no longer on the case from what information we need for counsel appearing in the CA/SCOTX. I don’t think courts send former counsel anything—so, we may not need their addresses. If we require information we don’t really need, it could result in briefs getting struck for no good reason or cause counsel to spend time tracking down the current whereabouts of former counsel (and billing the client for that time). For current counsel, email addresses and phone numbers are probably more important than mailing addresses.

II. Current Rules

TRAPs 38, 52, 53, and 55 are all briefing rules in the courts of appeals and the Texas Supreme Court. They require the following disclosures so that the justices hearing the case can determine whether disqualification or recusal is required:

- TRAP 38.1(a). Identity of Parties and Counsel. The brief must give a complete list of all parties to the trial court’s judgment or order appealed from, and the names and addresses of all trial and appellate counsel, except as otherwise provided in Rule 9.8.
- TRAP 52.3(a). Identity of Parties and Counsel. The petition [for writ of mandamus] must give a complete list of all parties, and the names, and addresses of all counsel.
- TRAP 53.2(a). Identity of Parties and Counsel. The petition [for review] must give a complete list of all parties to the trial court’s final judgment, and the names and addresses of all trial and appellate counsel.
- TRAP 55.2(a). Identity of Parties and Counsel. The brief must give a complete list of all parties to the trial court’s final judgment, and the names and addresses of all trial and appellate counsel.
- TRAP 25 governing the notice of appeal does not require the listing of trial and appellate counsel.

- TRAP 32 governs the contents of the docketing statement on appeal and requires the listing of information about lead counsel on appeal and in the trial court.

III. Subcommittee Discussion and Recommendation

No materials were provided with the referral letter. It is unclear whether the referral was made to address specific problems that have come up with failures to fully disclose counsel for a party or any resulting problems with failures of justices to timely recuse or disqualify. But the questions asked appear to reflect two concerns:

- Incomplete disclosure of all trial and appellate counsel by (a) failing to list former counsel no longer involved in the case and (b) failing to list all current and former law firms of the counsel during representation.
- Timing issues relating to the disclosure: (a) a full list of counsel is not required before a brief is filed; and (b) after a brief is filed, there is no requirement that the list of counsel be updated if a lawyer changes firms.

The subcommittee discussed these four concerns and agreed that the rules should be clarified to require the listing of all counsel, past and present, and all law firms, past and present, that have appeared in the trial court or on appeal. The subcommittee also agreed that the disclosure should not be required to be included in the docketing statement or the notice of appeal to avoid making those documents longer and unduly cumbersome. The subcommittee also agreed that there should be a duty to supplement when a listed counsel has changed law firms.

An open question for discussion by the full SCAC is whether the listing of counsel and firms requirement also should be required for motions as part of TRAP 10.

IV. Proposed rule change

Proposed amendment to TRAP 38.1(a):

Identity of Parties and Counsel. The brief must give a complete list of all parties to the trial court's judgment or order appealed from, ~~and except as otherwise provided in Rule 9.8. The brief must also give a complete list of~~ the names ~~and addresses~~ of all ~~trial and appellate~~ counsel appearing in the trial or appellate courts; their firm names at the time of the appearance; and, for current counsel, their mailing addresses, telephone numbers, and email addresses, except as otherwise provided in Rule 9.8. If new counsel makes an appearance or if any listed counsel changes firm affiliation during

the pendency of the appeal, lead counsel for the party will notify the clerk by filing a supplemental disclosure letter.

Proposed amendment to TRAP 52.3(a):

Identity of Parties and Counsel. The petition must give a complete list of all parties, and the names, ~~and addresses~~ of all counsel appearing in the trial or appellate courts; their firm names at the time of the appearance; and, for current counsel, their mailing addresses, telephone numbers, and email addresses. If new counsel makes an appearance or if any listed counsel changes firm affiliation during the pendency of the appeal, lead counsel for the party will notify the clerk by filing a supplemental disclosure letter.

Proposed amendment to TRAP 53.2(a):

Identity of Parties and Counsel. The petition must give a complete list of all parties to the trial court's final judgment, ~~and the names and addresses of all trial and appellate counsel.~~ The petition must also give a complete list of the names of all counsel appearing in the trial or appellate courts; their firm names at the time of the appearance; and, for current counsel, their mailing addresses, telephone numbers, and email addresses. If new counsel makes an appearance or if any listed counsel changes firm affiliation during the pendency of the appeal, lead counsel for the party will notify the clerk by filing a supplemental disclosure letter.

Proposed amendment to TRAP 55.2(a):

Identity of Parties and Counsel. The brief must give a complete list of all parties to the trial court's final judgment, ~~and the names and addresses of all trial and appellate counsel.~~ The brief must also give a complete list of the names of all counsel appearing in the trial or appellate courts; their firm names at the time of the appearance; and, for current counsel, their mailing addresses, telephone numbers, and email addresses, except as otherwise provided in Rule 9.8. If new counsel makes an appearance or if any listed counsel changes firm affiliation during the pendency of the appeal, lead counsel for the party will notify the clerk by filing a supplemental disclosure letter.