



SMITH COUNTY  
COURTHOUSE  
100 N. BROADWAY 4<sup>th</sup> Floor  
TYLER, TEXAS 75702

**D. Matt Bingham**  
**Criminal District Attorney**  
**Smith County**

TELEPHONE: (903) 590-1720  
TELECOPIER: (903) 590-1719

Jennifer Barfield, Office Manager

April Allison Sikes, First Assistant D. A.

May 26, 2016  
The Honorable Judge Peeples  
District Court Judge  
Sitting for the 7<sup>th</sup> Judicial District Court

Re: Jo Ann Fleming, et. al. v. Joel Baker  
Cause Number 16-0831-A  
7<sup>th</sup> Judicial District Court, Smith County, Texas

Dear Judge Peeples:

During the recent conference call in which we all participated, including Petitioners' and Judge Bakers' lawyers, this Court asked that by May 27<sup>th</sup> I make two (2) decisions: (1) was I was going to recuse the D.A.'s Office in this case, and (2) if not, was the D.A.'s Office going to join in the Petition.

This letter is to inform you that for the reasons set out below, I am requesting leave to be recused from the above-captioned case.

This decision is not taken lightly and has been reached as a result of my continued legal research, in an effort to make a sound legal and ethical decision. Through this research, additional guiding opinions have very recently been located and have led to this request. Specifically, the Texas Supreme Court Professionalism Committee's Opinion 615, discussed herein.<sup>1</sup>

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<sup>1</sup> Tex. Comm. on Prof'l Ethics, Op. 615 (2012)

As the Court knows, the Smith County D.A.'s Office advises the County Commissioners Court, through its Civil Division, pursuant to statute.<sup>2</sup> That Division appears in Commissioners Court and renders legal advice, and provides legal representation and advice to elected officials and employees of this County, pursuant to statute.<sup>3</sup>

The Texas Disciplinary Rules of Professional Conduct (TDRPC) impute to all members of a particular law firm any information received by one of its members.<sup>4</sup> The Texas Supreme Court Professionalism Committee (TSCPC) has further refined the issue in its determination that "all attorneys in the office of the district attorney are considered to be in the same "firm," regardless of the department or division in which they practice."<sup>5</sup> The petition that we now address, Petitioners' "Verified Petition for Removal of Judge Joel Baker Pursuant to Texas Local Government Code Chapter 87," lists as one basis for the removal action a contract between ATS and Smith County. There is a reasonable probability that this office's Civil Division received information and provided legal advice to the Commissioners Court during its discussions regarding the ATS contract, and any such information would be imputed as known by the entirety of this office.

Furthermore, the TSCPC Opinion contemplates matters pertaining to a district attorney's representation of a client on a matter which is brought before him in a subsequently filed removal proceeding or prosecution. The primary holding in this Opinion states that a district attorney may proceed with his statutory duty under Chapter 87 of the Local Government Code "only if either (1) there is no reasonable probability that confidential information obtained in the representation of the office will be disclosed or used in violation of the district attorney's obligations to protect the confidential information of the official and the proposed current representation is not substantially related to the prior representation of the official, or (2) the official consents after disclosure of the circumstances."<sup>6</sup> Based on this Opinion, under the first prong, it is my belief that claims made by Petitioners regarding the ATS contract are related to legal representation by this office's Civil Division, and under the second prong, there is no vehicle through which to obtain the consent contemplated.

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<sup>2</sup> Tex. Gov't. Code §41.007

<sup>3</sup> Tex. Loc. Gov't. Code §157.901

<sup>4</sup> Tex. Disciplinary Rules Prof'l Conduct R. 1.06

<sup>5</sup> Tex. Comm. On Prof'l Ethics, Op. 539 (2002)

<sup>6</sup> Tex. Comm. on Prof'l Ethics, Op. 615 (2012)

Based upon the totality of my research, and the duties bestowed by law upon this D.A.'s Office, I now respectfully request the Court to order that the Smith County District Attorney's Office be recused from this matter, and that an appropriate attorney pro tem be appointed in accordance with Article 2.07 of the Texas Code of Criminal Procedure.<sup>7</sup>

If I may answer any questions or concerns, please do not hesitate to contact me.

Sincerely,



D. Matt Bingham  
Criminal District Attorney

cc: Mr. Greg Porter  
Mrs. Leigh Porter  
Mr. James "Trey" Trainor, III  
Mr. Joseph Nixon

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<sup>7</sup> Tex. Code Crim. Proc. Art. 2.07