

IN THE SUPREME COURT OF TEXAS

=====
No. 98-0806
=====

IN RE USERS SYSTEM SERVICES, INC., USSI COMPUTER SERVICES, INC., AND
RON LANDRETH, RELATORS

=====
ON PETITION FOR WRIT OF MANDAMUS
=====

Argued on February 10, 1999

JUSTICE BAKER, concurring.

I agree with the Court's conclusion that the trial court did not abuse its discretion, and that the Court should mandamus the court of appeals for holding to the contrary. However, I believe that News America's waiver is a more viable theory upon which the trial court could have based its decision. Here, the Court recognizes that we need not afford mandamus relief to a dilatory party, even if an opposing party does not assert lack of diligence as a ground for denying relief. But the Court decides not to consider waiver because "Cannan has offered some explanation of the delay, and the record on the issue is unclear...."

However, on the evidence presented, the trial court could have concluded that News America was dilatory and, under its discretionary authority, the trial court could have disregarded Cannan's explanation of the delay. Accordingly, I concur in the Court's judgment.

Disqualification is a severe remedy. *See Spears v. Fourth Court of Appeals*, 797 S.W.2d 654,

656 (Tex. 1990); *NCNB Tex. Nat'l Bank v. Coker*, 765 S.W.2d 398, 400 (Tex. 1989). In considering a motion to disqualify, the trial court must adhere to an exacting standard to prevent a party from using a motion to disqualify as a dilatory trial tactic. *See Spears*, 797 S.W.2d at 656; *Coker*, 765 S.W.2d at 399. One of the requirements of that exacting standard is that a party who does not file a motion to disqualify opposing counsel in a timely manner waives the complaint. *See Grant v. Thirteenth Court of Appeals*, 888 S.W.2d 466, 468 (Tex. 1994); *Vaughan v. Walther*, 875 S.W.2d 690, 690 (Tex. 1994); *HECI Exploration Co. v. Clajon Gas Co.*, 843 S.W.2d 622, 628 (Tex. App.--Austin 1992, writ denied).

In determining whether a party has waived a complaint, the reviewing court should consider the time period between when the conflict becomes apparent to the aggrieved party and when the aggrieved party moves to disqualify. *See Vaughan*, 875 S.W.2d at 690-91; *Wasserman v. Black*, 910 S.W.2d 564, 568 (Tex. App.--Waco 1995, orig. proceeding). A seven-month delay between the discovery of a potential disciplinary rule violation and the filing of a motion to disqualify based on that potential violation has been held untimely. *See, e.g., Vaughan*, 875 S.W.2d at 690 (six and one-half month delay untimely); *see also Enstar Petroleum Co. v. Mancias*, 773 S.W.2d 662, 664 (Tex. App.--San Antonio 1989, orig. proceeding)(a four-month delay untimely).

News America learned of Frazier's communication with Akin Gump on January 24, 1996. News America did not file its motion to disqualify until August 20, 1996, almost seven months later. The time lapse in this case supports a ruling based on waiver and such a ruling was within the trial court's discretion. *See Vaughan*, 875 S.W.2d at 690; *Enstar*, 773 S.W.2d at 664.

Here, the record supports the trial court's decision based on News America's waiver of its right to urge the disqualification because its motion was untimely. Accordingly, I believe the Court's

judgment setting aside the court of appeals' order is appropriate. Therefore, I concur in the Court's judgment.

James A. Baker,
Justice

OPINION DELIVERED: June 24, 1999