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Table of Contents for the Government Law 101 Course

MCLE # 174006740
6.5 Hours (1.25 Hours Ethics)
(Click on any blue link below to open articles)

To update your MCLE records online, visit **MyBarPage.com**
Requires internet access. MCLE records cannot be updated until after completion of the course

Come a Day Early for

Government Law 101

Live Site Only

LIVE San Antonio
July 18, 2018
Westin Riverwalk San Antonio

Wednesday

6.5 hours including 1.25 ethics

8:00 **Registration**
Coffee & Pastries Provided

8:55 **Welcoming Remarks**
Course Directors
Scott A. Durfee, *Houston*
Harris County District Attorney's Office

John C. Grace, *Lubbock*
City of Lubbock

9:00 **Open Records** *.5 hr*
Justin D. Gordon, *Austin*
Office of the Attorney General

9:30 **Drafting/Crafting Meeting Agendas That Comply With the Open Meetings Act** *.5 hr (.25 ethics)*
Victor Flores, *Denton*
City of Denton

10:00 **Police Powers and Authority of Different Entities** *.5 hr*
Robert W. Collins, *Houston*
City of Houston Legal Department

10:30 **Break**

10:45 **Common Areas of Local Entity Preemption You Did Not Know Existed** *.5 hr*
Ryan S. Henry, *San Antonio*
Law Offices of Ryan Henry

11:15 **Conflicts of Interest** *.5 hr ethics*
M. Ann Montgomery, *Waxahachie*
Ellis County Attorney's Office

11:45 **Break - Lunch Provided**

12:00 **Luncheon Presentation: Legal Writing for the Government Lawyer - How to Enhance Your Brief Writing** *.75 hr (.25 ethics)*
Chad Baruch, *Dallas*
Johnston Tobey Baruch

12:45 **Break**

1:00 **Update on Land Use, Zoning, and Planning** *.5 hr*
Speaker to be announced

1:30 **The Texas Tort Claims Act and Sovereign Immunity** *.75 hr*
Michael A. Shaunessy, *Austin*
McGinnis Lochridge

2:15 **Expunctions and Non-Disclosures** *.5 hr (.25 ethics)*
Bryan S. McWilliams, *Amarillo*
City of Amarillo

2:45 **Networking Break**

3:00 **1st Amendment Issues for Government Entities** *.5 hr*
William M. (Mick) McKamie, *San Antonio*
McKamie Krueger, LLP

3:30 **Social Media Policies for the Government Employer** *1 hr*
Alan J. Bojorquez, *Austin*
Bojorquez Law Firm

Heather Lockhart, *Austin*
City of Austin Law Department

Jennifer Richie, *Waco*
Waco City Attorney's Office

4:30 **Adjourn**

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6.5 Hours (1.25 Ethics)

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Thursday

7 hours including 1.25 ethics

8:00 **Registration**
Breakfast sponsored by:

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(Live site only)

8:55 **Welcoming Remarks**
Course Directors
Scott A. Durfee, *Houston*
Harris County District Attorney's Office

John C. Grace, *Lubbock*
City of Lubbock

9:00 **Legal Issues on How to Overcome and Plan Ahead for the Next Disaster** *.75 hr*
Kimberley Mickelson, *Houston*
Kimberley Mickelson, PC

9:45 **Social Media** *.5 hr (.25 ethics)*
Scott A. Durfee, *Houston*
Harris County District Attorney's Office

10:15 **Networking Break**

10:30 **eDiscovery Update** *.75 hr*
Craig D. Ball, *New Orleans, LA*
Craig D. Ball, PC

11:15 **SB20, Contracts, and Procurement** *.5 hr*
Sandy D. Hellums-Gomez, *Houston*
Thompson & Horton

GOVERNMENT LAW 101

Preface

The State Bar of Texas sponsored a one-day seminar entitled "Government Law 101" in San Antonio on July 18, 2018. This book was prepared for that program.

The State Bar would like to express its sincere appreciation for the fine efforts of the planning committee, and especially to the Course Directors, Scott A. Durfee and John C. Grace.

The greatest thanks and recognition, however, go to the authors and lecturers for their unselfish devotion of time and effort over the past several months to this worthwhile program.

Hedy R. Bower, Director
TexasBarCLE
State Bar of Texas

The authors who prepared the articles appearing in this book were carefully selected for their knowledge and experience in the subject area under review. They prepared their articles a short time prior to the program, and their manuscripts were, upon arrival at the State Bar, sent to the printer without being edited for content. The intent of this process is to provide readers with the most up-to-date information available.

Obviously, neither the State Bar nor the authors can warrant that the material will continue to be accurate, nor do they warrant it to be completely free of errors when published. Readers should verify statements before relying on them.

The articles in this book reflect the viewpoints of their authors and do not necessarily express the opinions of the State Bar of Texas, its Sections, or Committees.

TexasBarCLE

GOVERNMENT LAW 101

Course Directors:
SCOTT A. DURFEE, *Houston*
Harris County District Attorney's Office

JOHN C. GRACE, *Lubbock*
City of Lubbock

5126 July 2018

COURSE DIRECTOR

Scott Durfee is the General Counsel to the Harris County District Attorney Kim Ogg. In that capacity, Scott supervises the General Litigation Division, the Appellate Division, the Post Conviction Writs Division and the Conviction Review Section. He also represents the District Attorney and her staff in civil proceedings at all levels of state and federal court.

A 1988 graduate of the University of Texas School of Law, he has been an assistant district attorney in Houston since 1989, first as a trial prosecutor, then as an appellate prosecutor, and since 1995, as counsel for seven District Attorneys.

A frequent writer and speaker for the State Bar of Texas and other legal education providers on topics including criminal procedure, ethics, open government, media relations and identity theft, Scott was also a longtime member of the State Bar's Texas Disciplinary Rules of Professional Conduct Committee, as well as a two-time Chair of the State Bar's Government Law Section Council. He has won two President's Awards from the Houston Bar Association for his service as Chair of the Law and the Media Committee, as well as the Texas District and County Attorneys Association's C. Chris Marshall Distinguished Faculty Award in 2000, and Gerald Summerford Civil Practitioner of the Year Award in 2014 for his contributions to educating prosecutors statewide. This is his third time as a co-course director for the Advanced Government Law Seminar.

COURSE DIRECTOR

John Grace is an Assistant City Attorney in Lubbock, Texas, where he focuses on civil litigation. John practices in all phases of litigation, in municipal, state and federal court.

John received his undergraduate degree in Journalism, Broadcasting & Film from Trinity University on 1985 and his law degree from St. Mary's University School of Law in 1993. He started his legal career in San Antonio in private practice, dealing with criminal and juvenile law, civil litigation, and family law. In 2001, John relocated to Lubbock as a litigator in the Civil Division of the Lubbock County Criminal District Attorney's Office. In 2010, John moved to the Lubbock City Attorney's Office, still focusing on civil litigation.

John writes and speaks frequently around the state on issues involving pretrial procedure, governmental contracting, regulation of firearms, and requests for access to government information. He has been the Course Director for several State Bar legal seminars and he currently serves as Chair of the Government Law Section and the Texas Bar College. He is the past President of the Lubbock Area Bar Association.

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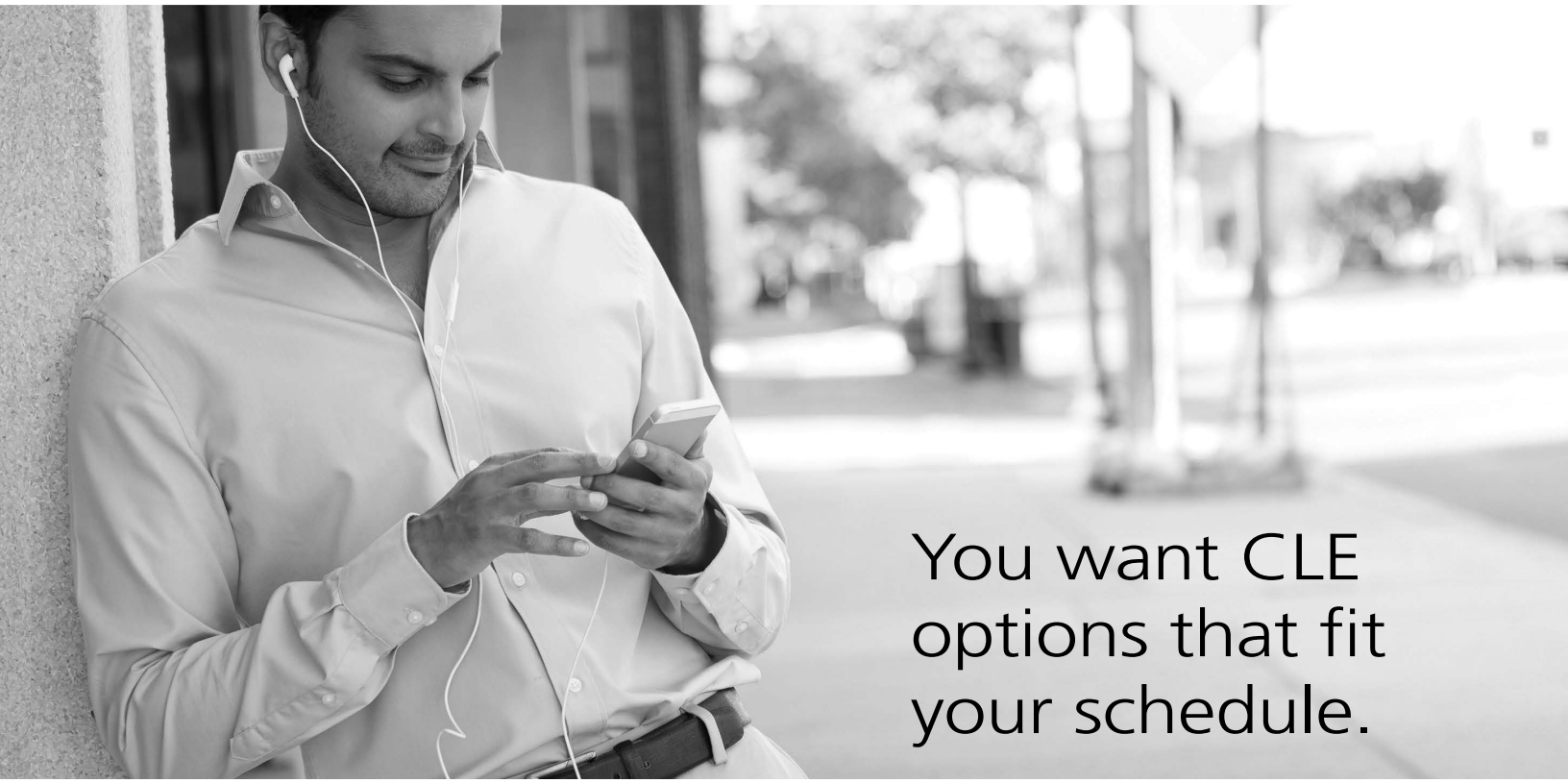

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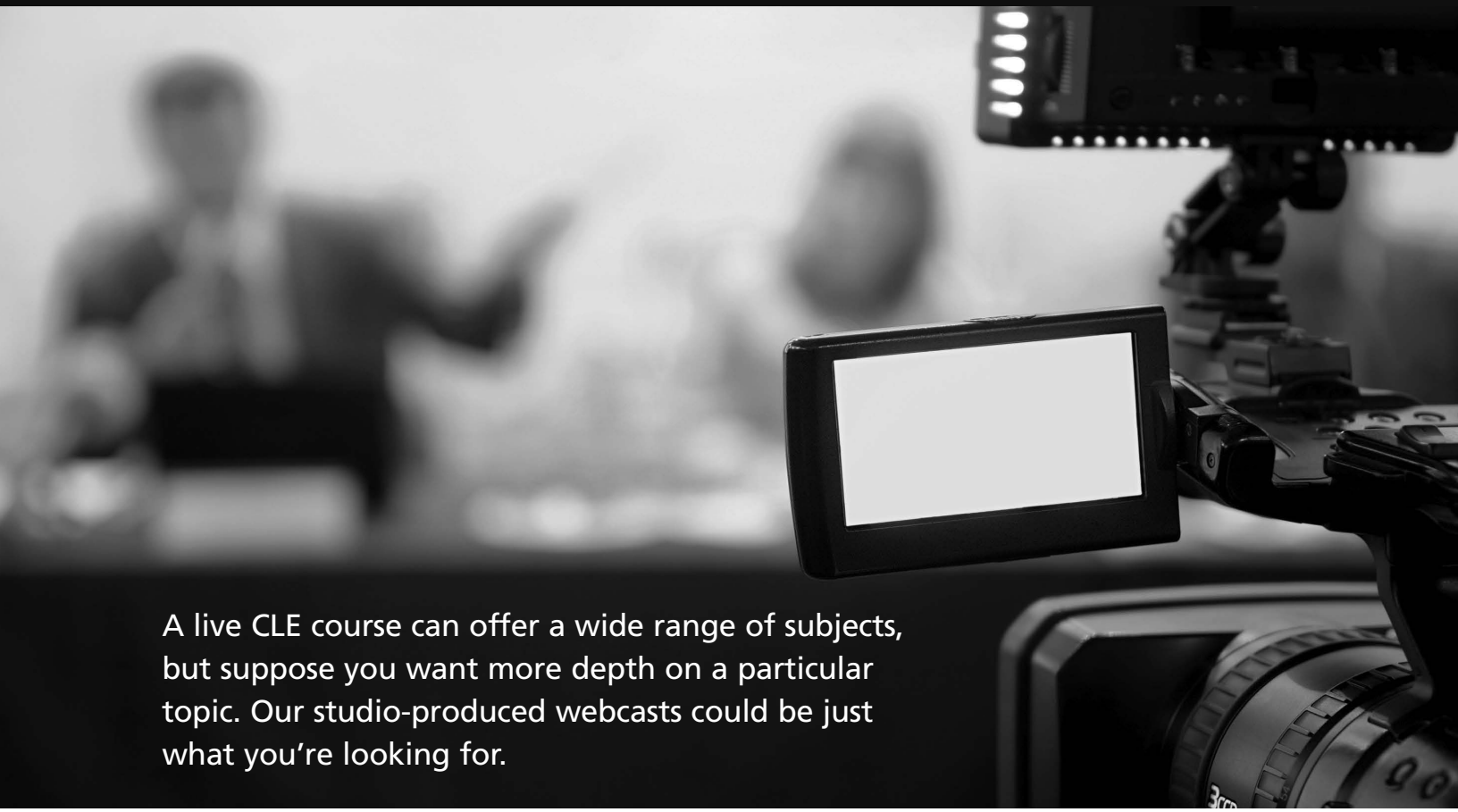

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THE TEXAS LAWYER'S CREED

A Mandate for Professionalism

Promulgated by The Supreme Court of Texas and the Court of Criminal Appeals November 7, 1989.

I am a lawyer; I am entrusted by the People of Texas to preserve and improve our legal system. I am licensed by the Supreme Court of Texas. I must therefore abide by the Texas Disciplinary Rules of Professional Conduct, but I know that Professionalism requires more than merely avoiding the violation of laws and rules. I am committed to this Creed for no other reason than it is right.

I. OUR LEGAL SYSTEM

A lawyer owes to the administration of justice personal dignity, integrity, and independence. A lawyer should always adhere to the highest principles of professionalism.

1. I am passionately proud of my profession. Therefore, "My word is my bond."
2. I am responsible to assure that all persons have access to competent representation regardless of wealth or position in life.
3. I commit myself to an adequate and effective pro bono program.
4. I am obligated to educate my clients, the public, and other lawyers regarding the spirit and letter of this Creed.
5. I will always be conscious of my duty to the judicial system.

II. LAWYER TO CLIENT

A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate means to protect and advance the client's legitimate rights, claims, and objectives. A lawyer shall not be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest.

1. I will advise my client of the contents of this Creed when undertaking representation.
2. I will endeavor to achieve my client's lawful objectives in legal transactions and in litigation as quickly and economically as possible.
3. I will be loyal and committed to my client's lawful objectives, but I will not permit that loyalty and commitment to interfere with my duty to provide objective and independent advice.
4. I will advise my client that civility and courtesy are expected and are not a sign of weakness.
5. I will advise my client of proper and expected behavior.
6. I will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that I abuse anyone or indulge in any offensive conduct.
7. I will advise my client that we will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party.
8. I will advise my client that we will not pursue tactics which are intended primarily for delay.
9. I will advise my client that we will not pursue any course of action which is without merit.
10. I will advise my client that I reserve the right to determine whether to grant accommodations to opposing counsel in all matters that do not adversely affect my client's lawful objectives. A client has no right to instruct me to refuse reasonable requests made by other counsel.
11. I will advise my client regarding the availability of mediation, arbitration, and other alternative methods of resolving and settling disputes.

III. LAWYER TO LAWYER

A lawyer owes to opposing counsel, in the conduct of legal transactions and the pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a lawyer's conduct, attitude, or demeanor toward opposing counsel. A lawyer shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.

1. I will be courteous, civil, and prompt in oral and written communications.
2. I will not quarrel over matters of form or style, but I will concentrate on matters of substance.
3. I will identify for other counsel or parties all changes I have made in documents submitted for review.
4. I will attempt to prepare documents which correctly reflect the agreement of the parties. I will not include provisions which have not been agreed upon or omit provisions which are necessary to reflect the agreement of the parties.
5. I will notify opposing counsel, and, if appropriate, the Court or other persons, as soon as practicable, when hearings, depositions, meetings, conferences or closings are cancelled.
6. I will agree to reasonable requests for extensions of time and for waiver of procedural formalities, provided legitimate objectives of my client will not be adversely affected.
7. I will not serve motions or pleadings in any manner that unfairly limits another party's opportunity to respond.
8. I will attempt to resolve by agreement my objections to matters contained in pleadings and discovery requests and responses.
9. I can disagree without being disagreeable. I recognize that effective representation does not require antagonistic or obnoxious behavior. I will neither encourage nor knowingly permit my client or anyone under my control to do anything which would be unethical or improper if done by me.
10. I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony towards opposing counsel, parties and witnesses. I will not be

11. influenced by any ill feeling between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel.
12. I will not take advantage, by causing any default or dismissal to be rendered, when I know the identity of an opposing counsel, without first inquiring about that counsel's intention to proceed.
13. I will promptly submit orders to the Court. I will deliver copies to opposing counsel before or contemporaneously with submission to the court. I will promptly approve the form of orders which accurately reflect the substance of the rulings of the Court.
14. I will not attempt to gain an unfair advantage by sending the Court or its staff correspondence or copies of correspondence.
15. I will not arbitrarily schedule a deposition, Court appearance, or hearing until a good faith effort has been made to schedule it by agreement.
16. I will readily stipulate to undisputed facts in order to avoid needless costs or inconvenience for any party.
17. I will refrain from excessive and abusive discovery.
18. I will comply with all reasonable discovery requests. I will not resist discovery requests which are not objectionable. I will not make objections nor give instructions to a witness for the purpose of delaying or obstructing the discovery process. I will encourage witnesses to respond to all deposition questions which are reasonably understandable. I will neither encourage nor permit my witness to quibble about words where their meaning is reasonably clear.
19. I will not seek Court intervention to obtain discovery which is clearly improper and not discoverable.
20. I will not seek sanctions or disqualification unless it is necessary for protection of my client's lawful objectives or is fully justified by the circumstances.

IV. LAWYER AND JUDGE

Lawyers and judges owe each other respect, diligence, candor, punctuality, and protection against unjust and improper criticism and attack. Lawyers and judges are equally responsible to protect the dignity and independence of the Court and the profession.

1. I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.
2. I will conduct myself in court in a professional manner and demonstrate my respect for the Court and the law.
3. I will treat counsel, opposing parties, witnesses, the Court, and members of the Court staff with courtesy and civility and will not manifest by words or conduct bias or prejudice based on race, color, national origin, religion, disability, age, sex, or sexual orientation.
4. I will be punctual.
5. I will not engage in any conduct which offends the dignity and decorum of proceedings.
6. I will not knowingly misrepresent, mischaracterize, misquote or miscite facts or authorities to gain an advantage.
7. I will respect the rulings of the Court.
8. I will give the issues in controversy deliberate, impartial and studied analysis and consideration.
9. I will be considerate of the time constraints and pressures imposed upon the Court, Court staff and counsel in efforts to administer justice and resolve disputes.

Order of the Supreme Court of Texas and the Court of Criminal Appeals

The conduct of a lawyer should be characterized at all times by honesty, candor, and fairness. In fulfilling his or her primary duty to a client, a lawyer must be ever mindful of the profession's broader duty to the legal system.

The Supreme Court of Texas and the Court of Criminal Appeals are committed to eliminating a practice in our State by a minority of lawyers of abusive tactics which have surfaced in many parts of our country. We believe such tactics are a disservice to our citizens, harmful to clients, and demeaning to our profession.

The abusive tactics range from lack of civility to outright hostility and obstructionism. Such behavior does not serve justice but tends to delay and often deny justice. The lawyers who use abusive tactics, instead of being part of the solution, have become part of the problem.

The desire for respect and confidence by lawyers from the public should provide the members of our profession with the necessary incentive to attain the highest degree of ethical and professional conduct. These rules are primarily aspirational. Compliance with the rules depends primarily upon understanding and voluntary compliance, secondarily upon reenforcement by peer pressure and public opinion, and finally when necessary by enforcement by the courts through their inherent powers and rules already in existence.

These standards are not a set of rules that lawyers can use and abuse to incite ancillary litigation or arguments over whether or not they have been observed.

We must always be mindful that the practice of law is a profession. As members of a learned art we pursue a common calling in the spirit of public service. We have a proud tradition. Throughout the history of our nation, the members of our citizenry have looked to the ranks of our profession for leadership and guidance. Let us now as a profession each rededicate ourselves to practice law so we can restore public confidence in our profession, faithfully serve our clients, and fulfill our responsibility to the legal system.

The Supreme Court of Texas and the Court of Criminal Appeals hereby promulgate and adopt "The Texas Lawyer's Creed -- A Mandate for Professionalism" described above.

In Chambers, this 7th day of November, 1989.

The Supreme Court of Texas

Thomas R. Phillips, Chief Justice
Franklin S. Spears, Justice
C. L. Ray, Justice
Raul A. Gonzalez, Justice
Oscar H. Mauzy, Justice
Eugene A. Cook, Justice
Jack Hightower, Justice
Nathan L. Hecht, Justice
Lloyd A. Doggett, Justice

The Court of Criminal Appeals

Michael J. McCormick, Presiding Judge
W. C. Davis, Judge
Sam Houston Clinton, Judge
Marvin O. Teague, Judge
Chuck Miller, Judge
Charles F. (Chuck) Campbell, Judge
Bill White, Judge
M. P. Duncan, III, Judge
David A. Berchelmann, Jr., Judge

TEXAS PARALEGAL'S CREED

I work with, and under the supervision of, a lawyer who is entrusted by the People of Texas to preserve and improve our legal system. I realize that unethical or improper behavior on my part may result in disciplinary action against my supervising attorney. As a Paralegal, I must abide by the Texas Disciplinary Rules of Professional Conduct, but I know that Professionalism requires more than merely avoiding the violation of laws and rules. I am committed to this Creed for no other reason than it is right.

I. OUR LEGAL SYSTEM

A Paralegal owes to the administration of justice personal dignity, integrity, and independence. A Paralegal should always adhere to the highest principles of Professionalism.

1. I am passionately proud of my profession. Therefore, "My word is my bond."

2. I will work with my supervising attorney to educate clients, the public, and other lawyers and Paralegals regarding the spirit and letter of this Creed.

3. I will always be conscious of my duty to the judicial system.

II. PARALEGAL TO CLIENT

A Paralegal owes to the supervising attorney and the client allegiance, learning, skill, and industry. A Paralegal shall not be deterred by any real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by self interest.

1. With, and under the direction of, my supervising attorney, I will endeavor to achieve the client's lawful objectives in legal transactions and litigation as quickly and economically as possible.

2. I will be loyal and committed to the client's lawful objectives, but I will not permit that loyalty and commitment to interfere with my ability to be objective.

3. I will inform the client that civility and courtesy are expected and not a sign of weakness.

4. I will inform the client of proper and expected behavior.

5. I will treat adverse parties and witnesses with fairness and due consideration. A client has no right to demand that I abuse anyone or indulge in any offensive conduct.

6. I will inform the client that my supervising attorney and I will not pursue conduct which is intended primarily to harass or drain the financial resources of the opposing party.

7. I will inform the client that my supervising attorney and I will not pursue tactics which are intended primarily for delay.

III. PARALEGAL TO OPPOSING LAWYER

A Paralegal owes to opposing counsel and their staff, in the conduct of legal transactions and pursuit of litigation, courtesy, candor, cooperation, and scrupulous observance of all agreements and mutual understandings. Ill feelings between clients shall not influence a Paralegal's conduct, attitude, or demeanor toward opposing counsel or their staff. A Paralegal shall not engage in unprofessional conduct in retaliation against other unprofessional conduct.

1. I will be courteous, civil, and prompt in oral and written communications.

2. I will identify for other counsel and parties all changes made by my supervising attorney in documents submitted for review.

3. I will attempt to prepare drafts for my supervising attorney's review which correctly reflect the agreement of the parties and not arbitrarily include provisions which have not been agreed upon or omit provisions necessary to reflect the agreement of the parties.

4. I will notify opposing counsel, and, if appropriate, the Court, Court staff, or other persons, as soon as practicable, when hearings, depositions, meetings, conferences, or closings are canceled.

5. I can relay a disagreement without being disagreeable. I realize that effective representation by my supervising attorney does not require antagonistic or obnoxious behavior. I will not encourage or knowingly permit the client to do anything which would be unethical or improper if done by me or my supervising attorney.

6. I will not, without good cause, attribute bad motives or unethical conduct to opposing counsel, nor bring the profession into disrepute by unfounded accusations of impropriety. I will avoid disparaging personal remarks or acrimony toward opposing counsel, opposing counsel’s staff, parties, and witnesses. I will not be influenced by ill feelings between clients. I will abstain from any allusion to personal peculiarities or idiosyncrasies of opposing counsel or other Paralegals.

7. I will not attempt to gain an unfair advantage by sending the Court or its staff correspondence or copies of correspondence.

8. I will assist my supervising attorney in complying with all reasonable discovery requests. I will not encourage the client to quibble about words where their meaning is reasonably clear.

IV. PARALEGAL AND JUDGE

Paralegals owe judges and the Court respect, diligence, candor, and punctuality. Paralegals share in the responsibility to protect the dignity and independence of the Court and the profession.

1. I will always recognize that the position of judge is the symbol of both the judicial system and administration of justice. I will refrain from conduct that degrades this symbol.

2. I will conduct myself in Court in a professional manner, and demonstrate my respect for the Court and the law.

3. I will treat counsel, opposing parties, the Court, and members of the Court staff with courtesy and civility.

4. I will be punctual and will assist my supervising attorney in being punctual.

5. I will not engage in any conduct which offends the dignity and decorum of proceedings.

Order of the Supreme Court of Texas and the Court of Criminal Appeals

Misc. Docket No. 99-9012

Standards For Appellate Conduct

At the request of the Council of the Appellate Practice and Advocacy Section of the State Bar and the Board of Directors of the State Bar of Texas, and based upon their submissions to our courts, the Supreme Court of Texas and the Court of Criminal Appeals hereby adopt and promulgate the attached Standards of Appellate Conduct. Nothing in these standards alters existing standards of conduct under the Texas Disciplinary Rules of Professional Conduct, the Texas Rules of Disciplinary Procedure, or the Code of Judicial Conduct.

In Chambers, this 1st day of February, 1999.

Standards for Appellate Conduct

Lawyers are an indispensable part of the pursuit of justice. They are officers of courts charged with safeguarding, interpreting, and applying the law through which justice is achieved. Appellate courts rely on counsel to present opposing views of how the law should be applied to facts established in other proceedings. The appellate lawyer's role is to present the law controlling the disposition of a case in a manner that clearly reveals the legal issues raised by the record while persuading the court that an interpretation or application favored by the lawyer's clients is in the best interest of the administration of equal justice under law.

The duties lawyers owe to the justice system, other officers of the court, and lawyers' clients are generally well-defined and understood by the appellate bar. Problems that arise when duties conflict can be resolved through understanding the nature and extent of a lawyer's respective duties, avoiding the tendency to emphasize a particular duty at the expense of others, and detached common sense. To that end, the following standards of conduct for appellate lawyers are set forth by reference to the duties owed by every appellate practitioner.

Use of these standards for appellate conduct as a basis for motions for sanctions, civil liability or litigation would be contrary to their intended purpose and shall not be permitted. Nothing in these standards alters existing standards of conduct under the Texas Disciplinary Rules of Professional Conduct, the Texas Rules of Disciplinary Procedure or the Code of Judicial Conduct.

Lawyers' Duties to Clients

A lawyer owes to a client allegiance, learning, skill, and industry. A lawyer shall employ all appropriate means to protect and advance the client's legitimate rights, claims, and objectives. A lawyer shall not be deterred by a real or imagined fear of judicial disfavor or public unpopularity, nor be influenced by mere self-interest. The lawyer's duty to a client does not militate against the concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of harm on the appellate process, the courts, and the law itself.

1. Counsel will advise their clients of the contents of these Standards of Conduct when undertaking representation.
2. Counsel will explain the fee agreement and cost expectation to their clients. Counsel will then endeavor to achieve the client's lawful appellate objectives as quickly, efficiently, and economically as possible.
3. Counsel will maintain sympathetic detachment, recognizing that lawyers should not become so closely associated with clients that the lawyer's objective judgment is impaired.
4. Counsel will be faithful to their clients' lawful objectives, while mindful of their concurrent duties to the legal system and the public good.
5. Counsel will explain the appellate process to their clients. Counsel will advise clients of the range of potential outcomes, likely costs, timetables, effect of the judgment pending appeal, and the availability of alternative dispute resolution.
6. Counsel will not foster clients' unrealistic expectations.
7. Negative opinions of the court or opposing counsel shall not be expressed unless relevant to a client's decision process.
8. Counsel will keep clients informed and involved in decisions and will promptly respond to inquiries.
9. Counsel will advise their clients of proper behavior, including that civility and courtesy are expected.
10. Counsel will advise their clients that counsel reserves the right to grant accommodations to opposing counsel in matters that do not adversely affect the client's lawful objectives. A client has no right to instruct a lawyer to refuse reasonable requests made by other counsel.
11. A client has no right to demand that counsel abuse anyone or engage in any offensive conduct.
12. Counsel will advise clients that an appeal should only be pursued in a good faith belief that the trial court has committed error or that there is a reasonable basis for the extension, modification, or reversal of existing law, or that an appeal is otherwise warranted.
13. Counsel will advise clients that they will not take frivolous positions in an appellate court, explaining the penalties associated therewith. Appointed appellate counsel in criminal cases shall be deemed to have complied with this standard of conduct if they comply with the requirements imposed on appointed counsel by courts and statutes.

Lawyers' Duties to the Court

As professionals and advocates, counsel assist the Court in the administration of justice at the appellate level. Through briefs and oral submissions, counsel provide a fair and accurate understanding of the facts and law applicable to their case. Counsel also serve the Court by respecting and maintaining the dignity and integrity of the appellate process.

1. An appellate remedy should not be pursued unless counsel believes in good faith that error has been committed, that there is a reasonable basis for the extension, modification, or reversal of existing law, or that an appeal is otherwise warranted.
2. An appellate remedy should not be pursued primarily for purposes of delay or harassment.
3. Counsel should not misrepresent, mischaracterize, misquote, or miscite the factual record or legal authorities.
4. Counsel will advise the Court of controlling legal authorities, including those adverse to their position, and should not cite authority that has been reversed, overruled, or restricted without informing the court of those limitations.
5. Counsel will present the Court with a thoughtful, organized, and clearly written brief.
6. Counsel will not submit reply briefs on issues previously briefed in order to obtain the last word.
7. Counsel will conduct themselves before the Court in a professional manner, respecting the decorum and integrity of the judicial process.
8. Counsel will be civil and respectful in all communications with the judges and staff.
9. Counsel will be prepared and punctual for all Court appearances, and will be prepared to assist the Court in understanding the record, controlling authority, and the effect of the court's decision.
10. Counsel will not permit a client's or their own ill feelings toward the opposing party, opposing counsel, trial judges or members of the appellate court to influence their conduct or demeanor in dealings with the judges, staff, other counsel, and parties.

Lawyers' Duties to Lawyers

Lawyers bear a responsibility to conduct themselves with dignity towards and respect for each other, for the sake of maintaining the effectiveness and credibility of the system they serve. The duty that lawyers owe their clients and the system can be most effectively carried out when lawyers treat each other honorably.

1. Counsel will treat each other and all parties with respect.
2. Counsel will not unreasonably withhold consent to a reasonable request for cooperation or scheduling accommodation by opposing counsel.
3. Counsel will not request an extension of time solely for the purpose of unjustified delay.
4. Counsel will be punctual in communications with opposing counsel.
5. Counsel will not make personal attacks on opposing counsel or parties.
6. Counsel will not attribute bad motives or improper conduct to other counsel without good cause, or make unfounded accusations of impropriety.
7. Counsel will not lightly seek court sanctions.
8. Counsel will adhere to oral or written promises and agreements with other counsel.
9. Counsel will neither ascribe to another counsel or party a position that counsel or the party has not taken, nor seek to create an unjustified inference based on counsel's statements or conduct.
10. Counsel will not attempt to obtain an improper advantage by manipulation of margins and type size in a manner to avoid court rules regarding page limits.
11. Counsel will not serve briefs or other communications in a manner or at a time that unfairly limits another party's opportunity to respond.

The Court's Relationship with Counsel

Unprofessionalism can exist only to the extent it is tolerated by the court. Because courts grant the right to practice law, they control the manner in which the practice is conducted. The right to practice requires counsel to conduct themselves in a manner compatible with the role of the appellate courts in administering justice. Likewise, no one more surely sets the tone and the pattern for the conduct of appellate lawyers than appellate judges. Judges must practice civility in order to foster professionalism in those appearing before them.

1. Inappropriate conduct will not be rewarded, while exemplary conduct will be appreciated.
2. The court will take special care not to reward departures from the record.
3. The court will be courteous, respectful, and civil to counsel.
4. The court will not disparage the professionalism or integrity of counsel based upon the conduct or reputation of counsel's client or co-counsel.
5. The court will endeavor to avoid the injustice that can result from delay after submission of a case.
6. The court will abide by the same standards of professionalism that it expects of counsel in its treatment of the facts, the law, and the arguments.
7. Members of the court will demonstrate respect for other judges and courts.

depression

Lawyers are at high risk for depression.

If you think you or someone you know may be depressed, please don't try to handle it alone.

The clinically depressed lawyer:

- **has little or no energy.**
- **sometimes misses deadlines.**
- **knows phone calls have to be returned but feels too enervated to do so.**
- **may spend hours at the office behind a closed door staring out the window.**
- **easily becomes angry or irritated.**
- **feels overwhelmed and immobilized by indecisiveness.**
- **has diminished ability to concentrate, analyze and synthesize information.**
- **isolates socially and professionally.**
- **is confused by an inability to "snap out of it," feels "weak," and berates self.**
- **tries to feel better by using alcohol, sedatives, stimulants or other substances, including food.**
- **fantasizes about some kind of escape, has fleeting thoughts of suicide.**

For more information, contact the Texas Lawyers' Assistance Program:

1-800-343-TLAP or 1-512-427-1453.

All communications with TLAP are confidential by law.

This information is provided through the collaboration of the State Bar of Texas Task Force on Lawyer Mental Health and the Texas Lawyers' Assistance Program.

SAVE A LIFE!
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32%
of lawyers under 31 and 21% of all lawyers have a **DRINKING PROBLEM**

28%
of lawyers face **DEPRESSION**

19%
of lawyers experience **ANXIETY**

11%
of lawyers have experienced **SUICIDAL THOUGHTS**

- These statistics mean there's a **chance it will be you and a certainty it will be someone you know**. Care for your colleagues and yourself.
- When you **see something, do something**. These issues can destroy lives and damage lawyers' reputations.
- Getting help for a friend or asking for help yourself **saves lives, futures, families, and practices**. Ignoring or doing nothing can cost a life.

1-800-343-8527 (TLAP)

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TEXAS LAWYERS' ASSISTANCE PROGRAM

Confidential. Respectful. Voluntary.

I. SOME SIGNS AND SYMPTOMS OF DEPRESSION AND SUBSTANCE ABUSE:

Consistent feelings of sadness or hopelessness

Lack of interest in people, things, or activities previously enjoyed

Increased fatigue or loss of energy, restlessness or irritability

Noticeable change in appetite, weight or sleep patterns

Isolation from family, friends, colleagues

Feelings and expressions of guilt or worthlessness

Diminished ability to remember, think clearly, concentrate, or make decisions

Thoughts or expressions of death or suicide

Using alcohol or drugs to bolster performance

Using alcohol/substances on the job, during the day, before appointments, meetings, deposition or court appearances

Failing to show for appointments, meetings, depositions, court appearances; failing to return phone calls

Declining quality and quantity of work product

Avoiding law partners, staff, colleagues, clients, friends, and family

Drinking/using substances alone. Making excuses for, or lying about, frequency or amount

Moral, ethical, and behavioral transgressions

II. WHAT CAN YOU DO?

Call TLAP at 1-800-343-8527 (TLAP) or 512-427-1453
Or, call the TLAP Judges' Line at 1-800-219-6474

Identity of caller can remain confidential

III. WHY DO IT?

Provide help, not discipline

Fulfill your ethical obligation to report

IV. WHAT HAPPENS?

TLAP staff, volunteer lawyers and judges can contact impaired lawyer, offer help, and educate on available services

Receive coaching and education about practical, immediate and long-term solutions and options

V. TLAP SERVICES INCLUDE:

Crisis counseling, coaching, and referral

Referrals to resources (counselors, therapists, psychologists, psychiatrists in relevant geographical areas)

Recommendations for out-patient and in-patient treatment programs

Match lawyer/judge with local peer volunteers and/or support groups

Referrals for limited financial assistance for lawyers without assets/resources

TLAP helpline for LAWYERS: 1-800-343-8527 (TLAP)

TLAP helpline for JUDGES: 1-800-219-6474

tlaphelps.org

TEXAS LAWYERS' ASSISTANCE PROGRAM

Confidential. Respectful. Voluntary.

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Communication Access Fund

Provided by the State Bar of Texas

When Texas lawyers and people seeking legal services need help communicating with each other, the State Bar of Texas can help lawyers meet their obligations under the Americans with Disabilities Act.

Funds are available to reimburse lawyers for sign language interpreters, Communication Access Real-Time Transcription (CART), braille documents, readers, and other services.

Learn more or apply for reimbursement at: texasbar.com/communicationaccess

STATE BAR *of* TEXAS

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The State Bar of Texas Member Benefits Program offers numerous resources to help attorneys with the everyday practice of law. Learn more about the hundreds of offerings available through the easy-to-navigate, one-stop shop for member benefits and services at **texasbar.com/benefits**.

Lifestyle

Spend time on you—life doesn't have to be all work and no play.

Office

Make your practice more efficient with new tools and programs.

Travel

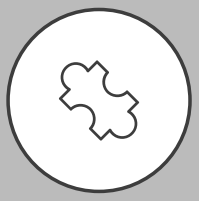
Make your plans for anything and anywhere, from a much-needed vacation to a quick business trip.

Insurance and Finance

Get peace of mind with health insurance and a retirement plan that work for you.

Technology

Get up to speed on everything from building a website to billing clients.



Additional Benefits

Look through hundreds of offerings to find just what you need—and things you didn't even know about.

Texas Bar Private Insurance Exchange

The Texas Bar Private Insurance Exchange is an online marketplace where State Bar of Texas members, their staffs, and dependents can compare and purchase products from insurance providers who compete for business within the exchange. The exchange is available for **individuals and employer groups** and offers health insurance, as well as a variety of other insurance products.

- **Complimentary $10,000 Accidental Death & Dismemberment Coverage**
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If you or your staff can't decide which coverage is best, take advantage of the interactive decision support tools or live chat. If a more personalized approach is preferred, then a licensed benefits counselor is just a phone call away.

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STATE BAR of TEXAS

MEMBER BENEFITS & SERVICES

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Bank of America
Beneplace - *Hundreds of Additional Benefits*
Brooks Brothers
Budget Car Rental
Clio - *Practice Management*
Costco
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EsqSites - *Website Design*
Geico
Hertz Car Rental
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Legal Directories
LexBlog
Lex Helper
Member Benefits Discount Hotels
Member Benefits Travel
National Car Rental
Office Depot
Page Vault - *Webpage Capturing Software*
RMail - *Registered Email*
Ruby Receptionists
SOFI - *Student Loan Refinancing*
TLIE - *PLI*
UPS - Delivery Services
USI Affinity - *PLI*
Word Rake - *Legal Editing Software*

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5. **See promotional offers.**
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8. **Learn about our services.**
9. **Increases your visibility on social media.**
10. **Enjoy fun and interesting content.**

Don't forget to tag us in your posts!

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How to Tag TexasBarCLE in Social Media Posts

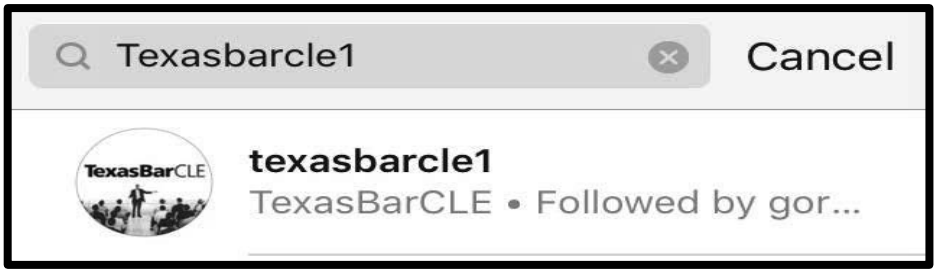
Tagging us is when you post on social media and provide a link to our business page. When you tag our page, we will be alerted that you've shared something which we can then share on the TexasBarCLE page. This is important to do to get the most possible views of your post.

Tagging a business page is easy. Begin your post and type @ and then start typing TexasBarCLE. A list of related people and business pages for you to choose from should appear and you will then select our page from the group.

Facebook: @Tbcle

Twitter: @TexasBarCLE

Instagram: @TexasBarCLE1



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TEN TIPS FOR LAWYERS DEALING WITH STRESS, MENTAL HEALTH, AND SUBSTANCE USE ISSUES

Prepared by:
CHRIS RITTER, J.D., *Austin*
Staff Attorney for Texas Lawyers' Assistance Program (TLAP)
www.texasbar.com\tlap
800-343-TLAP(8527)
512-427-1453

State Bar of Texas
BONUS MATERIALS

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TEN TIPS FOR LAWYERS DEALING WITH STRESS, MENTAL HEALTH, AND SUBSTANCE USE ISSUES

ABSTRACT

Being a lawyer in Texas is not easy. This paper provides some basic information and tools to help lawyers understand and address the serious stress, mental health and substance use issues which so many attorneys face.

I. INTRODUCTION.

For those practicing law in Texas, it may be no surprise that lawyers suffer very high rates of mental health and substance use disorders. Lawyers are handed their clients' worst problems and are expected to solve them. They are supposed to be perfect or their reputations dwindle. If they make a mistake, it can be career changing or devastating to a client's life. There is little time to smell the roses, and when that opportunity comes, it is hard if not impossible to stop thinking about the fires which need putting out at the office. It is a tremendous understatement to say that the life of a lawyer can be very stressful and difficult.

For decades, researchers have looked at the strenuous lifestyle and bad habits of lawyers. They have found extraordinary differences between the mental health and substance use of attorneys compared to normal people.

A recent law review article noted that attorneys have the highest rate of depression of any occupational group in the United States.[1] Another study showed that attorneys suffer depression 3.6 times as often as the general population.[2]

With regard to alcohol use, researchers have understood since a major study in 1990 that attorneys have much higher than usual rates of problem drinking and mental health issues.[3] Now, the details of the extent of the legal world's woes are revealed in two new major studies regarding the degree to which attorneys and law students suffer from such mental health and substance use disorders.

With regard to attorneys, in 2016 the American Bar Association Commission on Lawyer Assistance Programs and the Hazelden Betty Ford Foundation released a groundbreaking study of almost 13,000 employed attorneys which showed that 21% of attorneys screened positive for problematic drinking, defined as "hazardous, harmful, and potentially alcohol-dependent drinking" (some have referred to these people in the past as "alcoholics"), 28% suffer from depression, and 19% suffer from clinical anxiety.[4] Perhaps even more disturbing, 36% reported drinking alcohol in a quantity and frequency that would indicate "hazardous drinking or possible alcohol abuse or dependence," 46% felt they suffered depression in the past, and 61% reported concerns about anxiety.[5]

As a reference to how these numbers stack up to the norm, about 6% of adults over 26 years of age suffer from problematic drinking[6] (versus 21% of lawyers), and only 15% of doctors reported drinking alcohol in a quantity and frequency that would indicate hazardous drinking or possible alcohol abuse or dependence (versus 36% of lawyers).[7]

Likewise, a 2015 law school wellness study of nearly 4,000 participating law students at 15 law schools across the country showed similar results. In the study, 42% of respondents indicated that in the past year they had thought they needed help for emotional or mental health problems. Furthermore, 25% answered two or more of four questions that comprise the CAGE assessment, indicating as many as one-quarter of the law students should be considered for further screening for alcohol use disorder. The study also showed that 43% of law students reported binge drinking in the past 2 weeks and 25% reported marijuana use in the past year.[8]

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[1] *See Lawrence S. Krieger and Kennon M. Sheldon, What Makes Lawyers Happy? Transcending the Anecdotes with Data from 6200 Lawyers . 83 GEO. WASH. U. L. REV. 554 (2015), also published as FSU College of Law, Public Law Research Paper No. 667(2014); see also Rosa Flores & Rose Marie Arce, Why are lawyers killing themselves?, CNN (Jan. 20, 2014, 2:42 PM),* http://www.cnn.com/2014/01/19/us/lawyer-suicides/.

[2] *See William Eaton et al., Occupations and the Prevalence of Major Depressive Disorder, 32 J. OCCUPATIONAL MED. 1079, 1085 tbl. 3 (1990).*

[3] *See Justin J. Anker, Ph.D., Attorneys and Substance Abuse, Butler Center for Research(Hazelden 2014)(available at* http://www.hazelden.org/web/public/document/bcrup_attorneyssubstanceabuse.pdf)

[4] *See* Patrick Krill, Ryan Johnson, and Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, Journal of Addiction Medicine, Feb. 2016, Vol. 10, Issue 1, pp. 46-52, http://journals.lww.com/journaladdictionmedicine/Fulltext/2016/02000/The_Prevalence_of_Substance_Use_and_Other_Mental.8.asp

[5] *Id.*

[6] *Behavioral Health Trends in the United States: Results from the 2015 National Survey on Drug Use and Health, U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, September 2015,* http://www.samhsa.gov/data/sites/default/files/NSDUH-FRR1-2014/NSDUH-FRR1-2014.pdf

[7] *Id.*

[8] *See* Jerome M. Organ, David B. Jaffe, and Katherine M. Bender, *Helping Law Students Get the Help They Need: An Analysis of Data Regarding Law Students' Reluctance to Seek Help and Policy Recommendations for a Variety of Stakeholders*, The Bar Examiner, Dec. 2015, Vol. 4, Issue 4,

Additionally, 14% reported using prescription drugs in the past year without a prescription, 27% reported having an eating disorder, and 21% percent reported that they had considered suicide.[9]

One law school study found that before law school, only 8% reported alcohol problems. By the third year of law school, 24% reported a concern about having a drinking problem.[10] Moreover, a 2014 Yale Law School study sent shockwaves across academia when it reported 70% of its law students had symptoms of depression.[11]

Regarding suicide, lawyers have consistently been at or near the top the list of all professionals in suicide rates.[12] They have been found to be twice as likely as the average person to commit suicide.[13]

Obviously, these are major problems. No one wants to be troubled by thinking about these issues, but they demand real attention. This paper is an effort to provide some basic information and tools to help attorneys and others in contact the legal community understand and address the unique and substantial stress, mental health and substance use issues from which so many attorneys suffer.

II. DEFINING THE ISSUES.

While there are a large number of hardships faced by attorneys practicing law across the State of Texas, the following are some of the most common and most serious:

A. Anxiety Disorders.

Disorders relating to anxiety range from a general Panic Attack (which is Panic Disorder with or without Agoraphobia[14]) to specific phobias such as Social Anxiety Disorder (SAD), Obsessive-Compulsive Disorder (OCD), Posttraumatic Stress Disorder (PTSD), Acute Stress Disorder (ASD), Generalized Anxiety Disorder (GAD), Substance-Induced Anxiety Disorder, anxiety due to a medical condition, and anxiety disorder not otherwise specified.

Generalized Anxiety Disorder is prevalent in the legal community, although most lawyers would argue that its symptoms sound like what one experiences every day when practicing law:

1. Excessive anxiety and worry (apprehensive expectation) which occurs more days than not for at least six months about a number of events or activities (such as work or school performance);
2. The person finds it difficult to control the worry;
3. The anxiety and worry are associated with three (or more) of the following six symptoms present for more days than not for the past 6 months:

    a. restlessness or feeling keyed up or on edge;
    b. being easily fatigued;
    c. difficulty concentration or mind going blank;
    d. irritability;
    e. muscle tension;
    f. sleep disturbance (difficulty falling or staying asleep or restless unsatisfying sleep);

4. The focus of anxiety or worry is not about another disorder (panic, social phobia, OCD, PTSD, etc);
5. The anxiety, worry or physical symptoms cause clinically significant distress or impairment in social, occupation or other important areas of functioning; and
6. The disturbance is not due to the direct physiological effects of a substance (drug of abuse, medication, etc.) or a general medical condition and does not exclusively occur during a mood disorder or psychotic disorder.[15]

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http://www.ncbex.org/pdfviewer/?file=%2Fassets%2Fmedia_files%2FBar-Examiner%2Fissues%2F2015-December%2FBE-Dec2015-HelpingLawStudents.pdf

[9] *Id.*

[10] *See* G.A. Benjamin, E.J. Darling, and B. Sales, *The Prevalence Of Depression, Alcohol Abuse, And Cocaine Abuse Among United States Lawyers*, International Journal of Law and Psychiatry, 1990, Vol. 13, pp. 233-246.

[11] *See* Yale Law School Mental Health Alliance, *Falling Through the Cracks: A Report on Mental Health at Yale Law School*, December 2014, http://www.scribd.com/doc/252727812/Falling-Through-the-Cracks

[12] According to a 1991 Johns Hopkins University study of depression in 105 professions, lawyers ranked number one in the incidence of depression. *See William Eaton et al., Occupations and the Prevalence of Major Depressive Disorder*, 32 JOURNAL OF OCCUPATIONAL MEDICINE 11, Page 1079(1990).

[13] A 1992 OSHA report found that male lawyers in the US are two times more likely to commit suicide than men in the general population. *See http://www.lawpeopleblog.com/2008/09/the-depression-demon-coming-out-of-the-legal-closet/* .

[14] This is a type of anxiety disorder in which you fear and often avoid places or situations that might cause you to panic and make you feel trapped, helpless or embarrassed.

[15] *See* www.depression-screening.org for self-assessment screening tests for anxiety disorders.

B. Substance Use Disorders and Process Addictions.

Approximately 21% of the lawyers in the United States are affected by alcohol and other substance use disorders compared with about 6% of the general public in the same age group.[16] The substances used to excess include: alcohol, amphetamines, methamphetamine, caffeine, club drugs, cocaine, crack cocaine, hallucinogens, heroin, marijuana, myriad prescription drugs, nicotine, sedatives, steroids and a combination of all of the above (polysubstance abuse/dependency).

Substance use disorders span a wide variety of problems arising from substance use. The following are the 11 different criteria for diagnosing a substance use disorder under the recently established DSM-5[17]:

1. Taking the substance in larger amounts or for longer than meant to;
2. Wanting to cut down or stop using the substance but not managing to;
3. Spending a lot of time getting, using, or recovering from use of the substance;
4. Cravings and urges to use the substance;
5. Not managing to do what should be done at work, home or school, because of substance use
6. Continuing to use, even when it causes problems in relationships;
7. Giving up important social, occupational or recreational activities because of substance use;
8. Using substances again and again, even when it puts one in danger;
9. Continuing to use, even when known that there is a physical or psychological problem that could have been caused or made worse by the substance;
10. Needing more of the substance to get the effect wanted (tolerance); and/or
11. Development of withdrawal symptoms, which can be relieved by taking more of the substance.

The DSM-5 further provides a measure for determining the severity of a substance use disorder as follows:

MILD: Two or three symptoms indicate a mild substance use disorder

MODERATE: four or five symptoms indicate a moderate substance use disorder, and

SEVERE: six or more symptoms indicate a severe substance use disorder. Clinicians can also add "in early remission," "in sustained remission," "on maintenance therapy," and "in a controlled environment."[18]

Though they are not all classified as substance use disorders, TLAP also works in increasing numbers with lawyers who also experience process addictions (compulsive or mood altering behavior related to a process such as sexual activity, pornography – primarily online, gambling, gaming, exercise, working, eating, shopping, etc.). The DSM-5 does now recognize Gambling Disorder as a behavioral addiction.

C. Depressive Disorders.

Texas lawyers often present with symptoms of depressive disorders, including Major Depression, Persistent Depressive Disorder (formerly referred to as Dysthymic Depression), Compassion Fatigue, and Depression Not Otherwise Specified.

1. Major Depressive Disorder:

A major depressive episode is a period characterized by the symptoms of major depressive disorder when five or more of the following are present during the same two-week period:

a. depressed mood most of the day, nearly every day, as indicated by subjective report or observation made by others;
b. markedly diminished interest or pleasure in all or most activities most of the day, nearly every day;
c. significant weight gain or loss (when not dieting) or decrease or increase in appetite nearly every day;
d. insomnia or hypersomnia nearly every day;
e. psychomotor agitation or retardation nearly every day;

[16] *See* Patrick Krill, Ryan Johnson, and Linda Albert, *The Prevalence of Substance Use and Other Mental Health Concerns Among American Attorneys*, Journal of Addiction Medicine, Feb. 2016, Vol. 10, Issue 1, pp. 46-52, http://journals.lww.com/journaladdictionmedicine/Fulltext/2016/02000/The_Prevalence_of_Substance_Use_and_Other_Mental.8.asp ; s*ee also G.A.H. Darling et al., The prevalence of depression, alcohol abuse, and cocaine abuse among United States lawyers,* 13 INTERNATIONAL JOURNAL OF LAW AND PSYCHIATRY 233-246 (1990).

[17] The Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition, abbreviated as DSM-5, is the 2013 update to the American Psychiatric Association's (APA) classification and diagnostic tool. In the United States, the DSM serves as a universal authority for psychiatric diagnosis. *See* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. text rev. 2013) (hereinafter "DSM-5").

[18] *Id. See also http://www.alcoholscreening.org/* for an alcohol use disorder self-assessment test.

f. fatigue or loss of energy nearly every day;
g. feelings of worthlessness or excessive or inappropriate guilt nearly every day;
h. diminished ability to think or concentrate, or indecisiveness, nearly every day; and/or
i. recurrent thoughts of death, recurrent suicidal ideation without a plan, suicide attempt or a specific plan for completing suicide.[19]

2. Persistent Depressive Disorder:

This is a disorder involving a depressed mood that occurs for most of the day, for more days than not, for at least 2 years with the presence of at least two of the following six symptoms:

a. poor appetite or overeating;
b. insomnia or hypersomnia;
c. low energy or fatigue;
d. low self-esteem;
e. poor concentration or difficulty making decision; and/or
f. feelings of hopelessness.

Additionally, for Persistent Depressive Disorder to be diagnosed, the person must not have been without the symptoms above for more than two months at a time during the 2-year period of the disturbance and must not have experienced a major depressive episode, manic episode or hypomanic episode in that time.

Finally, the disturbance must not occur exclusively during the course of a chronic psychotic disorder, must not be due to substance use or another medical condition, and must cause clinically significant distress or impairment in social, occupational or other important areas of functioning.[20]

3. Compassion Fatigue and Burnout.

Compassion fatigue has been defined as "a combination of physical, emotional, and spiritual depletion associated with caring for persons in significant emotional pain and physical distress."[21] Its components are the presence of Secondary Traumatic Stress (STS) in combination with a condition commonly referred to by lawyers as "Burnout":

a. Secondary Traumatic Stress.

Secondary Traumatic Stress is the presence of traumatic symptoms caused by indirect exposure to the traumatic material. The following are characteristics of this kind of trauma:

(1). Symptoms are similar to Post Traumatic Stress Disorder except the information about the trauma is acquired indirectly from communicating with the person who personally experienced the traumatic event.
(2). The traumatic event is persistently re-experienced in one or more of the following ways: recurrent and intrusive distressing recollections, dreams, acting or feeling as if the event is reoccurring.
(3). Persistent avoidance of the stimuli associated with the trauma (the client, the case, the deposition, specific facts, etc.) and numbing of general responsiveness develops.
(4). Persistent symptoms of increased arousal such as difficulty falling or staying asleep, irritability or outbursts of anger, difficulty concentrating, hyper vigilance, or exaggerated startle response.

b. Burnout.

Burnout is the term used by many lawyers to describe the psychological syndrome of emotional exhaustion, depersonalization and reduced personal accomplishment. Burnout symptoms include:

> increased negative arousal, dread, difficulty separating personal and professional life, inability to say "no," increased frustration, irritability, depersonalization of clients and situations, diminished enjoyment of work, diminished desire or capacity for intimacy with family and friends, diminished capacity to listen and communicate, subtle manipulation of clients to avoid them or painful material, diminished effectiveness, loss of confidence, increased desire to escape or flee, isolation.

If you are concerned about suffering from Compassion Fatigue, you may be interested in taking the self-assessment test at http://www.compassionfatigue.org/pages/cfassessment.html.

D. Suicide.

There is no need to define suicide, but because it is such a serious matter and so prevalent among lawyers, it deserves further discussion.

A recent study by the Air Force (2010) found that suicide prevention training included in all military training reduced the mean suicide rate within the

[19] *See* www.depression-screening.org for a self-assessment screening test for depression.
[20] *See* DSM-5.
[21] Barbara Lombardo & Carol Eyre, *Compassion Fatigue: A Nurse's Primer*, 16 THE ONLINE JOURNAL OF ISSUES IN NURSING 1 (2011).

population studied by an unprecedented 21%.[22] In light of this recognition of the major impact training and education can have on suicide, it is appropriate that TLAP has made it a priority since 1987 to inform lawyers about this issue. If you want to know how to carry on a conversation about suicide, how and when to get a client, friend or colleague to professional help, or how to handle a suicide emergency, explore the resources on TLAP's website at www.texasbar.com/TLAP. [23]

III. TEN HELPFUL TIPS FOR LAWYERS DEALING WITH STRESS, MENTAL HEALTH, OR SUBSTANCE USE ISSUES.

When dealing with the spectrum of problems faced by Texas attorneys, there is no single solution which will take care of everything, but many tools are useful for both mental health and substance abuse issues. The following are ten practical tools which any affected attorney should consider using for prevention or to help solve a problem:

1. Take Action!

Whether a lawyer is living in the darkness of depression or lost in a routine of substance abuse, there is a solution but it depends on *action*. Taking action requires courage. By expressing the need for help to someone, the process to peace begins. TLAP is available for any lawyer to confidentially share a desire to change the way he or she is living and to assist the person in getting the help needed. [24] Once an attorney is able to take even the smallest action toward solving their problem, life gets better quickly.

a. Get Professional Help.

Lawyers are slow to utilize professional assistance, perhaps due to fear of what people might think, how it might affect their practice, or being ashamed of not being able to figure it out alone. It has been said that people cannot think their way out of bad thinking. Of all people, lawyers know that using a professional who specializes in solving a particular problem is wise.

If what you are doing is not working and you would like to confidentially get professional help but do not already know a suited professional, TLAP can help guide you to licensed professionals who are a good fit for you and who are experienced in working with lawyers.

b. Take The Steps Which Are Suggested.

Having discovered and accepted the fact that a problem exists, it is important to accept help from people who have experience in solving that problem. Once a plan is made, it is important to accept and follow the steps suggested for getting better. Professionals and doctors may prescribe certain actions to address your problem and which may bring about major changes in the way you function and feel. Likewise, there are many 12 Step programs [25] which provide guidance for recovery from a variety of problems and which suggest specific actions which bring about change in the way a person thinks and lives so as to overcome the "problem."

c. Get proactive.

Know that this profession can wear you out. So, get an annual physical. Take a vacation (or "stay-cation"). Develop a team of experts for yourself: peer support, primary care physician, therapist and psychiatrist. Act now, do not wait to address your burnout, sense of dread, lingering grief, daily fear, or excessive substance use intended to numb all of the above.

d. Call TLAP.

The only way to ensure that the situation changes for you is to take action. It may be hard to figure out what action to take. If you are wondering what to do, TLAP's experienced and professional staff is available by phone 24/7 to answer your questions about substance abuse, mental health and wellness issues. Your calls will be to attorneys with resources and helpful ideas to better your life. You can call TLAP at any time at 1-800-343-TLAP(8527). By statute, all communications are confidential pursuant to the Texas Health and Safety Code Chapter 467. TLAP services include confidential support, referrals, peer assistance, customized CLE and education, mandated monitoring, and volunteer opportunities. Without proper intervention and

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[22] *See* Eric D. Caine, *Suicide Prevention Is A Winnable Battle*, 100 *AMERICAN JOURNAL OF PUBLIC HEALTH* S1 (2012).

[23] If you or anyone you know is in need, the National Suicide Prevention Hotline is available 24/7 at 1(800)273-8255(TALK).

[24] TLAP is afforded confidentiality of communications through the Texas Health and Safety Code Chapter 467.

[25] The following are some of the many 12 Step Programs: AA - Alcoholics Anonymous; ACA - Adult Children of Alcoholics; Al-Anon/Alateen, for friends and families of alcoholics; CA - Cocaine Anonymous; Co-Anon, for friends and family of addicts; CoDA - Co-Dependents Anonymous, for people working to end patterns of dysfunctional relationships and develop functional and healthy relationships; DA - Debtors Anonymous; EA - Emotions Anonymous, for recovery from mental and emotional illness; FA - Food Addicts in Recovery Anonymous; FAA - Food Addicts Anonymous; GA - Gamblers Anonymous; Gam-Anon/Gam-A-Teen, for friends and family members of problem gamblers; MA - Marijuana Anonymous; NA - Narcotics Anonymous; NicA - Nicotine Anonymous; OA - Overeaters Anonymous; OLGA - Online Gamers Anonymous; PA - Pills Anonymous, for recovery from prescription pill addiction; SA - Smokers Anonymous; SAA - Sex Addicts Anonymous; and WA - Workaholics Anonymous.

treatment, substance abuse and mental illness are both chronic health conditions that worsen over time. Please call and find out how TLAP can help.

2. Set Boundaries.

Boundaries are important for a person practicing self-care. Personal or professional boundaries are the physical, emotional and mental limits, guidelines or rules that you create to help identify your responsibilities and actions in a given situation and allow you take care of yourself. They also help identify actions and behaviors that you find unacceptable. They are essential ingredients for a healthy self and a healthy law practice. In essence, they help define relationships between you and everyone else.

How does one establish healthy boundaries? Know that you have a right to personal and professional boundaries. Set clear and decisive limits and let people know what you expect and when they have crossed the line, acted inappropriately or disrespected you. Likewise, do not be afraid to ask for what you want, what you need and what actions to take if your wishes are not respected. Recognize that other's needs and feelings and demands are not more important than your own. Putting yourself last is not always the best – if you are worn out physically and mentally from putting everyone else first, you destroy your health and deprive others of your active engagement in their lives. Practice saying no and yes when appropriate and remain true to your personal and professional limits. Do not let others make the decisions for you. Healthy boundaries allow you to respect your strengths, your abilities and your individuality as well as those of others. [26]

3. Connect with Others.

Connecting with others who know first-hand what you are going through can help reduce the fear and hopelessness that is often connected to mental health and substance use disorders. A growing body of research shows that the need to connect socially with others is as basic as our need for food, water and shelter. [27] Fortunately, there are support groups available for lawyers. TLAP and the Texas Lawyers Concerned for Lawyers[28] programs have joined together to offer and support lawyer self-help and support groups around the state. Groups are active around the state in major cities and other areas (Austin, Beaumont, Corpus Christi, Dallas, El Paso, Ft. Worth, Houston, Lubbock, Rio Grande Valley, and San Antonio). These groups operate to support lawyers dealing with a variety of concerns, primarily stress, anxiety, substance use, addictions, and depression. A list of active groups and local contacts is available at www.texasbar.com/TLAP.

Additionally, TLAP's resources include a dedicated and passionate group of hundreds of volunteers who can connect with a lawyer suffering from a mental health or substance use issue. These volunteers are lawyers, judges and law students who are committed to providing peer assistance to their colleagues and who have experienced their own challenges, demonstrated recovery, and are interested in helping others in the same way they were helped. TLAP volunteers uniquely know how important confidentiality is to the lawyer in crisis and are trained to help in a variety of ways: providing one-on-one peer support and assistance, sharing resources for professional help, introducing others to the local support groups and other lawyers in recovery, speaking and making presentations and a host of other activities.

4. Practice Acceptance.

Acceptance is a big, meaningful word which encompasses a variety of important tools for a person seeking a positive life change. First, being able to honestly accept the place where you are at present is an important step in making a change. Until a person is able to accept that the future is not here yet and that the past is gone, he or she cannot be present to focus on what is within grasp that day.

Furthermore, accepting that something is wrong is a step many lawyers resist. Perfectionism and pride play a role in learning to be a good lawyer, but the effects of those can be limiting on a person who needs to get honest about a difficulty.[29] Acceptance of the fact that you have an issue for which help is needed is a major part of solving the problem.

5. Learn to Relax.

For attorneys, relaxing can seem almost impossible. The mind is an instrument, but sometimes

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[26] *This section includes information originally included in a paper written by* Ann D. Foster, JD, LPC-Intern entitled *Practicing Law and Wellness: Modern Strategies for the Lawyer Dealing with Anxiety, Addiction and Depression, which is available online at www.texasbar.com/AM/Template.cfm?Section=Wellness1&Template=/CM/ContentDisplay.cfm&ContentID=15158, and is included herein with her permission.*

[27] *See* MATTHEW LIEBERMAN, *SOCIAL: WHY OUR BRAINS ARE WIRED TO CONNECT* (Crown Publishers 2013).

[28] Texas Lawyers Concerned for Lawyers (TLCL), a volunteer organization associated with the State Bar of Texas Lawyers' Assistance Program (TLAP), helps those in the legal profession who are experiencing difficulties because of alcohol and/or substance abuse, depression, anxiety and other mental health issues.

[29] *See Brené Brown's Ted Talk on "The price of invulnerability":* https://www.youtube.com/watch?v=_UoMXF73j0c&list=PLvzC42i6_rJJkyzWp1hyqUytxBBvNKgI6. *Dr. Brown is a research professor at the University of Houston Graduate College of Social Work where she has spent many years studying courage, shame and authenticity.*

it seems that the instrument has become the master. Breathing exercises, meditation, and mindfulness [30] practices have been very effective for attorneys who need to relax, or "quiet the mind." Much has been written to express how impactful these tools can be to bring about peace in the life of an attorney.[31]

There are countless variations of breathing exercises and resources to learn how to build control of your thoughts and worries.[32] TLAP's website includes links to several of these wellness resources at www.texasbar.com/TLAP.

Suggestion: Calendar what you want to do. Wishing and wanting to change are important ingredients for change but action is important. If there is something that you want to do, what would be the first thing to accomplish to move toward that goal? Calendar it. First things really do come first. Try it!

Finally, in order to relax, cultivate interests unrelated to the practice of law. This will provide you with opportunities to take a well-deserved break from your work, and, quite frankly, helps to make you a far more emotionally well-developed and interesting person. You will also meet a host of new friends and contacts who will help give some additional perspective about your life and your choices.

6. Practice Positive Thinking.

There is a growing body of research showing the powerful positive effects of positive thinking and positive psychology.[33] The goal of this movement is to help people change negative styles of thinking as a way to change how they feel.

Suggestion: Make a Gratitude List. One way to practice positive thinking is to focus your attention on what is right in your life. This is a proven and effective way to escape the sometimes overwhelming thoughts of all of the things that may seem to be wrong. Become conscious of your gratitude. Studies have shown that taking the time to make a list of things for which you are grateful can result in significant improvement in the way you feel and the amount of happiness you experience.[34] Try making a list of three to five things for which you are grateful each morning for a week and see what happens.

7. Help Others.

Service work sounds like just one more thing to add to the list of things you do not have time for, but this is something helpful for you, so consider really making time to do. Obviously, until you secure your oxygen mask, you should not attempt to rescue others, but lawyers have been found to gain "intense satisfaction" from doing service work, [35] and studies show it helps improve mental health and happiness.[36]

For example, a researcher named Dr. Martin Seligman highlighted this theory in an experiment called "Philanthropy versus Fun," Seligman divided up his psychology students into two groups. The first partook in pleasurable past times such as eating delicious food and going to the movies. The second group participated in philanthropic activities, volunteering in feeding the homeless or assisting the physically handicapped. What Seligman found was that the satisfaction and happiness that resulted from volunteering was far more lasting than the fleeting reward of food or entertainment.[37] Even if you feel that it is being done for your own selfish gain, try it anyway and before long you will experience a heightened sense of peace, joy and satisfaction in life. *Service Work Suggestions:* Try to do something kind for someone at least once a week. Try something small. If

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[30] *See* Rhonda V. Magee, *Making the Case for Mindfulness and the Law*, 86 NW Lawyer 3 at p. 18 (2014)(available online at: http://nwlawyer.wsba.org/nwlawyer/april_may_2014/?pg=20#pg20).

[31] *See e.g.*, STEVEN KEEVA, TRANSFORMING PRACTICES: FINDING JOY AND SATISFACTION IN THE LEGAL LIFE (1999); Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Clients*, 7 HARV. NEGOT. L. REV. 1 (2002); Rhonda V. Magee, *Educating Lawyers to Meditate?*, 79 UMKC L. REV. 535 (2010).

[32] Guided breathing exercises and meditations: http://marc.ucla.edu/body.cfm?id=22; Meditate at your desk: https://www.youtube.com/watch?v=nQjMJpQyj8E&feature=youtu.be;

[33] *See http://www.ppc.sas.upenn.edu/publications.htm*

[34] *See* Steven Toepfer, *Letters of Gratitude: Improving Well-Bring through Expressive Writing*, J. OF WRITING RES. 1(3) (2009).

[35] *See Lawrence S. Krieger and Kennon M. Sheldon, What Makes Lawyers Happy? Transcending the Anecdotes with Data from 6200 Lawyers . GEO. WASH. U. L. REV. 83 (2015 Forthcoming), FSU College of Law, Public Law Research Paper No. 667(2014) (citing* Bruno Frey & Alois Stutzer, HAPPINESS AND ECONOMICS: HOW THE ECONOMY AND INSTITUTIONS AFFECT HUMAN WELL-BEING at 105 (2002)).

[36] *See also* the following video of *Dr. Charles Raison, the Assistant Professor of the Department of Psychiatry and the Director of the Mind/Body Program at Emory University, in which Dr. Raison talks about happiness and what causes it:* http://www.youtube.com/watch?v=0orvsH07zeg

[37] *See* Karen Salmansohn, THE BOUNCE BACK BOOK (Workman Publ'g 2008), partially available online at http://www.psychologytoday.com/blog/bouncing-back/201003/the-world-taking-it-outta-you-seligman-study-shows-how-you-can-cheer-givin. *See also* Martin E. P. Seligman, Authentic Happiness (Simon & Schuster 2002).

you have the time, volunteer your time to help another. Do not make the activity about you – it should be about giving to others. Whatever measure you take, large or small, remember that it will not only help others, but it will also serve to build your self-esteem, help put your life in perspective, and help to develop and maintain a vital connection with the community in which you live. [38]

8. Live in the Present.

This cliché phrase may be one of the most under-appreciated tools for the legal profession of any listed here. As lawyers, this sounds like a joke. Deadlines loom. Trials approach. How can this work?

Try it. Consider during your day the things which you are able to do that day. Live it "only for today." If nothing can be done about something on your mind in the day you are in, return your focus to the things you can do that day. If you are not happy with your circumstance, what incremental thing can you do today about it? Nothing? Then move on and enjoy your today. As one attorney put it, "Be where your feet are." The Serenity Prayer is something which can serve as a means to practice this "one day at a time" method: "God, grant me the serenity to accept the things I cannot change, The courage to change the things I can, And the wisdom to know the difference."

9. Expand your Spirituality or Consciousness.

Whatever the variety, research has shown that expanding this area of life makes a major impact of the wellbeing of people, and particularly lawyers. [39] Spirituality has many definitions, but at its core spirituality brings context to our lives and the struggles within them. For many lawyers dealing with the legal world and its many issues, expanding the spiritual life is invaluable. Other lawyers who do not prefer religion or traditional spiritual practices often find great benefit to expanding their consciousness by means of an expansion of an involvement in natural, philosophical, or other pursuits which bring about the contemplation of the reality of existence.

10. Keep it Real.

Recovering from a mental health or substance abuse problem requires honesty. If you begin to feel like you should be better than you are, but you are embarrassed to let others down by admitting your true condition, you are doing yourself a major disservice. Commit to "keeping it real." Be honest with someone about how you are doing so that you do not lose touch with those who can help.

One way to develop or ensure honesty with ourselves is to do an inventory. We all know that any business that fails to take inventory is bound to fail. People are no different. Assessing your life by taking an inventory or snapshot of your daily life can give you an idea of where you are and -- of equal importance -- where you want to go. Small corrections in allocation of time today will help prevent an out-of-balance life tomorrow.

Here is an exercise to help with this type of inventory: Draw a circle and divide the circle into wedges representing the time spent on your daily activities. Are you happy with the allocation of time and energy? Are there areas where you spend the majority of your time and you wish you'd spend less? Are there areas where you devote minimal or no time but wish you did? There is no right or wrong allocation. After all, it is your life and your responsibility. If your inventory highlights areas of concern, what can you do to change them? Or, better said, what would your perfect day's circle look like? Would there be enough time for all-important life activities: work, family, self, exercise, friends, hobbies, spiritual practices, meditation, fun, sex and sleep? What's really important to you? [40]

IV. HELP AND HOPE: TLAP -- A SAFE PLACE TO GET HELP

Why TLAP?

As you know, practicing law can be an awesome adventure, a wonderful walk, a paralyzing fear factory, a sea of depressing doldrums, or all of the above in the same week, depending on your circumstances, lifestyle and perspective. Research shows that perspective and mental wellbeing are paramount to lawyer happiness.[41] Mark Twain once said, "There has been much tragedy

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[38] Ann D. Foster, JD, LPC-Intern entitled *Practicing Law and Wellness: Modern Strategies for the Lawyer Dealing with Anxiety, Addiction and Depression, which is available online at* *www.texasbar.com/AM/Template.cfm?Section=Wellness1&Template=/CM/ContentDisplay.cfm&ContentID=15158*.

[39] See Leonard L. Riskin, *The Contemplative Lawyer: On the Potential Contributions of Mindfulness Meditation to Law Students, Lawyers, and Clients*, 7 HARV. NEGOT. L. REV. 1 (2002).

[40] Ann D. Foster, JD, LPC-Intern entitled *Practicing Law and Wellness: Modern Strategies for the Lawyer Dealing with Anxiety, Addiction and Depression, which is available online at* *www.texasbar.com/AM/Template.cfm?Section=Wellness1&Template=/CM/ContentDisplay.cfm&ContentID=15158*, *portions included herein with her permission.*

[41] *See Lawrence S. Krieger and Kennon M. Sheldon, What Makes Lawyers Happy? Transcending the Anecdotes with Data from 6200 Lawyers . 83 GEO. WASH. U. L. REV. 554 (2015).*

in my life; at least half of it actually happened." This sort of disconnection between perspective and reality is common for attorneys. The Texas Lawyers Assistance Program (TLAP) is a powerful tool for lawyers, law students, and judges to restore or keep wellness to have a hopeful and happy life practicing law.

Background.

TLAP began in 1989 as a program directed toward helping attorneys suffering from alcoholism. While that role remains important for TLAP (attorneys have twice the rate of alcoholism as the general population), the mission is now much broader.

Currently, approximately half of all assistance provided by TLAP is directed toward attorneys suffering from anxiety, depression, or burnout. Additionally, TLAP helps lawyers, law students, and judges suffering problems such as prescription and other drug use, cognitive impairment, eating disorders, gambling addictions, codependency, and many other serious issues. These problems[42] are very treatable, and TLAP's staff of experienced attorneys can connect a person-in-need to a variety of life-changing resources.

TLAP is a Safe Place to Get Help.

It is essential to emphasize and repeat this for those who may be worried: TLAP is a safe place to get help**.** It is confidential and its staff can be trusted. TLAP's confidentiality was established under Section 476 of the Texas Health & Safety Code. Under this statute, all communications by any person with the program (including staff, committee members, and volunteers), and all records received or maintained by the program, are strictly protected from disclosure. TLAP doesn't report lawyers to discipline!

Call TLAP to Get a Colleague Help.

While the majority of calls to TLAP are self-referrals, other referrals come from partners, associates, office staff, judges, court personnel, clients, family members, and friends. TLAP is respectful and discreet in its efforts to help impaired lawyers who are referred, and TLAP *never* discloses the identity of a caller trying to get help for an attorney of concern.

Furthermore, calling TLAP about a fellow lawyer in need is a friendly way to help an attorney with a problem without getting that attorney into disciplinary trouble. Texas Health & Safety Code Section 467.005(b) states that "[a] person who is required by law to report an impaired professional to a licensing or disciplinary authority satisfies that requirement if the person reports the professional to an approved peer assistance program." Further, Section 467.008 provides that any person who "in good faith reports information or takes action in connection with a peer assistance program is immune from civil liability for reporting the information or taking the action." *Id.*

What TLAP Offers.

Once a lawyer, law student, or judge is connected to TLAP, the resources which can be provided directly to that person include:

- direct peer support from TLAP staff attorneys;
- self-help information;
- connection to a trained peer support attorney who has overcome the particular problem at hand and who has signed a confidentiality agreement;
- information about attorney-only support groups such as LCL (Lawyers Concerned for Lawyers – weekly meetings for alcohol, drug, depression, and other issues) and monthly Wellness Groups (professional speakers on various wellness topics in a lecture format) which take place in major cities across the state;
- referrals to lawyer-friendly and experienced therapists, medical professionals, and treatment centers; and
- assistance with financial resources needed to get help, such as the Sheeran-Crowley Memorial Trust which is available to help attorneys in financial need with the costs of mental health or substance abuse care.

In addition to helping attorneys by self-referrals or third-party referrals, TLAP staff attorneys bring presentations to groups and organizations across the state to educate attorneys, judges, and law students about a variety of topics, including anxiety, burnout, depression, suicide prevention, alcohol and drug abuse, handling the declining lawyer, tips for general wellness, and more. In fact, TLAP will customize a CLE presentation for your local bar association.

Finally, TLAP provides an abundance of information about wellness on its website. The site offers online articles, stories, blogs, podcasts, and videos regarding wellness, mental health, depression, alcohol and drugs, cognitive impairments, grief, anger and many other issues. Check the site out for yourself at www.texasbar.com/TLAP.

V. FINANCIAL HELP: THE SHEERAN-CROWLEY MEMORIAL TRUST

It is funny how society assumes lawyers are all rich. A 2014 CNN report indicated that, while law school debt averaged $141,000, the average starting

[42] *See* www.texasbar.com/TLAP for resources for most of these problems.

U.S. income for attorneys was $62,000.[43] Considering the financial strain many lawyers face and the significant impairment of an attorney struggling with a mental health or substance use problem, you might see how plenty of lawyers cannot afford to get help.

For this reason, in 1995, a small group of generous Texas lawyers created The Patrick D. Sheeran & Michael J. Crowley Memorial Trust. These lawyers knew that about 20% of members of the bar suffer from alcohol or drug problems and that about the same percentage suffer from mental health issues such as depression, anxiety, and burnout. They also knew that, if untreated, these problems would eventually devastate a lawyer's practice and life. With proper treatment and care, however, many of these lawyers can be restored to an outstanding law practice and a healthy life.

The Trust provides financial assistance to Texas lawyers, law students, and judges who need and want professional help for substance abuse, depression and other mental health issues. To be approved, the applicant must be receiving services from TLAP and must demonstrate a genuine financial need.

Once an individual's application for assistance is approved by the Trustees, grants are made payable directly to the care provider(s). To help protect the corpus of the Trust and to give applicants a significant stake in their own recovery, all applicants are asked to make a moral commitment to repay the grant. Beneficiaries can receive up to $2,000 for outpatient counseling, medical care, and medication, $3,000 for intensive outpatient treatment and medication, and $8,000 for inpatient treatment.

The Trust is the only one of its kind in Texas that serves both substance abuse and mental health needs. It has been funded contributions from lawyers and organizations, including the State Bar of Texas, the Texas Center for Legal Ethics, and the Texas Bar College. The Trust is administered by TLAP staff and controlled by a volunteer Board of Trustees who are also members of Texas Lawyers Concerned for Lawyers, Inc., a non-profit corporation that works closely with TLAP.

If you need assistance, or if you would like to help other attorneys in need by contributing to this trust, please contact TLAP at 1-800-343-TLAP (8527)! Also, for more information about the trust or about how to make contributions, see the form attached in the appendix or click here: Sheeran-Crowley Memorial Trust Web Page.

VI. CONCLUSION: TAKE ACTION, CALL TLAP!

A call to TLAP will connect you to a staff attorney around the clock. A recent study indicated that the number one reason law students in need of help would not seek it was the fear of bad professional consequences (63% indicated this fear) such as losing a job, not being able to take the bar, etc.[44] There is **no** *professional* consequence for calling TLAP, but there will be a *personal* consequence for failing to do so if you need help!

Lawyers suffering from mental health and substance use disorders must take action to get better. As Mahatma Gandhi (a lawyer in his younger years) said, "The future depends on what you do today." If you or a lawyer, law student, or judge you know needs help, TLAP is available to provide guidance and support at 1(800)343-TLAP(8527).

[43] *See Ben Brody, Go to Law School. Rack Up Debt. Make $62,000. CNN (July 15, 2014),* http://money.cnn.com/2014/07/15/pf/jobs/lawyer-salaries/ .

[44] *See* 2014 ABA/Dave Nee Survey of Law Student Well-Being (co-piloted by David Jaffe and Jerry Organ and funded by the ABA Enterprise Fund and the Dave Nee Foundation).

APPENDIX 1:

MORE ABOUT THE SHEERAN – CROWLEY MEMORIAL TRUST AND DONATION FORM

The Patrick D. Sheeran & Michael J. Crowley Memorial Trust

Trustees: Mike G. Lee, Dallas; Dicky Grigg, Austin; Bob Nebb, Lubbock

In 1995, a small group of Texas lawyers created The Patrick D. Sheeran & Michael J. Crowley Memorial Trust. They were compelled to do so by the grim knowledge that approximately 15-20% of Texas lawyers suffered from mental illnesses such as substance abuse and depression and that these illnesses, if left untreated, directly impacted a lawyer's practice in myriad negative ways. They also knew that, with proper treatment and mental health care, a lawyer could be restored to a productive life and the ethical practice of law.

The Trust is specifically designed to provide financial assistance to Texas attorneys who need and want treatment for substance abuse, depression and other mental health issues. It serves those whose illnesses have impacted their financial situation and reduced their ability to pay or maintain insurance for necessary mental health care.

All applicants must be receiving services from the Texas Lawyers' Assistance Program and must demonstrate financial need. Once an individual's application for assistance is approved by the Trustees, grants are made payable only to the treatment or provider, after services have been rendered. To help protect the corpus of the Trust and to give applicants a significant stake in their own recovery, all applicants are asked to make a moral commitment to repay the grant. No applicant may be allowed additional grants unless previous grants have been repaid.

The Trust is the only one of its kind in Texas that serves both substance abuse and mental health needs and is currently funded solely by contributions from lawyers. Since 2000, the Trust has raised just over $68,000. Since 2006, the Trust has granted an average of $10,000 per year to lawyers in need of mental health services who could not otherwise afford them, but the need is much greater.

Mental health care is expensive: a psychiatrist charges an average of $300 per hour and a master's level psychotherapist charges $100 per hour. A three month supply of medication to treat depression may cost up to $300. A typical out-patient eight week substance abuse treatment costs $5000, and in-patient substance abuse treatment for one month starts around $12,000. The good news is that lawyers who follow a recommended course of treatment usually respond well and often return to practice relatively quickly. Your generous donation could provide a month of therapy; a three month supply of medication; an out-patient course of treatment; a one month course of in-patient treatment or even more. There are no administrative fees or costs, and volunteer Trustees serve pro bono, to insure that all contributions provide truly valuable and much needed assistance.

In 2010, *The Texas Bar Journal* published the story of a lawyer who received funds from the Trust. Success speaks more eloquently than any fundraiser's plea:

> **"Approximately two years ago I found myself in a deep dark place from which I could see no hope for the future. The Sheeran Crowley Trust provided that hope…. I decided that rehab was appropriate for my situation. The next hurdle was financial…. I was totally surprised that there was some financial assistance available to help with the cost of treatment. I never expected financial assistance via a trust specifically set up to help lawyers like me…. Without the Sheeran Crowley Trust I don't know where I would be today. They provided the financial backing to get me the help that I needed. I learned the rest was up to me. I've remained sober since my release from rehab and I have my law practice back. It's been almost two years now. Thank God for TLAP. Thank God for the Sheeran Crowley Trust."**

The Trust is named in honor of the first Director of the State Bar of Texas' Lawyers' Assistance Program, Patrick D. Sheeran, and Michael J. Crowley, one of the founders of TLAP, who, during their lives, helped many

attorneys to achieve recovery from alcohol, drugs, depression and other mental health issues. The Trust is supported by the Texas Lawyers' Assistance Program and administered by a volunteer Board of Trustees who are also members of Texas Lawyers Concerned for Lawyers, Inc., a non-profit corporation that works closely with TLAP.

The Trust needs your help through your tax deductible contributions. For more information, please contact Bree Buchanan at 800-343-8527 or simply send a check made payable to the Trust, along with a copy of the accompanying form to: The Sheeran-Crowley Trust, c/o Bree Buchanan, P. O. Box 12487, Austin, Texas 78711.

Yes, I want to make a difference! Please accept my donation to

The Patrick D. Sheeran & Michael J. Crowley Memorial Trust.

_____ $100 _____ $5000

_____ $300 _____ $12,000

_____ $1000 _____ Other

☐ I prefer to remain anonymous.

☐ This gift is in memory / honor of: _____.

☐ I have remembered the Trust in my will.

☐ I have purchased a life insurance policy naming The Patrick D. Sheeran & Michael J. Crowley Memorial Trust as beneficiary.

The Patrick D. Sheeran & Michael J. Crowley Memorial Trust is a 501(c)(3) charitable organization.

Thank you for your generous contribution!

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PUBLIC INFORMATION ACT HANDBOOK 2018

JUSTIN GORDON, *Austin*
Office of the Attorney General

State Bar of Texas
GOVERNMENT LAW 101
July 18, 2018
San Antonio

CHAPTER 1

Justin Gordon

Justin Gordon is the chief of the Open Records Division of the Office of the Attorney General. Previously, he was an assistant general counsel in the General Counsel Division of the Office of the Governor. Before joining the governor's office in 2011, Justin served as a senior attorney and a drafting attorney in the Open Records Division of the Office of the Attorney General. Justin earned a B.A. from The University of Texas at Austin in 2002 and a J.D. from Baylor Law School in 2005.

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VICTOR A. FLORES, *Plano*
City of Plano – Assistant City Attorney

State Bar of Texas
GOVERNMENT LAW 101
July 18, 2018
San Antonio

CHAPTER 2

Victor A. Flores, Assistant City Attorney
City of Plano – City Attorney's Office
1520 K Avenue, Ste 340, Plano, Texas
T: 972.941.7125
C: 956.802.5620
Email: vflores@plano.gov

Victor Flores is a U.S. Marine Corps Iraq War veteran. He's represented local governmental entities across the Rio Grande Valley, including the City of McAllen, and continues to provide legal counsel on government law related matters, most recently, with the City of Plano as Assistant City Attorney.

He is President-elect for the Texas Young Lawyers Association and has served on various other State Bar of Texas boards and committees, including the Texas Bar Journal Board of Editors and State Bar of Texas Government Law Council. He is also a Texas Bar Foundation fellow and Texas Bar College member.

He earned his B.A. in Political Science from the University of Texas – Rio Grande Valley and a J.D. from Western Michigan University – Cooley Law School. He is married to Kristal Flores, and they have one son.

Publications and Speaking Engagements:

Government Law – Year in Review
Texas Bar Journal, Volume 81, No.1

Immunity 101: Horse of a Different Color
State Bar of Texas – Soaking Up Some CLE

Social Media in Schools: Testing the Frist Amendment in the Digital Age
American Board of Trial Advocates – Teachers Law School

Fundamentals of the Texas Open Meetings Act
State Bar of Texas – Government Law Boot Camp

Beyond Gregarious: Introverted Attorneys Surviving in an Extrovert-Driven Society
Texas Bar Journal, Volume 79, No.6

Survey of the Texas Tort Claims Act
Hidalgo County Bar Assoc. – David Hockema Civil Trial Law Course

Planning & Zoning and Board of Adjustment: A Comparison Review
UT Law CLE – Land Use Fundamentals

Current Professional Associations:

Texas Young Lawyers Association – *President Elect*
State Bar of Texas, Texas Bar Journal – *Board of Editors*
State Bar of Texas, Gov't Law Section – *Council Member*
Texas Bar Foundation – *Fellow*
Texas Bar College – *Member*

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DRAFTING/CRAFTING MEETING AGENDAS THAT COMPLY WITH THE OPEN MEETINGS ACT

I. INTRODUCTION

The Texas Open Meetings Act was enacted in 1967 following passage of Senate Bill 94, Acts 60th Legislature, Regular Session. Initially, the purpose of TOMA was rather simple: "[Assure] that the public has the opportunity to be informed concerning transactions of public business." Acts 1967, 60th Leg., ch. 271, p. 597, Sec. 7.

However, the Act's original language did not include the depth of specificity it does today. See Texas Government Code Chapter 551, Texas Open Meetings Act ("TOMA" or "Act") (originally cited as article 6252-17, Tex. Rev. Civ. Stat. Ann.).

In Texas, a swell of amendments followed in the wake created by the Sharpstown stock fraud scandal. In 1971, the U.S. Securities and Exchange Commission filed a lawsuit in Federal Court for the Northern District of Texas alleging, among others, that Texas House Speaker Gus Mutscher, Texas Representative Tommy Shannon (Fort Worth), and Rush McGinty (an aide to Mutscher) had made quick turnover, bank-financed purchases in exchange for passage of legislation that would predominantly benefit Frank Sharp's Sharpstown State Bank. On March 15, 1972, Mutscher, Shannon, and McGinty were found guilty of conspiracy to accept a bribe from Sharp. The general election following the Sharpstown Scandal resulted in a slate of new legislators promising reform to close TOMA loopholes and extend requirements to more governmental meetings.

The tug-of-war between public transparency and efficiency in governance through confidential communications continues to yield other TOMA amendments. Therefore, it is imperative to closely follow legal developments in open government.

There are various guiding materials provided by the Texas Attorney General and Texas Municipal League. This article will present a narrow discussion as it relates to drafting/crafting meeting agendas that comply with the Act.

II. ADEQUATE NOTICE UNDER THE ACT

TOMA requires that every meeting by a governmental body be open to the general public and that the public receive adequate notice of (a) the time and place of the meeting and (b) the subject matter to be discussed or acted upon. TEX. GOV'T CODE §§ 551.002, 551.041.

Among those requirements, the important questions remains: What is adequate notice? Striking the correct balance of information provided within the notice often relies on a case-by-case analysis. Notice should inform the reader of the subject matter that will be discussed and potential action. But, the notice shouldn't be so specific that it implies that the decisions have been pre-determined, unreasonably limits the governing body to act upon such items, or ceases to be understood by the readers because of overwhelming details.

Below, this article will review several Texas cases that evaluate when general notice might comply with the Act, review special interest items that require heightened notice descriptions, study issues that result when notice deviates from customary practice, and compare the content of the notice and actions taken by the governing body.

III. GENERAL NOTICE AND COMPLIANCE WITH THE ACT

The first two significant Texas Supreme Court cases that reviewed adequacy of notice under the Act were Lower Colorado River Authority v. City of San Marcos, 523 S.W.2d 641 (Tex. 1975) and Texas Turnpike Authority v. City of Fort Worth, 554 S.W.2d 675 (Tex. 1977).

In Lower Colorado River Authority, there was a dispute between the City of San Marcos (the City) and the Lower Colorado River Authority (the Authority) related to regulatory jurisdiction over electricity rates. 523 S.W.2d at 642. The Authority passed a resolution to increase rates on October 19, 1972 (to be effective on January 1, 1973). Id. However, the October 19th agenda notice made no reference to rates. Id. at 646. Later, on May 24, 1973, the Authority held another meeting and that notice stated the board would consider certain matters concerning the Authority's operations "including the ratification of the prior action of the Board taken on October 19, 1972, in response to changes in electric power rates for electric power sold within the boundaries of the City of San Marcos." Id.

The City argued that the Authority's 1972 and 1973 resolutions increasing the rates were void for noncompliance with the Act. Id. at 642.

The Texas Supreme Court held that the notice of the 1972 meeting did not comply with the Act. Id. at 646. However, as it related to the 1973 meeting, the Court held that although the notice was "not as clear as it might be" - it complied with the Act because "it would alert a reader of the fact that some action would be considered with respect to charges for electric power sold in San Marcos." Id.

In summary, this decision demonstrated that the failure to identify the subject to be discussed at an open meeting may invalidate any action taken. However, it was not necessary for the Authority to include substantial detail in the agenda notice.

In Texas Turnpike Authority, the notice stated that the board would "[c]onsider [the] request of County of Dallas, City of Grand Prairie, Dallas Central Highway

Committee, Dallas Chamber of Commerce, and Grand Prairie Chamber of Commerce to determine feasibility of a bond issue to expand and enlarge the Dallas-Fort Worth Turnpike …" 554 S.W.2d at 676 (emphasis added). The City of Fort Worth asserted that previous Turnpike Authority resolutions declared its intent to transfer the Turnpike as a free road under State Highway operation and it was necessary for the agenda to specify the same. Id. The Court upheld the notice stating, "There is no necessity to … state all of the consequences which may necessarily flow from the consideration of the subject stated." Id.

Here, the Court ruled that the word "consideration" was sufficient to put the general public on notice that the governing body might act during the meeting.

In each of these limited cases, the Court held that general notice might comply with the Act even though the notice could have been more specific. However, as discussed further below, general notice is not adequate in all circumstances.

IV. ITEMS OF "SPECIAL INTEREST" TO THE PUBLIC

In Cox Enters., Inc. v. Bd. of Trs. of Austin Indep. Sch. Dist., the Court reviewed a case where it held general notice was inadequate. 706 S.W.2d 956 (Tex. 1986).

In Cox Enters., Inc., the Austin Independent School District Board of Trustees routinely listed closed session items under generalized topics, including "Personnel," "Litigation," and "Real Estate Matters." Here, a newspaper (Cox Enterprises, Inc., doing business as the Austin American-Statesman) asserted that the board of trustees violated the Act when, among other items, it considered the selection of a new school superintendent under the general caption "Personnel." Id. at 959.

The Court acknowledged that it previously held general notice in certain cases would be substantially compliant with the Act even though the notice was not as specific as it should be. Id.

However, in this case, the Court also clarified that "less than full disclosure is not substantial compliance." Id. at 960. The Court explained that the selection of the superintendent was not "in the same category as ordinary personnel matters– and a label like 'personnel' fail[ed] as a description of that subject." Id. at 959. This decision was a turning point for Texas courts reviewing adequacy of notice under the Act, specifically for items of special interest.

In most situations, identifying the existence of a "special interest" will be challenging. The next few cases provide some guiding marks.

In Point Isabel Indep. Sch. Dist. v. Hinojosa, a closed session notice stated: "Consider and approve recommendation of Superintendent on employment of personnel for the 1988-89 school year." 797 S.W.2d 176, 178-79 (Tex.App.—Corpus Christi 1990, pet. denied). During the public meeting, following the closed session, the board filled the position of principal and also hired a librarian, an English teacher, an elementary teacher, a band director, and a part-time counselor. Id. at 182. A rejected applicant for high school principal alleged that "employment of personnel" was not sufficiently specific to give notice that the school board would hire a principal. Id. at 176.

This court noted that "employment of personnel" adequately notified the public of the board's decision to fill "less important positions." Id. There were no findings that the librarian, teachers, band director or counselor were of special public interest. Id. However, the court found evidence supporting principals as "important positions, and crucial to the functioning of the operation of those schools." Id. at 181. Therefore, this court held that the notice failed to provide sufficient notice of the agenda item with respect to the principal.

In a similar case, Mayes v. City of De Leon, a closed session item stated that the council would "consider the employment and evaluation of city personnel." 922 S.W.2d 200, 203 (Tex.App.—Eastland 1996). After closed session, the city council voted in open session to terminate Mayes as police chief. Id. The issue before the court was whether the position of police chief was a matter of special interest to the public.

The City of De Leon asserted that it only had thirteen (13) full-time employees, that the police chief only supervised two employees, that the police department's budget was lower than the street department, and that the police chief in many cities was hired and fired by the city manager. Id.

Still, the court explained that the public had a special interest related to the employment of a police chief, citing broad contact with the public and the importance of the police services provided. Id. Therefore, the court held that the termination of a city's police chief does not fall into the category of ordinary personnel matters. Id.

In the Hinojosa and Mayes cases, both courts placed an emphasis on increased impact these individuals had on the organization and the general public.

As the Texas Court of Appeals in San Antonio and Austin discussed in the following cases, the court will also consider whether the special interest is specific to an individual or the general public.

V. WHO IS THE INTENDED AUDIENCE UNDER THE ACT

In City of San Antonio v. Fourth Court of Appeals, the city posted an agenda that listed the following condemnation ordinance:

> An Ordinance determining the necessity for and authorizing the condemnation of certain property in County Blocks 4180, 4181, 4188, and 4297 in Southwest Bexar County for the construction of the Applewhite Water Supply Project.

820 S.W.2d 762, 764 (Tex. 1991). Vamarie Inc., the party holding an oil and gas lease on the subject land, argued that the notice failed to provide a sufficient description that their particular tracts of land were subject to the condemnation.

Here, the Court addressed what audience was intended to receive notice under the Act. The Court held that "the intended beneficiaries of the Act are not individual citizens, such as particular landowners affected by this condemnation, but members of the interested public." City of San Antonio, 820 S.W.3d at 765 (emphasis added). The Court found that the notice informed the public "(1) that the City Council would be considering a condemnation ordinance, (2) that the land subject to the condemnation was located in four county blocks in southwest Bexar County, and (3) that the purpose of proposed action was to construct the Applewhite Water Supply Project." Id. at 765-66. According to the Court, that's all that the Act required.

Similarly, in Rettberg v. Tex. Dept. of Health, a closed session notice stated: "[T]he board will meet in executive session to discuss the evaluation, designation and duties of the board's executive secretary; and the board will meet in open session to discuss and possibly act on the evaluation, designation and duties of the board's executive secretary." 873 S.W.2d 408, 410 (Tex.App.—Austin 1994, pet. denied). Rettberg, the executive secretary, was present during the public meeting but was unaware of the discussions made during executive session. Following the executive session, the board voted in the public meeting to recommend that Rettberg's appointment as executive secretary be rescinded. Id.

Rettberg asserted that he had a "special interest" and had a right to more specific notice. This court held that "the specificity of notice is tied to the level of general public interest, not personal interest," and upheld the notice as sufficient under the Act. Id. at 412 (citing Stockdale v. Meno, 867 S.W.2d 123, 125 (Tex.App.—Austin 1993, pet denied)). The court's analysis provided a key distinction when evaluating the existence of a special interest. As the court held in this case, a special interest is reviewed from the perspective of the general public.

The cases discussed above provide great tools for drafting personnel and real estate related agenda items. However, similar analysis should still be applied when drafting other agenda items.

Generally, the Act doesn't require that notice be exhaustive. Texas courts will evaluate the context wherein an agenda item is published. Creedmoor Maha Water Supply Corp. v. Barton Springs-Edwards Aquifer Conservation District, 784 S.W.2d 79, 86-87 (Tex.App. – Austin 1989, writ denied). As legal counsel for any governmental entity, maintaining an awareness of controversial items is key for drafting any agenda. From a practical perspective, it would be reasonable to describe the subject and potential action for high-profile agenda items in more detail than is necessary.

In addition to identifying special interest agenda items, attention should be applied to agenda language that might unintentionally mislead the public. This typically occurs when notice deviates from customary practice.

VI. WHEN NOTICE DEVIATES FROM CUSTOMARY PRACTICE

The best case to demonstrate this issue is River Rd. Neighborhood Ass'n v. S. Tex. Sports, 720 S.W.2d 551 (Tex.App.—San Antonio 1986, writ dism'd).

In River Rd. Neighborhood Ass'n, the River Road Neighborhood Association (Association) argued that a lease for the Alamo Stadium was approved during a San Antonio School District (District) meeting in violation of TOMA. 720 S.W.2d at 553. The Association asserted that the notice merely stated the Alamo Stadium lease would be "discussed" and gave no indication that any action would be taken. Id. at 554.

Here, the court pointed to the record and cited to other meetings that were called in connection with the Alamo Stadium lease. Only the May 31st meeting (the meeting challenged by the Association) limited the purpose of the meeting to "discussion." Id. at 557. In the previous four meetings, the purpose of the notice was described as "discussion/action." Id.

The court held that "considering all of the facts and circumstances present … the notice of the May 31 meeting … was deceptive because, in view of well-established custom and practice of the District, it did not alert the public to the fact that action might be taken." Id.

Until now, the discussion has centered on providing more descriptive notices. Equal concern should be applied where dizzying descriptions of agenda items overwhelm the reader or confine the governing body where it cannot reasonably act on the item.

VII. DRAFTING AGENDAS THAT OVERWHELM THE READER OR LIMIT ACTION

The court in City of San Angelo v. Tex. Natural Resources Conservation Com'n, 92 S.W.3d 624 (Tex.App.—Austin, 2002) sheds some light on this issue. In City of San Angelo, a dispute was raised over

petitions requesting that the Commission appoint watermasters for the San Saba River and the Concho River Basin. 92 S.W.3d at 626. The Commission held an open meeting to discuss various legal questions, including whether domestic and livestock water users were water right holders for purposes of signing the petition requesting the appointment of a watermaster. Id. at 627.

The published noticed included the following language, "Consideration of the four legal issues raised by the Executive Director with regard to the petitions for watermaster …" Id. at 628 (emphasis added).

The City of San Angelo argued that the Commission was limited to discussion of the four legal issues and that the notice did not indicate the Commission would consider the ultimate validity of the petitions. Id. at 630-31.

The court held that "read in its entirety, the agenda sufficiently notifie[d] an interested reader that the Commission would be considering issues related generically to the watermaster petitions." Id. The court further explained that there could be situations where the degree of specificity "would so overwhelm readers that it would prove even less informative" than general notice. Id. (citing City of San Antonio, 820 S.W.2d at 766).

In 2010, the Save our Springs Alliance (SOS Alliance) raised a similar argument against the City of Dripping Springs (the City).

SOS Alliance claimed that the City violated TOMA by issuing public notices that insufficiently stated the subject of several development agreements. Save our Springs Alliance, Inc. v. City of Dripping Springs, 304 S.W.3d 871, 877 (Tex.App. – Austin 2010, pet. denied). Specifically, the Cypress-Hays Development Agreement agenda item stated: "Consider Approving a Development Agreement with Cypress-Hays, L.P., including adopting Ordinance No. 1280.1 Designating a District under Section 42.044 of the Texas Local Government Code." Save our Springs Alliance, Inc., 304 S.W.3d at 888.

SOS Alliance alleged that the notices failed to refer to the property locations, multiple variances from City ordinances, or other time periods for which the agreements could not be altered. Id.

Here, the court held:

> In this case, … the City's notice identified the applicable parties to the agreements and stated the type of agreement at issue … set out the counties affected without specifying the precise area. … Therefore, a reader of the notices would be informed that the subject of the meetings would include the potential approval of [the] agreements … The City was not obligated to state all of the consequences that would flow from these Development Agreements. … Indeed, had the notices listed all the consequences that would follow from the Development Agreements … the result may have been to overwhelm, rather than inform, the reader.

Id. 889-90 (citing Texas Turnpike Authority, 554 S.W.2d at 676 and City of San Antonio, 820 S.W.2d at 766).

Determining sufficiency of notice requires an acute knowledge of the law and sensible application of the same to the item being presented on a given agenda.

VIII. CONCLUDING REMARKS

In reviewing these cases, most TOMA challenges are related to some controversial action taken by the governing body, not just simply the language included within the notice. Therefore, if any doubt exists concerning the sufficiency of notice, counsel should be prepared to review the proposed agenda language and also ensure that the governing body's discussion stays within the posted agenda item. This will help avoid language that might not provide adequate notice or, conversely, cease to be understood by the public readers because of overwhelming details.

POLICE POWERS AND AUTHORITY OF DIFFERENT ENTITIES

ROBERT W. COLLINS, *Houston*
City of Houston Legal Department

State Bar of Texas
GOVERNMENT LAW 101
July 18, 2018
San Antonio

CHAPTER 3

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FIVE PREEMPTION ISSUES YOU DIDN'T KNOW EXISTED

RYAN HENRY, *San Antonio*
Law Offices of Ryan Henry, PLLC

State Bar of Texas
GOVERNMENT LAW 101
July 18, 2018
San Antonio

CHAPTER 4

Ryan Scott Henry
Law Offices of Ryan Henry, PLLC
1380 Pantheon Way, Suite 110
San Antonio, Texas 78232
(210)257-6357
Fax: (210) 569-6494
Ryan.henry@rshlawfirm.com
Website: rshlawfirm.com

Ryan Henry graduated with honors from New Mexico State University with dual bachelor's degrees in Criminal Justice and Psychology in 1995. He attended law school at Texas Tech School of Law and graduated in May of 1998.

While attending law school, Ryan began clerking for the Lubbock City Attorney's Office. He received his third-year practice card and began prosecuting municipal court complaints and appearing in Justice of the Peace court for the City. As a result, he began defending governmental entities even before he graduated from law school and so began his career supporting local governments. Upon graduation, Ryan began working in Brownsville, Texas, with the same focus. In June of 2002, Ryan moved to San Antonio and joined a local law firm doing the same thing. In 2012, Ryan started the Law Offices of Ryan Henry, PLLC. In June 2016, and again in 2017, Ryan was listed as one of the best lawyers practicing municipal law in the San Antonio area by S.A. Scene Magazine. Ryan is also on the board for the State Bar of Texas - Government Law Council.

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FIVE PREEMPTION ISSUES YOU DIDN'T KNOW EXISTED

I. BASICS

OK, so you already know that the city or county cannot regulate alcohol licenses because the subject matter (well most of it anyway) is preempted. Good for you.

However, as a governmental attorney, did you know there are some WEIRD preemption issues which do not come up very often? When they do, they can cause havoc with your regulations if you passed the regulations without an escape. Well, here are five preemption issues which you may not know about, but probably should.

II. SOLICITATION

Many municipalities have solicitation ordinances which require a solicitor to register and get a permit before soliciting. This includes solicitations going door to door as well as on street corners. As long as the City is observing prudent First Amendment factors in they way it goes about creating the regulation such a system can work perfectly fine.

However, the regulation needs to take into account, the state level preemption allowed for public safety organizations. Tex. Occ. Code Ann. §1803.002 (West 2017). Essentially, when individuals assert they are fire fighters, police, EMS, and other public safety personnel who are soliciting for funds to help with different aspects of their jobs, people tend to be willing to give them money. Some associations made up of public safety personnel, do fund raising and hire promoters or solicitors to help, making the system more efficient. However, this can lead to potential abuses and fraud. As a result, Texas has charged the Texas Attorney General with the enforcement authority to regulate such solicitations. The state law on solicitation regulation generally controls over municipal ordinances.

Here is a general idea of how it works. A "[p]ublic safety organization" means a nongovernmental organization that, in a manner that reasonably implies that the organization is composed of law enforcement or public safety personnel or that a contribution, purchase, or membership will benefit public safety personnel, uses the term "officer," "peace officer," "police officer," "police," "law enforcement," "reserve officer," "deputy," "deputy sheriff," "constable," "deputy constable," "fireman," "firefighter," "volunteer fireman," "emergency medical service provider," "civilian employee," or any other term and uses the terms in its name, the organization publications, or in a solicitation for (i) contributions to the organization;(ii) membership in the organization; (iii) the purchase of advertising in a publication of the organization; or (iv) the purchase of products or tickets to an event sponsored by or for the benefit of the organization by a solicitor. Tex. Occ. Code Ann. §1803.001 (West 2017).

"Public safety solicitor" means a person who (A) contracts for or receives money for providing solicitation services for a public safety entity or public safety publication and/or solicits for them under certain conditions. Tex. Occ. Code Ann. §1803.001(7) (West 2017).

Such an entity or organization is prohibited from soliciting unless it registers with the Texas Secretary of State's Office and pays a registration fee. Tex. Occ. Code Ann. §1803.051(a) (West 2017). The Secretary of State is not a regulatory body, but merely a filing/holding body which notes whether an entity filed or did not file.

A public safety entity or publication may not use a solicitor, and a person *may not act* as a solicitor unless the solicitor files an individual registration with the Secretary of State and files/maintains a $10,000.00 bond. Tex. Occ. Code Ann. §1803.051(b) (West 2017). Each solicitor must then connect themselves with the entity he/she is doing the solicitations for. Tex. Occ. Code Ann. §1803.053 (West 2017).

If a member of the public has a concern about whether an individual solicitor or entity is authorized to collect donations or membership, an information hotline is set up to confirm whether registration exists. Tex. Occ. Code Ann. §1803.102 (West 2017).

If a person is acting as a solicitor or an organization is not legitimate, the Texas Attorney General can perform an audit (§1803.151), seek criminal penalties (§1803.152), civil penalties (§1803.153), and injunctive relief (§1803.153). Penalties may be taken out of the bond. Tex. Occ. Code Ann. §1803.154 (West 2017).

Since the Attorney General's office is charged with enforcement, local regulations on solicitation are preempted. Tex. Occ. Code Ann. §1803.002 (West 2017). However, a point about the wording of §1803.002 is worth mentioning. The preemption applies only as it relates to a person registered under the Chapter. So, if someone is acting as a solicitor but is not registered, arguably the City's ordinances are not preempted as they apply to that individual. The rest of the Chapter applies, but the preemption is only triggered by registration.

III. GROUP HOMES

Cities have zoning regulations. They place restrictions on uses into certain zones. Simple, right? However, several state and federal laws preempt what a City can and cannot do through its zoning power. One of those restrictions involves group homes.

For those that do not know, a "group home" or "community home" is a small scale assisted living

facility that helps disabled or elderly individuals live collectively. It is a form of assisted living facility. Many cities view these facilities as businesses because they can be run by a corporate entity. However, the courts do not see it that way. These facilities are technically institutional uses, but ones viewed as consistent with residential, single-family use.

State law specifies that a "community home" can operate within any residential zone regardless of city regulation. Tex. Hum. Res. Code Ann. §123.003 (2017). In other words, local zoning ordinances are preempted by the state law to this degree.

A "community home" has a specific definition under Texas law, which includes an assisted living facility if the facility has six (6) or fewer disabled individuals living in the structure and no more than two (2) care givers. Tex. Hum. Res. Code Ann. §123.006 (2017). If a facility services more than six (6) disabled individuals, it does not qualify as a community home under state law and can be regulated within a residential zoning designation. *City of Friendswood v. Registered Nurse Care Home*, 965 S.W.2d 705 (Tex. App. Houston 1st Dist.,1998, no pet.),

To qualify as a community home, the facility must also be licensed by the Department of Aging and Disability Services ("DADS"), be a non-profit, and its exterior must remain compatible with the surrounding dwellings. Tex. Hum. Res. Code Ann. §123.004 (2017). Additionally, a community home may not be established within one-half mile of an existing community home. Tex. Hum. Res. Code Ann. §123.003 (2017).

However, do not be fooled into thinking a local regulation can easily utilize the distance requirement without thinking it through. Congress passed the federal Fair Housing Act ("FHA") as Title VIII of the Civil Rights Act of 1968 to prohibit housing discrimination. 42 U.S.C §§ 3601-3631. In 1988, Congress passed the Fair Housing Amendments Act ("FHAA"), which expanded the coverage of the FHA to include people with disabilities. See 42 U.S.C §§ 3602(h), 3604. For ease of reference I'll just be referring to both of them as the FHA.

Three theories of liability exist to establish an FHA violation: (1) disparate treatment (or intentional discrimination); (2) disparate impact (or discriminatory effect); and (3) a failure of a municipality to make a reasonable accommodation. *Gamble v. City of Escondido*, 104 F.3d 300, 304-05 (9th Cir. 1996); *Alliance for the Mentally Ill v. City of Naperville*, 923 F. Supp. 1057, 1069 (N.D. Ill. 1996); *Robinson v. City of Friendswood*, 890 F. Supp. 616, 622 (S.D. Tex. 1995). All three require a distinctly different way of thinking and may seem a little paradoxical at times.

However, for preemption purposes, the main issues tend to fall under the reasonable accommodation claims. The official position of the federal Department of Housing and Urban Development ("HUD") and the Department of Justice ("DOJ") (found in their online policies) state a "'reasonable accommodation' is a change, exception, or adjustment to a rule, policy, practice, or service that may be necessary for a person with a disability to have an equal opportunity to use and enjoy a dwelling, including public and common use spaces. Since rules, policies, practices, and services may have a different effect on persons with disabilities than on other persons, treating persons with disabilities exactly the same as others will sometimes deny them an equal opportunity to use and enjoy a dwelling."

The DOJ and HUD take this position (which courts have adopted) that individuals with disabilities are not in the same situation as people without the disability. And different disabilities have different effects on peoples' lives. It is often necessary to increase occupancy limits to allow unrelated, handicapped persons to live in greater numbers in a single-family district for economic reasons. *Elderhaven, Inc. v City of Lubbock*, 98 F.3d 175, 178 (5th Cir. 1996). The nature of group home living for the handicapped often requires alternative living arrangements to effectuate the purpose of the FHA. *Elderhaven*, 98 F.3d at 179. The disabled are not able to live safely and independently without organized, and sometimes commercial group homes. *Groome Res. Ltd., LLC v. Parish of Jefferson*, 234 F.3d 192, 199 (5th Cir. 2000). The fact that a group home is a business should not be the basis for denying an accommodation when reasonable and necessary. *Avalon Residential Care Homes, Inc. v. City of Dallas*, 130 F. Supp. 2d 833, 840 (N.D. Tex. 2000).

Some cities have attempted to build in automatic accommodations for group homes. A city's ordinance may state that five (5) unrelated persons can live in a R-1 zone, except if you are a group home, in which you can have seven (7). However, since the reasonable accommodation prong is designed to be an individualized, subjective assessment of the particular group home's situation, objective, built-in accommodations are not sufficient. These questions are better addressed by the City on a case-by-case basis. For this reason, courts inquire into the City's willingness to interpret its laws in a flexible manner so as to meet the needs of handicapped individuals. *Avalon Residential Care Homes, Inc. v. City of Dallas*, 130 F. Supp. 2d 833, 840 (N.D. Tex. 2000). If there is no mechanism for allowing this flexible enforcement, then the ordinance is subject to attack.

A reasonable accommodation claim under the FHA is fit for judicial decision "'when the disabled resident is first denied a reasonable accommodation, irrespective of the remedies granted in subsequent proceedings.'" *Groome Res. Ltd., LLC v. Parish of Jefferson*, 234 F.3d 192, 199 (5th Cir. 2000) (quoting *Bryant Woods Inn, Inc. v. Howard County, Md.*, 124

F.3d 597, 602 (4th Cir. 1997)); *Avalon Residential Care Homes, Inc. v. City of Dallas*, 2011 U.S. Dist. LEXIS 105661, 13-15, 2011 WL 4359940 (N.D. Tex. Sept. 19, 2011).

A reasonable accommodation in this context consists of an alteration, waiver, or exception to a local zoning rule that is "necessary to afford a person with a handicap equal opportunity to use and enjoy a dwelling.'" *Trovato v. City of Manchester*, 992 F. Supp. 493, 497 (D.N.H. 1997) (quoting 42 U.S.C.A. § 3604(f)(3)(B)). An accommodation is necessary when, "but for the accommodation, [individuals protected by the FHA] likely will be denied an equal opportunity to enjoy the housing of their choice." *Smith & Lee Assocs. v. City of Taylor*, 102 F.3d 781, 795 (6th Cir. 1996) (citing *Bronk v. Ineichen*, 54 F.3d 425, 429 (7th Cir. 1995)). "An accommodation is reasonable unless it requires 'a fundamental alteration in the nature of a program' or imposes 'undue financial and administrative burdens.'" *Smith & Lee*, 102 F.3d at 795 (quoting *Southeastern Cmty. Coll. v. Davis*, 442 U.S. 397, 410, 412, 60 L. Ed. 2d 980, 99 S. Ct. 2361 (1979)).

Under the FHA, an accommodation is required if it is "(1) reasonable and (2) necessary (3) to afford handicapped persons equal opportunity to use and enjoy housing." see 42 U.S.C. § 3604(f)(3); *Bryant Woods Inn v. Howard County*, 124 F.3d 597, (4th Cir. 1997).

If a group home does not negatively impact the communities but it needs to operate with say ten (10) or more people, its requested accommodation would neither undermine existing zoning regulations nor place an undue burden on the City. *Avalon Residential Care Homes, Inc. v. City of Dallas*, 2011 WL 4359940 (N.D. Tex. Sept. 19, 2011).

One of the more interesting factors in this analysis is that a reasonable accommodation must be made for not only clinical reasons, but also economic. *Avalon Residential Care Homes, Inc. v. City of Dallas*, 2011 WL 4359940 (N.D. Tex. Sep. 19, 2011).

Further, if the distance requirements outlined under state law (i.e. ½ mile between community homes) is placing an undue burden on the ability of disable individuals to have their community living environment, then a reasonable accommodation is "encouraged" to be made by the DOJ and HUD. In other words, a city's zoning regulation is preempted by state law, but the state law may be preempted by the federal law, as it relates to a group home.

IV. RELIGIOUS PRACTICES

Another area of preemption which creates havoc for local officials is when dealing with religious practices, especially in residential districts.

The Texas Religious Freedom Restoration Act ("TRFRA) and the Religious Land Use and Institutionalized Persons Act ("RLUIPA") enlarge the protections offered by the First Amendment to the United States Constitution in favor of religious practices. Both of these statutes open up a can of worms regarding enforcement of any local a regulations. However, the regulations, when drafted, must attempt to incorporate matters which would fall under the religious practices protections.

TRFRA provides that "a government agency may not substantially burden a person's free exercise of religion" unless "the government agency demonstrates that the application of the burden to the person ... is in furtherance of a compelling government interest; and ... is the least restrictive means of furthering that interest." Tex. Civ. Prac. & Rem.Code Ann. § 110.003(a)–(b) (West 2017). TRFRA defines "free exercise of religion" as an act or refusal to act that is substantially motivated by sincere religious belief. In determining whether an act or refusal to act is substantially motivated by sincere religious belief ..., it is not necessary to determine that the act or refusal to act is motivated by a central part or central requirement of the person's sincere religious belief. Tex. Civ. Prac. & Rem. Code Ann. §110.001(a)(1) (West 2017).

The federal counterpart to TRFRA is RLUIPA. See *Adkins v. Kaspar*, 393 F.3d 559, 567 & n. 32 (5th Cir. 2004). The language of RLUIPA regarding the burdens of proof required to demonstrate a violation is substantially similar to that language in TRFRA, and courts refer to federal caselaw construing the RLUIPA burdens of proof for TRFRA analyses. See 42 U.S.C.S. § 2000cc–1; see also Tex. Civ. Prac. & Rem.Code Ann. § 110.003(a)–(b); *Sheshunoff v. Sheshunoff*, 172 S.W.3d 686, 692 (Tex.App.-Austin 2005, no pet. h.) Under RLUIPA, and TRFRA, the plaintiff bears the initial burden of showing that the government is substantially burdening his free exercise of religion. *Balawajder v. Texas Dept. of Criminal Justice Institutional Div.*, 217 S.W.3d 20, 25–27 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

Once a plaintiff shows that his free exercise of religion has been substantially burdened, however, the Texas and federal acts differ regarding which party next has the burden of proof. However, regardless of the next step in the burden shifting analysis, the end result is a challenge to a local regulation which may not have been anticipated.

TRFRA, like RLUIPA, "was enacted to provide greater protection for religious practices than the federal constitution as currently interpreted." *Voice of Cornerstone Church Corp. v. Pizza Prop. Partners*, 160 S.W.3d 657, 672 (Tex.App.-Austin 2005, no pet.). It prohibits local regulations, even ones of general applicability, which have the affect of negatively impacting religious practices.

The types of regulations affected range from zoning, to employment, to permitting, to jails and prison management. Examples of the types of cases

involved: 1) blind monks sharing a community home (integrating both TRFRA and FHA; 2) half-way house prohibitions within residential zones; 3) prohibitions on certain animal sacrifices; 4) clothing and apparel regulations while working or utilizing public services (including schools); 5) ordinance regulating homeless shelters, and a whole lot more.

The full scope of the preclusive affect is too broad for this specific article. However, if you are drafting a local regulation, the impact on the ability of individuals to practice religious beliefs needs to be factored into the regulation process to avoid preemption issues.

V. SIGNS

This is a two-step section. First, you may not know it, but a city is prohibited from regulating political signs on private property (with a few exceptions). Tex. Loc. Gov't Code Ann. § 216.903 (West 2017). Some cities have ordinances stating such regulations as "no political sign can be placed 60 days before an election." Well, those are preempted by §216.903. That applies year-round.

However, the second step is a word of caution. Similar language to §216.903 was struck down as content-based regulation in *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218 (2015). And why many believe §216.903 is just as unconstitutional in application as the state law in *Reed*, the Texas law has not been challenged. Courts must presume the validity of a statute and further presume that the legislative body has acted reasonably and not in an arbitrary manner in enacting the statute. See *City of Brookside Village v. Comeau*, 633 S.W.2d 790 (Tex.1982). And since no one has stepped forward to be the test case, the statute, technically, remains in effect.

VI. CELL PHONE TEXTING

Many cities have cell phone ordinances which prohibit drivers of motor vehicles from using their cell phones while operating a motor vehicle. There is no state law prohibition on using a cell phone to make phone calls. There is only a state law prohibition on phone calls in motor vehicles while in a school zone or if the driver is under the age of 18. See Tex. Transp. Code Ann. §§545.424 - 545.425. Cities are still permitted to individually prohibit the use of using cell phones to make phone calls.

However, there is a state law regulating texting while driving. Tex. Transp. Code Ann. §545.4251 (West 2017). It essentially states that an operator of a motor vehicle "commits an offense if the operator uses a portable wireless communication device to read, write, or send an electronic message while operating a motor vehicle unless the vehicle is stopped." Tex. Transp. Code Ann. §545.4251 (West 2017). Several exceptions exist, but most have to do with either emergency situations or situations where the vehicle is completely stopped.

Therefore, the part of any city ordinance which is preempted by the state law is the section prohibiting texting while driving. The remaining sections of a city ordinance would remain, but any portions implicating reading, writing, or sending electronic messages is preempted. Tex. Transp. Code Ann. §545.4251(j).

As to the text messages, an offense is punishable in a range only between $25 and $99 for a first offense. See Tex. Transp. Code Ann. §545.4251(e). So, a city ordinance, which may charge as much as $500 per cell phone call offenses, cannot charge more than $99 for texting. It also has a minimum which must be assessed during a plea agreement.

VII. HONORABLE MENTIONS

There are many more instances of preemption which you may encounter. The scope of this article is not to go through them all, but only to mention several you may not be aware exist. The big preemption issues (such as TABC regulations) are already well known so were not discussed. A few honorable mentions include:

A. **SOB:** While not really a preemption issue, the regulation of sexually oriented businesses has a weird twist. Texas Local Government Code Section 243.001(a) is the enabling legislation which permits a municipality to regulate sexually oriented businesses. Tex. Loc. Gov't Code Ann. § 243.001(a) (West 2017); *see City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 805 (Tex.1984). However, since penalty for violating the ordinance is a Class A misdemeanor, a city's municipal court has no jurisdiction to hear a criminal charge. *State v. Chacon*, 273 S.W.3d 375 (Tex. App.—San Antonio 2008, no pet.)

B. **Non-Consent Towing Regulations**: Some, but not all, of a state or local regulation related to a "price, route, or service of any motor carrier," is preempted by Title 49, section 14501(c)(1) of the United States Code. However, several regulations are excepted from the preemption application including safety regulations and market participation exceptions. *Whitten v. Vehicle Removal Corp.*, 56 S.W.3d 293, 300 (Tex. App.—Dallas 2001, pet. denied). So just be careful about what you put in the ordinances regarding non-consent tows.

C. **Clean Air Act:** the Texas Clean Air Act expressly recognizes a municipality's power to enact and enforce an ordinance, but such an ordinance cannot be

> inconsistent with the statutory provisions or TCEQ rules or orders.

Tex. Health & Safety Code §382.113; *BCCA Appeal Group, Inc. v. City of Houston*, 496 S.W.3d 1, 9 (Tex. 2016), reh'g denied (Sept. 23, 2016). Any municipal regulation which imposed more stringent standards on certain air and water uses can be preempted by the Act.

VIII. CONCLUSION

While there are many instances of preemption and some pseudo-preemption matters which you may encounter, the factor to keep in mind is you cannot plan for everything. Some issues will pop up and take you by surprise. But accepting that weird preemption issues may occur is part of the job of a governmental attorney. Read up on whatever subject matter you are assigned to investigate and draft the best you can.

TO WHOM DO MY LOYALTIES TRULY LIE? 2018 EDITION A PRIMER ON REQUIRED AND AUTHORIZED CIVIL REPRESENTATION FOR ATTORNEYS REPRESENTING COUNTIES, AS WELL AS IMPLICATED ETHICAL CONCERNS

M. ANN MONTGOMERY, *Waxahachie*
Ellis County & District Attorney's Office

State Bar of Texas
GOVERNMENT LAW 101
July 18, 2018
San Antonio

CHAPTER 5

Special thanks to Scott Brumley, Potter County Attorney, who wrote this paper in 2014.

M. ANN MONTGOMERY
Assistant Ellis County and District Attorney
Waxahachie, TX 75165
(972) 825-5223
ann.montgomery@co.ellis.tx.us

EDUCATION AND LICENSES

State of Colorado, 2008
United States Supreme Court, May 2006
United States District Court, North District of Texas, January 2003
Supreme Court of Texas, May 2002
Juris Doctor-Texas Wesleyan University School of Law, December 2001
Certified Legal Assistant - National Association of Legal Assistants, February 1996
B.A., Political Science-University of Texas at Arlington, August 1989

EXPERIENCE

ELLIS COUNTY ATTORNEY'S OFFICE — February 2003 - present
First Assistant County Attorney

- Misdemeanor attorney for eleven (11) months
- Advisor to all county offices including Commissioner's Court
- Litigation of bond forfeitures and asset forfeitures
- Media liaison

STATE BAR OF TEXAS, Fort Worth, Texas
Assistant Disciplinary Counsel — May 2002-February 2003

- Negotiated settlement between Respondent Attorneys and Panel
- Prosecuted attorneys before evidentiary panels and in District Court
- Advisor to seven (7) investigatory committee districts
- Misconduct found in 100% of evidentiary cases tried
- Negotiated settlements in at least 8 cases (investigatory and evidentiary)
- Negotiated Resignations in Lieu of Discipline

Provisional Assistant Disciplinary Counsel — February 2002-May 2002

- Worked under supervision of Regional Counsel
- Negotiated settlements between Respondent attorneys and panel
- Prepared evidentiary cases for final review by attorney
- Negotiated settlements in at least 5 cases (investigatory and evidentiary)

Investigator — February 1998-February 2002

- Screened initial cases upon intake
- Drafted investigator's reports
- Participated at investigatory hearings
- Worked with attorneys on evidentiary/litigation cases

Litigation Paralegal — August 7, 1995-February 1998

- Drafted disciplinary petitions and discovery
- Responded to discovery
- Assisted with trial preparation and during trial
- Prepared monthly management reports

CATTERTON AND REINHARD, Fort Worth, Texas
Paralegal September 1989-August 4, 1995

- Drafted pleadings and answered discovery
- Managed client files (litigation and non-litigation)
- Preformed administrative office duties and accounting
- Managed two staff members

OTHER EXPERIENCE

Navarro County Junior College Adjunct Professor (Civil Litigation, Introduction to Law, Legal Research and Writing, Criminal Law and Procedure, Internship Class) - Fall 2008 and other times

Loyola University School of Law - Vienna, Austria: July 2001
Attended courses in Comparative Human Rights and Bioethics: The Beginning and Ending of Life

SPEAKER

TDCAA Civil Law Seminar, May 2018 -- Who's Your Client?

Texas Advanced Paralegal Seminar, September 2017 -- Basic County Law

TDCAA Civil and Criminal Annual Conference, September 2017 -- Asset Forfeiture Primer

TDCAA Civil Law Seminar, May 2017 -- County Purchasing Act

TDCAA Civil Law Seminar, May 2016 -- Top 5 Grievances Filed Against Civil/Government Attorneys

TDCAA Civil Law Seminar, May 2015 -- Rural County Forum

TxPPA Annual Conference, November 2013 -- Contracts, Relations, and More

TDCAA Key Personnel & Victim Assistance Coordinator Seminar, November 2011 --Bail Bond Forfeitures
Tarrant County Community College, April 2011 -- The Role of the Prosecutor

North Central Texas Judges and Commissioners Conference, June 2009 -- Duties of the County Judge and County Attorney

TDCAA Civil Law Seminar, May 2009 -- Purchasing Issues

TDCAA Civil Law Seminar, May 2007 -- Sexually Oriented Businesses and County Regulation

CLE at Sea Tarrant County Bar Association, February 2003 -- How to Avoid the Grievance Process and Now that You're in the Grievance Process - How to Respond

TWU Externship Class - June 2002 and October 2002
Ethics - The Grievance Process

TWU Law Office Management Class - Spring 2002
Ethics - The Grievance Process

Tarrant County Bar Association Brown Bag Seminar Series - Ethics, April 26, 2002
The Grievance Process and How to Respond

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TO WHOM DO MY LOYALTIES TRULY LIE? 2018 EDITION

A PRIMER ON REQUIRED AND AUTHORIZED CIVIL REPRESENTATION FOR ATTORNEYS REPRESENTING COUNTIES, AS WELL AS IMPLICATED ETHICAL CONCERNS

I. INTRODUCTION.

When attending law school, I always knew I wanted to be a prosecutor. But, a prosecutor handles criminal cases right? I quickly learned after a year in my office how little I really knew when I became the one attorney handling civil matters for the county. What did that entail? Or, better yet, what didn't it entail? Asset forfeiture and bail bond forfeiture cases, expunctions and non-disclosures, public information act requests to all county office/officials, providing legal advice to all offices and elected officials. Private sector lawyers generally have the wherewithal to shoo away unwanted mavericks. We, those that work for a county attorney (or something similar) on the other hand, often wind up riding herd over them by virtue of the legislature. In hopes of accommodating that resigned sense of duty, I offer the following observations about who we can and must represent, and what basic obligations we owe as a result. So, this paper as well as the presentation, is written towards those working for the government and not the private sector lawyer, although the same rules would apply.

II. OUR FAVORITE ADMONISHMENT: "I PAY YOUR SALARY."

Your office is authorized, under some circumstances, to represent the county, its officers and employees in civil matters. It is true that county and district attorneys are charged primarily with enforcement of the criminal statutes. *Guynes v. Galveston County*, 861 S.W.2d 861, 864 (Tex. 1993). As such, it generally is not one of the prescribed duties of a district or county attorney to represent the county in its general legal business or the conduct of ordinary civil actions. *Id.*; *Hill Farm, Inc. v. Hill County*, 425 S.W.2d 414, 419 (Tex. Civ. App.—Waco 1968), *aff'd on other grounds*, 436 S.W.2d 320 (Tex. 1969). Even so, the commissioners court is authorized to contract with the district or county attorney to employ that officer as its attorney to represent the county in such matters. *Hill Farm, Inc*., 436 S.W.2d at 419; *accord* Op. Tex. Att'y Gen. No. JM-198 (1984) at 1 (county attorney may contract with commissioners court to represent county in condemnation proceedings). This observation, coupled with *Guynes*'s clarification that the commissioners court has broad discretionary authority to contract with attorneys, appears to implicitly overrule older authority opining that a commissioners court had no authority to contract with a district or county attorney for defense in future lawsuits. *See Jones v. Veltmann*, 171 S.W. 287, 291 (Tex. Civ. App.—San Antonio 1914, writ ref'd) (finding no authority for commissioners court to contract with county attorneys for defense of suits not in existence); *cf.* Op. Tex. Att'y Gen. No. GA-0153 (2004) at 4-5 (*Guynes* effectively overruled reasoning of older Attorney General opinion espousing rule in *Jones*).[1] In some counties, moreover, a statutory assignment of representation duties exists. Specifically, the table in Appendix A sets forth the counties in which representation of the county and/or its officers and employees in civil matters is statutorily assigned to the criminal district attorney or county attorney.

Knowing that you are assigned or authorized to represent the county does not answer all the questions about the identity of your client or the duties you owe to that client, though. For one thing, your responsibility to represent "the county" may be seen to subsume an obligation to represent other entities that lurk under the "county" umbrella. Thus, some may view your office as the "one-stop shopping center" for giving notice of a claim, at least for limitations purposes.[2] *See Castro v. Harris County*, 663 S.W.2d 502, 504-05 (Tex. App.—Houston [1st Dist.] 1983, writ dism'd) (County Attorney's statutory duty to defend district meant that misdirected citation, delivered to County Attorney, gave notice to true defendant within limitations period, despite district's lack of formal notice). More broadly, it is a common misperception that representing the county and representing the commissioners court are one and the same. While in some cases that may be the practical reality, there is a distinction between the county as an entity on the one hand and its bodies, agencies and officers on the other. It was long ago observed that, as between a sheriff and a commissioners court, "[n]either is [the] county, but each has a bounden duty to the administration of the county affairs."

[1] That work may be *au gratis*. The Attorney General also has opined that the Professional Prosecutors Act prohibits a covered county attorney from receiving compensation in his private capacity for representing the county in civil matters. Op. Tex. Att'y Gen. No. JC-0034 (1999) at 3. Instead, in the Attorney General's view, a county or district attorney in such a case may "voluntarily and gratuitously" provide such services. *Id.*

[2] By no means should this prospect be taken as an indication that proper, formal notice to the correct party is obviated for jurisdictional purposes. *See* TEX. GOV'T CODE § 311.034 ("Statutory prerequisites to a suit, including the provision of notice, are jurisdictional requirements in all suits against a governmental entity.").

Tarrant County v. Smith, 81 S.W.2d 537, 538 (Tex. Civ. App.—Fort Worth 1935, writ ref'd) (quoted in Op. Tex. Att'y Gen. No. JC-0214 (2000) at 3). With that said, a suit that concerns a policy or official act of the county often will focus upon the activity of the commissioners court since it is the county's primary policy-making body. For that reason, it is useful to base this discussion initially upon an understanding of that entity and its authority. The Commissioners Court, like your office, is a creature of constitutional origin. In pertinent part, the Texas Constitution provides:

> Each county shall, in the manner provided for justice of the peace and constable precincts, be divided into four commissioners precincts in each of which there shall be elected by the qualified voters thereof one County Commissioner, who shall hold his office for four years and until his successor shall be elected and qualified. The County Commissioners so chosen, with the County Judge as the presiding officer, shall compose the County Commissioners Court, which shall exercise such powers and jurisdiction over all county business, as is conferred by this Constitution and the laws of this State, or as may hereafter be prescribed.

TEX. CONST. art. V, § 18 (b). Under the constitution, the commissioners court is the county's principal governing body. *Comm'rs Ct. of Titus County v. Agan*, 940 S.W.2d 77, 79 (Tex. 1997). The powers and duties of the commissioners court include aspects of legislative, executive, administrative and judicial functions. *Id*. As indicated by the constitutional text, and by supporting legislation, the commissioners court is composed of the four commissioners and the county judge, who sits as the presiding officer if he or she is present. *Id*.; *see also* TEX. LOC. GOV'T CODE § 81.001(a), (b). As a fundamental matter, it should be remembered that counties and their commissioners courts are entities of limited jurisdiction. Though their origins are constitutional,[3] their powers flow from legislative grants and are controlled by the terms of those statutes. *See City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 28 (Tex. 2003) (though counties and commissioners courts are creatures of constitution, their powers are subject to legislative regulation). It has long been held that a commissioners court's authority over county business is not general and all-inclusive, but is limited to such as is specifically conferred by the constitution and statutes. *Anderson v. Wood*, 137 Tex. 201, 152 S.W.2d 1084, 1085 (1941). But that does not necessarily mean that a broadly-worded grant of authority to the commissioners court must be subjected to a limiting construction. Where a right is conferred or an obligation imposed on the commissioners court, it has implied authority to exercise a broad discretion to accomplish the purposes intended. *Id*. What all this means in the end is that, while a commissioners court may exercise broad discretion in conducting county business, the legal basis for any action taken must be grounded ultimately in the constitution or statutes. *Guynes*, 861 S.W.2d at 863. As a practical matter, these authorities may be read to say that counties are unlike their home-rule municipality brethren. While a city typically is seen to have authority unless the constitution or a statute provides otherwise, the opposite tends to be true for counties. Unless a constitutional provision or statute vests a county with authority, the county generally lacks that authority. *See, generally, Anderson*, 152 S.W.2d at 1085; *see also City of Laredo v. Webb County*, 220 S.W.3d 571, 576 (Tex. App.—Austin 2007, no pet.) (home-rule cities "look to the legislature only for specific limitations on their power"; counties "may only exercise those powers expressly conferred by either the legislature or the Texas Constitution"). Thus, determining a commissioners court's authority under a particular constitutional or statutory scheme, and whether it is strictly limited or subject to implied discretionary expansion, is one of the aspects of your representation that will be continually needed by the county.

A. Daddy Writes the Checks, But Momma's Watching.

Beware, however. You are not the only watchdog in the yard. District courts in Texas maintain constitutional jurisdiction to supervise the commissioners courts. TEX. CONST. art. V, § 8. A party can invoke a district court's constitutional supervisory control over a commissioners court judgment, but only when the commissioners court acts beyond its jurisdiction or clearly abuses the discretion conferred upon it by law. *Agan*, 940 S.W.2d at 80; *Ector County v. Stringer*, 843 S.W.2d 477, 479 (Tex. 1992); *Medina County Comm'rs Ct. v. Integrity Group, Inc.*, 21 S.W.3d 307, 309 (Tex. App.—San Antonio 1999, pet. denied); *Comm'rs Ct. of Grayson County v. Albin*, 992 S.W.2d 597, 603 (Tex. App.—Texarkana 1999, pet. denied). The acts of commissioners courts as public officials are subject to presumed validity until the contrary is shown. *Anderson v. Geraghty*, 212 S.W.2d 972, 974 (Tex. Civ. App.—San Antonio 1948, no writ); *accord Bexar County v. Hatley*, 136 Tex. 354, 150 S.W.2d 980, 987 (1941) ("presumptions are in favor of the validity of acts

[3] *See* TEX. CONST. arts. IX, § 1 (creation of counties); XI, § 1 (counties recognized as legal subdivisions of State).

of the commissioners' courts"). Because of this limiting construction, courts are wary of exercising their power to override a commissioners court's judgment concerning county finance. In the words of the Texas Supreme Court:

> In the area of a governing body's fiscal policy, the district court's role is necessarily a limited one: A court has no right to substitute its judgment and discretion for the judgment and discretion of the governing body upon whom the law visits the primary power and duty to act. Of course, if such governing body acts illegally, unreasonably, or arbitrarily, a court of competent jurisdiction may so adjudge, but there the power of the court ends.

Stringer, 843 S.W.2d at 479 (quoting *Lewis v. City of Fort Worth*, 126 Tex. 458, 89 S.W.2d 975, 978 (1936)). Once the commissioners court exercises its discretion over budgetary concerns, "the district court may review the order for abuse of discretion, but it cannot substitute its discretion for that of the commissioners court." *Stringer*, 843 S.W.2d at 479.

Different courts have described the appropriate standard for reviewing commissioners court acts in divergent terms. Some see the scope of review as limited to finding the existence of substantial evidence to ascertain whether the action taken was arbitrary or capricious. *See Collins v. County of El Paso*, 954 S.W.2d 137, 152 (Tex. App.—El Paso 1997, pet. denied). To conduct such review, the court determines whether, when evaluating the evidence as a whole, reasonable minds could have reached the decision reached by the agency that led to the disputed action. *Id.* at 153. Under this method, the appealing party bears the burden of demonstrating a lack of substantial evidence, which burden is not met simply by showing that the evidence preponderates against the agency decision. *Id.* If substantial evidence would support either affirmative or negative findings, the court must uphold the agency decision and resolve any conflicts in favor of the agency decision. *Id.* To this end, "it is presumed that the [commissioners court act in a legislative capacity] has not acted unreasonably or arbitrarily; and a mere difference of opinion, where reasonable minds could differ, is not a sufficient basis for striking down legislation as arbitrary or unreasonable." *Sherrod*, 854 S.W.2d at 927 (Dodson, J., concurring and dissenting) (quoting *Smith v. Davis*, 426 S.W.2d 827, 831 (Tex. 1968)).

Review by the more orthodox standard of abuse of discretion requires the court to test not whether, in the opinion of the court, the facts present an appropriate case for the action at issue, but whether the commissioners court acted without reference to any guiding rules and principles. *Hooten v. Enriquez*, 863 S.W.2d 522, 533 (Tex. App.—El Paso 1993, no writ); *accord Sherrod*, 854 S.W.2d at 930 (Boyd, J., concurring and dissenting). Under this standard, the mere fact that the decision maker might decide a matter within its discretionary authority differently from an appellate judge in a similar circumstance does not demonstrate that an abuse of discretion has occurred. *Id.* This principle is borne out by the further maxim that, in a mandamus proceeding for review, the burden is upon the party seeking relief to negate by affirmative proof every fact or condition which would have authorized the public official to refuse to take the action sought to be enforced upon him. *City of Houston v. Houston Chronicle Publ'g. Co.*, 673 S.W.2d 316, 324 (Tex. App.—Houston [1st Dist.] 1984, no writ); *Smith v. McCoy*, 533 S.W.2d 457, 460 (Tex. Civ. App.—Dallas 1976, writ dism'd).

What may be derived from these lines of reasoning is the notion that a district court's invalidation of a commissioners court's action as arbitrary, capricious or abusive of discretion requires support in the form of proof that the action was taken without reference to objective, authoritative criteria. *See Sherrod*, 854 S.W.2d at 930 (Boyd, J., concurring and dissenting); *Hooten*, 863 S.W.2d at 533; *cf. Vondy v. Comm'rs Ct. of Uvalde County*, 714 S.W.2d 417, 422 (Tex. App.—San Antonio 1986, writ ref'd n.r.e.) ("The record is replete with evidence that the Commissioners Court did not deliberate as to what would be a reasonable compensation for Vondy, but rather they considered only the need for Vondy's services."). In advising the commissioners court with an eye toward ensuring that its acts will withstand legal review, your responsibility is to remind the court of these standards. How those standards are applied to resolve a particular issue is a matter that must be left to the commissioners court itself, and you would do well to avoid injecting yourself into the court's ultimate policy determinations. *See Hooten*, 863 S.W.2d at 529 ("Generally, the allocation of county funds is a policy-making determination left to the sound discretion of the commissioners court"); *Dodson v. Marshall*, 118 S.W.2d 621, 624 (Tex. Civ. App.—Waco 1938, writ dism'd) ("But so long as there is a reasonable exercise of the discretion vested in the commissioners court in a matter within its jurisdiction, that court alone has the right to determine the policy to be pursued"). Indeed, the rule that your job is to advise on the law — not policy — also is contemplated within the Disciplinary Rules of Professional Conduct. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.12, cmt. 6, *reprinted in* TEX. GOV'T CODE, tit. 2, subtit. G app. A (TEX. STATE BAR R. art. X, § 9) ("Decisions concerning policy and operations, including ones entailing serious risk, are not as such in the lawyer's province"). In short, diligently advise your clients on how the law constrains their decisions on the expenditure of county funds, but

leave those ultimate decisions to the people who are elected to make them.

All of this points to the fact that you are most likely to encounter difficult advisory scenarios when the issue involves budgeting or spending county money. To navigate this minefield, you need to have a solid understanding of the commissioners court's authority. As is so true in most aspects of modern life, the single greatest power the commissioners court can wield is that of the purse strings. Fundamentally, the commissioners court is the body authorized to appropriate and allocate county funds. *See* TEX. LOC. GOV'T CODE §§ 111.008, 111.010(b), 111.039, 111.041(a), 111.068, 111.070(a). Here, the commissioners court acts in a legislative capacity. That is, the commissioners court performs a legislative function when it creates the budget for the county's offices and departments. *Jensen Constr. Co. v. Dallas County*, 920 S.W.2d 761, 773-74 (Tex. App.—Dallas 1996, writ denied), *disapproved on other grounds*, *Travis County v. Pelzel & Assocs., Inc.*, 77 S.W.3d 246 (Tex. 2002); *Hooten v. Enriquez*, 863 S.W.2d 522, 528 (Tex. App.—El Paso 1993, no writ); *accord Agan*, 940 S.W.2d at 81 (budgetary decision to transfer payroll preparation responsibilities is legislative function over which commissioners court enjoys broad discretion). In this sphere, the commissioners court's authority is fairly plenary. Specifically, the allocation of county funds, including the amount of compensation for county officers, is a matter within the commissioners court's discretion. *White v. Comm'rs Ct. of Kimble County*, 705 S.W.2d 322, 326 (Tex. App.—San Antonio 1986, no writ); *Weber v. City of Sachse*, 591 S.W.2d 563, 566 (Tex. Civ. App.—Dallas 1979, writ dism'd). An important caveat should be offered here. This rule applies to your office, too. *See* TEX. LOC. GOV'T CODE § 152.011 (commissioners court shall set the amount of compensation, office and travel expenses and all other allowances for county and precinct officers and employees paid wholly from county funds); *accord Comm'rs Ct. of Caldwell County v. Criminal Dist. Att'y, Caldwell County*, 690 S.W.2d 932, 934-35 (Tex. App.—Austin 1985, writ ref'd n.r.e.) (addressing discretionary authority of commissioners court as applied to district attorney's requested budget); *accord Randall County Comm'rs Ct. v. Sherrod*, 854 S.W.2d 914, 930 (Tex. App.—Amarillo 1993, no writ) (Boyd, J., concurring and dissenting) (commissioners court may exercise discretion in granting, withholding or reducing supplement paid to district attorney through county budget). That discretion is not boundless, however. "The Commissioners Court ... cannot attempt to abolish or restrict [a constitutional office] by refusing to allow or by preventing the elected official from performing those duties required of him." *Vondy*, 714 S.W.2d at 422; *see also County of Maverick v. Ruiz*, 897 S.W.2d 843, 846 n. 1 (Tex. App.—San Antonio 1995, no writ) (commissioners court, by refusing to compensate some of its own members, improperly placed restriction upon office of county commissioner). As is discussed below, the budget process presents possibly the greatest single prospect for landing you in the trap of advising the court on a matter of financial interest to your office and you. For the purposes of this paper, the intricacies of the budgeting process are beyond the scope of the present discussion. The scheme for the annual process of county budgeting, including the setting of salaries for those paid from county funds, is set forth in chapters 111 and 152 of the Local Government Code. Any lawyer who must advise a commissioners court during the budget process should familiarize himself or herself with those provisions.

B. When the Bottom Line Can't Be the Bottom Line.

As is relevant here, suffice to say that the politically-charged, fluid circumstances of budgeting may cast you in the dual role of legal advisor and deeply interested party. *See Criminal Dist. Att'y, Caldwell County*, 690 S.W.2d at 934-35 ("The correlation of total revenue and expenditure, and apportionment of the former among the various county functions, operations, and programs, in the overall public interest, is the essence of the decision making entrusted to the judgment of the Commissioners Court."). If you are advising your commissioners court during its budgeting or expenditure decisions, you must recall that it is the county and its commissioners court that are your collective client. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.12(a); *accord Sutton v. Mankoff*, 915 S.W.2d 152, 157 (Tex. App.—Fort Worth 1996, writ denied) ("we recognize that a lawyer hired to represent an entity, represents the organization, not its members individually."). In this capacity, you are obligated to exercise independent professional judgment and render candid advice to the commissioners court. TEX. DISCIPLINARY R. PROF'L CONDUCT 2.01. Here, it is critical to ensure that your own financial concerns do not override your obligation of loyalty to your client. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06, cmt. 1 ("Loyalty is an essential element in the lawyer's relationship to the client."). Compromising that baseline requisite of loyalty may occur as the result of your interests, as well as those of other parties who you may represent. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(b)(2). As the rules see the issue:

> Loyalty to a client is impaired not only by the representation of opposing parties in situations within paragraphs (a) and (b)(1) but also in any situation when a lawyer may not be able to consider, recommend or carry out an appropriate course of action for one client because of the lawyer's own interests or responsibilities to others. The conflict in

> effect forecloses alternatives that would otherwise be available to the client.

TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06, cmt. 4; *see also id*., cmt. 5 ("The lawyer's own interests should not be permitted to have adverse effect on representation of a client, even where paragraph (b)(2) is not violated. For example, a lawyer's need for income should not lead the lawyer to undertake matters that cannot be handled competently and at a reasonable fee."). Concededly, it would be naïve to overlook the reality that you have an abiding interest in the budget for your office. When the commissioners court is brandishing the budget-cutting ax, a very real potential for you to be placed in a classic Hobson's choice exists when your office's budget comes up for consideration. Though they may be of cold comfort, the Disciplinary Rules do provide a couple of suggestions. First, it should be made unmistakably clear that your role with respect to your own office's budget is as an advocate for your office, not as a disinterested advisor on the legal ramifications of the budget as a whole, and that disputes over your office's budget may require the commissioners court to retain independent counsel to advise it on that issue. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.12(e); *id*., cmt. 4 (clarifying lawyer's obligation to make clear to constituents whose interests become adverse to organizational client that independent representation may become necessary). More drastically, if your office's interests become materially and directly adverse[4] to those of the county and its commissioners court, you may be required to withdraw from representation of the county with respect to the budget. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(b)(2), (e), 1.15(a)(1).

III. THE LINE FORMS HERE.

As you are aware, though, the commissioners court is not likely to be the only entity that seeks your advice during the process. To a certain extent, this inherent tension may be unavoidable. Your office is required, on request, to give to a county or precinct official of your district or county a written opinion or written advice relating to that person's official duties. TEX. GOV'T CODE § 41.007.[5] Your obligation to advise, of course, does not require you to represent a disgruntled county official in a suit against the county arising from the performance of public duty. TEX. LOC. GOV'T CODE § 157.9015(c). Absent an alleged violation of the Public Information Act,[6] in fact, there is no authorization for you to bring suit against the county or its commissioners court members in their official capacities[7] without an order or request from the commissioners court, even if requested or demanded by a grand jury. *See, e.g.*, *Driscoll v. Harris County Comm'rs Ct*., 688 S.W.2d 569, 582 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.) (county attorney, in individual or official capacity, lacked authority to sue for injunctive or declaratory relief against expenditure of county funds or formation and selection of board members of county agency); *Ward County v. King*, 454 S.W.2d 239, 240-41 (Tex. Civ. App.—El Paso 1970, writ ref'd w.o.j.) (county attorney's suit, purportedly on behalf of county, against commissioners court members in their official capacities dismissed in absence of authorization for suit by commissioners court); *Harwell v. Ward County*, 314 S.W.2d 868, 870 (Tex. Civ. App.—El Paso 1958, writ ref'd n.r.e.) (grand jury could not authorize county attorney to sue five members of commissioners court to recover value of fence materials and labor costs).[8] This places you in the same position as any other civil lawyer. Specifically, in representing the county, you must abide

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[4] A "directly adverse" position arises if your independent judgment on behalf of your client or your ability or willingness to consider, recommend or carry out a course of action will be or is reasonably likely to be adversely affected by your representation of, or responsibilities to, another. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06, cmt. 6. Additionally, a "directly adverse" representational scenario may play out if you reasonably appear to be called upon to espouse adverse positions in the same matter or a related matter. *Id*. On the other hand, generalized adverse interests, "such as competing economic interests," do not constitute the representation of directly adverse interests. *Id*.

[5] A practical pointer is appropriate here. While the statute is silent on the issue of any form the foundational request must take, experience teaches that it is at least prudent to ask those officials who seek your advice to do so in writing. At a minimum, this forces the requestor to give some thought to what they are asking and it creates a tangible reference point for defining the scope of the advice you will give.

[6] *See* TEX. GOV'T CODE § 552.3215(c), (h)-(i) (authorizing district or county attorney to bring action for declaratory or injunctive relief, in the name of the state, against governmental body based on violation of Public Information Act; providing for deferral to attorney general in case of conflict of interest).

[7] Texas law holds that a suit against a county official in his or her official capacity is a suit against the county itself. *Ware v. Miller*, 82 S.W.3d 795, 800 (Tex. App.—Amarillo 2002, pet. denied); *see also Terrell ex rel. Estate of Terrell v. Sisk*, 111 S.W.3d 274, 280 (Tex. App.—Texarkana 2003, no pet.) (suit against officer of government in officer's official capacity is actually suit against governmental entity served by officer).

[8] A significant distinction should be observed here, however. The lack of authority to bring an action on behalf of the county without commissioners court approval does not bear upon a district or county attorney's authority to litigate a civil matter on behalf of the state, such as a forfeiture action. *See State v. 1977 Pontiac Trans Am*, 668 S.W.2d 730, 733 (Tex. App.—Houston [1st Dist.] 1983, writ dism'd) (representation by or deferral to Attorney General in asset forfeiture action not required or authorized).

by the decisions concerning the objectives and general methods of representation made by those authorized to make such decisions for the county. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(a)(1). That decisionmaker, for most county purposes, is the commissioners court. This is so because, absent some impingement upon the statutory duties of other officials, the commissioners court retains the implied power to control county litigation and choose its legal remedies. *Guynes*, 861 S.W.2d at 863-64. Take care to note, however, that providing written advice upon request is one of your prescribed statutory duties that cannot (and should not) be delegated. *See* TEX. GOV'T CODE § 41.007; *accord Guynes*, 861 S.W.2d at 864 n. 2. That you are required to render such an opinion does not restrict the commissioners court in the employment of attorneys to advise and render services to the court, though. Op. Tex. Att'y Gen. No. JM-788 (1987), at 5. Of course, not all disputes in which someone will seek your legal services arise during budget formulation. Lawsuits, like the flu, can crop up any time. When that happens, you should be prepared to quickly determine whether you must provide representation and how far that representation extends.

A. Free Lawyer? Yes, Please!

If viewed as a family, county government often is a dysfunctional one. It is not uncommon for litigation between county officials and the commissioners court or the county itself to occur. You may face conflicting demands for representation under those circumstances. From ethical and practical perspectives, it is prudent to be familiar with the relevant statutory provisions and common law principles in order to quickly establish your obligations. As a foundational matter, the Local Government Code creates an entitlement to representation at county expense in particular situations: Specifically:

> A county official or employee sued by any entity, other than the county with which the official or employee serves, for an action arising from the performance of a public duty is entitled to be represented by the district attorney of the district in which the county is located, the county attorney, or both.

TEX. LOC. GOV'T CODE § 157.901(a). In light of the criminal duties assigned to your office, the Legislature recognized that the potential for conflict may arise and addressed that prospect as follows:

> If additional counsel is necessary or proper in the case of an official or employee provided legal counsel under Subsection (a) or if it reasonably appears that the act complained of may form the basis for the filing of a criminal charge against the official or employee, the official or employee is entitled to have the commissioners court of the county employ and pay private counsel.

Id. at (b). The requirement imposed by section 157.901 rests in the discretion of the employee or official who is sued. That is, the official or employee is not required to accept the legal counsel provided under section 157.901. *Id*. at (c). Acknowledging that the common law vests counties with authority to retain counsel for their officers and employees in circumstances beyond those delineated in section 157.901, the Eastland Court of Appeals in a seminal case on the issue held that provision of county-funded counsel outside the confines of a section 157.901 situation (such as in a criminal case) is a discretionary policy decision. *White v. Eastland County*, 12 S.W.3d 97, 104 (Tex. App.—Eastland 1999, no pet.). At the same time, you may also take a measure of comfort in the knowledge that section 157.901 imposes no duty upon you in your individual capacity. *Condit v. Nueces County*, 976 S.W.2d 278, 280 (Tex. App.—Corpus Christi 1998, no pet.).

Section 157.901's entitlement language can create difficulties where the litigation at issue is "in house." Fortunately, these dilemmas are fairly simple to resolve. A dispute between a county official and the county itself generally will not trigger your duties under section 157.901 of the Local Government Code for one of two reasons. First, if the erstwhile officer sues the county, he or she is not among the defendant class to whom the statute's benefits inure. *See* TEX. LOC. GOV'T CODE § 157.901(a) ("A county official or employee *sued by any entity* ... is entitled to be represented by the district attorney of the district in which the county is located, the county attorney, or both.") (emphasis added). Second, if the county is the plaintiff, the statute again is expressly inapplicable. *See id*. ("A county official or employee sued by any entity, *other than the county with which the official or employee serves*, ...") (emphasis added). In either case, you may confront a claim from the official that your office is "conflicted out," meaning you are purportedly subject to an impermissible conflict of interest because of your advisory and representational obligations to all county officials and employees. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.06(a), (b)(1); *see also* TEX. LOC. GOV'T CODE § 157.901(a), (b) (providing obligation to defend county official or employee, requiring retention of additional counsel where "necessary or proper" or where act complained of may form basis for filing of criminal charge against

official or employee).[9] Where you represent the county as a defendant, the legislature has definitively settled the issue in your favor. Specifically, the Local Government Code provides:

> It is not a conflict of interest for a district or county attorney under Section 157.901 to defend a county or a county official or employee sued by another county official or employee and also to advise or represent the opposing party on a separate matter arising from the performance of a public duty, regardless of whether the attorney gives the advice or representation to the opposing party before the suit began or while the suit is pending.

TEX. LOC. GOV'T CODE § 157.9015(a).[10] Sensibly enough, the statute requires assignment of a different attorney to defend the county or county official or employee being sued than the attorney who advises or represents the opposing party on the separate matter, if practicable. *Id*. at (b). In any event, the statute also makes clear that you are not required to represent a county official or employee who brings a suit against the county or another county official or employee for an action arising from the performance of a public duty. *Id*. at (c). As you may guess, the statute does not address the thornier issue of how the trust your sundry clients have in you will be affected by the various hats you may wear in such cases. Since the duties at issue are roughly drawn by statute, the Disciplinary Rules take a hands-off approach to addressing such problems. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 13; id., at 1.12, cmt. 9. Where this milieu arises, perhaps the most prudent course of action is to be taken by analogizing the rule on serving as an intermediary. In other words, it seems reasonable to consult with each affected party regarding the disparate representation that your office is called upon to provide by statute (including express discussion of the relevant statutory provisions), and the potential consequences of that disparate representation in order to equip the parties to make informed decisions on how they may wish to proceed, recalling that a county official or employee who is entitled to representation under section 157.901 of the Local Government Code is free to opt out of that relationship. *See* TEX. LOC. GOV'T CODE § 157.901(c); *see also* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.07(b) (requiring above-referenced consultation by lawyer who seeks to serve as intermediary).

Though facial conflict may be statutorily resolved, a more vexing issue may lie hidden in a section 157.901 case. If your office routinely represents the county and its commissioners court, and, like every other County or District Attorney's office employee in Texas, you are paid by the county, you may find yourself in the uncomfortable position of serving two masters. In such a case, in fact, you may have two clients, depending on the contractual relationship your office has with the county and its commissioners court. *See Unauthorized Practice of Law Comm. v. Am. Home Assur. Co.*, 261 S.W.3d 24, 42 (Tex. 2008) (whether defense counsel also represents insurer "is a matter of contract between them"). With respect to your representation of the employee or officer under section 157.901, however, the officer or employee is your primary client to whom the accompanying loyalties must primarily flow. *See Am. Physicians Exch. v. Garcia*, 876 S.W.2d 842, 844 n. 6 (Tex. 1994) (though attorney was paid by insurance company, he was insured's attorney, not insurance company's; noting also duty of "unqualified loyalty" owed to insured by attorney retained by insurer to defend insured). That does not mean that cost-related directives, for example, of the commissioners court can be blithely ignored. Indeed, the Texas Supreme Court has reiterated that a third-party payor's "right of control generally includes the authority to make defense decisions *as if it were the client* 'where no conflict of interest exists.'" *Unauthorized Practice of Law Comm.*, 261 S.W.3d at 42 (quoting *Northern Mut. Ins. Co. v. Davalos*, 140 S.W.3d 685, 688 (Tex. 2004)) (emphasis in original). In these circumstances:

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[9] That the statute contemplates a situation in which criminal charges may arise does not require you to represent the county official or employee in a criminal matter. Of primary importance is the fact that the Code of Criminal Procedure prohibits district and county attorneys from being of counsel adversely to the state in any case in any court. TEX. CODE CRIM. PROC. ANN. art. 2.08(a). Likewise, section 157.901 does not create an independent basis of authority for or impose a duty upon counties to furnish counsel for a county official in a criminal proceeding. *White*, 12 S.W.3d at 102. Also, logically enough, criminal conduct generally does not "arise out of the performance of public duty" as is necessary to trigger the defense duty within section 157.901. *See, e.g.*, *In re Reed*, 137 S.W.3d 676, 679-80 (Tex. App.—San Antonio 2004, orig. proceeding) (indecent exposure charge against justice of peace "undisputedly" did not arise out of performance of public duty, negating duty of district attorney's office to defend against charge in judicial conduct suspension proceeding).

[10] *See also* TEX. DISCIPLINARY R. PROF'L CONDUCT preamble ¶ 13 (government lawyers "may be authorized to represent several government agencies in intragovernmental legal controversies where a private lawyer could not represent multiple private clients. ... These rules do not abrogate any such authority."); *id*. at 1.12, cmt. 9 ("duties of lawyers employed by the government or lawyers in military service may be defined by statutes and regulations.").

> A lawyer's professional conduct on behalf of a client may be directed by someone other than the client if: (a) the direction does not interfere with the lawyer's independence of professional judgment; (b) the direction is reasonable in scope and character, such as by reflecting obligations borne by the person directing the lawyer; and (c) the client consents to the direction under [advisement of the material risks of such representation and it is clear that the representation is not prohibited by law, will not result in assertion of adverse claims by the payor against the client in the same litigation and is not reasonably likely to impede the provision of adequate representation to any of the clients involved].

Unauthorized Practice of Law Comm., 261 S.W.3d at 42 n. 77 (quoting Restatement (Third) of the Law Governing Lawyers § 134 (2000) (editorial insertion added)). Even so, in employed-lawyer cases, "the attorney's duty to the client remains steadfast and surpasses any duty of loyalty owed to the employer." *Unauthorized Practice of Law Comm. v. Nationwide Mut. Ins. Co*., 155 S.W.3d 590, 598 (Tex. App.—San Antonio 2004, no pet.).

Occasionally, a self-styled "inventive" legal mind will concoct a challenge to your authority to represent a county official or employee based on an allegation that the defendant has acted "illegally" and, therefore, outside the scope of official duties.[11] Perhaps the most telling reason that such an argument fails is the fact that a plaintiff's prediction of a lawsuit's final outcome, standing alone, is insufficient for purposes of evaluating the propriety of county-funded defense. As the attorney general has observed, "suits may be only nominally against individuals when they are really designed to obstruct or control the legitimate performance of official duties. ... Such litigation does involve the interests of the county." Op. Tex. Att'y Gen. No. JC-0294 (2000) at 5. Thus, disposition of the lawsuit is irrelevant to the question of providing a defense. *Id*. Even when a lawsuit contains allegations that seem to place the actions of the officer outside the scope of official duties, a defense at public expense may still be proper. Op. Tex. Att'y Gen. No. JM-968 (1988) at 3. For this reason, an allegation in and of itself does not prevent the governmental body from providing for the defense of an officer. *Id*.

More generally, the obligations of section 157.901 flow from historically-recognized common law authority. As the administrative head of county government, the commissioners court possesses broad implied powers to accomplish its legitimate directives. These powers include the authority to contract with experts when necessary, including attorneys. *Guynes*, 861 S.W.2d at 863. As the attorney general sees the issue, section 157.901 augments, rather than contradicts, the pre-existing common law authority to provide a publicly-funded defense. Op. Tex. Att'y Gen. No. JC-0047 (1999) at 2. The common law rule, as espoused by the attorney general, historically has been stated as follows:

> Where a Texas governing body believes in good faith that the public interest is at stake, even though an officer is sued individually, it is permissible for the body to employ attorneys to defend the action. ... The propriety of such a step is not made dependent upon the outcome of the litigation, but upon the bona fides of the governing body's motive.

Id.; Op. Tex. Att'y Gen. Nos. JM-824 (1987) at 2; MW-252 (1980) at 1. Under this rule, you may represent public officers and employees when the commissioners court determines that the legitimate interests of the county — and not merely the personal interests of the officer or employee — require the assertion of a vigorous legal defense. Op. Tex. Att'y Gen. No. JM-1276 (1990) at 11; *accord* Op. Tex. Att'y Gen. No. JM-1092 (1989) at 6. That determination must be made by the county commissioners, who must vote whether to expend public funds in a particular case. Op. Tex. Att'y Gen. No. JM-824 (1987) at 3.

When the county itself is sued, of course, the commissioners court has broad authority to determine the course of its defense, including the designation of the county's defense counsel. *See Guynes*, 861 S.W.2d at 863. A more troublesome issue may arise when a commissioner is sued in his or her individual capacity. At first blush, it may appear that a conflict of interest within the scope of Local Government Code chapter 171 is implicated. Under that chapter, if a local public official has a substantial interest in a business entity or in real property, the official must file an affidavit stating

[11] In an action challenging the salary set for a constable, for example, I have encountered a motion to show authority under TEX. R. CIV. P. 12 contending that the commissioners' acts were intentional and unlawful, thereby disqualifying them from county-funded representation under chapter 102 of the Civil Practice and Remedies Code. Of course, chapter 102 pertains to "Tort Claims Payments by Local Governments," and it pertains solely to claims seeking to impose tort liability. Tex. Att'y Gen. LO-90-93 (1990) at 2; *see also* Op. Tex. Att'y Gen. No. JM-1276 (1990) at 11-12 (chapter 102 is authorization to provide defense distinct from section 157.901, Local Government Code). Though accepting every other argument made by the plaintiff in the case, the district court correctly rejected this argument.

the nature and extent of the official's interest and abstain from further participation in the matter if action on the matter will have a special economic effect on the business entity or the value of the real property that is distinguishable from its effect on the public. TEX. LOC. GOV'T CODE § 171.004(a). However, a commissioner's interest in the form of his or her income from the county would not seem to constitute the requisite interest in a "business entity," since a governmental unit is not typically viewed as a "business entity." *See, e.g.*, Op. Tex. Att'y Gen. Nos. GA-0195 (2004) at 2 (special utility district is not "business entity"), GA-0031 (2003) at 2 (school district is not "business entity"), DM-267 (1993) at 2 (city is not "business entity"). Nonetheless, the appearance of propriety may well counsel in favor of the particular commissioner's abstention from voting on the provision of a defense to him or her.

B. "Liaison": Hard to Spell and Harder to Do.

By their own terms, sections 157.901 and 157.9015 apply to active litigation. It may be, however, that you are called upon to serve as a "go-between" in a dispute between an official and the county, its commissioners court or another county official. A classic "red flag" should be seen in such a case. The Disciplinary Rules expressly caution that:

> A lawyer shall not act as an intermediary between clients unless:
>
> (1) the lawyer consults with each client concerning the implications of the common representation, including the advantages of the common representation, including the advantages and risks involved, and the effect on the attorney-client privileges, and obtains each client's written consent to the common representation;
> (2) the lawyer reasonably believes that the matter can be resolved without the necessity of contested litigation on terms compatible with the clients' best interests, that each client will be able to make adequately informed decisions in the matter and that there is little risk of material prejudice to the interests of any of the clients if the contemplated resolution is unsuccessful; and
> (3) the lawyer reasonably believes that the common representation can be undertaken impartially and without improper effect on other responsibilities the lawyer has to any of the clients.

TEX. DISCIPLINARY R. PROF'L CONDUCT 1.07(a). In such a tenuous situation, it is critical that your own interests be factored out of the equation. *See id.*, cmt. 2 ("a lawyer should not permit his personal interests to influence his advice relative to a suggestion by his client that additional counsel be employed."). If any of the conditions described by paragraph (a) of the rule is no longer satisfied, withdrawal from all representation in the matter is required. *Id.* at (c). If you are precluded from acting as an intermediary under Rule 1.07, your entire office is similarly barred from doing so. *Id.* at (e). Also, some practical evaluation of the situation is required under this rule. If the clients already have assumed definite antagonism, the odds that the clients' interests can be adjusted by intermediation ordinarily are not seen as being very good. *See id.*, cmt. 4. Either way, when the prospect of serving as an intermediary arises, you are required to consult with each client involved concerning the decision to be made and the considerations relevant in making them, so that each client can make adequately informed decisions. *Id.* at (b). Practically speaking, it's a good idea to memorialize these consultations in writing and obtain the signature of each affected party.

IV. EVER REPRESENTED AN 800-POUND GORILLA?

The seemingly innocuous provision of the Texas Constitution concerning County, District and Criminal District Attorneys harbors an oft-ignored but substantial representation obligation. In pertinent part, the constitution states:

> The County Attorneys shall represent the State *in all cases* in the District and inferior courts in their respective counties; but if any county shall be included in a district in which there shall be a District Attorney, the respective duties of District Attorneys and County Attorneys shall in such counties by regulated by the Legislature.

TEX. CONST. art. V, § 21 (emphasis added). Note what the Constitution *doesn't* say. It does not limit its language to criminal cases. Consequently, article 5, section 21 has been interpreted to mean pretty much what it says: for suits in district court, the State shall be represented by either the District Attorney or the County Attorney, as determined by the Legislature. *El Paso Elec. Co. v. Tex. Dep't of Ins.*, 937 S.W.2d 432, 438 (Tex. 1996). With that said, we all know there is another significant player in the State civil representation game who happens to be the same officer responsible for issuing opinions that we may or may not like. *See* TEX. CONST. art. IV, § 22 (Attorney General shall represent State in "all suits and pleas in the Supreme Court of the State in which the State may be a party"); TEX. GOV'T CODE § 402.021 (Attorney General "shall prosecute and defend all actions in which the state is interested

before the supreme court and courts of appeals"). Regardless of how authority to represent the State in civil matters is allocated between the Attorney General, the District Attorney and the County Attorney, the Legislature may not divest any of those officers of their collective constitutional authority by shifting representation to some other attorney employed by the State or under contract to the State. *El Paso Elec. Co.*, 937 S.W.2d. at 439. But the Legislature can authorize an agency to retain private counsel to prosecute actions as long as such counsel's authority is subordinate to that of the Attorney General, the District Attorney or the County Attorney. *Id*.

While primacy as the State's counsel in district court civil cases may be exciting or daunting, depending on your perspective, it's a status of limited reach. The constitutional and legislative provisions making it the duty of the County Attorney or District Attorney to represent the State in civil proceedings in district or inferior courts do not confer the power or duty to file and prosecute a suit for the State or in the name of the State unless some statute so authorizes. *A.B.C. Rendering, Inc. v. State*, 342 S.W.2d 345, 348 (Tex. Civ. App.—Houston 1961, no writ). In order to provide some guidance about when your office may be called upon to provide civil representation to the State, the express statutory authorizations and requirements pertaining to representation of the State and other entities by County Attorneys or District Attorneys in civil matters are summarized in Appendix B, which appears at the end of this paper.[12]

V. YOU DON'T OWN ME … DO YOU?

Once you agree to provide professional services to a client, whether by contract, implication through the dealings between the parties or by statute, the attorney-client relationship is created. *Greene's Pressure Treating & Rentals, Inc. v. Fulbright & Jaworski, L.L.P.*, 178 S.W.3d 40, 43 (Tex. App.—Houston [1st Dist.] 2005, no pet.). This relationship has long been recognized as sacrosanct and replete with duty upon the lawyer in the eyes of the law. As the Supreme Court characterized it:

> The relation between an attorney and his client is highly fiduciary in nature, and their dealings with each other are subject to the same scrutiny, intendments and imputations as a transaction between an ordinary trustee and his cestui que trust. The burden of establishing its perfect fairness, adequacy, and equity, is thrown upon the attorney, upon the general rule, that he who bargains in a matter of advantage with a person, placing a confidence in him, is bound to show that a reasonable use has been made of that confidence; a rule applying equally to all persons standing in confidential relations with each other.

Archer v. Griffith, 390 S.W.2d 735, 739 (Tex. 1965). Hence, the relationship between attorney and client is "one of special trust and confidence," under which the attorney is bound to extend to the client "the utmost fairness and good faith." *Holland v. Brown*, 66 S.W.2d 1095, 1102 (Tex. Civ. App.—Beaumont 1933, writ ref'd). That's a rather stiff responsibility, particularly if you don't really like your client. And it's not just about sentimental notions or the abstract principles of trust and honesty. The fiduciary duty an attorney owes to a client requires "absolute perfect candor, openness, and honesty, and the absence of any concealment or deception." *Combs v. Gent*, 181 S.W.3d 378, 384 (Tex. App.—Dallas 2005, no pet. h.). It also focuses upon the "integrity and fidelity" of the attorney, meaning that the fiduciary duty is breached by the attorney benefiting improperly from the attorney-client relationship through subordinating the client's interests to those of the attorney, engaging in self-dealing, improperly using client confidences, failing to disclose conflicts of interest or making misrepresentations to achieve those ends. *Gibson v. Ellis*, 126 S.W.3d 324, 330 (Tex. App.—Dallas 2004, no pet.); *Kimelco Petroleum, Inc. v. Morrison & Shelton*, 91 S.W.3d 921, 923 (Tex. App.—Fort Worth 2002, pet. denied).

A. We Have Ways of Making You Talk.

Overall, the fiduciary duty an attorney owes to a client is seen to impose a strict duty of disclosure. Such a disclosure duty has been described as the "fail safe" mechanism of the fiduciary relationship, and it includes the traditional obligation not to make material misrepresentations, as well as an affirmative duty to make a full and accurate confession of all fiduciary activities, transactions, profits and mistakes. *Jackson Law Office, P.C. v. Chappell*, 37 S.W.3d 15, 22 (Tex. App.—Tyler 2000, pet. denied); *see also Holland*, 66 S.W.2d at 1102 (attorney owes client duty to "affirmatively disclose to him, not only all material facts which would affect their relationship but to disclose the legal consequences of those facts as well."). These obligations accord with the basic requirements under the Disciplinary Rules of Professional Conduct that a lawyer keep his or her client reasonably informed about the status of a matter, promptly comply with reasonable requests for information and explain a matter to the

[12] In the interest of efficiency, Appendix B also contains express statutory authorizations and/or requirements applicable to County Attorneys and District Attorneys regarding counties and county officials and employees.

extent reasonably necessary to permit the client to make informed decisions regarding the representation. TEX DISCIPLINARY R. PROF'L CONDUCT 1.03. The adequacy of such communication will depend upon the kind of advice or assistance given. While all important provisions should be reviewed with a client prior to entry into an agreement, where feasible, it may be impractical to describe trial or negotiation strategies in detail. *Id*., cmt. 2. The touchstone in this context is reasonable fulfillment of the client's expectations for information consistent with the duty to act in the client's best interests and the client's overall requirements as to the character of representation. *Id*. Adequacy of communication also may be defined by the scope of representation. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(b) (lawyer may limit scope, objectives and general methods of representation if client consents after consultation). A lawyer's fiduciary duties to a client, although extremely important, extend only to dealings within the scope of the underlying relationship of the parties. *Joe v. Two Thirty Nine Joint Venture*, 145 S.W.3d 150, 159 (Tex. 2004). While it is true that an attorney owes a client a duty to inform the client of matters material to the representation, then, this duty to inform does not extend to matters beyond the scope of the representation. *Id*. at 160. Indeed, a lawyer may not act beyond the scope of the contemplated representation without additional authorization from the client. *Id*. (citing, *inter alia*, TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02).

If those are not onerous enough burdens for you, the Texas Supreme Court also has held that, as an agent, an associate of a firm owes a fiduciary duty to his or her employer not to personally profit or realize any financial or other gain or advantage from referring a matter to another law firm or lawyer, absent the employer's agreement otherwise. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 197 (Tex. 2002). Because the high court based its holding upon agency principles[13] rather than contractual provisions that might be unique to law firm work, it could be argued that an assistant County Attorney or District Attorney is thereby obligated to seek approval from the elected officeholder before referring out a case that the office otherwise might handle and receiving a referral fee in return, regardless of whether the Professional Prosecutors Act applies.[14]

B. Secret, Secret. I've got a Secret.

So you may be representing an array of parties and entities within the county context. That makes you interesting, right? Perhaps, but it also implicates confidentiality concerns. By virtue of your representation, you may become privy to information that is desirable to the media and the public. Rightly or not, you are seen as knowing the sordid details and background facts that can make a case much more interesting and commercially attractive than it is within the confines of the pleadings. Yes, you often know where the bodies are buried. People want to know those facts, and they may go to surprising lengths to get them. That includes your friends in the news media. When the wheedling begins, you must initially remind yourself of the duties and restrictions set forth in Rule 1.05 of the Disciplinary Rules of Professional Conduct.

Rule 1.05 is concerned with the confidential information that comes into a lawyer's possession through representation of a client, as well as the expectation of "free discussion" between the client and the lawyer that should prevail within such representation. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05 cmt. 1. "Confidential information" consists of two types of data: "privileged information" and "unprivileged client information." TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(a). "Privileged information" encompasses the communications between lawyer and client that are protected by the lawyer client privilege recognized in TEX. R. EVID. 503 and under the umbrella of common law privileges recognized by FED. R. EVID. 501. Thus, "privileged information" includes any communication not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the

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[13] An assistant prosecuting attorney is authorized to perform all duties imposed by law on the prosecuting attorney. TEX. GOV'T CODE § 41.103(b). By comparison, "agency" is a fiduciary relationship created by express or implied contract or by law, in which one party (the agent) may act on behalf of another party (the principal) and bind that other party by words or actions. BLACK'S LAW DICTIONARY 62 (7th Ed. 1999). As such, it is at least arguable that an assistant County or District Attorney acts in a professional sense as the agent of the elected prosecutor.

[14] Under the Professional Prosecutors Act, certain prosecutors who receive state salary supplementation are precluded from engaging in the private practice of law, and are expressly precluded from accepting a fee from another attorney to whom the prosecutor has referred a case. TEX. GOV'T CODE § 46.005(a), (b). The same preclusion applies to an assistant if, from all state and county funds received, the assistant receives a salary that is equal to or more than 80 percent of the benchmark salary. *Id*. at (c). The pertinent "benchmark salary" is the state-funded salary of a district judge, which presently is set at $125,000. TEX. GOV'T CODE § 659.012(a)(1); *see also* TEX. GOV'T CODE § 46.001(2) (defining "benchmark salary" as salary that is provided for district judge in General Appropriations Act). Also, assistant prosecutors who receive state-funded longevity pay are prohibited from engaging in the private practice of law if they receive a salary that is equal to or more than 80 percent of a district judge's salary. TEX. GOV'T CODE § 41.254. To determine whether your office is subject to the Professional Prosecutors Act, *see* TEX. GOV'T CODE § 46.002.

rendition of professional legal services to the client and those reasonably necessary for the transmission of the communication. TEX. R. EVID. 503 (a)(5). If such a communication is made for the purpose of facilitating the rendition of professional legal services to the client, it is "privileged information" if it is:

> (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
> (B) between the lawyer and the lawyer's representative;
> (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer, representing another party in a pending action and concerning a matter of common interest therein;
> (D) between the representatives of the client or between the client and a representative of the client; or
> (E) among lawyers and their representatives representing the same client.

TEX. R. EVID. 503 (b)(1); *cf.* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(a). Significantly, such confidentiality is specifically applicable to governmental lawyers, even though they may disagree with the policy goals that their representation is designed to advance. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05 cmt. 5. Just as significantly, an exception to this confidentiality may arise in the context of governmental representation since some of the information garnered in the course of representing the county or its officials may come from public records. Interpreting the confidentiality provisions of the prior Code of Professional Responsibility, the Texas Committee on Professional Ethics concluded that information that is a matter of public record is not considered confidential, despite the fact that such information was given by the client to the lawyer in connection with the lawyer's representation of the client. Tex. Comm. on Prof'l Ethics, Op. 463, 52 TEX. B.J. 1085 (1989); *compare* TEX. DISCIPLINARY R. PROF'L CONDUCT 3.07(c)(2) (pretrial publicity rule generally not violated by statement of information contained in public record); *see also Crumrine v. Harte-Hanks Television, Inc.*, 37 S.W.3d 124, 127 (Tex. App.—San Antonio 2001, pet. denied) (holding that once information is made matter of public record, First Amendment may prohibit recovery for injuries caused by further disclosure of and publicity given such information) (citing, *inter alia*, *Indus. Found. of the S. v. Tex. Indus. Accident Bd.*, 540 S.W.2d 668, 684 (Tex. 1976)). Unless information communicated in the course of representation can be directly attributed to a public record, then, it should be considered confidential.

Existence of former client information within public information may not be universal carte blanche, though. The Professional Ethics Committee has considered the question of whether confidential information is "generally known,"[15] and thereby subject to being used in a manner disadvantageous to the former client, simply because it may be found in a public record. The committee concluded that it is not. It noted that inclusion in a public record alone does not demonstrate general public awareness. Rather, said the committee, information is "generally known" if it is actually known to some members of the general public as opposed to merely being available to members of the public who might choose to look where the information may be found. Tex. Comm. on Prof'l Ethics, Op. 595, 73 Tex. B.J. 478 (2010). So, unless information communicated in the course of representation can be directly attributed to a public record and is known to more than just the legal moles digging for it, or is subject to a disclosure authorization discussed below, it should be treated as confidential and unavailable for use to the detriment of the former client.

"Unprivileged client information," in contrast, is all information relating to a client or furnished by the client that is not privileged information and that is acquired by the lawyer during the course of or by reason of the representation of the client. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(a).

The reason these concepts are they help define when information obtained in the course of representing a client can, and cannot, be disclosed. In general, any information falling within the overarching scope of "confidential information" may not knowingly be revealed to any person that the client has instructed not to receive the information or anyone else, other than the client, the client's representatives or the members, associates or employees of the lawyer's firm. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(b)(1). Moreover, "confidential information" may not be used to the disadvantage of a client or former client unless the client or former client consents after consultation, nor may such information be used for the advantage of the lawyer or of a third person unless the client consents after consultation. *Id.* at (b)(2)-(4). However, the circumstances of a case may dictate that revelation of information, which is "confidential information" within the contemplation of the rule, may be necessary in a particular case. Indeed, it may be crucial to

[15] *See* Tex. Disciplinary R. Prof'l Conduct 1.05(b)(3) (lawyer may not use confidential information of former client to disadvantage of former client after conclusion of representation unless former client consents after consultation or confidential information "has become generally known.").

safeguarding the reputation and status of your client,[16] and you may find that the news media is willing to be a conduit for accomplishment of those purposes. *See* Scott Armstrong, Panel Discussion: Mass Media's Impact on Litigation, Lawyers, and Judges: What to Do When Your Case Is Front Page News (Feb. 24, 1995), *in* 14 REV. LITIG. 595, 617-18 (1995) ("If you take your case and order it in a way that helps [the media] structure their story, they're going to be grateful and you're going to get the play. The press is more often manipulated than it is the manipulator.") Thus, if there is potential that disclosure of client information may be necessary, an initial determination must be made about the nature of the client information, since overlapping—but differing—standards apply to disclosure of "privileged information" and "unprivileged client information." *Compare* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(c) *with id.* at (d).

"Confidential information," which necessarily includes "privileged information,"[17] may be disclosed under certain, limited circumstances. Specifically, a lawyer may reveal "confidential information":

> (A) when the lawyer has been expressly authorized to do so in order to carry out the representation;
> (B) when the client consents after consultation;
> (C) to the client, the client's representatives, or the members, associates and employees of the lawyer's firm, except when otherwise instructed by the client;
> (D) when the lawyer has reason to believe it is necessary to do so in order to comply with a court order, a Texas Disciplinary Rule of Professional Conduct, or other law;
> (E) to the extent reasonably necessary to enforce a claim or establish a defense on behalf of the lawyer in a controversy between the lawyer and the client;
> (F) to establish a defense to a criminal charge, civil claim or disciplinary complaint against the lawyer or the lawyer's associates based upon conduct involving the client or the representation of the client;
> (G) when the lawyer has reason to believe it is necessary to do so in order to prevent the client from committing a criminal or fraudulent act; or
> (H) to the extent revelation reasonably appears necessary to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(c). Since "confidential information" includes "unprivileged client information,"[18] the latter may be revealed in any of the situations delineated above. Additionally, other circumstances may authorize the disclosure of "unprivileged client information." Rule 1.05 permits a lawyer to disclose "unprivileged client information":

> (A) when impliedly authorized to do so in order to carry out the representation;
> (B) when the lawyer has reason to believe it is necessary in order to:
>
> (1) carry out the representation effectively;
> (2) defend the lawyer or the lawyer's employees or associates against a claim of wrongful conduct;
> (3) respond to allegations in any proceeding concerning the lawyer's representation of the client; or
> (4) prove the services rendered to a client, or the reasonable value thereof, or both, in an action against another person or organization responsible for the payment of the fee for services rendered to the client.

TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(d). Review of the disclosure provisions reveals the common concern with the use of a lawyer's services to commit criminal or fraudulent acts. *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05 cmts. 10-13. In making the decision to reveal "confidential information" or "unprivileged client information" on the basis of past or potential criminal or fraudulent conduct, relevant considerations include the magnitude, proximity and likelihood of the contemplated wrong, the nature of the lawyer's relationship with the client, the lawyer's own involvement in the transaction and any mitigating factors relating to the conduct. *Id*. cmt. 14. Once this initial analysis is conducted, determination of what may be disclosed and what must be withheld in front of the media is more attainable. If certain information about the case may not be disclosed, but the media asks about it, experience counsels that "no comment" is usually a poor way of addressing the matter. *Accord* Ruth E. Pillar, *Dealing with the Press During Trial: A Primer*, 37 HOUS. LAW. 42, 44 (2000).[19] Instead, the most

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[16] *See Gentile v. State Bar of Nev*., 501 U.S. 1030, 1043, 111 S.Ct. 2720, 2728, 115 L.Ed.2d 888 (1991) ("[a]n attorney's duties do not begin inside the courtroom door. He or she cannot ignore the practical implications of a legal proceeding for the client.").

[17] *See* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(a).

[18] TEX. DISCIPLINARY R. PROF'L CONDUCT 1.05(a).

[19] "Indeed, if an attorney is asked about the trial and/or the lawsuit in general, that attorney should make some sort of

fruitful approach is being forthright about the ethical rule that prevents your discussion. *See* William H. Colby, Panel Discussion: Mass Media's Impact on Litigation, Lawyers, and Judges: What to Do When Your Case Is Front Page News (Feb. 24, 1995), *in* 14 REV. LITIG. 595, 607 (1995).[20]

C. Who to Ask Is as Important as What to Ask.

Lawyers representing a client generally know that they may not communicate directly with a "person, organization or entity of government" the lawyer knows to be represented by another lawyer about the subject of representation unless the other lawyer consents or some law authorizes the communication. TEX. DISCIPLINARY R. PROF'L CONDUCT 4.02(a). Indirect communication is similarly precluded, either with the represented party or with a person or organization employed or retained for conferral or advisement about the subject matter at issue. *Id*.; *see also id*. at (b). Consequently, the opposition's experts may not be directly contacted without the consent of opposing counsel or independent legal authorization. TEX. DISCIPLINARY R. PROF'L CONDUCT 4.02 cmt. 3. That much is relatively straightforward. It is representation of the county that can muddle the question a bit.

Although the county is a somewhat complex organization, and its business is directed generally by the commissioners court,[21] the obligations of the lawyer representing the county itself do not ultimately extend to those within that structure. Rather, the Disciplinary Rules contemplate that a lawyer retained by an organization represents the entity. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.12(a). Ultimate responsibility to the county prevails even though the lawyer may be required to report to the commissioners court, the auditor and other officers, as well. *See id.*[22] That conclusion flows from the fact that, although the lawyer representing an organization must conduct that representation through a constituent, it is the organization — as distinct from its officers, employees, members, shareholders or other constituents — that is the client. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.12 cmt. 1. In fact, the rule further imposes an affirmative obligation upon a lawyer to explain to the organization's directors, officers, employees, members, shareholders or other constituents the identity of the client when it is apparent that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing, or when it is necessary to avoid misunderstanding on the part of those constituents. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.12(e). Lest there be any confusion based on the usage of terms like "shareholders" or "directors," the obligations of Rule 1.12 apply to governmental organizations. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.12 cmt. 9.

At the same time, for purposes of the represented party contact rule, "organization or entity of government" includes:

> (1) those persons presently having a managerial responsibility with an organization or entity of government that relates to the subject of the representation; or
> (2) those persons presently employed by such organization or entity and whose act or omission in connection with the subject of representation may make the organization or entity of government vicariously liable for such act or omission.

TEX. DISCIPLINARY R. PROF'L CONDUCT 4.02(c). Accordingly, the Committee on Professional Ethics has concluded that direct contact by a plaintiff's lawyer with the members of a defendant city's ruling council, without consent of the city's attorney, is improper under Rule 4.02. Tex. Comm. on Prof'l Ethics, Op. 474, 55 TEX. B.J. 882 (1992). Such a conclusion is predictable, since the no-contact rule is based on the presumption that persons having managerial responsibilities to the organization or entity of government are so closely identified with the interests of the organization or entity of government that its lawyers will represent them as well. TEX. DISCIPLINARY R. PROF'L CONDUCT 4.02 cmt. 4. For better or worse, however, the rule does not

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comment, because reporters interpret "no comment" as a brush-off. That is, an innocent "no comment" by an attorney may be reported as a refusal to comment, which suggests that the attorney has something to hide or, even worse, that the attorney distrusts and dislikes the press. That is important, because it could wind up affecting the way the story is reported." Pillar, *supra*, at 44.

[20] Colby maintains that lawyers should be extremely cautious in dealing with reporters. Nevertheless, he counsels, "I don't mean to imply that you treat reporters with any lack of courtesy or professionalism, because I think that's very important, not to getting a leg up, but in ensuring that you're treated fairly. … [R]eporters generally don't understand the law. So, to the extent that you help educate them, you assist. Common courtesy is appreciated." Colby, *supra*, at 607.

[21] *See* TEX. CONST. art. V, § 18(b).

[22] Rule 1.12 specifically states that, "[w]hile the lawyer in the ordinary course of working relationships may report to, and accept direction from, an entity's duly authorized constituents, in [situations involving legal violations within the organization by officers, employees or other persons associated with the organization] the lawyer shall proceed as reasonably necessary in the best interest of the organization without involving unreasonable risks of disrupting the organization and of revealing information relating to the representation to persons outside the organization." TEX. DISCIPLINARY R. PROF'L CONDUCT 1.12(a).

cut both ways. If the person, organization or entity of government represented by a lawyer in a matter seeks advice regarding that matter from another lawyer, the second lawyer is not prohibited from giving advice without notifying or seeking consent from the first lawyer. TEX. DISCIPLINARY R. PROF'L CONDUCT 4.02(d). You may find in the course of a sensational case that factions or elements within the county, or department of the county, you represent are given to second-guessing your strategy and decisionmaking. To that end, the commissioner, officer or other official who disagrees with you may ask another lawyer to "armchair quarterback" your work. If that faction can muster three votes on the commissioners court, the county itself may seek such a second opinion. Unfortunately, the rule offers no protection to you in this circumstance. *See id.* To add insult to injury, in fact, such co-counsel likely is entitled to access relevant documents in your possession. *See In re Norris*, No. 02-04-047-CV, 2004 WL 912664, at *2 (Tex. App.—Fort Worth Apr. 29, 2004, orig. proceeding [mand. dism'd]) (mem. op.) (holding trial court order prohibiting disclosure of relevant, admissible documents as between co-counsel violated fundamental principles underlying attorney-client relationship and prevented co-counsel from discharging attorney-client obligations to client).

VI. CONCLUSION.

In the end, knowing who you represent is only part of the puzzle. And it can be a distasteful part. But as members of County and District Attorneys' offices throughout the State of Texas, we are thrust into some representational contexts without much say in the matter. When we shoulder the responsibility for a client, willingly or otherwise, we also take on the burdens applicable to the attorney-client relationship in general. So we have come full circle. To whom do your loyalties truly lie? Look at the applicable statutes, remember your professional obligations under the Disciplinary Rules and applicable case law, then chart your course the best you can.

Appendix A

County Attorney Civil Requirement and Authorizations

County	Office Responsible for Representation of County *	Source Law
Austin	Austin County Criminal District Attorney (permissive)	TEX. GOV'T CODE. § 44.108(b)
Bexar	Bexar County Criminal District Attorney	TEX. GOV'T CODE § 44.115(a)
Brazoria	Brazoria County Criminal District Attorney	TEX. GOV'T CODE § 44.120(a)
Calhoun	Calhoun County Criminal District Attorney (comm'rs ct. may retain private counsel in civil matter as it considers appropriate)	TEX. GOV'T CODE § 44.129(b)
Cass	Cass County Criminal District Attorney	TEX. GOV'T CODE § 44.134(a)
Denton	Denton County Criminal District Attorney (comm'rs ct. may retain private counsel in civil matters as it considers appropriate)	TEX. GOV'T CODE § 44.161(c)
Galveston	Galveston County Criminal District Attorney†	TEX. GOV'T CODE § 44.184(a)
Harrison	Harrison County Criminal District Attorney	TEX. GOV'T CODE § 44.202(a)
Jefferson	Jefferson County Criminal District Attorney	TEX. GOV'T CODE § 44.223(a)
Panola	Panola County Criminal District Attorney (permissively may represent county official or employee in civil matter if it arises out of performance of official duties by official or employee)	TEX. GOV'T CODE § 44.283(a)
Randall	Randall County Criminal District Attorney	TEX. GOV'T CODE § 44.291(a)
Smith	Smith County Criminal District Attorney	TEX. GOV'T CODE § 44.312(a)
Tarrant	Tarrant County Criminal District Attorney (comm'rs ct. may retain "special counsel of its own choice, learned in the law" for eminent domain and acquisition of rights-of-way)	TEX. GOV'T CODE § 44.320(a)
Upshur	Upshur County Criminal District Attorney	TEX. GOV'T CODE § 44.330(a)
Victoria	Victoria County Criminal District Attorney	TEX. GOV'T CODE § 44.335(a)
Walker	Walker County Criminal District Attorney (Criminal District Attorney not required to represent county in delinquent tax suit or condemnation suit; county authorized to retain other legal counsel in civil matter any time it considers it appropriate to do so)	TEX. GOV'T CODE § 44.336(c)
El Paso	El Paso County Attorney	TEX. GOV'T CODE §

		45.171(a)
Fort Bend	Fort Bend County Attorney	TEX. GOV'T CODE § 45.179(a)
Grimes	Grimes County Attorney	TEX. GOV'T CODE § 45.193(a)
Harris	Harris County Attorney (also required to represent Harris County Flood Control District)	TEX. GOV'T CODE § 45.201
Matagorda	Matagorda County Attorney	TEX. GOV'T CODE § 45.261(a)
Montgomery	Montgomery County Attorney (commissioners court may retain independent counsel in any civil matter)	TEX. GOV'T CODE § 45.270(a)
Wharton	Wharton County Attorney (also represents Wharton County Drainage District)	TEX. GOV'T CODE § 45.341(a)

[*] Representation of county is statutorily assigned unless some or all aspects of representation are expressly made permissive as indicated.

[†] *But see Guynes v. Galveston County*, 861 S.W.2d 861, 863-64 (Tex. 1993) (finding Criminal District Attorney did not have duty to represent county in civil matters and commissioners court could retain civil counsel, at least where Criminal District Attorney's duties were not usurped and Criminal District Attorney did not object).

Appendix B

Notable Statutory and Constitutional Representation Requirements and Authorizations

Entity client	Representation required or permissive	Scope of representation	Source law
State	Required (if requested by Dep't of Agriculture)	Action to collect civil penalty and enjoin violations of regulation of weights and measures	TEX. AGRIC. CODE § 13.007
State	Required (if requested by Dep't of Agriculture)	Action to collect civil penalty and enjoin violations of statutes, regulations concerning liquefied petroleum gas meters	TEX. AGRIC. CODE § 13.307
State	Required (if requested by Dep't of Agriculture)	Action to collect civil penalty and enjoin violations of statutes, regulations concerning ranch scales	TEX. AGRIC. CODE § 13.357
State	Required (if requested by Dep't of Agriculture)	Action to collect civil penalty and enjoin violations of statutes, rules concerning licensed inspectors of weighing and measuring devices	TEX. AGRIC. CODE § 13.406
State	Permissive	Action to collect civil penalty for violation of regulations regarding public grain warehouses	TEX. AGRIC. CODE § 14.086
State	Required (if requested by Dep't of Agriculture)	Action to collect civil penalty and enjoin violations of Organic Standards Program	TEX. AGRIC. CODE § 18.009
Texas Dep't of Agriculture	Required (if requested by Dep't)	Action to collect civil penalty, and enjoin violation of statutes, rules governing certification of agricultural products	TEX. AGRIC. CODE § 18.054(c), (d)
State	Required (if requested by Dep't of Agriculture)	Action to collect civil penalty and enjoin violation of Citrus Budwood Certification Program	TEX. AGRIC. CODE § 19.013
Commodity Producers Bd.	Permissive	Suit on board's behalf concerning collection or remittance of assessment	TEX. AGRIC. CODE § 41.101(a)(2)
State	Required (if requested by Dep't of Agriculture)	Action to collect civil penalty and enjoin violation of "Go Texan" Partner Program	TEX. AGRIC. CODE § 46.013
State	Required (if requested by Dep't of Agriculture)	Action to collect civil penalty and enjoin violation of statutes and rules regulating inspections, quarantines, control and eradication zones	TEX. AGRIC. CODE § 71.012
State	Required (if requested by Dep't of Agriculture)	Action to collect expenses of treatment or destruction, civil penalty and to enjoin violation of statutes and rules regulating nursery products and florist items	TEX. AGRIC. CODE §§ 71.047, .059
State	Required (if requested by Dep't of Agriculture)	Action to collect civil penalty and enjoin violation of statutes and rules regulating vegetable plants	TEX. AGRIC. CODE § 71.117
State	Required (if requested by Dep't of Agriculture)	Action to collect civil penalty and enjoin violation of statutes and rules	TEX. AGRIC. CODE § 72.046

		concerning Mexican Fruit Fly control	
State	Required (if requested by Dep't of Agriculture)	Action to collect civil penalty and enjoin violation of statutes and rules concerning citrus diseases and pests	TEX. AGRIC. CODE § 73.010
State	Required (if requested by Dep't of Agriculture)	Action to collect civil penalty and enjoin violation of statutes and rules concerning cotton pest control	TEX. AGRIC. CODE § 74.008
Commissioner of Agriculture	Permissive (on request of Commissioner)	Suit for civil, injunctive or "other appropriate relief" concerning statutes, rules pertaining to boll weevil eradication	TEX. AGRIC. CODE § 74.126(c)
State	Required	Action to collect civil penalty for violation of statutes or rules regulating pesticides and herbicides	TEX. AGRIC. CODE § 76.156
Commissioner of Agriculture	Permissive (on request of Commissioner)	Suit for civil, injunctive or "other appropriate relief" concerning statutes, rules pertaining to citrus pest and disease management	TEX. AGRIC. CODE § 80.027(c)
State	Required (if requested by Dep't of Agriculture)	Action to collect civil penalty and enjoin violation of statutes or rules governing handling and marketing of perishable commodities	TEX. AGRIC. CODE § 101.0185
State	Required (if requested by Dep't of Agriculture)	Action to collect civil penalty and enjoin violation of statutes or rules governing transportation of citrus	TEX. AGRIC. CODE § 102.1045
State	Permissive (investigation mandatory on receipt of complaint)	Suit for injunction against violation of marketing agreement, license, order or rule concerning citrus marketing	TEX. AGRIC. CODE § 102.169
State	Required (if requested by Dep't of Agriculture)	Action to collect civil penalty and enjoin violation of Produce Recovery Fund program	TEX. AGRIC. CODE § 103.015
Chief Apiary Inspector (or other official with enforcement power under chapter 131)	Required	Action to enjoin violation of chapter 131 or rules adopted thereunder or quarantine adopted under chapter 131	TEX. AGRIC. CODE § 131.104(b); *see also id.* § 261.3031(b)
State	Required (if requested by Dep't of Agriculture)	Action to collect civil penalty and enjoin violation of statutes and rules concerning eggs	TEX. AGRIC. CODE § 132.0715
State	Permissive	Suit on bond of cattle slaughterer in certain counties	TEX. AGRIC. CODE § 148.042(b)
State	Required	Suit for violation of certain livestock and quarantine provisions of chapter 161, Agriculture Code	TEX. AGRIC. CODE § 161.133
State	Required	Suit to attach property of out-of-state violator of animal disposal or movement provisions	TEX. AGRIC. CODE § 161.132
State	Required (if offender is corporation or corporate agent)	Suit to collect fine for offense under tick eradication provisions	TEX. AGRIC. CODE § 167.113
Chief Apiary Inspector (appointed by director of Tex. Agric. Experiment Station) or Dep't of	Required (on request)	Injunctive action to enforce quarantine or rule concerning bees	TEX. AGRIC. CODE § 261.3031(b)

Health			
State	Required (on receipt of affidavit)	Suit to restrain violation of Alcoholic Beverage Code or operation under wrongfully-issued permit or license	TEX. ALCO. BEV. CODE § 101.01
State	Permissive	Suit for injunction to abate and enjoin common nuisance under Alcoholic Beverage Code	TEX. ALCO. BEV. CODE § 101.70(b)
State	Permissive (must notify AG or State Bd. of Ins. if defendant is insurer or ins. agent)	Injunctive relief under DTPA	TEX. BUS. & COM. CODE § 17.48
State	Permissive	Action for civil penalty, injunctive relief for violation of passenger vehicle rental statutes	TEX. BUS. & COM. CODE § 91.103
State	Permissive	Action to collect civil penalty for violation of statutes concerning international matchmaking organizations	TEX. BUS. & COM. CODE § 101.005(c)
State	Permissive	Suit for injunction concerning business relations between sex offender and sexually oriented business	TEX. BUS. & COM. CODE § 102.004
State	Permissive	Action to recover civil penalty for violation of pay-to-park or valet parking statutes	TEX. BUS. & COM. CODE § 106.005
State	Required (if directed by AG)	Action to enforce statutory lien, quo warranto to cancel certificate of insolvent business entity	TEX. BUS. ORGS. CODE § 12.254
State	Permissive	Injunctive action to prevent, prohibit or restrain violation of any revenue law of State	TEX. CIV. PRAC. & REM. CODE § 65.016
State	Permissive	Quo warranto	TEX. CIV. PRAC. & REM. CODE § 66.002
State	Permissive	Suit to enjoin, abate common nuisance	TEX. CIV. PRAC. & REM. CODE §§ 125.002, .044
Self (official capacity)	Permissive	Suit to enjoin performance of contract made by school district in violation of competitive purchasing requirements	TEX. EDUC. CODE § 44.032(f)
Tex. Higher Ed. Coordinating Bd.	Quasi-permissive ("acting for" AG)	Suit for remaining sum of student loan	TEX. EDUC. CODE § 52.39
Victim of family violence	Permissive (generally CA or CDA)	Proceeding for family violence protective order	TEX. FAM. CODE § 81.007
Tex. Dep't of Family & Protective Servs.	Quasi-permissive ("Dep't shall seek assistance from appropriate" CA or DA)	Obtaining order to cooperate with CPS investigation	TEX. FAM. CODE § 261.3031
Tex. Dep't of Family & Protective Services	Required (unless conflict or special circumstance prevents representation)[†]	Any action under Family Code	TEX. FAM. CODE § 264.009(a)
State	Permissive	Action for injunction to enjoin violation or enforce compliance with Money Services Act or regulations adopted thereunder	TEX. FIN. CODE § 151.701
Court Reporters Certification Bd.	Required (unless AG represents)	Injunctive action or complaint against court reporter not certified by Tex. Supreme Court or against reporting	TEX. GOV'T CODE §§ 52.021, 52.0255

		firm holding itself out as such absent registration with Court Reporters Certification Board	
State	Permissive	Enforcement (including civil penalties and injunctive action [in Travis County]) of statutes regulating lobbyists	TEX. GOV'T CODE § 305.035(a), (b)
State	Permissive (DA or prosecuting attorney performing duties of DA)	Suit to enjoin unauthorized use of DPS insignia, badge or ID card	TEX. GOV'T CODE § 411.017(c)
Dep't of Pub. Safety	Permissive	Hearing on denial, revocation or suspension of concealed handgun license	TEX. GOV'T CODE § 411.180(a)
Tex. Comm'n on Fire Protection	Required (unless AG represents)	Appeal of commission decision	TEX. GOV'T CODE § 419.905(b)
State	Permissive (on request of Governor's office of economic dev.)	Suit for civil penalty, injunctive relief to prevent or abate violation of "Genuine Texas" manufactured product program (in Travis County)	TEX. GOV'T CODE § 490C.106(b), .108(a)
State	Quasi-permissive[•]	Suit for declaratory or injunctive relief to address violation of Public Information Act	TEX. GOV'T CODE § 552.3215(c)
State	Permissive	Action to enjoin or recover payment of salary to public officer who commits nonfeasance of office and to remove person from office	TEX. GOV'T CODE § 553.023(a)
State	Permissive	Action for injunction, forfeiture against seditious organization	TEX. GOV'T CODE § 557.003
Military veteran employee/former employee of local gov't entity	Quasi-required (DA if DA reasonably believes applying veteran is entitled to benefit of ch. 613, subchapter A)	Action to require compliance with veteran re-employment provisions	TEX. GOV'T CODE § 613.022
State	Required (on direction of governor)	Condemnation suit concerning acquisition of land by state for public use	TEX. GOV'T CODE § 2204.001(b)
State	Required (CA)	Action to collect civil penalty for violation of statutes, rules concerning migrant labor housing facilities	TEX. GOV'T CODE § 2306.933(b)
State	Required (on written request of state chest hospital administrator)	Action for patient support and maintenance	TEX. HEALTH & SAFETY CODE § 13.039(a)
Tex. Dep't of Health	Required (on request)	Obtaining order requiring counseling and testing of person for reportable diseases (including HIV infection)	TEX. HEALTH & SAFETY CODE § 81.050
State	Required (on request of health authority)	Application for court order for management of person with communicable disease	TEX. HEALTH & SAFETY CODE § 81.151(a) et seq.
State	Permissive (on request from Commissioner of Health)	Suit for injunction and civil penalties concerning violations of Tanning Facility Regulation Act, regulations adopted thereunder	TEX. HEALTH & SAFETY CODE § 145.0121
County	Permissive (on request from Commissioner of Health)	Suit for injunction and civil penalties concerning violations of statutes or rules regulating tattooing and body piercing	TEX. HEALTH & SAFETY CODE § 146.020

State	Permissive	Suit for injunction and civil penalties for violations of statutes regulating installation of asbestos	TEX. HEALTH & SAFETY CODE §§ 161.403, .404
State	Permissive	Action to collect civil penalties, enjoin violations of Treatment Facilities (drug/mental) Marketing Practices Act	TEX. HEALTH & SAFETY CODE § 164.011
State	Permissive (at request of commissioner of health or on own initiative)	Suit to enjoin statutes or rules regulating hospitals, collect civil penalty	TEX. HEALTH & SAFETY CODE §§ 241.054, .055(d)
State	Required (if referred by Dep't of Aging & Disability Services)	Collection of civil penalty who violates rules or threatens health & safety of resident of assisted living facility	TEX. HEALTH & SAFETY CODE § 247.045(d)
State	Required (on receipt of notice from local health authority, or may request AG litigation or assistance)	Suit to abate public health nuisance	TEX. HEALTH & SAFETY CODE § 341.012(d)
County	Permissive	Action for injunction and civil penalty to address sanitation and health protection violations	TEX. HEALTH & SAFETY CODE § 341.092(d)
State or County	Permissive	Suit for injunction to prevent unlawful littering, violation of county regulations regarding disposal of litter	TEX. HEALTH & SAFETY CODE §§ 365.015, .017
State	Permissive	Action to collect civil penalty for failure to place proper symbol on plastic container	TEX. HEALTH & SAFETY CODE § 369.002
State	Permissive (on request of Commissioner of Health)	Suit to enjoin operation of low-volume livestock processing establishment if contaminated livestock can reasonably be traced to facility	TEX. HEALTH & SAFETY CODE § 433.0245(d)
State	Required (DA under direction of AG)	Suit to recover civil penalty for failure to file report required under Texas Meat and Poultry Inspection Act	TEX. HEALTH & SAFETY CODE § 433.092(c)
State	Permissive (if requested by Commissioner of Health)	Action to enjoin violation of Texas Meat and Poultry Inspection Act or regulations adopted thereunder	TEX. HEALTH & SAFETY CODE § 433.099
County	Permissive	Action to enjoin sale of food without permit if permit is required	TEX. HEALTH & SAFETY CODE § 437.015
State	Required‡	Hearing on court-ordered treatment for chemical dependency	TEX. HEALTH & SAFETY CODE § 462.004
State	Required (if requested by Comm'n on Alcohol and Drug Abuse); permissive if on own initiative	Action for injunctive relief, civil penalties for violation of statutes, regulations governing chemical dependency treatment facilities	TEX. HEALTH & SAFETY CODE §§ 464.015, .017
State	Permissive (DA)	Suit to collect civil penalty for registrant's or dispenser's violation of chapter 481, Health & Safety Code	TEX. HEALTH & SAFETY CODE § 481.128(e)
State Bd. of Pharmacy	Permissive (board may not be represented by other than CA, DA or AG)	Legal proceeding under Texas Dangerous Drug Act	TEX. HEALTH & SAFETY CODE § 483.076
State	Permissive	Suit for judicial warning, penalty or	TEX. HEALTH &

		injunction concerning regulation of sale of aerosol paint (in county with population of 75,000 or more)	SAFETY CODE § 485.019(f)
Community MHMR Center	Required (on request from center's executive director)	Representation of center in collecting fees	TEX. HEALTH & SAFETY CODE § 534.017(d)
Tex. Dep't of Mental Health & Mental Retardation	Required (on written request)	Claim in probate or other court to recover costs of patient's care, support, maintenance and treatment	TEX. HEALTH & SAFETY CODE § 552.019(a)
State	Required‡	Hearings under Mental Health Code	TEX. HEALTH & SAFETY CODE § 571.016
State	Required (on request of Dep't of Mental Health and Mental Retardation), permissive on own initiative	Suit to collect civil penalty and obtain injunctive relief for violation of Mental Health Code or its regulations	TEX. HEALTH & SAFETY CODE § 571.023(c),(d)
State	Required (on request of Dep't of Mental Health and Mental Retardation)	Action for injunction concerning unlicensed operation of mental hospital or mental health facility	TEX. HEALTH & SAFETY CODE § 577.019(c)
State	Permissive	Action for civil penalties, injunction concerning violations of Persons with Mental Retardation Act and its regulations	TEX. HEALTH & SAFETY CODE § 591.023
State	Permissive (DA)	Suit to abate cemetery (if located outside city limit of city with population > 25,000) as nuisance	TEX. HEALTH & SAFETY CODE § 711.007(b)(4)
State	Permissive	Suit to enjoin operation of boiler constituting serious menace to life and safety of person nearby or without certificate	TEX. HEALTH & SAFETY CODE § 755.042(a)
State	Required (if AG does not bring suit)	Suit to recover civil penalty for violation of construction standards for outdoor shooting range	TEX. HEALTH & SAFETY CODE § 756.043
State	Permissive	Suit to enjoin violation of statutes concerning pipeline easements and rights-of-way	TEX. HEALTH & SAFETY CODE § 756.125(a)
State	Permissive	Suit to compel compliance with statutes and rules regarding emergency medical services	TEX. HEALTH & SAFETY CODE § 773.063
State	Permissive	Injunctive or other action to enforce building fire escape requirements	TEX. HEALTH & SAFETY CODE § 791.051
State	Required (on request of Dep't of Health)	Suit to collect reimbursement owed to department for rabies vaccine or serum	TEX. HEALTH & SAFETY CODE § 826.025(c)
State	Required (on request of Dep't of Family and Protective Servs.)	Suit for collection of civil penalty, injunctive relief for violation or threat to violate license, certification, listing or registration requirement applicable to facility or family home	TEX. HUM. RES. CODE § 42.074(c)
Tex. Dep't of Aging & Disability Servs.	Required (prosecuting attorney who represents state in County Court criminal cases, unless conflict prevents representation)	Cases involving state provision of guardianship services ("APS" cases)	TEX. HUM. RES. CODE § 161.110(a)
State	Permissive	Action to collect penalty against	TEX. INS. CODE §

		general casualty company	861.703
State	Permissive	Suit for injunction to enforce Insurance Code provisions, rules adopted thereunder, pertaining to joint underwriting	TEX. INS. CODE § 2202.207
State	Permissive	Proceeding for injunction to enforce Title 13 of Insurance Code, enjoin any person, firm, corporation or depository institution from attempting to engage in business of insurance in violation of law	TEX. INS. CODE § 4005.110
State	Required (if proceedings appropriate)	Actions to enjoin, collect civil penalties for, Labor Code violations by labor unions	TEX. LAB. CODE § 101.124
State	Permissive	Action to enjoin violations of statutes concerning secondary picketing	TEX. LAB. CODE § 101.204
State	Permissive	Action to enjoin violation of Labor Code provisions concerning right to work	TEX. LAB. CODE § 101.302(a)
State	Quasi-permissive (DA must represent State, but has discretion to file)	Suit to remove member of governing board of municipality from office	TEX. LOC. GOV'T CODE § 21.029(d)
State	Required*	Removal (of elected district, county or precinct officer) proceedings	TEX. LOC. GOV'T CODE § 87.018(d)-(f)
State	Permissive (DA, or CA in county not served by DA)	Suit to recover civil penalty, diverted funds from municipal treasurer	TEX. LOC. GOV'T CODE § 105.091(d)
State	Permissive (DA, or CA in county not served by DA)	Suit to recover civil penalty, diverted funds from county treasurer	TEX. LOC. GOV'T CODE § 113.005(d)
County Treasurer	Required	Suit for recovery of amount paid through improperly issued duplicate instrument	TEX. LOC. GOV'T CODE § 113.041(g)
County	Permissive (at direction of county treasurer)	Suit for recovery of debt to county	TEX. LOC. GOV'T CODE § 113.902
County official or employee	Required if desired by official or employee (additional counsel may be retained by comm'rs ct. if it reasonably appears act complained of may form basis of criminal charge against official or employee)	Action arising from performance of public duty	TEX. LOC. GOV'T CODE § 157.901(a)-(c)
County	Required (if report not filed after 10 days from notice of late report)	Action to collect civil penalty for late filing of personal financial statement in county with population > 125,000	TEX. LOC. GOV'T CODE § 159.035
County	Permissive	Action to enjoin violation/threatened violation of county zoning ordinance	TEX. LOC. GOV'T CODE §§ 231.083(a), 231.113(a)
County	Permissive (on request of commissioners court)	Action to enjoin violation of, recover damages for violations of county platting, road and utility requirements	TEX. LOC. GOV'T CODE § 232.005
County	Permissive	Action to enjoin violations of subdivision rules, collect civil penalties & costs	TEX. LOC. GOV'T CODE §§ 232.037, .080

County	Permissive	Proceeding to enjoin sale or transfer of lot without water and sewer services, unless properly platted or replatted	TEX. LOC. GOV'T CODE § 232.040(d)
County	Permissive	Action for injunction, mandamus or abatement to prevent, abet, remove or enjoin erection, construction or reconstruction of structure in violation of building or set-back line	TEX. LOC. GOV'T CODE § 233.036
County	Permissive	Action to enjoin operations of slaughterer in violation of statutes or rules adopted by county	TEX. LOC. GOV'T CODE § 234.036
County	Permissive	Action to enjoin violation/threatened violation of order regarding dangerous wild animals	TEX. LOC. GOV'T CODE § 240.004
County	Permissive	Suit to enjoin violation of regulation of outdoor lighting near certain observatories and military installations	TEX. LOC. GOV'T CODE § 240.035(a)
County	Permissive	Action to enjoin violation/threatened violation of order regarding communication facility structures	TEX. LOC. GOV'T CODE § 240.088
County	Mandatory (on notification by county auditor)	Suit for mandamus to compel compliance with reporting requirements concerning county official's operation of private business on public property	TEX. LOC. GOV'T CODE § 291.006(c)
County Parks Bd.	Required	Provision of legal services to bd.	TEX. LOC. GOV'T CODE § 320.048(b)
County Parks Bd. (coastal county with island(s) suitable for parks)	Permissive (on request of bd.)	Provision of legal services required by bd.	TEX. LOC. GOV'T CODE § 321.048(b)
Park and Recreation District	Permissive	Action for injunction, damages and attorney's fees for violation of rules or ordinances of park district board	TEX. LOC. GOV'T CODE § 324.066(d)
State	Permissive (DA or prosecuting attorney performing duties of DA)	Suit to enjoin use of unauthorized police identification item	TEX. LOC. GOV'T CODE § 341.904(f)
County or Reg'l Housing Auth.	Permissive (CA on request of housing auth.)	Provision of legal services to auth.	TEX. LOC. GOV'T CODE § 392.040(b), (c)
State	Required	Action to enjoin obstruction of public beach, declare public right of access	TEX. NAT. RES. CODE § 61.018
State	Required	Suit for injunctive relief to prevent taking of material from island or peninsula bordering Gulf of Mexico or land within 1,500 feet of public beach in violation of subchapter F, chapter 61, Natural Resources Code	TEX. NAT. RES. CODE § 61.223
Beach Park Bd.	Permissive (CA on request of bd.)	Provision of legal services to bd.	TEX. NAT. RES. CODE § 62.048(a)
State	Required	Action to enjoin violation of provisions protecting certain dune areas and collect damages to natural	TEX. NAT. RES. CODE § 63.181

		resources caused by violation	
State	Required (by direction of Railroad Comm'n)	Suit to recover civil penalty for waste of oil or gas or violation of commission order	TEX. NAT. RES. CODE § 85.383
State	Permissive (if joined by AG)	Suit to recover civil penalty (injunction also available) for violation of statutes, rules regulating production of natural gas	TEX. NAT. RES. CODE § 86.223
State	Permissive	Action to enjoin dealer, peddler or broker from continuing in business in violation of statutes and rules governing used oil field equipment dealers	TEX. NAT. RES. CODE § 112.031
State	Permissive	Action for injunction, collection of civil penalties concerning solicitation of patients	TEX. OCC. CODE § 102.009, .010(b)
State	Required (if requested by appropriate licensing board)	Appropriate judicial proceedings against person who violates identification requirements of Healing Art Identification Act	TEX. OCC. CODE § 104.005
Tex. Bd. of Chiropractic Examiners, State	Required (if requested)	Proceeding for revocation, cancellation or suspension of chiropractor's license, injunction against violation of statutes regulating practice of chiropractic	TEX. OCC. CODE §§ 201.508(b), .601(c)
Tex. State Bd. of Podiatric Med. Examiners	Required (unless AG represents)	Action to enjoin violation of law regulating practice of podiatry or rule adopted under that law	TEX. OCC. CODE § 202.601(b)
State	Permissive	Action for injunctive relief to compel compliance with statutes, rules governing acupuncture	TEX. OCC. CODE § 205.402(a)
State	Required	Action to enjoin practice of dentistry in violation of law, collect civil penalty	TEX. OCC. CODE § 264.052, .102
Texas Optometry Board	Permissive	Hearings before board, suits in which board is party	TEX. OCC. CODE § 351.158
State	Required (on receipt of verified complaint)	Enforcement of statutes/regulations regarding opticians	TEX. OCC. CODE § 352.351
State	Required (on receipt of verified complaint)	Injunctive enforcement of Contact Lens Prescription Act	TEX. OCC. CODE § 353.204
Tex. State Bd. of Examiners for Speech-Language Pathology & Audiology	Required (along with AG)	General ("The board shall be represented by the attorney general and the district and county attorneys of this state.")	TEX. OCC. CODE § 401.206
State	Permissive	Suit to enjoin unlawful practice of physical therapy, collect civil penalty	TEX. OCC. CODE §§ 453.451, .453
State	Permissive	Suit to enjoin unlawful practice of occupational therapy, collect civil penalty	TEX. OCC. CODE §§ 454.351, .353
State	Permissive	Suit to enjoin unlawful or unlicensed provision of massage therapy or massage services	TEX. OCC. CODE § 455.351
Tex. State Bd. of Examiners of Psychologists	Required (unless AG represents)	Injunctive action to restrain violation of laws governing practice of psychology	TEX. OCC. CODE § 501.501(b)

Tex. State Bd. of Examiners of Marriage and Family Therapists	Required (unless AG represents)	Injunctive action to restrain violation of laws governing practice of marriage and family therapy	TEX. OCC. CODE § 502.451(c)
Tex. State Bd. of Examiners of Professional Counselors	Required (unless AG represents)	Action to enjoin violation of laws governing professional counselors	TEX. OCC. CODE § 503.451(b)
State Bd. of Pharmacy	Permissive	General (representation of board in legal action under subtitle J, Occupations Code)	TEX. OCC. CODE § 554.001(d)
State Bd. of Pharmacy	Required (if referred by Board after AG fails to act)	Action to collect civil penalty for unlicensed/unlawful practice of pharmacy	TEX. OCC. CODE § 566.103
Dep't of State Health Servs.	Permissive (on request of dep't)	Action to enjoin violation of laws governing perfusionists	TEX. OCC. CODE § 603.451(a)
Tex. Funeral Serv. Comm'n	Required (unless AG represents)	Injunctive action against funeral establishment, embalmer, funeral director or crematory that violates laws or rules governing funeral services	TEX. OCC. CODE § 651.601(b)
State Dep't of Health Servs.	Permissive	Suit to enjoin violation of laws governing dietitians	TEX. OCC. CODE § 701.157(4)
State	Permissive	Enforce penalties and remedies, including injunction and civil penalties, concerning health spas	TEX. OCC. CODE § 702.551-.554
Tex. Bd. of Veterinary Med. Examiners	Permissive (upon request of bd.)	Suit for injunction to enforce statutes regulating veterinary practice	TEX. OCC. CODE § 801.502
Tex. Bd. of Architectural Examiners	Permissive	Action to enjoin violation of statutes or rules regulating architectural practice	TEX. OCC. CODE § 1051.502
County Surveyor	Permissive	Action for order authorizing surveyor to cross land	TEX. OCC. CODE § 1071.3585(c)
State	Permissive	Action to abate or enjoin violation of Real Estate License Act	TEX. OCC. CODE § 1101.001
State	Permissive	Action to abate or enjoin violations of statutes or rules concerning real estate inspectors	TEX. OCC. CODE § 1102.404
State	Permissive (on request by Tex. Appraiser Licensing and Certification Bd.)	Action to recover civil penalty for frivolous complaint by certified or licensed appraiser against another appraiser	TEX. OCC. CODE § 1103.553(c)
State	Permissive (on request by Tex. Appraiser Licensing and Certification Bd.)	Action to recover civil penalty for unlicensed appraisal activity	TEX. OCC. CODE § 1103.5535
State	Permissive (on request by Tex. Appraiser Licensing and Certification Bd.)	Action to recover civil penalty for unregistered appraisal management activity	TEX. OCC. CODE § 1104.252(c)
Tex. Comm'n on Law Enforcement Officer Standards & Education	Required (unless Attorney General represents)	Appeal of comm'n action	TEX. OCC. CODE § 1701.506(c)
County	Permissive	Action to collect civil penalty for failure to hold county metal recycling facility license	TEX. OCC. CODE § 1956.004
State	Permissive	Action to restrain raffle in violation	TEX. OCC. CODE

		of Charitable Raffle Enabling Act	§ 2002.058
State	Permissive (DA)	Action for injunction against operation of amusement ride in violation of statute, rule adopted by Commissioner of Insurance	TEX. OCC. CODE § 2151.151
State	Permissive (DA)	Suit to enjoin motor vehicle salvage dealer's business operations for at least one year after conviction of more than one offense under § 2302.353(a)	TEX. OCC. CODE § 2302.351(b)
State	Permissive	Suit to recover value of fish or game unlawfully killed, caught, taken, possessed or injured	TEX. PARKS & WILD. CODE § 12.303(a)
State	Permissive	Suit for injunction, civil penalty and recovery of value of material taken in violation of ch. 86, Parks & Wildlife Code	TEX. PARKS & WILD. CODE § 86.025(c)
Comptroller	Required (if approved by AG)	Action claiming property escheated to State	TEX. PROP. CODE § 71.301
Comptroller or AG	Required (if requested by Comptroller or AG)	Enforcement of unclaimed property statutes	TEX. PROP. CODE § 74.704
County (pop. > 200,000)	Permissive (County Attorney)	Action to enforce land use restrictions	TEX. PROP. CODE § 203.003(a)
County	Required‡ (unless comm'rs ct. contracts with private attorney to collect delinquent taxes)	Enforce collection of delinquent taxes	TEX. TAX CODE § 6.30
Appraisal Review Bd.	Permissive	Provision of legal services (advisory)	TEX. TAX CODE § 6.43
Appraisal Dist.	Required	Enforcement of penalty for fraud or evasion concerning property tax statement or report	TEX. TAX CODE § 22.29(b)
County	Permissive (CA)	Enforcement of land use restrictions concerning recreational, park or scenic use	TEX. TAX CODE § 23.82(c)
County	Permissive (CA)	Enforcement of land use restrictions concerning public access airport property	TEX. TAX CODE § 23.92(c)
Tax Assessor-Collector	Required	Suit to collect penalty concerning vehicle, vessel and outboard motor sales	TEX. TAX. CODE §§ 23.121, .122, .124, .125
Tax Assessor-Collector	Required	Suit to collect penalty concerning manufactured housing retailers	TEX. TAX. CODE § 23.127, .128
Tax Assessor-Collector	Permissive	Suit to collect penalty concerning heavy equipment dealers	TEX. TAX CODE §§ 23.1241, .1242
Appraisal Review Bd.	Required‡	Suit to enforce subpoena	TEX. TAX CODE § 41.62
State	Permissive (on request of Comptroller or person solicited)	Suit for civil penalty, injunction for improper use of public information concerning audit	TEX. TAX CODE § 111.0075(e)
State	Required (at direction of AG)	Suit to collect delinquent sulfur production tax, penalties and interest	TEX. TAX CODE § 203.101(c)
County	Permissive	Suit against person required to collect hotel tax to require payment over to county, enjoin operation of hotel until tax is paid or report filed	TEX. TAX CODE § 352.004(d)

State	Required (if AG does not represent State)	Suit to collect civil penalty for violation of statutes, rules concerning regulation of air carriers	TEX. TRANSP. CODE § 21.154(c)
State	Permissive	Suit for injunctive relief concerning regulation of air carriers	TEX. TRANSP. CODE § 21.155(b)(2)
County	Required (upon receipt of affidavit of underlying facts by any person)	Suit to collect penalty from railroad company that fails to maintain roadbed and right-of-way over county road in proper condition for use of traveling public	TEX. TRANSP. CODE § 112.059
State	Required (at request of AG)	Condemnation suit under Modernization of State Highways program	TEX. TRANSP. CODE § 203.054(b)
State	Required	Condemnation proceeding to acquire right-of-way	TEX. TRANSP. CODE § 224.004(c)
County	Required (CA represents county)	Action to recover damages for damage to public road or bridge	TEX. TRANSP. CODE § 251.160(b)
County	Required (CA, upon receipt of treasurer's report)	Suit for foreclosure of lien or judgment concerning construction of ditches and adjoining roadway	TEX. TRANSP. CODE § 254.017(e)
State	Permissive	Suit to collect civil penalty for violation of statutes concerning outdoor advertising	TEX. TRANSP. CODE § 391.035
State	Permissive	Suit to collect civil penalty for erection of off-premise sign on certain highways (see Transp. Code § 391.252)	TEX. TRANSP. CODE § 391.254
State	Permissive	Suit to collect civil penalty for unlawful placement of sign in right-of-way of public road	TEX. TRANSP. CODE § 393.007
State	Permissive	Suit to collect civil penalty for outdoor advertising in violation of chapter 394 or regulation adopted thereunder	TEX. TRANSP. CODE § 394.081
County	Permissive	Public nuisance suit for injunction to remove sign in violation of chapter 394	TEX. TRANSP. CODE § 394.087(b)
County	Permissive	Suit to collect civil penalty for violation of statutes governing operation of automotive wrecking and salvage yard	TEX. TRANSP. CODE § 397.0125(b)
State	Required	Injunction to restrain bribery agreement concerning vehicle, trailer or semitrailer registration	TEX. TRANSP. CODE § 502.411(c)
State	Permissive (DA)	Suit to enjoin motor vehicle title service from maintain or operating business and close business location upon conviction of more than one offense under subchapter E, chapter 520	TEX. TRANSP. CODE § 520.062(a)
State	Permissive (DA or prosecuting attorney performing duties of DA)	Suit to enjoin possession of fictitious driver's license or personal identification certificate	TEX. TRANSP. CODE § 521.453(e)

Dept. of Public Safety	Permissive	Representation of DPS in appeal of license suspension	TEX. TRANSP. CODE § 524.041(e)
State	Permissive	Suit to recover on bond of emissions inspection station in certain counties	TEX. TRANSP. CODE § 548.4045(c)
Director of Public Safety (DPS)	Required (unless AG or full-time DPS attorney, with approval of AG, represents)	Appeal of final administrative decision of Director of Public Safety	TEX. TRANSP. CODE § 548.408(b)
State	Permissive	Suit to collect civil penalty for violation of emissions inspection statutes	TEX. TRANSP. CODE § 548.6015
State	Required	Suit for injunction against municipality erecting or maintaining unauthorized traffic signal or sign	TEX. TRANSP. CODE § 553.003
State	Permissive	Suit to recover civil penalty for telegraph company's failure to comply with order of municipality's governing body or commissioners court requiring company to arrange for transfer of messages	TEX. UTIL. CODE § 181.065(b)
Texas Underground Facility Notification Corp.	Permissive	Action to collect civil penalty for violation of notification requirement, damage to underground facility during excavation	TEX. UTIL. CODE § 251.201
County	Permissive	Suit for civil penalty, injunctive relief and damages for violation of rules adopted by municipality's governing body or commissioners court relating to water and sewer services in economically distressed areas	TEX. WATER CODE §§ 16.352-.3535
State	Permissive (on request by Executive Director of Tex. Nat. Res. Conservation Comm'n)	Suit for mandamus to compel filing of required information by certain districts created under art. III, § 52(b) or art. XVI, § 59 of Constitution	TEX. WATER CODE § 49.455(g)
Comptroller of Public Accounts and State of Texas	Required (upon election by Comptroller and approval of Attorney General)	Application to probate court for enforcement of order to pay unclaimed estate funds to Comptroller; any interest of State in probate matters	TEX. PROB. CODE § 432
Comptroller of Pubic Accounts	Required (upon election by Comptroller and approval by Attorney General)	Defense of suit by heir, devisee or legatee of estate to recover estate funds paid to Comptroller	TEX. PROB. CODE § 433(b)
State	Required (under direction of AG)	Suit to recover penalty from transportation or communication provider for violation of fare regulations	TEX. REV. CIV. STAT. art. 4015
State Rural Med. Educ. Bd.	Required (acting for AG)	Suit for remaining sum on defaulted loan	TEX. REV. CIV. STAT. art. 4498c, § 14(b)
State of Texas	Required (subject to division of duties as between County Attorneys and District Attorneys by Legislature)	All cases in district and inferior courts	TEX. CONST. art. V, § 21

[†] County Attorney provides representation unless District Attorney or Criminal District Attorney elects to provide representation.

‡ County Attorney provides representation unless there is no County Attorney, in which case District Attorney (or, as appropriate, Criminal District Attorney or court-appointed special prosecutor) provides representation.

* County Attorney provides representation unless proceeding is for removal of County Attorney, in which case District Attorney (or County Attorney from adjoining county) provides representation; if County or District Attorney who would otherwise represent state is also subject of pending removal proceeding, County Attorney from adjoining county, as selected by commissioners court in county of venue, provides representation.

• County or District Attorney, upon filing of complaint alleging violation of Public Information Act by governmental body, must determine whether declaratory or injunctive action will be brought.

LEGAL WRITING:
LESSONS FROM THE BESTSELLER LIST

CHAD BARUCH, *Dallas*
Johnston Tobey Baruch, PC

State Bar of Texas
GOVERNMENT LAW 101
July 18, 2018
San Antonio

CHAPTER 6

CHAD BARUCH
JOHNSTON TOBEY BARUCH, PC
DALLAS, TEXAS

In 2015, Chad Baruch wrote one of the most acclaimed legal briefs in American history while representing what the *New York Times* described as "a glittering array of hip hop stars." Another newspaper called it "the greatest amicus brief in Supreme Court history." The brief received nationwide media coverage.

Chad is Board Certified in Civil Appellate Law and has been voted one of the "Best Lawyers in Dallas" by D Magazine and a Texas "Super Lawyer" for the past decade. One of his cases, *Rhine v. Deatons*, became the first case in American history in which the U.S. Supreme Court requested briefing of a state solicitor general at the *certiorari* stage. *Rhine* is one of three appeals that Chad has handled as co-counsel with famed constitutional scholar Erwin Chemerinsky.

In the past three years, Chad has:

- Successfully represented the Dallas County Democratic Party in election litigation filed by the GOP,
- Served as Dallas County District Attorney Pro Tem for appeal of the criminal fraud case against Hunt Oil heir Albert G. Hill III,
- Successfully represented the Dallas County District Attorney in the appeal of his conviction for contempt of court,
- Represented one of the Navy SEALs who shot and killed Osama Bin Laden, in an ongoing case of professional liability in Indiana federal court,
- Represented clients in a Wisconsin legal-malpractice case arising from one of the largest lawsuits in state history, and
- Represented the family of murder victim Marjorie Nugent in seeking the return of her killer, Bernhardt Tiede (made famous by the movie *Bernie*) to prison to serve out his life sentence.

Chad has served on the Board of Directors for the State Bar of Texas and as Chair of the Texas Bar College. He is the 2015 winner of the State Bar's Gene Cavin Award, given to one Texas attorney annually for lifetime contributions to continuing legal education, and of the Texas Bar Foundation's 2017 Dan Rugeley Price Memorial Award for excellence in legal writing and lifetime service to the profession. In 2017, Chad lost a runoff election to serve as President-Elect of the State Bar of Texas.

Chad has taught government at the high school and college levels, and his First Amendment writings have been cited as scholarly authority in at least two published appellate opinions. Chad also has served as men's basketball coach at the high school, NAIA, and NCAA levels.

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LEGAL WRITING: LESSONS FROM THE BESTSELLER LIST

I. INTRODUCTION

"[T]he term 'legal writing' has become synonymous with poor writing: specifically, verbose and inflated prose that reads like – well, like it was written by a lawyer." Steven Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389, 1389 (1984). Legal writing suffers from "convoluted sentences, tortuous phrasing, and boring passages filled with passive verbs." *Id.* Despite recognition of this problem and concerted efforts by law schools to fight it, legal writing continues to deteriorate. *See* Lynne Agress, *Teaching Lawyers the Write Stuff*, LEGAL TIMES, Oct. 2, 1995, at 37.

No one who teaches at any level will be surprised by this deterioration in writing skills. Teachers bemoan it every day in high school, college, and law school faculty lounges. This paper presents a series of practical, easily implemented steps to improve legal writing.

A. Legal Writing is Important!

Many lawyers roll their eyes at discussions of legal writing, and use legal writing presentations during seminars as coffee breaks. They regard legal writing as a topic for law professors, judges, and all-around eggheads, one that has little application to their practices. They are wrong. As Irving Younger explained:

> So prevalent is bad legal writing that we get used to it, shrugging it off as a kind of unavoidable occupational disability, like a cowboy's bowlegs. This is an unfortunate state of affairs. Bad writing goes with bad thinking, and since bad thinking is the source of many of the ills that beset us, lawyers should acknowledge a professional obligation to wage war against bad writing. If the author who produced it is you, correct it. If another, condemn it.

Irving Younger, *Symptoms of Bad Writing*, SCRIBES J. OF LEGAL WRITING 121, 121 (2001-2002).

There are many reasons for a lawyer to write well. Good writing helps attorneys by:

- Enhancing their credibility with other lawyers. Many lawyers *are* good writers, and most of them recognize and respect quality legal writing when they see it. When opposing these lawyers, your ability to write well commands respect and affects their evaluation of the likelihood of success. At my former firm, we were writing snobs. When facing attorneys from small firms, we routinely made assumptions about them based upon their legal writing. Quality legal writing gains you respect that may prove useful in litigation.
- Preventing malpractice and grievances. Inferior legal research and writing skills can give rise to malpractice liability, client grievances, and court sanctions.
- Enhancing their credibility with clients. Some clients read what you produce in their cases with a Javert-like obsession for pointing out even the tiniest errors. A superior legal writing product works like a salve on these clients' tortured psyches.
- Enhancing their credibility with judges. Judges are the most frequent victims of bad legal writing. They cannot escape a daily barrage of poorly written motions and briefs. No surprise, then, that judges take special note of well-written pleadings. Once, during a sanctions hearing, a district court judge permitted me to argue on behalf of my client for less than one minute, telling me that his reading of my brief already made clear that I was "the only lawyer in the room who knows what he is talking about" (that was not true, but it kept my client from being sanctioned and pleased my mother very much).
- Helping them win cases. Legal writing is critical to appellate success. Even at the trial court level, better legal writing – particularly at the summary judgment stage – will produce better results for your clients. Like it or not, many cases are won or lost on the briefing.

The importance of legal writing increases as the odds of reaching trial diminish. In this era of ever-rarer trials and hearings, legal writing takes on added significance. As courts expand the types of matters they will decide based solely on briefing, legal writing becomes ever more critical. *See* Edward D. Re, *Increased Importance of Legal Writing in the Era of the "Vanishing Trial*, 21 TOURO L. REV. 665 (2005).

B. Know Your Audience – Judges Matter!

An important part of legal writing is to know your audience. Lawyers write most often for judges. With increasing frequency, judges are making public their frustration with much of the legal writing that comes before them and are asking attorneys to do better. As Supreme Court Justice Ruth Bader Ginsburg noted:

> "The cardinal rule: it should play to the audience . . . The best way to lose that audience is to write the brief long and cluttered . . . ."

> Ruth Bader Ginsburg, *Appellate Advocacy: Remarks on Appellate Advocacy*, 50 S.C. L. REV. 567, 568 (1999).

Judges do not have unlimited time to read briefs:

> Briefs usually must compete with a number of other demands on the judge's time and attention. The telephone rings. The daily mail arrives with motions and petitions clamoring for immediate review. The electronic mail spits out an urgent message . . . . The clerk's office sends a fax with an emergency motion. The air courier arrives with an overnight delivery. The law clerks buzz you on the intercom because they have hit a snag in a case. So the deathless prose that you have been reading . . . must await another moment. Or another hour. Or another day.
>
> RUGGERO J. ALDISERT, WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT 24-25 (1996).

The simple truth is that judges – and particularly state court judges – rarely have extended periods of time to focus on your legal writing. Judges want briefs that are interesting but also are organized and clear – in other words, briefs that are easy to read.

It is not uncommon for a state court judge to hear motions in twenty or thirty cases in a single morning. Most mornings, several of those are summary judgment motions involving lengthy briefs. Sometimes a hearing involves complex legal issues that necessitate lengthy briefs. Even in those cases, however, attorneys can take a number of steps to assist a busy judge reviewing their briefs. This paper describes some of those steps.

C. For Further Instruction

Attorneys interested in more detailed instruction on legal writing should take Bryan Garner's seminars. He is an outstanding teacher of legal writing and anyone attending his seminars will come away a better writer (I even recommend his seminars to my high school students in preparation for the AP examination). Mr. Garner's books on legal writing are helpful in any significant writing project. His most helpful for attorneys is *The Winning Brief*.

D. Maintain Credibility

Your brief only has as much value as your reputation and credibility. Be careful, then, to maintain your credibility with opposing counsel and the court. Don't misstate or overstate the facts or law. Cite-check your citations. Address all significant arguments raised or likely to be raised by your opponent. When the other side is right, don't be afraid to say so if it will not matter to the end result.

E. Use the Right Tone

Shrill briefs are not persuasive. Adopt a reasonable and respectful tone regardless of how opposing counsel behaves. An angry or defiant tone usually is unproductive. On very rare occasions, humor may be effective in conveying frustration. In helping defend an attorney from a specious sanctions motion several years ago, I wanted to point out to the court that the other party was blaming my client for a whole host of things that were not even arguably his fault. The opening line of our response read: "Smith has accused Mr. X of everything but being the gunman on the grassy knoll." Upon receiving the response, opposing counsel called to tell me he enjoyed the line, so apparently it got our point across without offending anyone.

II. DRAFTING EFFECTIVE DOCUMENTS

A. Write in Something Resembling English

An important goal in drafting any document (presumably) is ensuring that the people who read it can understand it. Notwithstanding this rather obvious point, many contracts leave one with the unmistakable impression that the drafter's goal was to make certain that no one would ever comprehend the contract's terms.

Thought hardly difficult, drafting contracts in English requires a willingness to set aside entrenched writing habits and embrace the use of plain language. Here are some examples of traditional contract provision, and their plain English counterparts:

> *This Agreement constitutes the entire understanding between the parties with respect to the subject matter of this Agreement and supersedes any prior discussions, negotiations, agreements, and understandings between the Parties.*
>
> *This Agreement contains the entire agreement between the parties.*
>
> *The terms of this Agreement may not be varied or modified in any manner, except by a subsequent written agreement executed by all parties.*
>
> *The parties can amend this Agreement only by signing a written document.*

B. Prepare Documents in a Readable Typeface

To enhance readability, prepare documents in a serif typeface (serif refers to the lines or curves at the top and bottom of a letter) like Times New Roman or

Garamond. Avoid using Courier and Arial. Whatever typeface you choose, use at least 12-point font:

> A contract prepared in Garamond is readable.
>
> `A contract prepared in Courier is not.`
>
> Neither is Arial.

C. Use Plenty of White Space

Magazine editors know that the intelligent use of white space pleases the human eye and enhances readability. Use enough white space in your contracts that the reader's eye gets a break from the text. Place this white space strategically throughout the contract to prevent the reader from being overwhelmed by text.

D. Give Your Contract a Title

A contract entitled *Contract* or *Agreement* does not help the reader very much. On the other hand, a contract entitled *Contract for Alarm Services* or *Agreement to Provide Computer Consulting Services* may help the reader understand the contract's purpose.

E. Include a Table of Contents

For contracts more than a few pages long, provide a table of contents.

F. Give Each Section a Clear and Specific Title

Regardless of the length of your contract, provide section titles that clearly and specifically state the subject matter of each section. Meaningful section titles are easy to draft and make the contract more understandable. In other types of legal writing, a well drafted topic sentence fulfills this function. Think of your contract's section headings as a series of topic sentences, or alternatively as a roadmap through the contract. Here are some examples of good section headings:

> *How to Provide Notice*
> *The Law Governing This Agreement*
> *How to Amend this Agreement*
> *What We Can Do If You Default*

G. Provide an Introduction That Explains the Contract

In addition to a good title and descriptive section headings, provide an introductory statement that helps the reader understand the purpose of the contract.

> *This contract specifies the terms on which CenterCorp will provide alarm monitoring services to Smith's Widgets.*

H. The Strategic Use of Bullet Points

Bullet points are a remarkable tool both to enhance clarity and for persuasion. They are an excellent way to present any type of list, so long as the listed items have no rank order. To avoid adding more numbers to a contract, use bullet points when listing items that do not have a rank order.

I. Avoid Underlining and All-Capital Letters

The use of all capital letters is distracting and makes type very difficult to read. While lower case letters have distinctive shapes, most fonts do not include those individual characteristics for capital letters, meaning the capital letters have a uniform shape and appearance that renders them inherently difficult to read. Similarly, underlining – a holdover from the days of typewriters – fails to provide sufficient emphasis for critical contract terms and often looks unnatural. ***To add emphasis, use italics or boldface type.***

J. The Top Ten Things *Not* to Say in Contracts

Here are some other common words and phrases that should be excised from contracts:

1. Prior to.

Prior to is a longwinded way of saying before. Just say before. Prior to leads to other clunky phrasing (as in prior to commencement of the option period – instead of before the option period begins).

2. Shall.

Once upon a time, lawyers were taught that *shall* was a legal term of art imposing a mandatory duty. Whether that ever was true, it certainly isn't now. Lawyers routinely use *shall* to mean all sorts of different things, including *is* (*There shall be no right of appeal from the county court at law*) and *may* (*No floor supervisor shall investigate or resolve any complaint of harassment by a subordinate employee*). Where a contract calls for required action, use *must* instead of *shall*. It sounds more natural and leaves no doubt as to its mandatory effect.

3. Now, Therefore, in Consideration of the Foregoing and the Mutual Covenants and Promises Herein, the Receipt and Sufficiency of Which are Hereby Acknowledged.

This commonly used phrase causes a ordinary reader's eyes to glaze over, and adds nothing to the contract. A good contract specifies each party's consideration, making this clause redundant. If the contract fails to specify the consideration, this vague clause will not suffice to do so.

4. The Parties Agree.

Isn't the whole point of a contract that the parties agree to all the terms?

5. The Parties Expressly Agree.

By specifying certain terms that the parties "expressly agree" about, this language implies the parties do not expressly agree about all the other terms.

6. Unless Otherwise Agreed.

If this language refers to other potentially contradictory language in the contract, that other language should be specified. If it refers to contemplated amendments, it is unnecessary and probably confusing, so long as the contract specifies its amendment process.

7. Hereby.

This word never serves any legitimate function, and clutters otherwise sound legal writing.

8. Wherefore.

Let me introduce you to hereby's more annoying cousin.

9. Notwithstanding Anything in This Contract to the Contrary.

This provision serves only to confuse the reader. A well written contract should not have inconsistencies necessitating this language. If two provisions may be interpreted inconsistently and this cannot be avoided, the better practice is to explain the apparent inconsistency and how it should be resolved.

10. In Witness Hereof, the Parties Have Caused this Contract to be Executed by Their Duly Authorized Representatives.

This is another common phrase without any real meaning.

III. WRITING TO PERSUADE

A. Strong Introductions – Starting Well

Good writing includes a strong introduction. An introduction serves several purposes. First and foremost, it hooks the reader. An introduction piques the reader's interest and invites further reading. Mystery novelist Elmore Leonard is a master of the understated yet compelling introduction. Consider the opening paragraph from one of his recent novels:

> Late afternoon Chloe and Kelly were having cocktails at the Rattlesnake Club, the two seated on the far side of the dining room by themselves: Chloe talking, Kelly listening, Chloe trying to get Kelly to help her entertain Anthony Paradiso, an eighty-four-year-old guy who was paying her five thousand a week to be his girlfriend.
> ELMORE LEONARD, MR. PARADISE 1 (2004).

This introduction hooks the reader, who wants to know more about Chloe's sordid arrangement with her sugar daddy. There is an important lesson here for lawyers. Most lawyers who use introductions focus on *issues*. The Leonard approach focuses on *people*; issues would be set forth only in the context of their impact on people. All of us – even judges – are more likely to be interested in people facing problems than in abstract legal issues. An introduction that presents the primary players in a compelling light is particularly effective:

> Joseph Burke got it on Guadalcanal, at Bloody Ridge, five .25 slugs from a Jap light machine gun, stitched across him in a neatly punctuated line.
> ROBERT B. PARKER, DOUBLE PLAY 1 (2001).

Here is the introduction to a summary judgment brief filed on behalf of the American Civil Liberties Union in a First Amendment case involving the petition clause, in which we hoped to hook a rural Texas judge right away:

> On July 18, 1833, Stephen F. Austin arrived in Mexico City bearing a petition for reforms relating to grievances asserted by the residents of what is now Texas. For this audacity in petitioning his government, Austin spent more than a year in prison. Whoville City Council Member Cindy Simple apparently takes a similarly dim view of the petition right. While John Smith has not been imprisoned, he has - solely for exercising his constitutional right to petition his government - been haled into court and forced to defend this SLAPP (strategic lawsuit against public participation).
> Mr. Smith is entitled to summary judgment because the communications at issue sought redress of grievances from elected government officials and therefore are protected by the Petition Clauses of the United States and Texas Constitutions. Permitting this SLAPP to proceed would threaten fundamental constitutional liberties: "Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined."
> *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656 (Sup. Ct. 1992, *aff'd*, 616 N.Y.S.2d 98 (App. Div. 1994).

Sometimes, an introduction begins with a single line so interesting or compelling that it commands the reader's attention. Quintin Jardine, Scottish author of the Inspector Skinner series so popular in the United Kingdom, often begins his novels with single sentences so interesting the reader cannot help but continue:

> Panic was etched on the face of the clown on the unicycle.
> QUINTIN JARDINE, SKINNER'S FESTIVAL 1 (1994).

> As a city, Edinburgh is a two-faced bitch.
> QUINTIN JARDINE, SKINNER'S RULES 1 (1993).

> It was only a small scream.
> QUINTIN JARDINE, SKINNER'S TRAIL 1 (1994).

Here is an example of the eye-catching opening sentence from another of Spenser's cases:

> The office of the university president looked like the front parlor of a successful Victorian whorehouse.
>
> Bradford W. Forbes, the president . . . was telling me about the sensitive nature of a college president's job, and there was apparently a lot to say about it. I'd been there twenty minutes and my eyes were beginning to cross. I wondered if I should tell him his office looked like a whorehouse. I decided not to.
> ROBERT B. PARKER, THE GODWULF MANUSCRIPT5-6 (1973).

In a recent case involving an attorney who sold real property to our clients under a contract for deed but failed to follow the new property code provisions governing executory contracts, we began our clients' summary judgment motion with the following line:

> Stanley Jones is an attorney who refuses to follow the law.

Perhaps my all-time favorite introduction to a legal brief, cited by Bryan Garner, is this opening paragraph of the shareholders' brief in a complex takeover case:

> "NL Industries is owned by its shareholders. The board of directors works for them. The shareholders want to sell their stock to Harold Simmons. The board won't let them."
> BRYAN GARNER, THE WINNING BRIEF 99 (2004).

This introduction is wonderful. It focuses on people, explains their problem, and points the reader toward a conclusion.

A strong introduction to a legal motion or brief provides a glimpse of the most important legal issues in the case. These should be woven into your client's story. Good introductions frame the issues so their resolution is clear to the reader. This is done by framing the issues so the reader is compelled to reach the result you seek without being asked to do so.

Sometimes, an attorney must be creative in crafting an introduction. Several years ago, I represented a retired couple being sued on an account. The couple retired after selling a successful fabrication business to their son, who promptly ran it into bankruptcy. One of the son's unpaid creditors, who also did business with the company prior to the sale, sued the couple. This creditor sued the couple because the son was bankrupt and the parents had money. The parents were entitled to summary judgment and this would be fairly evident to any judge willing to read a five-page brief. The goals of our introduction were to persuade the judge to read the remainder of the brief – in other words, to get the judge's attention – and to make clear that the wrong people were being sued. In preparing the brief, I remembered a motion hearing during which the judge questioned me about a murder case in Dallas that I worked on for a brief time. The judge was fascinated by the case. The introduction to our brief joined the judge's interest in true crime with our desire to show the creditor's motive for suing our clients:

> The murder of Marilyn Reese Sheppard, found beaten to death in her home on July 4, 1954, was the most reported and sensational crime of the 1950's. During his closing argument en route to winning an acquittal at the retrial of Dr. Sam Sheppard, criminal defense attorney F. Lee Bailey described the myopic police investigation that resulted in the conviction and imprisonment of an innocent man:
>
> > In my closing argument, I compared the State of Ohio to a woman who was poking around in the gutter beneath a street light. When a passerby asked what she was doing, she said she was looking for a dollar bill she had dropped fifty feet away. "Then why aren't you looking over there? asked the passerby. "Because," she replied, "the light is better over here."

> ABC Services filed this breach of contract case to collect a commercial account. The services at issue were ordered and received by TinMan Fabricating, which failed to pay for them. Rather than suing TinMan –which is insolvent and bereft of assets – ABC sued Nick and Nora Nelson, a married couple whose business assets were sold to, and later reacquired through foreclosure from, the founders of TinMan. Instead of suing the company that ordered the services and is obliged to pay for them, ABC chose to sue the Nelsons – presumably because "the light is better over here" (meaning the Nelsons can satisfy a judgment).
>
> In a different era, ABC might have pursued the Nelsons under the de facto merger doctrine, enmeshing the court in a protracted and arduous analysis of the Nelsons' business relationship with TinMan. In 1979, however, the Texas Legislature precluded the types of claims alleged by ABC in this lawsuit when it amended the Business Corporation Act to preclude successor liability in the absence of express assumption. Because the Nelsons did not:
>
> - order or authorize anyone to order the services,
> - receive the services,
> - have any involvement in TinMan,
> - give any indication they would pay for the services, or
> - expressly assume any of TinMan's liabilities upon acquiring that company's assets,
>
> they are not liable for payment of the account. ABC must look for its money where it was lost, not where "the light is better."

The Nelsons are entitled to summary judgment.

This introduction worked better than we possibly could have imagined. Not only was it clear at the hearing that the judge read our entire brief, the judge actually referred to the better light analogy during argument! Opposing counsel began his argument by telling the judge that summary judgment was not appropriate "despite the excellent brief" we filed. The judge granted our clients' summary judgment motion.

Drafting an introduction is a good way to focus your briefing in a case. When there are several complex issues in a case, drafting the introduction first necessarily forces you to decide what facts and arguments really are important. Having to compress four pages of facts and ten or twenty pages of argument into four or five sentences usually shows you what matters!

Introductions are also effective in shorter motions. The next time you file a motion for continuance, consider replacing:

> Plaintiff John Smith files this Motion for Continuance, and would respectfully show as follows . . . .

with:

> John Smith seeks a continuance due to non-elective surgery he is scheduled to undergo on the day of trial.

By reading the first sentence of your motion, the court will know what you seek, and why.

B. Strong Conclusions – Finishing Well

A particularly puzzling aspect of legal writing is the tendency of some lawyers to write an outstanding motion or brief – complete with strong introduction, well-crafted paragraphs, and persuasive arguments – and then end it with a conclusion that says something like "Wherefore, premises considered, plaintiff prays that this motion be granted in its entirety." Talk about ending with a whimper! A strong conclusion is nearly as important as a strong introduction. It is your opportunity to provide a compelling summary of your argument and leave the reader thinking about your principal points. Stuart Woods did a great job ending his early novels. In ending a book about a middle-aged man recounting his youthful adventures with a married couple, and the tragic death of the wife, Annie, he concludes:

> The years have passed, and all this has remained fresh with me. I think of Mark often. I cannot bear to think of Annie.
>
> STUART WOODS, RUN BEFORE THE WIND 373 (1983).

This ending is perfect – poetic, appropriate, abrupt, and emotional without being sentimental. What is its focus? It does not refer to any of the thrilling events of the novel. Instead, it focuses solely on *people*. Again, *people* are compelling.

A conclusion should describe the specific relief you seek, tie it to the people you represent, set forth the most compelling reason it should be granted, and leave the reader thinking. Here is the conclusion from our summary judgment motion involving the parents being sued for their son's obligation:

> The Business Corporation Act precludes successor liability in the absence of express assumption. Because the Nelsons did not expressly assume any of TinMan's liabilities, and because they neither purchased nor received the services at issue, they are not obliged to pay for them or spend any more money defending this lawsuit. The Nelsons are entitled to summary judgment.

This conclusion is brief, but it sets forth the central argument, focuses on the people involved, and tells the court what relief is being sought.

C. Summarize Arguments and Issues

How important are summaries? Well, the Fifth Circuit and the Texas appellate courts require them. Summaries are helpful to appellate judges, and their usefulness probably is even greater to overworked and distracted trial court judges. A summary of the argument or issue should identify the relief requested, the legal principles at issue, and the specific arguments addressed in the brief. A good summary achieves the delicate balance between being thorough and reprinting your entire argument. A summary that states your arguments but does not provide any support for them has limited utility. A summary that essentially copies your entire argument serves little purpose. Useful summaries are short, yet set forth the critical arguments in support of your key points.

D. Use Tables for Lengthy Briefs

Tables of contents and authorities are useful tools for judges and should be provided in any motion or brief longer than ten pages. There is a reason these tables are required for appellate briefs – judges and their clerks use them.

E. Use Headers

Headers, particularly in the argument section of a brief, are powerful summaries and a useful roadmap of your position. The ideal header is a one sentence statement in the form of a positive assertion of the argument that follows it, rather than merely a signpost. This header is not very powerful: "The accident photographs." This header is better: "The accident photographs should be excluded because they are hearsay." Using headers throughout your motion or brief will make it more readable, understandable, and persuasive.

F. Literary References

Literary references are a potent persuasive tool and may be useful in calling to the reader's mind the theme of a literary work. For example, a judge's quotation of Shakespeare's *King Lear* ("How sharper than a serpent's tooth it is to have a thankless child") reveals his disdain for adult children who attempted to defraud their mother. *Mileski v. Locker*, 178 N.Y.S.2d 911 (N.Y. Sup. Ct. 1958).

Literary references may be useful in setting an overall theme for a legal brief. In seeking summary judgment on behalf of a SLAPP defendant in a case where the plaintiff's claims violated my client's First Amendment rights as well as any sense of decency, I cited on the cover page a line delivered by Wilford Brimley in the movie *Absence of Malice*: "It ain't legal and worse than that, by God it ain't right." It summed up my feelings about the case and, as it turned out, the judge's opinion as well. A terrific literary reference in any case involving an attempt to distort the meaning of a statute is Humpty Dumpty's classic statement about the meaning of words: "When I use a word, it means just what I choose it to mean . . . ." Could there be a better way to underscore a litigant's distortion of meaning?

Caution is the watchword when using literary references. Sad though it may be, don't assume that judges and lawyers will recognize even major literary references unless you provide a citation. Also, don't overuse literary references. It is easy to pass over the line from being clever and insightful to full-on Niles Crane insufferability.

G. Presenting the Issues

A good brief or motion immediately sets forth the critical issues in the case. In appellate cases, briefing rules often require immediate identification of the issues. Where no rule compels immediate identification of the critical issue, the good legal drafter nevertheless presents that issue through a well-crafted introduction. This simple paragraph introduces the issue in a motion to compel:

> Joe Nelson accuses the Smiths of carrying out a complex scheme to defraud him of more than $250,000.00. Mr. Nelson served interrogatories and document requests on the Smiths more than four months ago. The Smiths objected to every interrogatory and have yet to produce a single document. Mr. Nelson seeks to compel responses.

Good issues are hard to find. Generally, good issues:

- are presented at the outset of the motion or brief;
- are presented in short and readable sentences (rather than the old-style single sentence that begins with the word *whether* and continues until rigor mortis sets in);
- include facts sufficient for the reader to understand the issue and how it arose (in

other words, focus on the people rather than an abstract legal principle); and

- permit only one possible answer.

Here are examples of issues from appellate briefs that follow this format:

> The underlying lawsuits allege losses to three financial institutions by Smith's legal malpractice in failing to discover conflicts, implement procedures to assure compliance with ethical standards, train and educate lawyers working on financial institution matters in their ethical and professional duties, and assure that those lawyers were adequately supervised. Are these activities "professional services for others" within the meaning of the insuring agreement so that the insurance company has a duty to defend the underlying lawsuits against Smith?

> A jury convicted Abel Munoz of illegal entry after deportation. At sentencing, Mr. Munoz objected to the assessment of criminal history points for a prior conviction, claiming his guilty plea in that prior case was entered without benefit of counsel or a valid waiver of rights. The record of the prior case is silent as to representation or waiver. Despite the testimony by Mr. Munoz establishing lack of waiver or counsel, and the absence of any record or other evidence to contradict it, the district court assessed the points. Did the district court violate the sentencing guidelines?

Jane Doe sued ABC Corporation under Title VII. The district court granted ABC's summary judgment motion solely on the basis of after-acquired evidence. May a Title VII claim be adjudicated on the basis of after-acquired evidence?

These introductions to Supreme Court decisions present issues in the context of facts:

> Petitioner is a boy who was beaten and permanently injured by his father, with whom he lived. Respondents are social workers and other local officials who received complaints that petitioner was being abused by his father and had reason to believe that was the case, but nonetheless did not act to remove petitioner from his father's custody. Petitioner sues respondents claiming that their failure to act deprived him of his liberty in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. We hold that it did not. *DeShaney v. Winnebago County Soc. Servcs. Dep't*, 489 U.S. 189 (1989).

> After publicly burning an American flag as a means of political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. This case presents the question whether his conviction is consistent with the First Amendment. We hold that it is not. *Texas v. Johnson*, 491 U.S. 397 (1989).

IV. THE NUTS & BOLTS OF LEGAL WRITING

A. Relative Dating

Face it – dates are distracting, interrupting your prose with visual eyesores. Even worse, when someone goes to the trouble of inserting a date into a brief, most of us assume the date is relevant and slow down to try and absorb it. Judges are no different. As Fifth Circuit Judge Jacques Wiener Jr. observed:

> "When we judges see a date or a series of dates, or time of day, or day of the week, . . . most of us assume that such information presages something of importance and we start looking for it. But if such detailed information is purely surplus fact and unnecessary minutiae, you do nothing by including it other than to divert our attention or anticipation from what we really should be looking for. In essence, you will have created your own red herring." Jacques L. Wiener Jr., *Ruminations from the Bench: Brief Writing and Oral Advocacy in the Fifth Circuit*, 70 TUL. L. REV. 187, 192 (1995).

Most of the time, the date is irrelevant to any issue in the case and serves only as a serious distraction to the reader. Take, for example, this paragraph in a DTPA case:

> On February 6, 2006, the Millers purchased a house from the Smiths. On February 13, 2006, the Millers discovered a water stain on the wall of their bedroom closet. On February 16, 2006, Foundation Repair Company inspected the home and informed the Millers that it required significant foundation repairs. On March 12, 2006, the Millers paid Foundation Repair the sum of $8,500.00 to perform the necessary repairs.

All the dates are distracting; none of the dates is relevant. A better approach is:

> A week after purchasing a house from the Smiths, Robert and Ann Miller discovered a water stain on the wall of their bedroom closet. Three days later, Foundation Repair Company inspected the home and informed the Millers that it required significant foundation repairs. The following month, the Millers paid Foundation Repair the sum of $8,500.00 to perform the necessary repairs.

An even better approach is:

> After purchasing a house from the Smiths, Robert and Ann Miller discovered a water stain on the wall of their bedroom closet. Foundation Repair Company inspected the home and informed the Millers that it required significant foundation repairs. The Millers paid Foundation Repair the sum of $8,500.00 to perform the necessary repairs.

In most instances, chronology and relative dating are a better approach than actual dates. Of course, dates must be included when they are important, as in cases involving statutes of limitations or other legal issues dependent on actual dates. Even where actual dates are included, however, it is often best to frame them within the chronology. For example:

> The Texas Supreme Court rejected Ms. Smith's application for review on March 1, 2001, triggering the two-year statute of limitations. Ms. Smith filed this lawsuit two weeks prior to expiration of the limitations period, on February 16, 2003.

B. Spell Check (A Dangerous Tool!)

Spell check is a wonderful tool but is no substitute for thorough editing. The dangers of spell check are illustrated by a recent federal criminal pleading in which the government stated its intention to prosecute an alien for "Attempted Aggravated Sexual Assualt of a Chile." Jerry Buchmeyer, *Who Was That Masked Man?*, 69 TEX. BAR J. 491, 492 (2006) (and presumably giving whole new meaning to the term *hot sex*).

C. Don't Plagiarize

Legal writing culture is citation oriented, meaning it insists that sources of words and ideas be documented. In this environment, pagiarism is a very real issue. Plagiarism can have severe consequences, including a lawyer's loss of credibility and professional standing.

Most plagiarism in legal writing occurs when a lawyer uses the words, whether directly quoted or paraphrased, from a court decision or treatise. This is a tempting technique, since courts and legal scholars often set forth applicable principles clearly and concisely. The pride of a well written brief, however, will give way to humiliation if opposing counsel or the judge discovers that a source is quoted or paraphrased without attribution. In *Iowa Supreme Court Board of Professional Ethics v. Conduct & Lane*, 642 N.W.2d 296 (Iowa 2002), Lane copied almost twenty pages of published work into a brief and then requested an award of $16,000.00 in legal fees for preparing it. When a magistrate discovered that Lane had taken the pages verbatim from a treatise, the Iowa Supreme Court concluded that Lane plagiarized the brief and suspended him from the practice of law for six months.

When borrowing from form books, other briefs, or court decisions, it is appropriate to borrow language so long as it is tailored and applied to the specific case. Treatises and articles, however, should not be used without attribution.

Like other writers, attorneys must take care for ethical and practical reasons not to plagiarize.

D. "A Few Too Many Words"

Salieri said it best in *Amadeus*: "A few too many notes." Though probably an unfair criticism of Mozart, it remains an accurate assessment of most legal writing. Lawyers use too many words.

To improve your writing, review each draft with an eye toward cutting needless words. Be relentless in hacking unnecessary words from your writing. Shorten sentences. Simplify language. Cut, cut, cut. Spenser, Robert B. Parker's literate detective, speaks in simple yet descriptive sentences:

> It was a late May morning in Boston. I had coffee. I was sitting in my swivel chair, with my feet up, looking out my window at the Back Bay. The lights were on in my office. Outside, the temperature was 53. The sky was low and gray. There was no rain yet, but the air was swollen with it, and I know it would come.
> ROBERT B. PARKER, BACK STORY 1 (2003).

One source of clutter in legal writing is the overuse of certain customary phrases. If you find any of the following phrases in your writing, eliminate them:

- It is Smith's position that . . . .
- We respectfully suggest that . . . .
- It would be helpful to remember that . . . .
- It should be noted that . . . .
- It should not be forgotten that . . . .
- It is important to note that . . . .
- It is apparent that . . . .
- It would appear that . . . .

- It is interesting to note that . . . .
- It is beyond dispute . . . .
- It is clear that . . . .
- Be it remembered that . . . .

Some additional phrases used by lawyers, and more efficient alternatives, are:

• during the time that	while
• for the period of	for
• as to	about
• the question as to whether	whether
• until such time as	until
• the particular individual	[Name]
• despite the fact that	although
• because of the fact that	because
• in some instances	sometimes
• by means of	by
• for the purpose of	to
• in accordance with	under
• in favor of	for
• in order to	to
• in relation to	about
• in the event that	if
• prior to	before
• subsequent to	after
• pursuant to	under

See BRYAN GARNER, LEGAL WRITING IN PLAIN ENGLISH 35(2001); RICHARD WYDICK, PLAIN ENGLISH FOR LAWYERS 11(2d ed. 1985).

Another way to pare your writing is to avoid using *provided that*. In addition to cluttering your writing, the phrase usually signals failure to think through what you want to say. Rather than weaving the additional matter into your original statement, you just added the words *provided that* to the end of the sentence. Consider the following sentence:

> Any expert witness may testify, provided that the expert has been properly designated.

With better planning – or editing – it becomes:

> Any properly designated expert witness may testify.

E. Names, Not Party Designations

We know that people, rather than issues, are compelling. Why, then, would an attorney ever detract from the power of a brief by referring to the client as *plaintiff*, *defendant*, *petitioner*, or *respondent*? Novelists certainly don't do this. Consider the following passage from Spenser's case files:

> I drove the side of my right fist into his windpipe as hard as I could and brought my forearm around and hit Zachary along the jawline. He gasped. Then Hawk was behind Zachary and kicked him in the side of his back. He bent back, half turned, and Hawk hit him a rolling, lunging right hand on the jaw, and Zachary loosened his grip on me and his knees buckled and he fell forward on his face on the ground. I stepped out of the way as he fell.

ROBERT B. PARKER, THE JUDAS GOAT 192 (1978).

Now read the same passage written in the style of some lawyers:

> Petitioner drove the side of his right fist into respondent's windpipe as hard as petitioner could and brought his forearm around and hit respondent along the jawline. Respondent gasped. Then intervenor was behind respondent and kicked respondent in the side of respondent's back. Respondent bent back, half turned, and intervenor hit respondent a rolling, lunging right hand on the jaw, and respondent loosened his grip on petitioner and respondent's knees buckled and he fell forward on his face on the ground. Petitioner stepped out of the way as respondent fell.

Yuck. When the human element of the narrative is removed, it ceases to be compelling.

There are two significant exceptions to the rule against using party designations. First, use of party designations may be advisable where the opposing party is sympathetic in comparison to your client. For example, I used party designations in defending a recent child molestation case on behalf of a Dallas church. In that case, *plaintiff* seemed a lot better for my client than *Sally*. Second, party designations are helpful in cases involving multiple parties where confusion might otherwise result. Other than these situations, it is best to use names rather than designations.

F. To Cap or Not to Cap – Parties

Puzzling as it is, many attorneys engage in the maddening practice of capitalizing party designations like Plaintiff and Defendant. As noted in the preceding section, the better practice is to use the parties' names rather than their party designations. If you must use party designations, don't capitalize them. There is no compelling reason to do so, and it distracts those of us who know it. Among the authorities supporting this viewpoint are two of the leading guides to legal writing, and the Supreme Court:

> Briefly, plaintiff seeks to recover for personal injuries . . . .
> HENRY WEIHOFEN, LEGAL WRITING STYLE 238 (1980).

> On January 15, 1979, appellant filed a charge with the Equal Employment Opportunity Commission . . . .
> JOHN DERNBACH & RICHARD V. SINGLETON II, A PRACTICAL GUIDE TO LEGAL WRITING AND LEGAL METHOD 174 (1981).

> Louisiana infringed appellant's rights of free speech and free assembly by convicting him under this statute . . . .
> *Cox v. Louisiana*, 379 U.S. 536 (1965).

During my first year as an associate, our partners assigned me the task of researching whether party designations should be capitalized and preparing a summary of my research. While they found my citation of legal writing authorities persuasive, the decisive factor in their decision was my discovery that Justice Cardozo did not capitalize those designations. For our partners, Justice Cardozo's word decided the matter.

G. Mr./Ms. or Last Names

This is one where Mr. Garner and I part ways. He advises legal writers to use last names alone:

> Legal writers seem to fear that, when referring to parties, they're being impolite if they don't consistently use *Mr.*, *Ms.*, or some other courtesy title. Actually, though, they're simply creating a brisker, more matter-of-fact style. Journalists aren't being rude when they do this, and neither are you.

BRYAN GARNER, THE WINNING BRIEF 266 (2004).

While recognizing Mr. Garner's superior expertise on writing, I disagree with his assessment of courtesy. Journalists face space limitations necessitating their use of only last names (in his excellent argument in favor of the serial comma, Mr. Garner points out that space limitations affect journalistic style). Lawyers do not have the same concern. Lawyers do, however, work in a profession losing even the pretense of civility. The use of *Mr.* or *Ms.* restores a small bit of this civility to the legal profession.

In debating the issue, I am reminded of George Washington. The most towering figure in American history, and a man known throughout the world as a great gentleman, Washington refused during the Revolutionary War to accept letters from General Howe addressed to "Mr. George Washington" or "George Washington, Esq." because they did not contain his rank of general. One can only imagine his reaction to a letter addressed simply to "Washington."

Perhaps the Texan in me causes me to feel this way. This much I know: my grandfather, who came to Texas during the 1890's, would never have approved of referring to any person – and certainly never a woman – solely by last name. I am not sure that a different approach constitutes progress.

On the subject of names, please avoid the peculiar practice of many attorneys who feel the need to tell us that Smith is shorthand for Smith:

> Plaintiff John Smith ("Smith") petitions the court for relief . . . .

If the reader cannot figure out that Smith means Smith, good luck with the rest of your argument.

H. Avoid Be-Verbs

Verbs move the action. Consequently, good writers try to avoid using forms of *to be*, the so-called be-verbs, including is, am, was, were, will be, and have been. These verbs undermine the power of your writing and put readers to sleep.

Be-verbs destroy impact and sap strength from sentences. Infusing writing with stronger verbs improves language and increases the reader's interest. It also creates a more compelling story or argument. Simply put, verbs matter more to our writing than any other category of words. Using strong verbs amounts to injecting your writing with performance-enhancing words. Here is a sentence with the dreaded be-verb:

> *The petitioner will be granted certiorari by the Supreme Court.* Now, here is the same sentence without the be-verb: *The Supreme Court will grant certiorari in the case.*

The first sentence is sluggish compared to the second. The more effective sentence makes the subject (in this case, the Supreme Court) perform the action – *The Supreme Court will grant*.

Employing "be-verbs" is not entirely off limits. If a subject does not need to be identified, for example, it is not necessary to use action verbs. To increase your writing efficiency, however, limit "be-verbs" to about a quarter of your sentences.

I. State a Rule, Give an Example

Legal writing is the process of presenting rules and explaining their application. Stating a rule without providing an example of its application to facts leaves the job half-done. When presenting and applying a rule, most lawyers first present the rule and then apply it to the facts of their case. Many times, an

intermediate step – presenting an example of the rule in action –improves the argument. Consider an argument concerning assumption of risk in athletics:

> Students who participate in sports assume risks inherent to the activity. *Morgan v. State*, 685 N.E.2d 202, 207-08 (N.Y. 1977). Tommy Jones did not assume the risk of tripping over debris in the end zone because that debris is not inherent to football.

This argument improves when an example is inserted between the general rule and its application:

> Students who participate in sports assume risks inherent to the activity. *Morgan v. State*, 685 N.E.2d 202, 207-08 (N.Y. 1977). A student who is injured in an awkward fall while learning a jump roll in karate class has assumed an inherent risk, while a student who trips over a torn tennis court divider has not. Falling is inherent to karate jump rolls, while torn nets are not inherent to tennis. Tommy Jones did not assume the risk of tripping over debris left in the end zone of the football field because that debris – like the torn tennis net – is not inherent to the game.

Michelle G. Falkow, *Pride and Prejudice: Lessons Legal Writers Can Learn from Literature*, 21 TOURO L. REV. 349, 358 (2005).

In presenting a rule – particularly a complex rule – provide an example of the rule before applying it to your case.

J. Provide Determinative Facts

Provide the determinative facts when discussing important cases. Attorneys are so focused on the rules established by cases that they sometimes forget to describe the facts that led to those rules. Whether relying on a case or distinguishing it, providing the critical facts that led to the holding helps judges understand it. Provide those facts that related directly to the holding, with an eye toward providing only that level of detail necessary to secure a complete understanding of the holding.

K. Tell A Good Story, or Any Story

Much of the advice in this paper relates to storytelling. These techniques are designed to help the legal writer tell a better story. The statement of facts in a motion or brief should be a compelling story. The most compelling way to tell a story usually is in chronological order, by providing the facts in the order they happened.

There are rare exceptions when chronology is not the most persuasive way to tell a story. In a recent Supreme Court petition, my client argued that the Fifth Circuit resolved fact issues in affirming summary judgment for an employer in a discrimination case despite the Supreme Court's previous admonition in a similar case not to do so. To emphasize the critical fact issues in the case, we presented alternate versions of certain facts:

> Toycom "Eliminates" the RTV Lead Position
>
> Ms. Johnson's Version: Only two weeks after demoting Ms. Johnson, Toycom informed her it was eliminating the position of RTV Lead altogether and the company reduced the pay of both Ms. Johnson and Ms. Smith. The very next day, however, Ms. Smith received a pay raise from Toycom. Ms. Smith received another pay raise when she became the RTV Clerk/Trainer, a newly created position with the same duties as the previously "eliminated" RTV Lead position. Toycom managers could not agree about why the position was eliminated just weeks after the demotion of Ms. Johnson and promotion of Ms. Smith. Ms. Johnson remained a clerk until being terminated by Toycom on June 18, 2003. The demotion from RTV Lead to clerk substantially altered Ms. Johnson's job duties and authority, as well as her salary.
>
> Toycom's Version: Toycom made a business decision (based upon transfer of certain functions from the RTV Department to a different department) that it did not require any RTV Leads. Ms. Johnson and Ms. Smith were both demoted to clerk, with an attendant salary reduction. The day after her demotion, Ms. Smith was given a merit pay increase as a result of her regularly scheduled performance review. Between January of 2003 and mid-2004, Toycom did not have any RTV Leads.
>
> The Critical Fact Issue: The parties differ sharply over whether Toycom ever eliminated the RTV Lead position. Ms. Johnson believes that Toycom realized it could not demote her legally, hatched a plot to eliminate the position only in name, created an equivalent position to award to Ms. Smith, and then lied about what its scheme.

This type of narrative is compelling when you want to highlight fact disputes. Most of the time, however, a chronological narrative is the best way to tell a story.

L. Creating Strong Paragraphs

Once upon a time, most of us had a high school teacher who instructed us to use topic sentences. Good advice. The first sentence of an effective paragraph expresses the focus of that paragraph. In legal writing, the topic sentence provides the reader with a summary of the argument contained in that paragraph. It also assists overworked judges trying to skim a brief before a hearing. Strong topic sentences permit judges to read only the beginning portion of each paragraph and still grasp the issues.

Backward though it may seem, many lawyers to do the exact opposite of what I am counseling – they fall into the habit of placing topic sentences at the end of paragraphs. This is most common in paragraphs discussing court decisions. Here is an example of this writing mistake:

> In *Smith v. Jones*, 000 S.W.0d 0 (Tex. 0000), the Texas Supreme Court held that "evidence of a prior sexual molestation conviction may not be admitted to show that molestation in the present case took place." *Id.* at 00. The court went on, however, to state that such evidence "may be admitted for the purpose of establishing other facts, such as absence of mistake, motive, plan, or preparation." *Id.* Thus, evidence of Johnson's prior conviction is admissible to disprove his defense of mistake.

Aargh. The reader must complete the paragraph before discovering its principal point. Even worse, the case is cited without any immediate clue about its importance. A judge reading this paragraph could better analyze the import of the case if the topic sentence was at the beginning – rather than the end – of the paragraph (like Mr. Bonikowske taught me in the tenth grade!). Here is the same paragraph, rewritten to help the reader:

> Evidence of Johnson's prior conviction is admissible to disprove his defense of mistake. In *Smith v. Jones*, 000 S.W.0d 0 (Tex. 0000), the Texas Supreme Court held that "evidence of a prior sexual molestation conviction may not be admitted to show that molestation in the present case took place." *Id.* at 00. The court went on, however, to state that such evidence "may be admitted for the purpose of establishing other facts, such as absence of mistake, motive, plan, or preparation." *Id.* Thus, Johnson's prior conviction is admissible under *Smith*.

Now the reader understands the point of the paragraph and case citation upon reading the first sentence. Good topic sentences make your writing more readable and persuasive.

M. Creating Strong Sentences

Short sentences transform prose. Lengthy sentences are a common element of most poorly written motions and briefs. Your goal should be an average sentence length of fewer than twenty words. Remember to vary your sentence length. Some sentences should be longer, others shorter, but twenty words or less is a good average.

Uncomplicated sentences are particularly important to express complicated ideas. The more complex the idea, the shorter and simpler the sentences presenting it should be.

N. Eliminate Legalese

One sure way to undermine the power of your writing is to use legalese. All of us know this rule, and all of us break it (or stand mute while others do). We obligate our clients to *agree and covenant* not to do certain things, as though agreeing without covenanting somehow is not enough. We seek *any and all* documents, *bind and obligate* parties, demand that others *cease and desist*, help our clients *give, devise, and bequeath* their belongings, and declare contracts *null and void*. Sometimes these outdated terms of art are actually necessary, but only rarely. Most of the time, a single word will perform the work of these phrases. Similarly, is there really any reason to use words like *aforementioned*, *herein*, *hereinabove*, *inter alia*, *arguendo*, *hereinafter*, or *wherefore*? These are grand words on the Scrabble board and at the Renaissance Faire, but not in your motions and briefs.

O. Write in English

Latin is legalese's insufferable cousin. Avoid writing in any foreign language (except of course, when practicing law in the jurisdictions where they are spoken). The principal benefits of writing in English are (1) being understood and (2) avoiding sounding like a pretentious jackass. A side benefit is avoiding the "marvelous capacity of a Latin phrase to serve as a substitute for reasoning." Edmund M. Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 229 (1922). Impress your friends at cocktail parties with your command of Latin. Write in English.

P. Active, Not Passive

Many lawyers use the passive voice without realizing the damage it does to their writing. With the passive voice, the subject of the clause does not perform the action of the verb. A classic example of a passive sentence is: *The deadline was missed by Mr. Jones.* The same sentence in active voice would read: *Mr. Jones missed the deadline.* The passive voice is weak and often ambiguous. Instead of saying that an actor acted, you say that an action was taken, meaning the reader might not realize who acted.

Lawyers who write strong, persuasive, and effective sentences avoid the passive voice. The passive voice adds unnecessary words, muddles writing, and undermines clarity.

Examples of passive phrases include:

- Is dismissed
- Are docketed
- Was vacated
- Were reversed
- Been filed
- Being affirmed
- Be sanctioned
- Am honored
- Got paid

The passive voice is acceptable in certain situations, such as when the actor cannot be identified or is unimportant. Use the passive voice when the active might alter what you want to say. On the whole, however, avoiding the passive voice saves words, promotes clarity, and animates your style. You will snatch and hold the reader's attention with clear, assertive sentences.

Q. Using However

You should not begin a sentence with however. You may, however, move it inside the sentence.

R. The Important Case of That v. Which

Confusion regarding the use of these words abounds. Much of the time when *which* is used, it should be *that* instead. The result of this confusion is misuse of both words, causing ambiguity. The best way to remember when to use these words is to understand that *that* is restrictive, while *which* is nonrestrictive. Remembering this simple rule will, at least most of the time, permit you to use *that* and *which* properly. The real mistake most writers make is to use *which* restrictively. So long as you remain vigilant in avoiding the restrictive *which*, you should be fine.

S. Not Sexist, But Not Awkward Either

Avoid sexist language. It offends some judges and lawyers and can be removed painlessly most of the time. The most effective way to remove sexist language is to reword your sentences to avoid it. Consider the following sentence: *The fiduciary duty an attorney owes to his client is one of the highest recognized by Texas law.* Some lawyers would rewrite the sentence to read as follows: *The fiduciary duty an attorney owes to his or her client is one of the highest recognized by Texas law.* How awkward! Rewrite the sentence to refer specifically to the litigants: *As the Wrays' attorney, Mr. Smith owed to them one of the highest fiduciary duties recognized by Texas law.* Alternatively, use an article instead of the pronoun: *An attorney's fiduciary duty to the client is one of the highest recognized by Texas law.*

You can rewrite most sentences easily to avoid sexist language. The sentence

> *Communications between a physician and his patient are protected from discovery*

becomes

> *Physician-patient communications are protected from discovery.*

While it may take some effort, rooting out sexist language is worth it.

T. Using the Dash – For Emphasis

Dashes highlight important phrases within your sentences. They are superior in this regard to commas and parentheses. Once you start using the dash this way, your use of commas will diminish and your use of parentheses will almost disappear. Dashes can be used both for interruptive phrases and for emphasis near the end of a sentence.

Here are some examples of dashes from actual briefs used this way:

- The Smiths paid the note – in full.
- The memorandum – which contained false information about Mayor Smith – was an attempt to obtain government action.
- Judge Benavides – in attempting to find some basis for Smith's decisions during voir dire – was being kind.

John Grisham, the best-selling legal writer of all time, uses the dash for interruptive phrases in his books:

> Rabbits, squirrels, skunks, possums, raccoons, a million birds, a frightening assortment of green and black snakes – all nonpoisonous I was reassured – and dozens of cats. But no dogs.

JOHN GRISHAM, THE LAST JUROR 28 (2004). Spenser also uses the dash both for emphasis and interruptive phrases:

> "It is a matter of the utmost delicacy, Mr. Spenser" – he was looking at himself in the glass again – " requiring restraint, sensitivity, circumspection, and a high degree of professionalism."
> ROBERT B. PARKER, THE GODWULF MANUSCRIPT 6 (1973).

> Her hair was loose and long. She wore a short-sleeved blouse, a skirt, no socks, and a pair of loafers. I looked at her arm – no tracks. One point for our side; she wasn't shooting. ROBERT B. PARKER, THE GODWULF MANUSCRIPT 54 (1973).

The most famous use of the dash for an interruptive phrase in American history – and perhaps the most compelling – is Abraham Lincoln's use in the Gettysburg Address:

> Now we are engaged in a great civil war, testing whether than nation – or any nation, so conceived and so dedicated – can long endure.

U. Quotation Marks

The misused quotation mark is inescapable in American society. My son and I pass a church sign each morning on the way to school that states:

ACADEMY NOW "ENROLLING"

Despite an entire year of trying, we have yet to figure out what it means. Our local driver's education school engages in the curious but common practice of using quotation marks to emphasize key words, along these lines:

> It is imperative that "any" student who wishes to take the driving test bring "all" forms of requested identification, and each student "must" pay the testing fee. There are "no" exceptions.

An entire page of this actually made my eyes hurt. The misused quotation mark is so common that there is an episode of *Friends* devoted in part to Joey's inability to understand how quotation marks are used!

Quotation marks should be used when you are quoting someone, when you are referring to a word (as in, *the Legislature's use in the statute of the word "the" denotes an intent to signal a particular class*), and when you are pointing out that a word or phrase is being misused (as in, *Smith's classification of a giraffe as a "farm animal" flies in the face of a century of caselaw, not to mention common sense*). Other than that, avoid the use of quotation marks. "Really."

V. Persuasion with a Bullet

Bullets are a remarkable persuasive tool. They are an excellent way to present any type of list, including the elements of a cause of action. The elements of a claim for breach of contract, for example, are:

- the existence of a valid and enforceable contract,
- breach, and
- proximate cause of
- actual damages.

Bullets are a great way to demonstrate the compnents of an argument:

> The Smiths take the startling position that they can sell their home to the Wrays and:
>
> - retain legal title to the property throughout the 20-year payment term,
> - have the Wrays pay all taxes and insurance on the property,
> - terminate the sales contract when the Wrays miss a single payment after faithfully making payments for 14 years, and
> - keep every penny paid by the Wrays for the previous 14 years, yet avoid the Texas statutes governing executory contracts by calling their contract a "rent-to-own" agreement.
>
> The contract is an executory contract subject to the provisions of the Texas Property Code.

Bullets highlight critical portions of your argument and make lengthy sequential statements more readable.

W. Confront Counter Arguments

Many lawyers make the critical mistake of avoiding counterarguments or relegating them to the very end of a brief. Good legal writers confront counterarguments directly and without hesitation. Sound argumentation requires not only the construction of your argument but also the refutation of opposing arguments.

The best way to overcome opposing arguments is to weave them into your argument. Begin your argument by joining the law and facts necessary to

support it, and then build to your principal conclusion. Then, enunciate the strongest possible counterargument and refute it. Repeat this process for each credible or likely counterargument. Finally, return to your principal argument and conclude it. In refuting counterarguments, devote as little time as possible to presenting the counterargument (you do not, after all, wish to highlight your opponent's arguments) and focus your efforts on refuting it. By this process, you will both support your argument and deal directly with the opposing arguments.

X. Serial Commas/Using Commas

Could there be a more important issue facing this nation than the ongoing dispute over the serial comma, known abroad as the Oxford comma (those British have a different word for everything!)? Some, Mr. Garner chief among them, are adamant about its use. Others, including Lynne Truss of *Eats Shoots and Leaves* fame, counsel flexibility.

Ms. Truss, incidentally, is the author of the greatest rule ever written about commas: *Don't use commas like a stupid person*. Well said and worth saying again in big scary letters:

DON'T USE COMMAS
LIKE A STUPID PERSON

The comma is the most overused, misunderstood mark in the English language. Please don't:

- Substitute a comma for the word *and* ("Agent, principal both responsible for defamation);
- Misplace a comma (the classic gun-toting panda who feels compelled to fire into the air because of a dictionary's misplaced comma – he believes a panda actually eats, shoots and leaves);
- Delete a necessary comma ("The captain crawled out of the boat's cabin before it sank and swam to shore");
- Use the gratuitous comma (The plaintiffs, were required to sign sworn statements waiving their DTPA rights);
- Overuse commas, placing them, at every turn, throughout your writing, leaving the reader to navigate, in frustration, what, otherwise, might be compelling prose;
- Use a comma to separate a party designation and name (Plaintiff, John Smith files this motion . . .).

Of course, some people can get away with breaking all the comma rules. In his farewell address before leaving Springfield after being elected president, Abraham Lincoln relied heavily on commas yet produced compelling prose still praised more than a century later:

> My friends – No one, not in my situation, can appreciate my feeling of sadness at this parting. To this place, and the kindness of these people, I owe every thing. Here I have lived a quarter of a century, and have passed from a young to an old man. Here my children have been born, and one is buried. I now leave, not knowing when, or whether ever, I may return, with a task before me greater than that which rested upon Washington. Without the assistance of the Divine Being, who ever attended him, I cannot succeed. With that assistance I cannot fail. Trusting in Him, who can go with me, and remain with you and be every where for good, let us confidently hope that all will yet be well. To His care commending you, as I hope in your prayers you will commend me, I bid you an affectionate farewell.

Y. To Split or Not to Split

As a first-year associate, I was summoned to our firm's conference room for a meeting with one of the partners. The partner laid before me a lengthy memorandum of my creation and turned to a portion he had highlighted in the middle of my glorious work. He asked me: "Are you aware of the firm's policy toward the split infinitive?" Concealing my astonishment that the firm had a policy on split infinitives, I confessed ignorance. The partner handed me a copy of Fowler's *Modern English Usage*, opened it to the section entitled *Split Infinitive*, and walked out of the room. This is what I learned (other than that our firm took legal writing a bit too seriously):

> The English-speaking world may be divided into (1) those who neither know nor care what a split infinitive is; (2) those who do not know, but care very much; (3) those who know and condemn; (4) those who know and approve; & (5) those who know and distinguish.

H.W. FOWLER, A DICTIONARY OF MODERN ENGLISH USAGE 558 (1944).

Upon completing the entry, I longed for the time only minutes earlier when I was among what Fowler termed those "happy folk, to be envied by most of the minority classes," who neither know nor care. Alas, from that moment forward, I would be haunted by misgivings and confusion about the dreaded split infinitive.

The preferred class of people – at least according to Fowler – is those who know and

distinguish. To summarize, split infinitives should be avoided unless the cure is worse than the disease. In other words, avoid the split infinitive unless doing so renders a sentence horrifically awkward, ambiguous, or patently artificial. Thus, we still avoid the classic *to mortally wound*, preferring instead *to wound mortally*. Captain Kirk and his crew do not undertake *to boldly go*, but instead *to go boldly*. On the other hand, we will probably prefer *our object is to further cement trade relations*, to *our object is further to cement trade relations* (making it unclear whether an additional object or additional cementing is the goal).

The problem is that many readers do not possess breeding sufficient to permit their appreciation of the nuance and beauty of the properly split infinitive, falling instead into the class of those who know and condemn in all cases. Even worse, those who know and condemn are on the constant lookout for the split infinitive, to point it out and thereby establish their intellectual superiority. At least of a few of these condemners are judges. My constant state of infinitive-paranoia therefore causes me to rephrase sentences at almost any cost to avoid split infinites. You will have to find your own way on this one.

Z. Numbers

Numbers greater than ten should be written as numbers (100), but only words should be used for one through ten. The most important exceptions to this rule are (1) when a passage contains numbers in both categories, in which case only numbers should be used, (2) references to discovery requests or other numbered items, (3) when referring to percentages, where only numbers should be used, and (4) when the number begins a sentence. Finally, don't engage in the puzzling practice of using words and numbers, as in ten (10). Few judges and lawyers will assume that by ten you mean 26.

AA. Referencing Filings

Most lawyers list the entire title of pleadings and discovery instruments when referring to them:

> After filing Plaintiff's Original Petition, plaintiff served Plaintiff's First Set of Interrogatories, Plaintiff's First Requests for Production, and Plaintiff's Requests for Disclosure. When defendant failed to respond, plaintiff filed Plaintiff's Motion to Compel Discovery and for Sanctions.

This is distracting because it requires the use of capital letters, confusing because it disrupts the narrative flow, and deflating because it interrupts your prose. To avoid these problems, describe a pleading rather than giving its title:

> After filing this lawsuit, Mr. Smith served requests for production and disclosure, as well as interrogatories, on Good Times. When Good Times did not respond, Mr. Smith sought to compel responses.

If the title must be used, it is best simplified:

> After filing his petition, Mr. Smith served interrogatories, document requests and disclosure requests on Good Times. When Good Times did not respond, Mr. Smith filed a motion to compel responses.

BB. Modifiers

Misplaced and dangling modifiers are not located properly in relation to the words they modify, leading to ambiguous sentences that sometimes do not mean what the writer intended them to mean. An example of a misplaced modifier would be: *The magazine sat on the bed that Jonathan had read.* Jonathan read the magazine, not the bed. This modifier is misplaced because it is not placed nearest the word it modifies. Another example: *The clerk posted the docket of cases for the lawyers heard that morning*. It should, of course, be: *The clerk posted the docket of cases heard that morning for the lawyers.* Dangling modifiers usually are –ing modifiers not logically connected to the principal part of the sentence: *Walking through the courthouse, the briefcase rubbed against my leg.* The briefcase was, in all likelihood, not walking through the courthouse. Instead, write: *The briefcase rubbed against my leg as I walked through the courthouse.*

Careful editing should resolve misplaced or dangling modifiers, which is important because they are to many readers the written equivalent of nails on a chalk board.

CC. Citing Cases – Joining Law & Fact

Case citations are more persuasive when joined with the facts of a particular case. Many lawyers insist on separating law and fact even though it undermines the power of their argument. Here is an example of legal writing undermined by its separation of law and fact:

> A party may protect from discovery the work of an expert witness employed purely for consultation. A party may not, however, continue to protect that consulting expert's work from discovery once it is reviewed by a testifying expert witness. TEX. R. CIV. P. 192.3(e) (West 2006).

> In this case, Smith's report as a consulting expert witness was later reviewed by Jones, an expert witness who will testify on behalf of Buy-Low at trial. As a result, Buy-Low must produce Smith's report.

These two paragraphs are combined, strengthened, and shortened by joining law and fact:

> Smith's report was not discoverable when Buy-Low was using him purely for consultation. Once Buy-Low showed Smith's report to Jones, however, it became discoverable because Jones is a testifying expert. TEX. R. CIV. P. 192.3(e) (West 2006).

While not always possible, joining law and fact in this manner often strengthens the argument and makes it easier for the judge to understand how a legal rule applies in a particular case.

DD. Instant Cases

Coffee is instant. Teenage gratification in American culture is instant. Cases are not instant. Enough said.

EE. Use Consistent Terms

Don't change the way you refer to people and things. Once it is a collision, don't make it an accident then an incident. Once it is an automobile, don't make it a car then a motor vehicle. Once it is Mr. Smith, don't make it Smith then Robert Smith. Be consistent.

FF. Use Transitions

Good writing contains transitions between paragraphs. Refer back to concepts in the previous paragraph to provide a bridge between your thoughts.

GG. Avoid Screaming Adjectives

Rarely will an over-the-top adjective enhance your argument. Consider the following sentence: *The school district's actions are outrageously insensitive and in blatant violation of the First Amendment.* Are regular violations of constitutional rights and normally insensitive actions not enough? These types of adjectives accomplish little other than to undermine your professional standing and credibility.

HH. Eliminate And/Or

Its inherent ambiguity and ugliness aside, the hatred many judges have for this phrase should be enough to persuade you to avoid it. Here is what the Wisconsin Supreme Court had to say about it (and this should convince you!):

> It is manifest that we are confronted with the task of first construing "and/or," that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of someone too lazy or too dull to express his precise meaning, or too dull to know what he did mean . . . .

Employers' Mut. Liab. Ins. Co. v. Tollefsen, 263 N.W. 376, 377 (Wis. 1935).

II. Avoid Repetition

Developing a consistent theme is one thing, but repeating the same sentence throughout a brief is quite another. Too many lawyers use the same sentence in the introduction, statement of the case, and facts sections, or the summary of the argument, argument, and conclusion. If you feel the need to say the same thing repeatedly, at least vary the language.

V. ETHICAL CONSIDERATIONS

A. Competence – Research

Texas attorneys are required to provide their clients with competent representation. TEX. DISCIPLINARY R. PROF. CONDUCT 1.01 cmt. 6 (2005), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. A (Vernon 2005). In many – perhaps even most – cases, competent representation of the client requires adequate legal research.

An attorney is expected "to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques." *Smith v. Lewis*, 530 P.2d 589, 595 (Cal. 1975). As one court stated: "We recognize that it is unreasonable to expect every attorney . . . to construct arguments as if they were authored by Learned Hand, but a line must be drawn separating adequate from inadequate briefs . . . ." *Mortars v. Barr*, No. 01-2011, 2003 WL 115359, at *3-4 (Wis. App. Jan. 14, 2003).

The reporters are rife with cases in which attorneys failed to perform adequate research. *See, e.g., Fletcher v. State*, 858 F. Supp. 169 (M.D. Fla. 1994) (party cited one case that had been overruled and another that was reversed). Violation of this rule may constitute an ethical violation. *Baldayaque v. United States*, 338 F.3d 145 (2d Cir. 2003) (attorney who advised client that deadline to file his habeas petition had passed, even though client still had fourteen months to file, violated ethical rule mandating competent representation). It may also violate federal or state civil procedure rules. *See, e.g., Carlino v. Gloucester City High School*, No. 00-5262, 2002 WL

1877011, at *1 (3d Cir. 2002) ("flagrant failure to conduct any legal research" violated Rule 11(b) of the Federal Rules of Civil Procedure).

An important part of performing adequate legal research is insuring the cases you cite remain valid law. Several years ago, I represented an employment discrimination plaintiff in federal court. The head of employment litigation for one of the mammoth downtown firms represented the employer. The employer sought summary judgment. A young associate drafted the motion, and the supervising partner signed it. Our summary judgment response pointed out that the principal cases the employer relied upon had been overturned. The federal magistrate began the summary judgment hearing by giving a senior partner of one of the largest law firms in Dallas a stern lecture about cite-checking and supervising associates. There are a lot ways to be humiliated in the practice of law, but having your opponent point out that you are relying on invalid law has to be near the top of the list.

B. Competence – Writing Skill

Competent representation usually requires adequate writing skills. With increasing frequency, courts are recognizing this fact and punishing lawyers who fail to heed it. The Kentucky Supreme Court suspended an attorney from the practice of law for sixty days when he filed a brief that was "little more than fifteen unclear and ungrammatical sentences, slapped together as two pages of unedited text with an unintelligible message." *Kentucky Bar Ass'n v. Brown*, 14 S.W.3d 916 (Ky. 2000). Similarly, the Minnesota Supreme Court publicly reprimanded an attorney and ordered him to attend ten hours of legal writing education programming based on pleadings that were "rendered unintelligible by numerous spelling, grammatical, and typographical errors . . . sufficiently serious that they amounted to incompetent representation." *In re Hawkins*, 502 N.W.2d 770 (Minn. 1993). The Vermont Supreme Court also ordered an attorney to obtain instruction to improve his writing as a condition of maintaining his license to practice law. *In re Shepperson*, 674 A.2d 1273 (Vt. 1996).

Sometimes, the cruelest punishment for an attorney's bad writing is the judge's public wrath. Take, for example, Judge Samuel B. Kent of the United States District Court for the Southern District of Texas:

> This case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston . . . ."
>
> [A]ttorneys have obviously entered into a secret pact – complete with hats, handshakes and cryptic words – to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court will be so utterly charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed.

Bradshaw v. Unity Marine Corp., 147 F. Supp. 2d 668, 670 (S.D. Tex. 2001).

In another case, a federal bankruptcy judge entered an "Order Denying Motion for Incomprehensibility," citing by footnote a statement from the movie "Billy Madison," in which a competition judge responds to Billy Madison's answer to a question:

> Mr. Madison, what you've just said is one of the most insanely idiotic things I've ever heard. At no point in your rambling, incoherent response was there anything that could even be considered a rational thought. Everyone in this room is now dumber for having listened to it. I award you no points, and may God have mercy on your soul.

The judge concluded that "[d]eciphering motions like the one presented here wastes valuable chamber staff time and invites this sort of footnote." Jerry Buchmeyer, *Who Was That Masked Man?*, 69 TEX. BAR J. 491, 492 (2006). The Mississippi Supreme Court criticized an attorney for using "legalese instead of English" in an indictment that was "grammatically atrocious." The court used a literary reference when it paraphrased Shakespeare and stated:

> It cannot be gainsaid that all the perfumes of Arabia would not eviscerate the grammatical stench emanating from this indictment.

Henderson v. State, 445 So.2d 1364, 1367 (Miss. 1984).

The tenor of legal writing also can give rise to sanctions. An attorney who referred in a pleading to the presiding judge as a "lying incompetent ass-hole," and then wrote that the special judge who replaced that judge would be superior if only he "graduated from the eighth grade" was suspended from the practice of law for sixth months (mercifully, it would seem, for his clients). *Kentucky Bar Ass'n v. Waller*, 929 S.W.2d 181 (Ky. 1996). Similarly, an attorney who referred to opposing counsel as "Nazis" and a "redneck pecker-wood" was reprimanded and ordered to apologize. *See In re Wilkins*, 782 N.E.2d 985, 987 (Ind. 2003).

The moral of these cases is that lawyers need to insure that their writing is competent and – if they believe it may not be – should get help to improve it.

C. Disclosure of Adverse Authority

Attorneys must disclose to the court any authority in the controlling jurisdiction known to the attorney to be directly adverse to the position of the client and not disclosed by opposing counsel. TEX. DISCIPLINARY R. PROF. CONDUCT 3.03(a)(4) (2005). Legal authority is not limited to case law. It includes administrative rulings, codes, ordinances, regulations, rules, and statutes. *See, e.g., Dilallo v. Riding Safety, Inc.*, 687 So.2d 353, 355 (Fla. Dist. Ct. App. 1997).

D. Following Court Writing Rules

Following court rules becomes progressively more difficult with each passing year. In the federal system, local rules have proliferated to the point that one sometimes wonders why the federal rules even exist. I was admitted to practice in the Northern District of Texas just after a number of the new discovery rules were enacted. Judge Sanders told me, "Some of us follow all the rules, some of us follow some of the rules, and some of us follow none of the rules – so make sure you read each judge's rules!" Whew. Not to be outdone, many state court judges now have individual rules and standing orders concerning pretrial and trial practice in their courts.

Lawyers ignore court rules concerning writing at their peril. The Texas Supreme Court has dismissed appeals due to failure to follow briefing rules. *See, e.g., White Budd Van Ness Partnership v. Major-Gladys Drive Joint Venture*, 811 S.W.2d 541 (Tex. 1991) (dismissing application for writ of error based upon improper type size and margins altered to comply with page limit). Attorneys who violate briefing rules may also be ordered to pay sanctions. *See, e.g., Laitram Corp. v. Cambridge Wire Cloth Co.*, 919 F.2d 1579, 1584 (Fed. Cir. 1990).

VI. THE LEGAL WRITING PROCESS

A. The Nike Rule: Just Write It!

As Eugene F. Ware noted: "All glory comes from daring to begin." The problem is how to begin. There is no shortage of advice, much of it contradictory, about the writing process. Some experts insist that the first step to any successful writing project is the old-fashioned outline. Some contend that you should write a rough draft before performing any research. Others counter that the more effective technique is to perform all the research, then prepare a rough draft. Still others advise lawyers to brainstorm and write down all their ideas before beginning the actual brief. There are probably as many effective ways to begin the writing process as there are writers. If a process works for you, use it. If it doesn't, find a new one. You can research, then outline, then write. You can brainstorm, then research, then write. Any combination of these tasks is acceptable so long as it works for you.

Writing ruts are a more persistent and universal problem. All writers get into ruts. There are things you can do to overcome these difficulties. Starting a brief in the middle is effective when you are having trouble beginning a project. Another useful tool is to change scenery. If you are having trouble writing in the office, try the neighborhood Starbucks or bookstore. A simple change of scenery may be enough to kick-start a project (and there is no better place for literary inspiration than the bookstore!).

B. Ruthless Editing

To call someone a great legal writer really is to say that person is a great legal editor. Great writing results from sustained and thorough editing.

The first and most important editor of your writing is you. Edit your work relentlessly and savagely, striking every unnecessary word. While editing your work, you should:

- have the Blue Book close at hand and pay careful attention to citation forms;
- proofread the final product – never assume that prior edits were made;
- let the finished product sit for a day or two, then come back to it for a final read.

Once you are relatively satisfied with your work, seek editing input from others. These others may be lawyers, but need not be – my mother is my best editor (of course, it helps that she actually was an editor!).

Committed editing means numerous drafts. Good writers write, rewrite, and rewrite again almost the point of being unable to stand looking at the work. One of the very best ways to edit your writing is to read it aloud. If it sounds unnatural, it probably needs to be rewritten. An even better editing method is to read your work aloud to someone else. Whatever your method, careful editing is a requirement for quality legal writing.

VII. SURVEY SAYS . . . .!

In 2009, the State Bar College asked me to resurvey Texas judges about their writing preferences. I performed a prior survey in 2007, limited to Dallas and Harris County judges. In 2009, I broadened the survey to include Dallas, Harris, Bexar, and Travis County civil judges (civil and family district courts, and county courts at law), and a small sampling of various rural district courts from around the state. The 2009 survey was more focused and probably better directed at judicial concerns, having been informed by

the 2007 survey results. As in 2007, the survey was anonymous to encourage honest responses.

A. What Judges Read

Perhaps not surprisingly, judges vary widely in what they read. An overwhelming majority of judges—right around 75 percent—read briefs relating to summary judgment and other dispositive motions in their entirety before the hearing. Surprisingly, at least to me, around eight percent of the judges indicated they almost never read the briefs even for dispositive motions. Just more than half of the judges indicate they usually read briefs supporting motions to compel, with just under half stating they generally read such briefs less than 50 percent of the time. Finally, the judges were divided fairly evenly in whether they read routine motions and briefs, such as those seeking a continuance. About 50 percent almost always read those motions and briefs, about 25 percent almost never read them, and the remaining 25 percent read them somewhere around half of the time.

The judges' responses indicate these percentages are subject to two caveats. First, judges in jurisdictions using a central docket almost never read anything because they have no idea what motions they will hear until just before the hearings take place. Second, in all categories, judges are more likely to read motions and briefs where a response is filed (and several judges indicated that in those situations, they often read the briefs in reverse order of filing).

Of critical importance for lawyers is the indication by around 50 percent of the judges that when they do "read" a brief, they usually skim it for what they believe to be important and read only the most important sections in their entirety. A few judges did, however, go out of their way to tell me that they read summary judgment affidavits very closely even when they only skim the briefs.

B. Judicial Preferences on "Hot Button" Issues

Judges overwhelmingly favor including an introduction in your brief. They also overwhelmingly appreciate lawyers who do not waste time by detailing the governing summary judgment standard (unless there is some disagreement or potential issue concerning it). Most judges also expressed a preference for gender-neutral language. Most judges seemed not to have a strong preference as to whether case citations belong in the body of the text or in footnotes, though those who did care preferred they be in the text.

C. Pet Peeves

Here are things responding judges took the time to write when asked to list "things that bother me:"

- Not bringing an order to the hearing
- Detailing irrelevant facts
- Sloppiness
- Dishonest statements in briefs
- Verbosity; length
- Citing cases that are not directly relevant
- Filing briefs at the last minute
- Failing to put major arguments at the beginning
- Taking extreme positions not supported by cases or evidence
- Wasting time telling me black-letter law every first-year law student already knows
- Too many exhibits
- Not providing a copy directly to the court—the clerk may not recognize the time constraints involved
- Citing something called "The Law" without actually citing a single statute or case to support it
- Lack of organization
- Failure to clearly state issue and requested relief
- Case citations that do not actually support the proposition for which they are cited
- Misrepresenting the holding of a case
- Not clearly identifying the type and grounds for summary judgment
- Vituperative language
- Failure to let the court know what kind of case it is at the outset
- Lack of citation to legal authorities
- Failure to provide the cases they want me to review
- Hyperbole
- Long or unclear titles for motions and briefs—one judge actually included a photocopy of one for me, entitled (and the names have been changed to protect both the innocent and the guilty) "Defendant City of Smithtown's Motion for Reconsideration of October 27, 2008 Partial Summary Judgment Order and for Partial Summary Judgment Limiting the City's Cumulative Potential Liability on All Claims by John Smith, Stacy Jones, Ronald Lee, Michael Plunkett, and Lucy Lopez to $500,000"); to make matters worse, as the judge pointed out, the title was printed in all-capital letters and was underlined, so it actually looked like this: DEFENDANT CITY OF SMITHTOWN'S MOTION FOR RECONSIDERATION OF OCTOBER 27, 2008 PARTIAL SUMMARY JUDGMENT ORDER AND FOR PARTIAL SUMMARY JUDGMENT LIMITING THE CITY'S CUMULATIVE POTENTIAL LIABILITY ON ALL CLAIMS BY JOHN SMITH, STACY JONES, RONALD LEE, MICHAEL PLUNKETT, AND LUCY LOPEZ TO $500,000.

D. Most Common Mistakes

The most common writing mistakes the surveyed judges see are:

- Poorly-drafted affidavits
- Wordiness
- *Ad hominem* arguments
- Inaccurate case citations (misrepresenting the holding)
- Assuming court is as familiar with case as advocates
- Using case law that has been overturned or otherwise called into question
- Grammar mistakes
- Citation errors
- Filing briefs too late
- Long analysis of irrelevant issues
- Failure to address the other side's issues
- Failure to provide a proposed order
- Emotional arguments

E. Annoyances

The things that most annoy the surveyed judges, in descending order of annoyance (from "infuriating" to "mildly annoying") are:

1. Derogatory remarks about opposing counsel or parties.
2. Wordiness/length.
3. Spelling and grammar mistakes.
4. Repeated use of words like "clearly" and"obviously" as a substitute for reasoning and citations.
5. Legalese.
6. Obvious errors in citation form.
7. String cites.

F. Wish List

Judges listed a great many things helpful to them (my favorite response by far was "having a briefing attorney"). The judges are almost unanimous in five preferences. First, they appreciate briefs that have an introduction at the very beginning explaining the case, issues, and argument. Second, they ask that counsel provide courtesy copies—at least in connection with dispositive or lengthy motions—of cases cited in briefs. Third, as they do in every survey and in response to almost every question, they ask that briefs be just that—brief! Some of the judges noted the growing importance of this preference in light of the move by their courts to electronic filings. Fourth, they appreciate when lawyers are specific and succinct in stating (at the beginning of the motion or brief) the requested relief in plain and simple language. Finally, they appreciate when lawyers plainly state the requested relief at the outset of the motion or brief, and provide a proposed order granting it.

One judge included a "wish list" item that I found particularly interesting: working with opposing counsel to narrow the issues and move the focus of the case to the actual dispute.

VIII. CONCLUSION

This paper is so brief a collection of ideas about writing that it really constitutes little more than a random collection of personal pet peeves. In applying these suggestions, remember that rules – at least many of them – were made to be broken. So, to paraphrase Richard Bach's reluctant messiah (RICHARD BACH, ILLUSIONS: THE ADVENTURES OF A RELUCTANT MESSIAH 136 (1977)):

Everything in this paper may be wrong.

UPDATE ON LAND USE, ZONING, AND PLANNING

LEAH HAYES, *Houston*
Olson & Olson, LLP

State Bar of Texas
GOVERNMENT LAW 101
July 18, 2018
San Antonio

CHAPTER 7

Leah Hayes is a senior attorney at the Texas municipal law firm Olson & Olson, LLP and has 20 years of municipal law experience as an in-house city attorney and outside counsel to cities. Leah's legal career began as a small firm civil litigator which led to her first job as an Assistant City Attorney at the City of Waco. She left Waco to pursue Assistant City Attorney positions at the City of Houston in its Business Litigation Division and Land Use Division where she successfully represented the city in matters relating to contracts, zoning and land use regulation, annexation, tax increment reinvestment zones, public improvement districts, municipal management districts, and public/private economic development projects. Leah also served as the Deputy Director of the Houston Planning Department and returned to Waco in 2008 to serve as City Attorney.

As counsel to general law and home rule cities, Leah's experience in zoning and land use regulation, annexation matters, and special districts has been critical to addressing the growth issues many of our clients are experiencing. Leah is well versed in the day-to-day general counsel needs of cities including open government, ethics and disclosure, personnel matters, competitive bidding, and governmental liability. She also has experience in the more complex areas of municipal governance such as elections, budget and taxation, and economic development corporation matters.

Leah holds a Bachelor of Arts degree from the University of Texas and a Juris Doctorate from The University of Houston.

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UNDERSTANDING SOVEREIGN IMMUNITY AND THE TEXAS TORT CLAIMS ACT OR "THE CHAMBER OF SECRETS"

MICHAEL A. SHAUNESSY, *Austin*
McGinnis Lochridge, LLP

Co-author:
ETHAN J. RANIS, *Austin*
McGinnis Lochridge, LLP

State Bar of Texas
GOVERNMENT LAW 101
July 18, 2018
San Antonio

CHAPTER 8

MICHAEL SHAUNESSY
McGinnis Lochridge
600 Congress Avenue, Suite 2100
Austin, Texas 78701
512-495-6061
FAX: 512-505-6361
mshaunessy@mcginnislaw.com

BIOGRAPHICAL INFORMATION

EDUCATION

University of Texas (B.B.A.)
Southern Methodist University (J.D.)

HONORS

Southwestern Law Journal
Briefing Attorney, Hon. Robert Campbell, Texas Supreme Court
Member American Board of Trial Advocacy
Fellow Texas Bar Foundation
Texas Monthly Super Lawyer

LICENSED TO PRACTICE

The Supreme Court of Texas
United States Supreme Court
United States Court of Appeals for the Fifth Judicial Circuit
United States District Courts for the Northern, Southern, Eastern, and Western Districts of Texas

PROFESSIONAL EXPERIENCE

Partner, McGinnis Lochridge
October 2013 to present
Partner, Sedgwick LLP
February 2007 to September 2013
The Shaunessy Law Firm, P.C.,
June 2002 to February 2007
Associate and Partner, Bickerstaff, Heath, Smiley, Pollan, Kever & McDaniel, L.L.P.
October 1991 to June 2002
Assistant Attorney General of Texas, Highway Division, 1989 to 1991
Associate, Moore & Peterson, Dallas, Texas, 1987 to 1989

CERTIFICATION

Board Certified Personal Injury Trial Law
American Board of Trial Advocacy

PUBLICATIONS AND PRESENTATIONS ON GOVERNMENTAL LIABILITY

Premises Liability Under the Tort Claims Act, Suing and Defending Governmental Entities Seminar, State Bar of Texas
Tort Liability of Governmental Entities Under the Texas Tort Claims Act, Suing and Defending Governmental Entities Seminar, State Bar of Texas

ETHAN RANIS
McGinnis Lochridge
600 Congress Avenue, Suite 2100
Austin, Texas 78701
512-495-6036
FAX: 512-505-6336
eranis@mcginnislaw.com

BIOGRAPHICAL INFORMATION

EDUCATION

Oberlin College (B.A.)
University of Texas (J.D.)

HONORS

Texas Law Review
Briefing Attorney, Hon. Michael Massengale, First Court of Appeals

LICENSED TO PRACTICE

The Supreme Court of Texas
United States District Court for the Western District of Texas

PROFESSIONAL EXPERIENCE

Associate, McGinnis Lochridge
August 2016 to present

PUBLICATIONS AND PRESENTATIONS

The Statute of Frauds & Typical Leasehold Documents, Ernest E. Smith Oil, Gas, and Mineral Law Institute
Loose Constraints: The Bare Minimum for Solum's Originalism, Texas Law Review

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CONTRACTING WITH THE KING – SCOPE AND BOUNDARIES OF SOVEREIGN IMMUNITY or "The Game of Thrones" (It's a Great Day for a Red Wedding)[1]

I. INTRODUCTION

This article analyzes sovereign immunity and the extent the Texas Legislature waived sovereign immunity through enactment of the Texas Tort Claims Act (the "TCA"or "Act"). The article begins by outlining the application and effect of common-law sovereign immunity. Next, the article analyzes various provisions of the Act, including the courts' interpretation of these provisions, focusing on: (1) sovereign immunity and tort liability of governmental entities at common law; (2) how sovereign immunity can be waived; (3) the waiver of sovereign immunity for tort liability under the Act; (4) the exclusions and defenses to liability under the Act; (5) submission of a premises-liability case to the jury; and (6) various miscellaneous issues that arise in tort suits against governmental entities.

II. SOVEREIGN IMMUNITY

Generally, governmental entities that enjoy sovereign immunity are not liable for the torts of their employees, absent a constitutional or statutory waiver of that immunity.[2] Tex. Dep't of Transp. v. Able, 35 S.W.3d 608, 611 (Tex. 2000); Lowe v. Tex. Tech Univ. 540 S.W.2d 297, 298 (Tex. 1976). The Act, for example, imposes liability based upon the condition or use of real and personal property and common law standards of liability. At the same time, where the Act or other statute or constitutional provision does not specifically waive governmental immunity from suit and liability, common law sovereign immunity remains the rule of law. Therefore, understanding the extent and basis for liability under the Act requires an understanding of sovereign immunity and common law premises liability.

A. A Brief History of Sovereign Immunity.

1. The Origins of Sovereign Immunity in American and Texas Jurisprudence.

Although the origins of sovereign immunity extend back to the English monarchy, it has been recognized in this country since the drafting of our Constitution. Alexander Hamilton spoke of sovereign immunity in the Federalist papers saying:

> It is inherent in the nature of sovereignty not to be amenable to suit of an individual without its consent. This is the general scheme and the general practice of mankind; and the exception, of one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.

THE FEDERALIST No. 81, at 487 [Alexander Hamilton][Clinton Rossitor Ed., 1961]. Hamilton made this statement in part to assuage fears that the new constitution would abrogate states' sovereign immunity. Wichita Falls State Hosp. v. Taylor, 106 S.W.3d 692 (Tex. 2003). State sovereign immunity was preserved by the Constitution. Alden v. Maine, 527 U.S. 706, 713, 119 S.Ct. 2240, 144 L.Ed. 2d 636 (1999); Meyers v. Texas, 410 F.3d 236, 240 (5th Cir. 2005). Thus, sovereign immunity is sometimes linked to the "futile fiction that 'the king can do no wrong' and sovereign immunity 'is an established principle of jurisprudence in all civilized nations [and in all states of the Union]'"." Taylor, 106 S.W.3d at 694-95 (quoting Beers v. Arkansas, 61 U.S. 527, 529, 20 How. 527, 15 L.Ed. 991 (1857)).

In Texas jurisprudence, sovereign immunity was first recognized by the Texas Supreme Court, not by operation of the Constitution or statute. "In 1847, this court held

[1] Thanks to Drew Edge, Blaire Knox and Natalie Mahlberg for their help preparing this paper. And thanks to Kay Cartwright for taking our writing and making it readable and presentable.

[2] This paper is a shorten form of a longer paper on sovereign immunity and therefore please understand some short cites are not proceeded by a full citation in this paper.

that 'no State can be sued in her own court without her consent and then only in the manner indicated by that consent....' The Court did not cite the origin of that declaration, but it appears to be rooted in an early understanding of sovereignty"." Id. (quoting Hosner v. De Young, 1 Tex. 764, 769 (1847)). Tex. Natural Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d 849, 863 (Tex. 2002) (Enoch, J., dissenting). Thus, sovereign immunity in Texas jurisprudence came through recognition of the common law principle recognizing the inherent immunity of any governmental unit, not from statute or any particular provision of the constitution. See Wichita Falls State Hosp., 106 S.W.3d at 692.

2. The Purpose of Sovereign Immunity.

Generally, the courts recognize sovereign immunity as serving two purposes. The first purpose is to preclude second guessing of certain governmental actions and decisions. See Tex. Dep't of Protective & Regulatory Servs. v. Mega Child Care, Inc., 145 S.W.3d 170, 198 (Tex. 2004). See also City of El Paso v. Heinrich, 284 S.W.3d 366, 371-73 & n.6 (Tex. 2009) (litigation cannot be utilized "*to control state action by imposing liability on the State*" (italics in the original). Thus, policy level decisions, decisions regarding budgeting and allocation of resources, decisions regarding the provision of certain services (fire, police, and emergency services) and decisions regarding the design of public works cannot be the bases of suit. Sw. Bell Tel., L. P. v. Harris County Toll Road Auth., 282 S.W.3d 59, 68 (Tex. 2009). "As we have often noted, the Legislature is best positioned to waive or abrogate sovereign immunity because it allows the Legislature to protect its policymaking function." Id. (internal quotation and citation omitted); Wasson Interests, Ltd. v. City of Jacksonville, 489 S.W.3d 427 (Tex. 2016). See Tex. Home Mgmt. v. Peavy, 89 S.W.3d 30, 43 (Tex. 2002); TEX. CIV. PRAC. & REM. CODE § 101.021. Second, the courts recognize that sovereign immunity serves to protect the public treasury. Ben Bolt-Palito Blanco Consol. Ind. Sch. Dist. v. Tex. Political Subdivisions Prop. Cas. Self Ins. Fund, 212 S.W.3d 320 (Tex. 2006). Tex. Dep't of Transp. v. Sefzik, 355 S.W.3d 618 (Tex. 2011); Rolling Plains Groundwater Cons. Dist. v. City of Aspermont, 2011 WL 5041964 (Tex. Oct. 21, 2011) *3; Wichita Falls State Hosp., 106 S.W.3d at 692. The purpose of sovereign immunity and governmental immunity "is pragmatic: to shield the public from the cost and consequences of imprudent actions of their government." Id. (internal quotation omitted); Wasson, 489 S.W.3d 427, 431–32 (Tex. 2016)("the stated reasons for immunity have changed over time. The theoretical justification has evolved from the English legal fiction that '[t]he King can do no wrong,'1 WILLIAM BLACKSTONE, COMMENTARIES *246, to 'accord[ing] States the dignity that is consistent with their status as sovereign entities,' Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760, 122 S.Ct. 1864, 152 L.Ed.2d 962 (2002), to 'protect[ing] the public treasury,' Taylor, 106 S.W.3d at 695. Regardless of which justification is most compelling, however, it is firmly established that 'an important purpose [of immunity] is pragmatic: to shield the public from the costs and consequences of improvident actions of their governments'"); City of Houston v. Williams, 353 S.W.3d 128, 131 (Tex. 2011). In the Rusk State Hospital decision, the Supreme Court again affirmed, that one of the purposes of sovereign immunity and early rulings on the issue of immunity to file suit, is to avoid the wasting of tax dollars on defending suits, including on discovery, where claims are barred by immunity. Houston Belt & Terminal RR Co. v. City of Houston, 487 S.W.3d 154, 157 (Tex. 2016)("An important justification for this immunity is pragmatic: it shields "the public from the costs and consequences of improvident actions of their governments. Yet the pragmatic rationale supporting this immunity also helps to delineate its limits—"extending immunity to officials using state resources in violation of the law would not be an efficient way of ensuring those resources are spent as intended"); Rusk State Hospital v. Black, 392 S.W.3d 88, 97, 106 (Tex. 2012); Heinrich, 284 S.W.3d 375 (one of the goals/purposes of sovereign immunity is to protect the public fisc). See also Hearts Bluff Game Ranch, Inc., v. State, 381 S.W.3d 468, 489 (Tex. 2012)(Texas Supreme Court refused to find a waiver of immunity in part because governmental entity would be left weighing whether "to act in the best interests of the people versus defending lawsuits").

This protection also extends to suits attempting to try the State's title to property. State v. Lain, 162 Tex. 549, 349 S.W.2d 579 (1961). But see Tex. Parks & Wildlife v. The Sawyer Trust, 354 S.W.3d 384 (Tex. 2011); Lain, 329, S.W.2d at 581; Parker v. Hunegnaw, 364 S.W.3d 398 (Tex.App.—Houston [14th Dist.] 2012); State v. BP Am. Prod. Co., 290 S.W.3d 345, 357-58 (Tex.App.—Austin 2009)(sovereign immunity does not bar suit where it has been determined that plaintiff and not the State has superior title and right of possession, therefore sovereign immunity did not preclude BP's trespass to try title suit against the State of Texas).

Allowing plaintiffs to bring suit and recover judgments would force governmental entities to take money from other activities (providing police protection, building public improvements, and providing social services) and expend those funds to defend law suits and pay judgments. Wichita Falls State Hosp., 106 S.W.3d at 698.; Catalina Dev., Inc. v. County of El Paso, 121 S.W.3d 704 (Tex. 2003). See Rusk State Hospital v. Black, 392 S.W.3d at 97, 106.

> Subjecting the government to liability may hamper governmental functions by shifting tax resources away from their intended purposes toward defending lawsuits and paying judgments. ... Accordingly, the Legislature is better suited than the courts to weigh the conflicting public policies associated with waiving immunity and exposing the government to increased liability, the burden of which the general public must ultimately bear.

IT-Davy, 74 S.W.3d at 854. See Wasson Interests, 489 S.W.3d 427 (Tex. 2016); Brown & Gay Engineering, Inc., v. Olivares, 461 S.W.3d 117 (Tex. 2015) ("Sovereign immunity ... protects the public as a whole by preventing potential disruptions of key government services that could occur when government funds are unexpectedly and substantially diverted by litigation. ... '[S]overeign immunity generally shields our state government's improvident acts—however improvident, harsh, unjust, or infuriatingly boneheaded these acts may seem" seem')(quoting Bacon v. Tex. Historical Comm'n, 411 S.W.3d 161, 172 (Tex.App.–Austin 2013, no pet.)); Tooke, 197 S.W.3d at 331–32Bacon v. Tex. Historical Comm'n, 411 S.W.3d 161, 172 (Tex.App.–Austin 2013, no pet.)) ; Tooke, 197 S.W.3d at 331–32 (It remains a fundamental principle of Texas law, intended "to shield the public from the costs and consequences of improvident actions of their governments."); Harris County Hosp. Dist. v. Tomball Reg'l Hosp., 283 S.W.3d 838, 847 (Tex. 2009) ([t]he judicial task is not to refine legislative choices about how to most effectively provide for indigent care and collect and distribute taxes to pay for it. The judiciary's task is to interpret legislation as it is written"); Sw. Bell Tel. at 68 ("[b]ut as we have often noted, the Legislature is best positioned to waive or abrogate sovereign immunity 'because this allows the Legislature to protect its policymaking function."); McIntyre v. Ramirez, 109 S.W.3d 741, 748 (Tex. 2003) ("[o]ur role … is not to second-guess the policy choices that inform our statutes or to weigh the effectiveness of their results; rather, our task is to interpret those statutes in a manner that effectuates the Legislature's intent").

The courts have recognized that one element of sovereign immunity, immunity from suit, is critical to allowing governmental entities flexibility in dealing with their contractual obligations. The Texas Supreme Court has repeatedly stated that immunity from suit serves the purpose of allowing governmental entities to avoid contractual obligations. Sovereign immunity and precluding suits for breach of contract prevent governmental entities from being bound by policy decisions of their predecessors. Id.; City of Houston v. Williams, 353 S.W.3d 128, 131 (Tex. 2011)(The purpose of sovereign immunity and governmental immunity "is pragmatic: to shield the public from the cost and consequences of imprudent actions of their government."); IT-Davy, 74 S.W.3d at 854. In the IT-Davy decision, the Supreme Court went so far as to say that forcing a contractor to obtain legislative permission to sue insures current officials are not bound by long term contracts

made by their predecessors. Id. Thus, in the contractual realm, the Supreme Court has expressly recognized that immunity allows governmental entities to breach their contracts and rely upon immunity to preclude suit when it is determined that contract no longer serves the best interest of the entity.

While Justice Hecht has stated that sovereign immunity must not be used as a means of stealing goods or services from contractors and a majority of that court continues to hold out the possibility that a governmental entity may waive immunity by contract, to date the Texas Supreme Court has not found a single instance in which a governmental entity has waived its immunity from suit by its conduct. See IT-Davy, 74 S.W.3d 860-61 (Hecht, J., concurring), 863-64 (Enoch, J., dissenting). Consequently, persons doing business with the State of Texas, counties, cities and other governmental entities in Texas may be doing so at their own risk. These contractors cannot depend upon being able to bring suit for damages in case the governmental entity breaches the contract. Contractors should adjust their price, closely monitor the governmental entity's performance of its obligations, not perform additional services or some combination of these in order to deal with the risk created by sovereign immunity. However, a recent decision by the First Court of Appeals reaches the conclusion that immunity from suit for contract can be waived by the State's conduct. Tex. S. Univ. v. State Street Bank & Trust Co., 212 S.W.3d 893 (Tex.App.—Houston [1st Dist.] 2007, pet. denied). But see Leach v. Tex. Tech Univ., 335 S.W.3d 386, 400 (Tex.App.—Amarillo 2011, writ pending) (refusing to find a waiver by conduct based on the Texas Supreme Court's holdings and refusing to follow the holding in State Street.)

Over the last two years, the Texas Supreme Court and the courts of appeal have combined these two separate reasons for sovereign immunity, precluding second guessing of decisions by the administrative and legislative branches and protecting the public treasury, into one over reaching basis for immunity. The courts now focus on sovereign immunity as serving the purpose of preventing litigation from being used to control the actions of the State and other governmental entities. Heinrich, 284 S.W.3d at 372-73; Combs v. City of Webster, 311 S.W.3d 85, 90-91 (Tex.App.—Austin, 2009). Interestingly the Texas Supreme Court considered the issue of "controlling" governmental entities through litigation, when it decided Cobb v. Harrington back in 1945. Cobb, 144 Tex. at 365-66.

3. What Governmental Entities Enjoy Sovereign Immunity?

Sovereign immunity extends far beyond the state itself. The state's agencies and political subdivisions also enjoy sovereign immunity. General Servs. Comm'n v. Little-Tex Insulation Co., 39 S.W.3d 591, 594 (Tex.2001); Lesley v. Veterans Land Board, 352 S.W.3d 479 (Tex. 2011); Lowe v. Tex. Tech Univ., 540 S.W.2d 297 (Tex. 1976); Tex. A&M Univ. v. Bishop, 996 S.W.2d 209, 212 (Tex.App.—Houston [14th Dist.] 1999, rev'd on other grounds, 35 S.W.3d 605 (Tex. 2000); Clark v. Univ. of Tex. Health Science Ctr., 919 S.W.2d 185, 187-88 (Tex.App.—Eastland 1996, n.w.h.). Consequently, state agencies and state universities, have sovereign immunity. Lowe, 540 at 298 (Tex. 1976); Heigel v. Wichita County, 84 Tex. 392, 19 S.W. 562, 563 (1892). Additionally, "[p]olitical subdivisions of the state—such as counties, municipalities and school districts—share the state's inherent immunity." Wasson Interests, Ltd. v. City of Jacksonville, 489 S.W.3d 427, 429–30 (Tex. 2016). Sovereign immunity also protects state junior colleges, hospital districts, and other special-purpose governmental districts. TEX. CIV. PRAC. & REM. CODE § 101.001(2)(A)-(B); San Antonio Independent School Dist. v. McKinney, 936 S.W.2d 279 (Tex. 1996). See Loyd v. ECO Res., Inc., 956 S.W.2d 110, 122-123 (Tex.App.–Houston [14th Dist.] 1997, no pet); Bennett v. Brown County Water Imp. Dist. No. 1, 272 S.W.2d 498 (Tex. 1954); Willacy County Water Control and Improvement Dist. No. 1 v. Abendroth, 177 S.W.2d 936 (Tex. 1944); Biclamowicz v. Cedar Hill Indep. School Dist., 136 S.W.3d 718 (Tex.App.–Dallas 2004, no pet. h.). "When performing governmental functions, political subdivisions derive governmental immunity from the State's sovereign immunity." City of Houston v. Williams, 353 S.W.3d 128, 131 (Tex. 2011).

Sovereign immunity as it applies to local governmental entities is often referred to as "governmental immunity." Harris County Hosp. Dist. v Tomball Reg'l Hosp., 283 S.W.3d at 842 ("[g]overnmental immunity, like the doctrine of sovereign immunity to which it is appurtenant, involves two issues: whether the State has consented to suit and whether the State has accepted liability").

Courts look to the "nature, purpose and powers of an entity in determining if the entity is a governmental entity that will enjoy sovereign or governmental immunity"." In Ben Bolt-Palito Blanco Consol. ISD v Tex. Political Subdivisions Prop. Cas. Self Ins. Fund, 212 S.W.3d 320 (Tex. 2006), the Texas Supreme Court had to determine whether a governmental group risk pool made up of cities, counties, school districts, special purpose districts and other political subdivisions was a political subdivision of the state that enjoyed sovereign immunity. Id. In determining whether the pool was a governmental entity, the Supreme Court considered the fact that the Texas Government Code's definition of "local government" includes combinations of political subdivisions. Id. The Court went on to note that the pool had "powers of government and [had] ... the authority to exercise such [governmental] rights, privileges, and functions"...." Id. at 325. Based on these factors, the Court held that where, as with the pool, an entity's "governing statutory authority demonstrates legislative intent to grant an entity the nature, purpose and powers of an arm of the state government, that entity is a government unit unto itself"." Id. at 325-26. See also LTTS Charter School, Inc. v. C2 Construction, Inc., 342 S.W.3d 73 (Tex. 2012): LTTS Charter School, Inc. v. C2 Construction, Inc., 358 S.W.3d 725, 734 (Tex.App.—Dallas 2012, pet. pending); Klein v. Hernandez, 315 S.W.3d 1(Tex. 2010) (by provision of statute Baylor Medical School is a state agency and enjoys sovereign immunity).

Governmental group risk or self-insurance pools are political subdivisions of the state that enjoy sovereign immunity. Id. Governmental group risk or self insurance pools are political subdivisions enjoying immunity in their own right and not just because they are composed of entities which have sovereign immunity. Id. at 326. The Court found that governmental self insurance or group risk pools are local governmental entities, similar to cities, and school districts. Id.

In LTTS Charter School, Inc. v. C2 Construction, Inc., 342 S.W.3d 73 (Tex. 2012), the Texas Supreme Court did not address whether an open-enrollment charter school is entitled to immunity from suit and immunity from liability but rather addressed whether an open-enrollment charter school is entitled to bring an interlocutory appeal under Chapter 51 of the Civil Practice and Remedies Code. Chapter 51 of the Civil Practice and Remedies Code, authorized governmental entities to bring interlocutory appeals from denial of motions raising immunity but does not define what constitutes a governmental entity. Id. The court turned to the TCA's definition of a "governmental unit" to decide what organizations as empowered to bring interlocutory appeals. The TCA defines governmental entities to include any "institution, agency, or organ of government the status and authority of which are derived from the Texas Constitution or from laws passed by the Legislature under the Constitution." Id. (quoting TEX. CIV. PRAC. & REM. CODE § 101.001(3)(D)). Rather than determining if open-enrollment charter schools have governmental status or authority derived from the Texas Constitution or laws passed by the Legislature under the Constitution, the Supreme Court followed the same analysis it relied upon in the UIL case to open-enrollment charter schools. Id.

Specifically, the Texas Supreme Court focused on the role, powers and limitations placed on open-enrollment charter schools in deciding whether they are governmental entities determining whether it was a governmental entity under the Tort Claims Act. Id. The Court noted that open enrollment charter schools are "indisputably" part of the Texas public education system, these schools have an explicit grant of authority under Title II of the Education Code, are schools open to general enrollment which receive funding from the State of Texas and cannot charge tuition. Id. These schools are subject to the Competitive Bidding Statute, the Public Information Act, and the Open Meetings Act. Id. These factors/characteristics led the Supreme Court to conclude that, "We are confident that the Legislature considers [open enrollment charter

schools] to be an 'institution, agency, or organ of government' under the Tort Claims Act and thus entitled to take an interlocutory appeal here." Id.

> The Supreme Court specifically left unresolved the question of whether open enrollment charter schools are immune from suit. LTTS Charter School, Inc. v. C2 Construction, Inc., 342 S.W.3d 73 (Tex. 2012). Additionally, the Supreme Court specifically noted that it was not addressing whether the Legislature has the authority to confer immunity from suit. Id. Previously, the Supreme Court held that the judiciary determines the scope of immunity, including which entities enjoy immunity from suit and which claims that are barred by, but only the Legislature can waive immunity. Id. The Court appears to be reminding the Legislator, governmental entities, and civil litigants that whether an entity enjoys immunity from suit, is determined by the judiciary and that the Texas Supreme Court will look to the purpose, powers, and restrictions on entities and how well they match those of known governmental entities in deciding if they enjoy immunity from suit. Id.

After the Texas Supreme Court's finding that open-enrollment charter schools were governmental entities entitled to take interlocutory appeals from jurisdictional rulings under Chapter 51 of the Civil Practice and Remedies Code, the Dallas Court of Appeals addressed the question of whether open-enrollment charter schools enjoyed immunity from suit. LTTS Charter School, Inc. v. C2 Construction, Inc., 358 S.W.3d 725, 734 (Tex.App.—Dallas 2012, pet. pending). The Dallas Court of Appeals began its analysis by acknowledging that the provisions of the Education Code under which charter schools are created provides indicated that open enrollment charter schools enjoyed immunity to the same extent as public school districts. Id. at 734. The Dallas Court went on to conclude that the language in the Education Code implies that open enrollment charter schools enjoy immunity from suit to the same extent that public schools and that any waiver of immunity from suit or liability for public schools would also apply to open enrollment charter schools. Id. 734-35.

Like the Supreme Court, the Dallas Court noted that the judiciary branch, not the legislative branch, determines the boundaries of the common law doctrine of sovereign immunity, including what entities enjoy immunity from suit. Id. at 735 (relying on City of Galveston, 217 S.W.3d at 471; Tooke, 197 S.W.3d at 331). The Dallas Court then followed the Supreme Court's analysis in UIL as well as its previous decision in LTTS and looked at the role of open enrollment charter schools, as well as the powers and restrictions placed upon them, to conclude whether an open enrollment charter school enjoy immunity suit. The Dallas Court of Appeals noted that the Supreme Court had determined open enrollment charter schools, "(1) are statutorily declared to be part of the public school system of the state; (2) derive authority to wield the powers granted to traditional public schools and to receive and spend tax dollars (and in many ways to function as a governmental entity from a comprehensive statutory scheme); (3) have responsibility for implementing the state's system of public education; and (4) are generally subject to state laws and rules governing public schools, including regulation of open meetings and access to public information." Id. (citation and internal quotations omitted). Id. at 735. Thus, the Dallas Court of Appeals found that open enrollment charter schools do enjoy immunity from suit. Id. at 736.

The Austin Court of Appeals found that University Interscholastic League ("UIL") was a governmental entity that enjoys sovereign immunity through its connection with the University of Texas. The Austin Court found that UIL enjoys sovereign immunity because it is part of the University of Texas. UIL v. Sw. Officials Ass'n, Inc., 319 S.W.3d at 957-63. This holding was based on the fact that the UIL was referenced by statute as being part of the University of

Texas, it had to report and account for all its activities and funds to state governmental entities, by statute it has rule making authority over high school sports and participation in those sports, the Texas Attorney General's office found that it was subject to the Public Information Act, UIL was subject to Sun Set Laws, and, like other state entities, by statute, mandatory venue for suits against UIL is in Travis County. UIL, 319 S.W.3d at 957-63.

The lesson of the Ben Bolt, UIL and Klein decisions is that, if a defendant is an entity that performs governmental related functions, it may enjoy governmental immunity for those functions. Klein, 315 S.W.3d 1. In Klein, the Texas Supreme Court noted that the Texas Health & Safety Code granted Baylor Medical School, a private medical school, full sovereign immunity in connection with the provision of medical care at an indigent care hospital by employees or students of Baylor Medical School. Id.

Whether a city enjoys sovereign immunity depends upon the capacity in which it acts. Wasson Interests, Ltd. v. City of Jacksonville, 489 S.W.3d 427 (Tex. 2016). Cities act in either a governmental capacity or a proprietary capacity. Id. See Dilley v. City of Houston, 222 S.W.2d 992, 993 (Tex. 1949); Barges v. City of San Antonio, 21 S.W.3d 347, 356 (Tex.App.–San Antonio 2000, pet. denied). Governmental functions are those "[a]cts done as a branch of the state—such as when a city 'exercise[s] powers conferred on [it] for purposes essentially public ... pertaining to the administration of general laws made to enforce the general policy of the state,'" such as duties imposed by law or assigned by the state. Wasson, 489 S.W.3d 427, 433 (Tex. 2016). "Propriety functions are those functions performed by a [municipality], in its discretion, primarily for the benefit of those within the corporate limits of the municipality." Id. When a city acts in a proprietary capacity, it is not acting as an arm of the government; it does not have sovereign immunity and is therefore liable as a private citizen for the torts of its employees. Id.; Dilley, 222, S.W.2d at 993. When a city acts in its governmental capacity it enjoys full sovereign immunity as an agent of the sovereign, the state. Wasson, 489 S.W.3d 427 (Tex. 2016); Dilley, 222 S.W.2d at 993.

Beginning in 2003, the Texas Supreme Court began to delineate between the kind of immunity applicable to the State and its entities, and the kind of immunity applicable to local governmental entities that derive their immunity from the state but are not state agencies. Wichita Falls State Hosp. v. Taylor, 106, S.W.3d 692, 694 n. 3 (Tex. 2003). As the sovereign, the state and its agencies enjoy "sovereign immunity." Id. "In addition to protecting the State from liability . . . [sovereign immunity] also protects the various divisions of state government, including agencies, boards, hospitals, and universities." Id. (citing Lowe v. Tex. Tech Univ., 540 S.W.2d 297 (Tex. 1976)). On the other hand, "governmental immunity" is the proper title for the immunity from suit and liability enjoyed by political subdivisions of the state, such as counties, cities, and school districts. Harris County Hosp. Dist v. Tomball Reg'l Hosp., 283 S.W.3d 838, 842 (Tex. 2009); Wichita Falls State Hosp, 106, S.W.3d at 694 n. 3. Id. The protections of governmental and sovereign immunity are the same, except as we shall see, where a political subdivision of the state is sued by or sues, the State or its agencies. For convenience, the term "sovereign immunity" is used in this paper to refer to the immunity enjoyed both by the State of Texas and its agencies, as well as political subdivisions of the state.

4. What Branch of Government Can Waive Sovereign Immunity for a Class of Governmental Defendants or for a Particular Type of Claim?

While it may have been a decision of the Texas Supreme Court that first interjected sovereign immunity into Texas jurisprudence, the court has consistently held that any waiver of immunity rests within the sole discretion of the Texas Legislature.

> Most sovereigns have long abandoned the fiction that governments and their officials can 'do no wrong.' To varying degrees, states and the federal government have voluntarily relinquished the privilege of

> absolute immunity by waiving immunity in certain contexts.
>
> …
>
> Courts in other jurisdictions have occasionally abrogated sovereign immunity by judicial decree. We have held, however, that the Legislature is better suited to balance the conflicting policy issues associated with waiving immunity.

Wichita Falls State Hosp., 106 S.W.3d at 695-96 (emphasis added).

The Texas Supreme Court decisions are in conflict over the question of whether the Legislature can empower agencies of the administrative branch and/or local governmental entities to waive immunity. Compare Univ. of Tex. at El Paso v. Herrera, 322 S.W.3d 192, 201 (Tex. 2010)(court does not reach the issue of whether the University of Texas at El Paso can waive its immunity through its personnel policies) and City of Dallas v. Albert, 354 S.W.3d 368 (Tex. 2011); Tex. Nat'l Res. Consv. Comm'n v. IT-Davy, 74 S.W.3d 849, 857-58 (Tex. 2002). In IT-Davy, the contractor argued that the agency waived its immunity from suit by the terms of the contract. The Supreme Court rejected this argument holding, "Texas law is clear. Only the Legislature can waive sovereign immunity from suit in a breach-of-contract claim. Administrative agencies…are part of our government's administrative branch [and] consequently cannot waive immunity from suit. It also follows that administrative agents—even those who have authority to contract on the agency's behalf—cannot waive their agency's immunity from suit."

The Supreme Court had an opportunity to re-state the IT-Davy holding in 2010 but refused to address the issue of whether the Legislature refused to address the issue of whether the Legislature could empower agencies to waive their immunity from suit. See Herrera, 322 S.W.3d at 201. Herrera claimed that UTEP had waived immunity by means of its Personnel Handbook. Id. The Supreme Court did not reach the issue of whether UTEP had the power to waive its own immunity, instead deciding that the language in the handbook could not be read as a waiver of immunity. Id.; see Leach, 335 S.W.3d at 394-95 (finding that University's operating procedures enacted pursuant to the Education Code did not waive immunity). Similarly, the Texas Supreme Court has never expressly resolved the issue of whether a City's Charter can waive immunity, instead finding the language in the charter was insufficient to constitute a waiver. Tooke v. City of Mexia, 197 S.W.3d 325, 344 (Tex. 2006).

However, the Supreme Court's decision in Albert seems to indicate that the Court now takes the position that a governmental entity cannot waive its own immunity, except by way of creating a right to offset when it brings a claim against an opposing party. Albert arose out of claims by Dallas firefighters and policemen that they were not being paid in accordance with the terms of an ordinance passed by public referendum. Albert, 354 S.W.3d 368, 370. The City counterclaimed saying that some of the plaintiffs have indeed been overpaid. The officers asserted that the City had waived immunity by filing its counterclaim and/or by the passage of the ordinance. The Supreme Court agreed that once the City filed the counterclaim, the trial court had jurisdiction over any properly asserted germane claims that could offset the amount of the City's claims against the plaintiffs. Id. at 375. However, the Court held that the filing of the counter claim was NOT a waiver of immunity by the City. Id. The Supreme Court went on to hold, that just as the Dallas City Council could not waive immunity by passing an ordinance and the voters of the city could not waive immunity by ordinance resulting from a referendum. Id. at 379-380. Albert and Sharyland Water Supply Corp v. City of Alton suggest that at present the Supreme Court is unwilling to find that a governmental entity can take actions to waive its own immunity. Id.; Sharyland Water Supply Corp v. City of Alton, 354 S.W.3d 407 (Tex. 2011)(rejecting the idea that courts can find a waiver of immunity from suit by conduct).

The Texas Supreme Court has repeatedly noted that, because of the consequences that come with waiving immunity, the Legislature is in the best position to make those policy decisions. Albert, 354 S.W.3d 368, 379; Tomball

Regional Hosp., 283 S.W.3d at 847 ([t]he judicial task is not to refine legislative choices about how to most effectively provide for indigent care and collect and distribute taxes to pay for it. The judiciary's task is to interpret legislation as it is written"); Sw. Bell Tel., L.P. v. Harris County Toll Road Auth., 282 S.W.3d 59, 68 (Tex. 2009) ("[b]ut as we have often noted, the Legislature is best positioned to waive or abrogate sovereign immunity 'because this allows the Legislature to protect its policymaking function"); McIntyre v. Ramirez, 109 S.W.3d 741, 748 (Tex. 2003) ("[o]ur role … is not to second-guess the policy choices that inform our statutes or to weigh the effectiveness of their results; rather, our task is to interpret those statutes in a manner that effectuates the Legislature's intent"). The court's deference to the Legislature to decide whether to waive immunity derives from both the principals related to separation of powers as well as the Legislature being better suited to make the decisions regarding allocation of resources. Tomball Reg'l Hosp., 283 S.W.3d at 848. See Sw. Bell Tel., L.P., 282 S.W.3d at 68.

At the same, the Texas Supreme Court has not "absolutely foreclosed the possibility that the judiciary may abrogate immunity by modifying the common law." Id. Justices Hecht and Enoch have written concurring opinions in which they have noted that unless the Legislature addresses certain problems with sovereign immunity and/or the Tort Claims Act, the Texas Supreme Court may act to abrogate immunity for the purpose of forcing the Legislature to act. See IT-Davy, 74 S.W.3d 863 (Enoch, J. Dissenting) (stating the Supreme Court should abrogate sovereign immunity in all breach of contract cases). Tex. Dep't of Criminal Justice v. Miller, 51 S.W.3d 583, 590-592 (Tex. 2001) (Hecht, J., concurring) (noting that the distinction between use of property for which immunity has been waived and non-use of property for which there is no waiver creates distinctions that cannot be justified, articulated, explained, or understood; thus, judicial abolition of immunity may be necessary to prompt Legislature to enact legislation for determining when immunity is waived for the non-use of property).

B. Sovereign Immunity at Common Law and the Two Forms of Immunity.

Under common law, governmental entities enjoyed full sovereign immunity. State v. Snyder, 18 S.W. 106, 109 (Tex. 1886); Hosner v. De Young, 1 Tex. 764 (1847); Buchanan v. State, 89 S.W.2d 239, 240 (Tex. Civ. App.—Amarillo 1936, writ ref'd). Sovereign immunity protects the State, its agencies, political subdivisions and officials from suits for damages. Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 405 (Tex. 1997).

> Sovereign immunity embraces two principals: *immunity from suit* and immunity from liability. First, the State retains immunity from suit without legislative consent, even if the State's liability is not disputed. Second, the State retains *immunity from liability* though the Legislature has granted consent to the suit.

Id. (citations omitted); Tex. Dep't of Transp. v. Jones, 8 S.W.3d 636, 638 (Tex. 1999) ("[i]mmunity from liability and immunity from suit are two distinct principles".). The Texas Supreme Court went on to explain the differences between the two different aspects of immunity.

> *Immunity from suit* bars a suit against the State unless the State expressly gives its consent to the suit. In other words, although the claim asserted may be one on which the State acknowledges liability, this rule precludes a remedy until the Legislature consents to suit. ...
>
> *Immunity from liability* protects the State from judgments even if the Legislature has expressly given consent to the suit. In other words, even if the Legislature authorizes suit against the State the question remains whether the claim is one for which the State acknowledges liability. The State neither admits liability by granting permission to be sued.

Federal Sign v. Texas Southern Univ., 951 S.W.2d 401, 405 (Tex. 1997) (citations omitted); State v. Lueck, 290 S.W.3d 876 (Tex. 2009) ("[i]mmunity from suit is a jurisdictional question of whether the State has expressly consented to suit. … On the other hand, immunity from liability determines whether the State has accepted liability even after it has consented to suit"); Harris County. Hosp. Dist. v. Tomball Reg'l Hosp., 283 S.W.3d 838, 842 (Tex. 2009) ("[g]overnmental immunity, like the doctrine of sovereign immunity to which it is appurtenant, involves two issues: whether the State has consented to suit and whether the State has accepted liability"). See Rusk State Hospital .v Black, 392 S.W.3d at 95, 101, 103-06 (immunity from suit implicates and impacts a trial court's jurisdiction, although the members of the Texas Supreme Court disagree on whether its impacts subject-matter jurisdiction or personal jurisdiction); Dillard v. Austin Indep. Sch. Dist., 806 S.W.2d 589, 592 (Tex.App.—Austin 1991, writ denied); Holder v. Mellon Mortgage Co., 954 S.W.2d 786, 804 (Tex.App.—Houston [14th Dist.] 1997, *rev'd on other grounds*, 5 S.W.3d 654 (Tex. 1999); Missouri Pac. R.R. Co. v. Brownsville Navigation Dist., 453 S.W.2d 812, 813 (Tex. 1970); Harsfield, Governmental Immunity From Suit and Liability in Texas, 24 TEX. L. REV. 337 (1949); Jones, 8 S.W.3d at 638. See also City of Houston v Rhule, 417 S.W.3d 440, 442 (Tex. 2013) (subject matter jurisdiction is essential to a court's power to decide a case, can be raised for the first time on appeal, and all courts have the affirmative obligation to determine if they have subject matter jurisdiction).

Thus, sovereign immunity bars both suit and liability absent express consent to suit and liability being given. Jones, 8 S.W.3d at 638; Federal Sign, 951 S.W.2d at 408; Holder, 954 S.W.2d at 808. Accordingly, any plaintiff bringing suit for money damages against the State had the burden of proving the state had waived immunity from both suit and liability. See City of Houston v. Arney, 680 S.W.2d 867 (Tex.App.—Houston [1st Dist.] 1984, no writ).

"A statute waives immunity from suit, immunity from liability, or both." Lueck, 290 S.W.3d at 880. Statutes such as the TCA and the Whistleblower Act waive immunity from suit and liability, thus making immunity from suit and liability "co-extensive." Lueck, 290 S.W.3d at 882. Thus, the plaintiff's ability to establish the trial court's jurisdiction is dependent upon her ability to prove liability. Id. See Hearts Bluff Game Ranch, Inc., v. State, 381 S.W.3d at 482-83. The Texas Supreme Court held that the trial court lacked jurisdiction over the plaintiff's claims because the plaintiff could not establish that the government's actions proximately caused the taking of plaintiff's property. Id.

1. Sovereign Immunity as it Applies to Torts.

With regard to tort claims, the State and its political subdivisions enjoy complete sovereign immunity (both immunity from suit and liability). Lowe, 540 S.W.2d at 298. "A Texas state agency [and other political subdivisions] may not be sued or held liable for the torts of its agents in the absence of a constitutional or statutory provision that waives [their] governmental immunity for alleged wrongful acts." Tex. Parks & Wildlife Dep't v. Davis, 988 S.W.2d 370, 372 (Tex.App.—Austin 1999, pet. pending). See In re United Servs. Auto. Ass'n, 307 S.W.3d 299, 307 (Tex. 2010). Thus, a plaintiff must establish both a waiver of immunity from suit **and** liability in order to successfully pursue to judgment a tort claim against the State or any of its political subdivisions.

2. Sovereign Immunity as it Applies to Contract Claims.

Contract and quasi-contract claims against governmental entities warrant special consideration. Recent decisions of the Texas Supreme Court and several Texas appellate courts have clearly stated that governmental entities enjoy a limited degree of sovereign immunity – immunity from suit only.

> It has long been recognized that sovereign immunity protects the State from lawsuits for damages, absent legislative consent to sue the State. The term "sovereign immunity" actually includes two principles: immunity from suit and immunity from liability.

> Immunity from suit bars legal action against the State, even if the State acknowledges liability for the asserted claim, unless the legislature has given consent to sue. Immunity from liability protects the State from judgments, even if the legislature has expressly given consent to sue. When the State [or other governmental entity] enters into a contract with a private entity, it gives up its immunity from liability, but not its immunity from suit.

Aer-Aerotron, Inc. v. Tex. Dep't of Transp., 997 S.W.2d 687, 690 (Tex.App.—Austin 1999, pet. granted) (emphasis added).

See further discussion of sovereign immunity in contract cases in section III, D, 1, below.

3. Heinrich Sovereign Immunity as it Applies to Claims for Injunctive and Equitable Relief.

Sovereign immunity offers the State and its subdivisions protection from the use of litigation to control decision making or to access the public treasury. The court has long recognized an exception to immunity for suits brought against state *officials*, on the ground that those officials have acted outside of their statutory authority. Heinrich, 284 S.W.3d at 371-73; E.g., Cobb v. Harrington, 190 S.W.2d 709, 712 (Tex. 1945). State officials are likewise subject to the equitable remedy of mandamus. In re Smith, 333 S.W.3d 582, 585 (Tex. 2011)(sovereign immunity will not bar suit for mandamus, i.e., seeking to compel a ministerial act that does involve the exercise of discretion). E.g., Tex. Nat'l Guard Armory Bd. v. McCraw, 126 S.W.2d 627 (Tex. 1939). Thus, the doctrine of sovereign immunity did not apply to claims for injunctive relief seeking to force governmental officials to follow the law or to quit acting outside the scope of their authority. Henrich, 284 S.W.3d at 371; Anderson v. City of Seven Points, 806 S.W.2d 791, 793 (Tex. 1991); Bullock v. Calvert, 480 S.W.2d 367 (Tex. 1972); Thompson, 2003 WL 22964277. But see Potter Cnty. Attorney's Office v. Stars & Stripes Sweepstakes, 121 S.W.3d 460 (Tex.App. –Amarillo 2003, no pet.), (suit for injunctive relief barred by sovereign immunity because there was nothing illegal about seizure of eight-liner machine).

The Texas Supreme Court explained the basis for this exception in 1945 and reiterated it in 2009. In Cobb v. Harrington, the Texas Supreme Court explained;

> This is not a suit against the State. This is not a suit to impose liability upon the State or to compel the performance of its contract…. It is not an action that is in essence one for the recovery of money from the State or in which a judgment obtained would be satisfied by the payment out of funds in the State treasury. [T]he purpose of [this suit is not] to control the Land Commissioner when acting within the scope of authority lawfully conferred upon him. This action is for the purpose of obtaining a judgment declaring that respondents are not motor carriers as defined by the tax statute, and that petitioners, in endeavoring to compel respondents to pay the tax, are acting wrongfully and without legal authority. The acts of officials which are not lawfully authorized are not acts of the State, and an action against the officials by one whose rights have been invaded or violated by such acts, for the determination and protection of his rights, is not a suit against the State within the rule of immunity of the State from suit.

Cobb, 144 Tex. at 365-366 (citations omitted).

The Texas Supreme Court returned to this reasoning in the Heinrich decision where the court held: "[S]uits to require state officials to

comply with statutory or constitutional provisions are not prohibited by sovereign immunity, even if a declaration to that effect compels the payment of money. To fall within this *ultra vires* exception, a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act. Compare Epperson, 42 S.W.2d at 231 ("the tax collector's duty ... is purely ministerial") with Catalina Dev. Inc. v. County of El Paso, 121 S.W.3d 704, 706 (Tex. 2003) (newly elected commissioners court immune from suit where it "acted within its discretion to protect the perceived interests of the public" in rejecting contract approved by predecessor) and Dodgen, 308 S.W.2d at 842 (suit seeking "enforcement of contract rights" barred by immunity in the absence of any "statutory provision governing or limiting the manner of sale"). Thus, *ultra vires* suits do not attempt to exert control over the State—they attempt to reassert the control of the State. Stated another way, these suits do not seek to alter government policy, but rather to enforce existing policy.

> [W]hile a lack of immunity may hamper governmental functions by requiring tax resources to be used for defending lawsuits … rather than using those resources for their intended purposes … this reasoning has not been extended to *ultra vires* suits.

Heinrich, 284 S.W.3d at 372-73.

These types of suits for injunctive relief have been held to fall within the courts' supervisory jurisdiction to protect against actions by officials or entities that are unconstitutional or *ultra vires*. Creedmoor-Maha Water Supply Corp. v. Tex. Comm'n on Envtl. Quality, 307 S.W.3d 505, 513 (Tex.App.—Austin 2010, no pet.); Sw. Bell Tel. Co. v. Public Util. Comm'n, 735 S.W.2d 663, 667-68 (Tex.App.—Austin 1987, no writ). Thus, these claims are not barred either by sovereign immunity or official immunity. Heinrich, 284 S.W.3d at 379-80.

As noted by the Supreme Court in Heinrich, often times the key to establishing entitlement to injunctive relief is proving that the suit involves a ministerial act in which the persons sued have no, discretion in the act sought to be compelled, Southwestern Bell Tel. v. Emmett, 459 S.W.3d 578, 587 (Tex. 2015); Heinrich, 284 S.W.3d at 371; Bagg v. Univ. of Tex. Med. Branch, 726 S.W.2d 582, 584-85 (Tex.App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.). Thus, suits such as Heinrich and Cobb are not actions where litigation is used to control a governmental entity but are instead instances where judicial action is necessary to reassert the control of the state and, thus, do not alter public policy but rather ensure public policy is followed by officials. Heinrich, 284 S.W.3d at 372-73.

Thus, suits of injunctive relief are barred by sovereign immunity if the purpose of the suit is to restrain a governmental entity or officials in the exercise of discretionary or constitutional authority. Mega Child Care, Inc., 145 S.W.3d 170, 198 (Tex. 2004). See also City of El Paso v. Heinrich, 284 S.W.3d 366, 372-73 & n.6 (Tex. 2009). Even *ultra vires* suits, which are the appositive of a suit to control state action, "must not complain of a governmental officer's exercise of discretion but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial function." Id. The Texas Supreme Court explained, that, "In IT-Davy, we distinguished permissible declaratory-judgment suits against state officials 'allegedly act[ing] without legal or statutory authority' from those barred by immunity: 'In contrast [to suits not implicating sovereign immunity], declaratory-judgment suits against state officials seeking to establish a contract's validity, to enforce performance under a contract, or to impose contractual liabilities are suits against the State. *That is because such suits attempt to control state action by imposing liability on the State*. Id. at 371-72 (internal quotations and citations omitted; italics in original).

Thus, the Supreme Court in Heinrich distinguished that case from another case the Court had recently decided, Houston Munic. Employees Pension v. Ferrell, 248 S.W.3d 151 (Tex. 2007), because Ferrell's suit sought review of the pension board's discretionary decision

making. Heinrich, 284 S.W.3d at 371, fn 3. The Court pointed out that Ferrell's suit might not have been barred by sovereign immunity if he had alleged the pension board was clearly violating its enabling statute. Id.

The fact that a state actor is granted some discretion in carrying out his duties does not automatically bar an ultra vires claim. Houston Belt, 487 S.W.3d at 163-64. Thus, where discretion is limited or confined by the terms of a statute, ordinance, etc., the official's actions are ultra vires when he exercises discretion in a many inconsistent with the statute, ordinance, etc., that grants him discretion. Id.

With regard to remedies available for ultra vires claims, in Heinrich, the Texas Supreme Court held that a plaintiff can obtain prospective injunctive relief with a general ability to sue the State and governmental entities for equitable relief. Heinrich, 284 S.W.3d at 375-76. See also Labrado v. County of El Paso, 132 S.W.3d 581, 593 (Tex.App.–El Paso 2004, no pet. h.); Tex. A&M Univ. v. Thompson, 2003 WL 22964277 (Tex.App.–Austin 2003, no pet. h.); Tex. Dep't of Transp. v. City of Amarillo, 2005 WL 2367770 (Tex.App. –Amarillo 2005).

At the same time, a party cannot seek to avoid the defense of sovereign immunity by dressing up a suit for money damages as a claim for equitable relief. As noted by the Fourteenth Court of Appeals:

> In Cobb, the complainants brought suit to obtain a judgment declaring that ... state officials were ... acting wrongfully and without legal authority. The court held that this was not a suit against the state and thus was not barred by sovereign immunity. The court emphasized that the complainants were not seeking to impose liability on the state or to compel performance of a contract.

TRST Corpus, Inc., v. Financial Center, Inc., 9 S.W.3d 316, 323 (Tex.App.–Houston [14th Dist.] 1999, pet. denied); see Smith v. Lutz, 149 S.W.3d 752 (Tex.App.–Austin 2004, no. pet. h.)(not released for publication); Freedman v. Univ. of Houston, 110 S.W.3d 504 (Tex.App.–Houston [1st Dist.] 2003, no pet. h.); Bell v. City of Grand Prairie, 221 S.W.3d 317 (Tex.App.–Dallas 2007). The courts are obligated to look at the real nature of the relief sought. Thus, when the suit primarily seeks money damages, adding a claim for declaratory or injunctive relief will not allow the plaintiff to circumvent the bar to suit and liability created by sovereign immunity. Id; Bell v. City of Grand Prairie, 160 S.W.3d 691, 693-94 (Tex.App.—Dallas 2005, no pet.).

In Smith, the Austin Court notes that the plaintiff did not have a legitimate declaratory judgment claim because he could not point to anything other than the contract, such as a statute, that would require the university to take the actions in question. 149 S.W.3d at 752. Therefore, the court found the declaratory judgment claim was a pretext to bring a suit for breach of contract. Id. The Austin Court explained that, in its opinion, all declaratory judgment claims involving contracts with the state are barred by sovereign immunity. Id. "["D]eclaratory-judgment actions brought against state officials seeking to establish a contract's validity, to enforce performance under a contract, or to impose contractual liabilities *are* considered suits against the state because they seek to control state action or impose liability on the state. This second category of declaratory actions may not be maintained without legislative permission." Id. at 759-760 (emphasis in original). Following the rationale of the Austin Court of Appeals, a party that enters into a contract with a state agency or a subdivision of the state waives its right to use the Declaratory Judgment Act to determine its obligations and rights under the contract. See id.

This bar applies regardless of the way in which the claim is framed. See IT-Davy, 74 S.W.3d at 854; see also, e.g., City of Houston v. Williams, 216 S.W.3d 827 (Tex. 2007) (firefighters' suit for declaratory judgment was, in fact, a claim for money damages and, thus, required a waiver of the city's sovereign immunity). When the only injury alleged is in the past and the only plausible remedy is an award of money damages, a declaratory judgment claim is barred by sovereign immunity. Bell v. City of Grand Prairie, 221 S.W.3d 317 (Tex.App.–Dallas 2007). However, where the firefighters' suit for

declaratory and injunctive relief would affect determination of seniority going forward, sovereign immunity did not bar the suit. Id.

At the same time, the fact that prospective equitable relief will result in the payment of money by a governmental entity or the mere inclusion of a claim for money damages does not mean that plaintiff is bringing a declaratory judgment act claim purely as a pretext for a breach of contract claim. Heinrich, 284 S.W.3d at 371-373; Labrado v. County of El Paso, 132 S.W.3d 581, 593-94 (Tex.App.—El Paso 2004 no pet. h.); see also City of El Paso v. Waterblasting Techs., Inc., 491 S.W.3d 890 (Tex. App.—El Paso 2016, no pet.) (applying similar analysis to competitive bidding for projects paid from municipal funds).. The plaintiffs in Labrado were seeking a declaration that the county had violated the competitive bidding statute. Id. The fact that they included a claim for money damages did not bar their suit for declaratory relief on the issue of whether the county violated the competitive bidding statute. Id.

The Texas Supreme Court's decision in Heinrich does clarify what monetary relief can be obtained in suits seeking declaratory, injunctive, and mandamus relief. Ms. Heinrich brought suit against the El Paso Fireman and Policemen's Pension Fund after her pension payments were reduced by 1/3. Heinrich, 284 S.W.3d at 369. The pension reduced her payment by 1/3 because her son had reached age 23 and they had begun paying 1/3 of the pension amount to him. Id., at p.6. Heinrich sued alleging that the reduction in her pension payment was in violation of the statute governing the pension fund. Id. In the suit, Heinrich sought an injunction compelling the pension to pay her both for the fund they had withheld in the past as well as to make payments to her equal to 100% of the pension amount in the future. Id. After holding that sovereign immunity did not bar her claims and that pension fund board members in their official capacity had violated the applicable statute, the Supreme Court turned to the question of what relief could be granted to Ms. Heinrich. Id., at p. 9. The Court noted that, while the equitable claims were not barred by sovereign immunity, the relief Ms. Heinrich sought might revive sovereign immunity. "But the *ultra vires* rule is subject to important qualifications. Even if such a claim may be brought, the remedy may implicate immunity." Heinrich, 284 S.W.3d at 373. The Court then explained that retrospective monetary relief is generally barred by sovereign immunity. Id. at 373-374. "This does not mean, however, that the judgment that involves the payment of money necessarily implicates immunity." Id. at 374. The Supreme Court then acknowledged that drawing a line on what relief could be granted without running afoul of sovereign immunity was "problematic." Ultimately, the Supreme Court held that "a claimant, who successfully proves an *ultra vires* claim is entitled to prospective injunctive relief as measured from the date of injunction." Id. p. 376. In doing so, the Supreme Court specifically overruled a portion of its holding in State v. Epperson, 42 S.W. 2d 228 (Tex. 1931). The Court explained that, to the extent the Epperson decision allowed recovery of retrospective monetary relief, that holding was overruled by Heinrich. Id. At the same time, the Supreme Court acknowledged that it is frequently difficult to distinguish between retrospective and prospective relief. Heinrich, 284 S.W.3d at 375. "That the programs are also compensatory in nature does not change the fact they are part of a plan that operates prospectively…." Id. (internal quotations and citations omitted). The Texas Supreme Court acknowledged that the United States Supreme Court had previously upheld, as prospective relief, a trial court order requiring state officials to spend six million dollars on education to remedy the effects of segregation. Id.

The Heinrich decision clearly sets out the limited circumstances in which a suit can be maintained based on a claim of *ultra vires* actions of government employees or officials in their official capacity. Id. "To fall within this *ultra vires* exception, a suit must not complain of a government officer's exercise of discretion, but rather must allege, and ultimately prove, that the officer acted without legal authority or failed to perform a purely ministerial act." Id. at 372. In re Smith, 333 S.W.3d at 585. Alternatively, the suit must allege that the official had limited discretion and exercised his discretion in a manner inconsistent with the statute,

ordinance or regulation that granted him that authority. Houston Belt, 487 S.W.3d at 163-64.

However the suit need not be brought against the governmental official who first took the ultra vires act. See Parker v. Hunegnaw, 364 S.W.3d 398 (Tex.App.—Houston [14th Dist.] 2012). Parker, the mayor of the City of Houston, contended that she was not the proper party to the suit because she was not in office at the time of the acts complained of by the plaintiff. Id. The Fourteenth Court of Appeals rejected this argument noting that the plaintiff's claim was not merely about the official's act of purchasing the property but rather the wrongful possession under a claim of ownership. Id.

Following Heinrich, the Austin Court of Appeals held that *ultra vires* claims cannot challenge a decision made by a state agency that has exclusive jurisdiction over a particular matter. Creedmoor-Maha Water Supply Corp. v. Tex. Comm'n on Envtl. Quality, 307 S.W.3d 505, 517-18 (Tex.App.—Austin 2010, no pet.). In this case, the Austin Court held that the Legislature had delegated to the Texas Commission on Environmental Quality exclusive authority to decide petitions for expedited consideration of obtaining an alternate water supply company. Id. The Austin Court held that, because the Legislature had given the TCEQ exclusive jurisdiction, an *ultra vires* suit could not be based upon the TCEQ reaching "an incorrect or wrong result when exercising its delegated authority." Id. The Austin Court reasoned that, because the TCEQ had authority to decide whether to grant the petition, it did not act without authority and could not be said to have acted *ultra vires*. Id.

Furthermore, the Texas Supreme Court in Heinrich held that, because *ultra vires* suits are predicated upon officials acting without legal authority, the proper defendants to such suits are the officials. Id. at 373. The Court concluded that suits complaining of *ultra vires* actions may not be brought against a governmental unit possessed of sovereign immunity, but must be brought against the allegedly responsible government actor in his official capacity.

When a plaintiff's "allegations and requested declaration are, in substance, *ultra vires* claims [and the Plaintiff] sued only the [governmental entity] rather than … officials acting in their official capacities… under Heinrich, the [governmental entity] retains its sovereign immunity in this case and Texas courts are without subject-matter jurisdiction to entertain" the suit. Tex. Dep't of Ins. v. Reconveyance Servs., Inc., 306 S.W.3d 256, 258-59 (Tex. 2010) (reversing denial of plea to the jurisdiction based on failure to bring suit officials in their official capacity). But see Rusk State Hospital v. Black, 392 S.W.3d at 95, 101, 103-06 (immunity from suit implicates and impacts a trial court's jurisdiction, although the members of the Texas Supreme Court disagree on whether its impacts subject-matter jurisdiction or personal jurisdiction);

Following Heinrich, a plaintiff would be wise to quickly move forward with a hearing on their application for injunctive relief. He should put on all his evidence in support of an injunction and should do so even if the court is taking up a defendant's plea to the jurisdiction. By following this strategy, the plaintiff communes the clock on the date from which prospective relief can begin to run under the Heinrich decision. Id.

Recently the Texas Supreme Court has suggested that if a statute offers a remedy, including monetary relief, a plaintiff may not be able to pursue a Heinrich ultra vires claim. See In re Nestle USA, Inc., 359 S.W.3d 207, 208 (Tex. 2012). The petitioners in Nestle USA brought an original proceeding in front of the Texas Supreme Court seeking a declaration that the Texas franchise law was unconstitutional, and seeking an injunction prohibiting the comptroller from collecting the taxes as well as a writ of mandamus ordering the comptroller to refund taxes that had been collected from 2008 to 2011. Id. at 208. The Supreme Court held that because the Legislature had created a comprehensive statute covering a particular subject and offered a means of obtaining monetary relief, the plaintiff must comply with the statute. Id. This holding can be seen as holding that Heinrich *ultra vires* claims are not available when a statutory frame work waives immunity and provides full relief. See id.

Additionally, the Declaratory Judgment Act "("DJA")" provides a means by which a party in litigation with a governmental entity can recover its attorney's fees. Tex. A&M

Univ.-Kingsville v. Lawson, 127 S.W.3d 866 (Tex.App.—Austin 2004 pet. denied); TML v. Prudential Ins. Co. of America, 144 S.W.3d 600 (Tex.App.–Austin 2004, pet. denied). But see Heinrich, 284 S.W.3d at 370 (however, the Declaratory Judgment Act is not a general waiver of sovereign immunity; it "does not enlarge a trial court's jurisdiction, and a litigant's request for declaratory relief does not alter a suit's underlying nature. Private parties cannot circumvent the State's sovereign immunity… by characterizing a suit for money damages… as a declaratory-judgment claim"). A party need not prevail on its suit under the DJA in order to recover its attorney's fees. Tex. A&M Univ.-Kingsville v. Lawson, 127 S.W.3d at 874-875. "A trial court may award just and equitable attorney's fees to a non-prevailing party." Id.

An amendment to the Code Construction Act throws doubt on the assumption that the DJA affects a waiver of the State's immunity from suit. TEX. GOV'T CODE § 311.034. By contrast, the Supreme Court has expressly held that the governmental immunity of municipal corporations is waived by the DJA. Tex. Educ. Agency v. Leeper, 893 S.W.2d 432 (Tex. 1994). In Leeper, the court held that the DJA's joinder provision waived municipal corporations' immunity from liability for attorney's fees by requiring their joinder to DJA suits. As opposed to municipal entities, the State need not be joined to such suits. See TEX. CIV. PRAC. & REM. CODE § 37.006(b). Section 311.034 precludes this provision from acting as a waiver of immunity, because a joinder provision shall not be construed as a waiver of immunity unless the provision expressly includes the State as a necessary party.

4. Sovereign Immunity Applies to Suits Involving Governmental Entities' Ownership in Land.

Sovereign immunity even bars suits seeking declaratory relief regarding a governmental entity's ownership of real property. Lesley v. Veterans Land Bd. Of State, 352 S.W.3d 479, 484 (Tex. 2011); Tex. Parks & Wildlife v. The Sawyer Trust, 354 S.W.3d 384 (Tex. 2011). Lesley involved a suit to determine ownership of mineral rights under properties owned by the Veterans Land Board. The Supreme Court held that because the plaintiffs were bringing a "suit for land" the VLB was immune from suit and the trial court thus lacks jurisdiction. Id. In Sawyer, the Supreme Court held that sovereign immunity barred the plaintiff's suit for declaratory relief and/or suits for trespass to try title to land. Texas Parks & Wildlife v. The Sawyer Trust, 354 S.W.3d 384 (Tex. 2011). However the court affirmed the right of a land owner to bring an ultra vires claim against a governmental official claiming that she is wrongfully claiming ownership or possession of property set out in its opinion State v. Lain, 162 Tex. 549, 349 S.W.2d 579 (1961); Texas Parks & Wildlife v. The Sawyer Trust, 354 S.W.3d 384 (Tex. 2011). See also Hearts Bluff Game Ranch, Inc., v. State, 381 S.W.3d at 489 (Texas Supreme Court refused to find a waiver of immunity because pleadings did not allege a legal basis on which the governmental entity would be left weighing whether "to act in the best interests of the people versus defending lawsuits").

Texas courts continue to analyze the application of the Heinrich and Lain principles to cases involving ownership of real property. Parker v. Hunegnaw, 364 S.W.3d 398 (Tex.App.—Houston [14th Dist.] 2012) is a good example of this. Because of his extensive international travel, the plaintiff in Parker executed a durable power of attorney granting a third party the right to convey specific lots the plaintiff owned in the Houston. Unbeknownst to plaintiff, his agent conveyed lots not covered by the durable power of attorney to the City of Houston. The plaintiff then brought suit against Parker, the mayor of Houston, in her official and individual capacity, to "quiet title" as well as for a declaration that the deeds conveying the property to the City were void and an injunction prohibiting Parker from continuing to possess the property. The allegations and relief sought in plaintiff's pleadings made it clear that ownership and control of the lot was the only relief he was seeking against Parker. Id. Parker filed a plea to the jurisdiction contending the claims were barred by governmental immunity.

The Fourteenth Court of Appeals, initially, determined what claims the plaintiff was bringing against Parker. The Court noted that [Parker] was not seeking declaratory relief or even a suit to "quiet title." Id. The Court

concluded that the plaintiff was bringing a trespass to try title action because he was seeking a determination of ownership of the lots and resolving competing claims to property. Id. The Court then evaluated whether a trespass to try title claim can form the basis of a Heinrich *ultra vires* claim. Id. The court noted that an *ultra vires* claim will allow plaintiff to obtain perspective declaratory and injunctive relief. Id.

In determining if immunity barred the claims against Parker, the Fourteenth Court of Appeals analyzed the Texas Supreme Court's decision in State v. Lain, 349 S.W.2d 573 (Tex. 1961), Sawyer Trust, and BP Am. The Court of Appeals began its analysis by reviewing the Texas Supreme Court's reasoning in Lain. It noted that a suit for recovery of title and possession of real property is not a suit against the State but is a suit against the officials asserting ownership and right to possession on behalf of the State. Id.

> One who takes possession of another's land without legal title is no less a trespasser because he is a state official or employee, and the owner should not be required to obtain legislative consent to institute suit to oust him simply because he asserts a good faith but overzealous claim that title or right to possession is in the state and he is acting for and on behalf of the state . . .[A] plea of sovereign immunity by government officials will not be sustained in a suit by the owner of land with the right to possession when the governmental entity has neither title nor right of possession.

Id. (quoting Lain, 349 S.W.2d at 581-82).

The Court of Appeals then noted that the Texas Supreme Court in Sawyer Trust rejected the argument that a trespass-to-try-title suit against an official is barred by immunity because the plaintiff is seeking relief binding a governmental entity, not the official. Id. The Court then noted that the Heinrich decision recognizes that *ultra vires* suits are suits which are for all practical purposes are suits against the state, yet the proper defendant is an official in his official capacity. Id. Finally, the Court rejected Parker's argument that the evidence she submitted to the trial court established that the City was the rightful owner of the property. The Court of Appeals noted that Parker's plea to the jurisdiction challenged only the adequacy of the plaintiff's pleadings which affirmatively demonstrated jurisdiction. Accordingly, the Court found that the plea to the jurisdiction was properly denied. Parker v. Hunegnaw, 364 S.W.3d 398 (Tex.App.—Houston [14th Dist.] 2012).

The Court also rejected Parker's argument that Lain's holding did not apply because she had committed no unlawful act since she became mayor after the City purchased the property at issue. Parker v. Hunegnaw, 364 S.W.3d 398 (Tex.App.—Houston [14th Dist.] 2012). The Court rejected this argument noting that the plaintiff's claim was not merely about the official's act of purchasing the property but rather the wrongful possession under a claim of ownership. Id.

Additionally sovereign immunity does not bar claims for violation of the constitution, including takings claims, or ultra vires claims. City of Dallas v Stewart, 361 S.W.3d 562 (Tex. 2012); Sawyer Trust at 390. While the Supreme Court acknowledges that prior to 1980 its opinions could be read to hold that sovereign immunity barred takings claims (see Sawyer Trust), following its decision in Steele v. City of Houston, 603 S.W.2d 786 (Tex. 1980), the Supreme Court has consistently held that immunity does not bar constitutional claims, including takings claims. City of Dallas v Stewart, 361 S.W.3d 562 (Tex. 2012). To establish a taking of property the plaintiff is required to plead and prove that the government exercised dominion and control over the property. Sawyer Trust at 390, 391.

5. Sovereign Immunity in Suits Between Governmental Entities.

Texas courts have begun to face the problem of applying sovereign immunity doctrine in cases brought by one governmental entity against another governmental entity.

While the law in this area is unsettled, it appears that sovereign immunity protects the State from suits by other governmental entities, but does not protect other governmental entities from suit by the State. In re Lazy W District No. 1, 493 S.W3d 538 (Tex. 2016)(holding a water district could assert immunity from suit even against a suit for condemnation of an easement by another governmental entity).

In Tex. Dep't of Transp. v. City of Sunset Valley, 146 S.W.2d 637 (Tex. 2004), the Court held that sovereign immunity bars claims *against a state agency* by a city. The City of Sunset Valley brought suit against TxDOT for an unconstitutional taking, a breach of the Texas Transportation Code, and common-law nuisance. Id. The City prevailed at trial, and the judgment was affirmed in part on appeal. Id. The Supreme Court reversed and rendered judgment for TxDot, finding all the City's claims, except its taking claim under Article 1, section 9 of the Texas Constitution, were barred by sovereign immunity. Id. at 641-644.[3]

Subsequently, the Supreme Court has also held that sovereign immunity bars suit *by the state* against a home-rule city. City of Galveston v. State of Tex., 217 S.W.3d 466, 468-69 (Tex. 2007). This suit arose from damage to a state highway allegedly caused by the city's negligence regarding the placement and maintenance of water lines in close proximity to the highway. While the state and the city entered into an inter-governmental contact in 1982 for construction of state highway and calling for the city to relocate certain utilities, the state did not bring suit under either the TCA or Chapter 2217. Id.

The majority began its analysis by noting that, "Political subdivisions in Texas have long enjoyed immunity from suit when performing governmental functions like that involved here. … [And] the Legislature has mandated that no statute should be construed to waive immunity absent clear and unambiguous language." Id. at 469. "This high standard is especially true for home-rule cities like Galveston. Such cities derive their powers from the Texas Constitution, not the Legislature." Id. The majority went on to state that the presumption of immunity was particularly appropriate in suits between governmental entities. "This heavy presumption in favor of immunity arises not just from the separation-of-powers principles but from practical concerns. In a world with increasingly complex webs of government units, the Legislature is better suited to make the distinctions, exceptions and limitations that different situations require." Id. at 469. The majority then points out that the Legislature has recently endeavored to steer resolution of governmental entities away from litigation. Id.

The majority then noted that the state has the power to waive a city's or other governmental entity's sovereign immunity. Id. at 471. "This is not a question of power but of authority. ... The State has the power to waive immunity from suit for cities, but no authority to do so without the Legislature's clear and unambiguous consent. There is no such authority here." Id. Thus, the court held the state's suit against the city was barred by sovereign immunity. Id. See Nueces County v. San Patricio County, 246 S.W.3d 651, 652 (Tex. 2008) (per curiam); see also City of Friendswood v. Horn, 489 S.W.3d 515 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (city acquiring storm-damaged lots and amending deed restrictions to incorporate FEMA restrictions was in furtherance of flood control, and therefore governmental).

The court then offered three policy reasons for finding there was no waiver for claims brought by the state against political subdivisions and local governmental entities. If "levee or skyscraper collapses, insure of fault and causation pale in comparison to issues of who can bear and repair such staggering losses. These are precisely the kinds of issues more suited to the Legislature than the court." " City of Galveston, 217 S.W.3d at 472. Next, "there are jurisdictional problems in asking courts to enforce a judgment again a government entity, even if it's a local one.

[3] The Court found that the city had not demonstrated an ownership interest in the property taken and also ruled for TxDOT on the takings claim. *Id.*

... Will courts order [local governments] to raise taxes, or impound funds for police, fire or sanitation workers so the State can collect? Or will the court order execution on city property-perhaps its parks, buses, water works, or airports." Id. at 472. Finally, the court found it would be fundamentally unfair to allow the state to use sovereign immunity to avoid suits by local governments and political subdivisions, but allow the state to sue and recover judgments against those entities without the Legislature having enacted a waiver of immunity. Id.

While the Legislature is best suited to determine when to waive immunity, the Judiciary defines the scope of the entities and claims covered by sovereign immunity, including immunity from suit. City of Galveston, 217 S.W.3d at 471; Tooke, 197 S.W.3d at 331. In defining the scope and application of soverign immunity, the Judiciary must "take as guides both the nature and purpose of immunity." Wasson, 489 S.W.3d 427, 432 (Tex. 2016). At the same time, the Judiciary must be careful not to use its power to define the scope of immunity in a way that interferes with or obviates the Legislature's proper role and "courts should be very hesitant to declare immunity nonexistent in any particular case." Id.

In a related issue, the Texas Supreme Court has questioned whether the Legislature can grant immunity, including immunity from suit, to an entity by statute. LTTS Charter School, Inc. v. C2 Construction, Inc., 342 S.W.3d 73 (Tex. 2012). See also LTTS Charter School, Inc. v. C2 Construction, Inc., 358 S.W.3d 725, 734 (Tex.App.—Dallas 2012, pet. pending).

The majority rejected the state's argument, "that because the City's immunity is derived from the State, it defies logic to allow immunity to be asserted against the State. But the major flaw in this reasoning is that it assumed the State 'gave' immunity to cities. This is simply not the case. Cities are not created by the State, but by the Constitution and the consent of their inhabitants. Immunity was not bestowed by the legislative or executive act; it arose as a common-law creation of the judiciary." City of Galveston, 217 S.W.3d at 473.

The Supreme Court has likewise held that sovereign immunity barred suits by one county against another county Nueces Co. 246 S.W.3d at 653.

Sovereign Immunity bars suits by one governmental entity against another entity for money damages even where the suit alleges that the defendant's actions were illegal. The Nueces County decision arises out of a boundary dispute as to the border between San Patricio and Nueces counties. San Patricio prevailed on its claim establishing that land claimed by Nueces County was actually within San Patricio County. Id. San Patricio argued that it was also entitled to recover the amount of taxes Nueces County had collected on the property in question. San Patricio argued that sovereign immunity did not bar its claim for money damages, because Nueces County acted beyond its legal authority in collecting those taxes. Id. at 632. The Supreme Court rejected this argument stating that one could always argue that any tortious act, even car accidents and breaches of contract, are acts beyond a governmental entity's legal authority. Id. The Supreme Court, therefore, held that the claim for recovery of taxes collected by Nueces County was barred by sovereign immunity. Id.

6. Eleventh Amendment Immunity.

In examining the scope of the defense of sovereign immunity, it is important to distinguish between common law sovereign immunity and the State's immunity under the Eleventh Amendment of the United States Constitution. While both sovereign immunity and Eleventh Amendment immunity are based upon the notion that "[i]t is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent," cities and counties do not enjoy Eleventh Amendment immunity. Florida Prepaid Postsecondary Educ. Expense Bd. v. College Sav. Bank, 527 U.S. 627, 119 S. Ct. 2199, 2204 (1999) (quoting Hans v. Louisiana, 134 U.S. 1, 13 (1890)) (quoting THE FEDERALIST NO. 81 (Alexander Hamilton); Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 47, 115 S. Ct. 394, 404 (1994). See also, e.g., Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 280, 97 S. Ct. 568, 572-573 (1977); Lincoln County v. Luning, 133 U.S. 529, 530, 10 S. Ct. 363 (1890). Thus, if you are representing governmental entities other than the State or arms of the State, your client does not enjoy the protections

afforded by the Eleventh Amendment. Williams v. Dallas Area Rapid Transp., 242 F.3d 315, 319-22 (5th Cir. 2001) (setting out the test for determining applicability of Eleventh Amendment; and noting that not all entities covered by the TCA enjoy the benefits of the Eleventh Amendment).

However, one should be aware that removing a case to federal court constitutes a waiver of immunity from suit in federal court and invokes the jurisdiction of the federal court. Meyers v. State of Tex., 410 F.3d 236 (5th Cir. 2005). The federal court must still look to state law to determine if the state has retained immunity from liability. Id. For a more detailed review of the fundamentals of Eleventh Amendment sovereign immunity, see Ann K. Wooster, Immunity of State from Civil Suits Under Eleventh Amendment - - Supreme Court Cases, 187 A.L.R. Fed. 175 (2004).

Recent United States Supreme Court decisions regarding Congress' authority to abrogate the States' Eleventh Amendment sovereign immunity may have opened the door to argue, pursuant to the Tenth Amendment, that when Congress lacks the authority to abrogate the State's sovereign immunity, it cannot circumvent that immunity by abrogation of the immunity of the state's political subdivisions. See, e.g. Kimel v. Florida Bd. of Regents , 528 U.S. 62, 120 S. Ct. 631, 650 (2000); Alden v. Maine, 527 U.S. 706, 119 S. Ct. 2240 (1999); College Sav. Bank, 527 U.S. at 627, 119 S. Ct. at 2204; City of Boerne v. Flores, 521 U.S. 507, 536, 117 S. Ct. 2157, 2172 (1997). Exploration of the parameters and implications of such argument and its likelihood of success are beyond the scope of this paper.

Like sovereign immunity, Eleventh Amendment immunity is waived where the state consents to suit. Clark v. Barnard, 108 U.S. 426 (1883). The state's decision to waive Eleventh Amendment immunity must be voluntary and clearly indicate the state's intention to be subject to the jurisdiction of a federal court. Meyers, 410 F.3d at 241. Generally, courts will find waiver if (1) the state voluntarily invokes federal court jurisdiction, or (2) the state makes a "clear declaration" that it intends to submit itself to federal court jurisdiction. Id. The most common way in which this occurs is when the State removes a suit to federal court or intervenes in a lawsuit. See Lapides v. Bd. of Regents of the Univ. of Ga., 535 U.S. 613 (2002).

7. Liability of Cities at Common Law.

Immunity for cities is not absolute, as it is for the State, but rather depends upon whether the action giving rise to the claim was a governmental function or a proprietary activity.

> Prior to the enactment of the [TCA] a city was not liable for the negligent acts of its agents and employees in the performance of governmental functions. However, it was liable for unlimited damages when negligently performing proprietary functions.

Turvey v. City of Houston, 602 S.W.2d 517, 519 (Tex. 1980) (citing City of Austin v. Daniels, 335 S.W.2d 753 (Tex. 1960)); Wasson, 489 S.W.3d 427 (Tex. 2016). The test for whether the function was proprietary or governmental was laid out in City of Galveston v. Posnainsky.

> [I]n so far as municipal corporations of any class, and however incorporated, exercise powers conferred on them for purposes essentially public-purposes pertaining to the administration of general law made to enforce the general policy of the state, they should be deemed agencies of the state, and not subject to being sued for any act or omission ... [except] when the state, by statute, declares they may be. Nueces County v. San Patricio County, 246 S.W.3d 651, 652, (Tex. 2008) (internal quotations omitted).
>
> …
>
> In so far, however, as they exercise powers not of this character, voluntarily assumed--powers intended for the private advantage and benefit of the locality and its

> inhabitants--there seems to be no sufficient reason why they should be relieved from that liability to suit and measure of actual damage to which an individual or private corporation exercising the same powers for the purpose essentially private would be liable.

Dillard, 806 S.W.2d at 593 (quoting City of Galveston v. Posnainsky, 62 Tex. 118, 125, 127 (1884)); Wasson, 489 S.W.3d 427 (Tex. 2016); Holder, 954 S.W.2d at 805. Accordingly, municipal immunity from tort and contract liability rested upon the determination of whether the City was acting as an agent of state government. Id. If it was not, the municipality enjoyed no immunity, and was held to the same standard of care as a private citizen engaged in that activity. Wasson, 489 S.W.3d 427 (Tex. 2016); Turvey, 602 S.W.2d at 519. [4]

The proprietary function exception to the sovereign rule of governmental immunity applied only to municipalities. At one time, the Texas Supreme Court appeared to expand the proprietary function exception beyond municipalities. In Tex. Highway Comm'n v. Tex. Ass'n of Steel Importers, Inc., 372 S.W.2d 525, 529 (Tex. 1963), the court found the building of highways to constitute a proprietary activity. As a consequence of the highway commission's proprietary activities, the state was subject to suit and liability. Id. The court subsequently limited the proprietary function exception to cities. In Turvey, the court held that, "[t]he distinction between proprietary and governmental functions does not apply to counties." Turvey, 602 S.W.2d at 519. See Nueces Co., 246 S.W.3d at 652. In the City of Gladewater v. Pike, 727 S.W.2d 514, 519 (Tex. 1987) decision, the court added that "[a] proprietary function is one intended primarily for the advantage and benefit of persons within the corporate limits of the municipality rather than for use by the general public." Consequently, because the actions of the state, its boards and agencies are intended to benefit the state as a whole rather than residents of a particular municipality, their actions are always deemed to be governmental. See id. Similarly, countries are 'involuntary agents of the state without the power to serve local interests of their residents, [thus] countries have no proprietary functions; all their functions are governmental." Additionally, the Dallas Court of Appeals has found that open-enrollment charter schools do not perform proprietary functions, even where they lease out portions of their facilities to for profit entities. LTTS Charter School, Inc. v. C2 Construction, Inc., 358 S.W.3d 725, 734 (Tex.App.—Dallas 2012, pet. pending). But see Wasson, 489 S.W.3d 427 (Tex. 2016) ("Therefore, in the realm of sovereign immunity as it applies to such political subdivisions—referred to as governmental immunity—this Court has distinguished between those acts performed as a branch of the state and those acts performed in a proprietary, non-governmental capacity. … 'Political subdivisions of States—counties, cities, or whatever—never were and never have been considered as sovereign entities.'") (quoting Reynolds v. Sims, 377 U.S. 533, 575, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964)).

For the state, counties, and municipalities carrying out governmental functions, sovereign immunity precluded suit and liability in tort. Prior to 1970, governmental entities were not liable for torts committed by their officers or agents. See State v. Terrell, 588 S.W.2d 784, 786 (Tex. 1979) (the state cannot be held in tort absent constitutional or statutory waiver of immunity from suit and liability); Welch v. State, 143 S.W.2d 876 (Tex. Civ. App.—Dallas 1941, writ ref'd). Therefore, they could not be held liable under either an agency or respondent superior theory of liability for the acts of their employees, agents, and officers. Id.

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[4] This proprietary-versus-governmental function distinction similarly applies immunity from relief incidental to these claims, such as attorney's fees. See Wheelabrator Air Pollution Control, Inc. v. City of San Antonio, 489 S.W.3d 448 (Tex. 2016) (attorney's fees available in suit for breach of contract for proprietary municipal function).

III. THE WAIVER OF IMMUNITY BY STATUTE AND ACTION

To understand the Tort Claims Act's waiver of immunity, it is imperative to keep in mind that the TCA does not waive immunity from suit for tort claims generally—but only for a limited class of claims. The test of a plaintiff's pleadings is whether they sate a claim that falls within the category of claim allowed.

A. The Enactment of the TCA: What Law Controls?

The enactment of the TCA created a **limited** waiver of sovereign immunity for certain torts. Alexander v. Walker, 435 S.W.3d 789 (Tex. 2014); Univ. of Tex. Med. Branch v. York, 871 S.W.2d 175, 177 (Tex. 1994); Terrell, 588 S.W.2d at 786. See City of Bellaire v. Johnson, 400 S.W.3d 922, 924 (Tex. 2013) (unless the TCA creates a waiver of immunity then the suit is barred). See also City of Watauga v. Gordon, 434 S.W.3d 586, 589(Tex. 2014) ("[g]overnmental immunity generally protects municipalities and other state subdivisions from suit unless the immunity has been waived by the constitution or state law.") Through the TCA, the legislature waived immunity from both suit and liability for the claims authorized therein. See id; TEX. TORT CLAIMS ACT §§ 101.021-101.025 (West 2005). The Texas Supreme Court has specifically recognized that the TCA is a **limited** waiver of sovereign immunity. Ryder Integrated Logistics, Inc., v. Fayette County, 453 S.W.3d 922, 927 (Tex. 2015)() (the TCA is strictly construed; immunity bars claims unless there is a clear waiver.). "The many compromises necessary to pass the Act obscured its meaning, making its application difficult in many cases... But one thing is clear: the waiver of immunity in the Tort Claims Act is not, and was not intended to be, complete." Dallas County Mental Health and Mental Retardation v. Bossley, 968 S.W.2d 339, 342 (Tex. 1998). See County of El Paso v. Dorado, 33 S.W.3d 44, 46-47 (Tex App.—El Paso 2000, no pet. h.) (while sovereign immunity for counties and other governmental entities is not waived by the wrongful death statute, their immunity from suit and liability in wrongful death caused by the condition or use of property is waived by the TCA); Golden Harvest Co. Inc. v. City of Dallas, 942 S.W.2d 682, 686-7 (Tex.App.–Tyler 1997, writ denied) (prior to adoption of the TCA, the state and political subdivisions had full sovereign immunity from tort liability. The Legislature did not abolish immunity when it passed the TCA; rather it waived immunity in certain limited areas); Seamans v. Harris County Hosp. Dist., 934 S.W.2d 393, 395 (Tex.App.–Houston [14th Dist.] 1996, no writ) ("[t]he Tort Claims Act did not abolish the doctrine of sovereign immunity.... It merely operates to waive governmental immunity in certain circumstances."). The TCA defines in detail those circumstances in which sovereign immunity has been waived and, therefore, can be held liable in tort. Bennett v. Tarrant County Water Control and Imp. Dist. No. 1, 894 S.W.2d 441, 450 (Tex.App.–Fort Worth 1995, writ denied). Accordingly, a plaintiff bringing suit under the TCA must plead and prove that his/her claim fits within the Act's waiver of immunity. Ryder Integrated Logistics, Inc., v. Fayette County, 453 S.W.3d at 927; City of Watauga v. Gordon, 434 S.W.3d 586, 592–93 (Tex. 2014) (while plaintiff sought to bring a suit in negligence, his pleadings established that he was asserting a claim based on an assault, an intentional tort, committed by a peace officer; because the TCA does not waive liability for intentional torts, the claim was barred by immunity); Alexander v. Walker, 435 S.W.3d 789 (Tex. 2014); Tarrant County Hosp. Dist. v. Henry, 52 S.W.3d 434, 441 (Tex.App.–Fort Worth 2001, no pet.); Dorado, 33 S.W.3d at 46-48; Bennett, 894 S.W.2d at 450. See City of Bellaire v. Johnson, 400 S.W.3d 922, 924 (Tex. 2013)

The San Antonio Court of Appeals laid out the scope of the Act's waiver of sovereign immunity:

> In order for immunity to be waived under the TTCA, the claim must arise under one of the three specific areas of liability for which immunity is waived and the claim must not fall under one of the exceptions from waiver. The three specific areas of liability for which immunity has been waived are: (1) injury

> caused by an employee's use of a motor-driven vehicle; (2) injury caused by a condition or use of tangible personal or real property; and (3) claims arising from premise defects.

Medrano v. City of Pearsall, 989 S.W.2d 141, 144 (Tex.App.–San Antonio 1999, no pet.).

Except to the extent replaced by the TCA, however, common law sovereign immunity, as well as proprietary liability for municipalities, continues to control suits against governmental defendants. Pike, 727 S.W.2d at 519; Seamans, 934 S.W.2d at 395; City of Denton v. Page, 701 S.W.2d 831 (Tex. 1986); Turvey, 602 S.W.2d at 519; Dobbins v. Tex. Turnpike Auth., 496 S.W.2d 744, 748 (Tex. Civ. App.–Texarkana 1973, writ ref'd n.r.e.). Accordingly, a suit will be dismissed if a plaintiff cannot point to a clear and unambiguous waiver of immunity in the TCA. See Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440, 446 (Tex. 1993); Tex. Dep't of Transp. v. Horrocks, 841 S.W.2d 413, 416 (Tex.App.—Dallas 1992), *rev'd on other grounds*, 852 S.W.2d 498 (Tex. 1993); Hampton v. Univ. of Tex.-M.D. Anderson Cancer Ctr., 6 S.W.3d 627, 629 (Tex.App. – Houston [1st Dist.] 1999, no pet.) ("It is the plaintiff's burden to allege and prove facts affirmatively showing that the trial court has subject matter jurisdiction.").

At one time, any uncertainty over whether the TCA creates a waiver of immunity was construed in favor of the plaintiff. York, 871 S.W.2d at 177, n.3; Flores v. Norton & Ramsey Lines, Inc., 352 F. Supp. 150, 156 (W.D. Tex. 1972). Now, however, it appears that any uncertainty regarding whether the TCA creates a waiver is weighed in favor of finding no waiver and dismissing the suit based on sovereign immunity. York, 871 S.W.2d at 177, n.3. But see City of San Augustine v. Parrish, 10 S.W.3d 734 (Tex.App.—Tyler 1999, pet. dism. w.o.j.) (applying a de novo standard of review for a plea to the jurisdiction and thereby construing the allegations in the petition as true and in favor of the plaintiff); Hampton, 6 S.W.3d at 631 (construing the plaintiffs' petition in their favor and refusing to dismiss a case for lack of subject matter jurisdiction because the plaintiffs' petition supported a cause of action under the TCA); Michael v. Travis County Hous. Auth., 995 S.W.2d 909 (Tex.App.–Austin 1999, no pet.) (the "waiver is to be liberally construed in order to effectuate the purposes of the Texas Tort Claims Act.").

Plaintiffs bringing a tort claim against a governmental entity bear the burden of establishing either that their claim falls within the TCA or some other waiver of sovereign immunity. See Turvey, 602 S.W.2d at 519; City of Orange v. Jackson, 927 S.W.2d 784 (Tex.App.–Beaumont 1996, no writ) (if there is no waiver of immunity under the TCA, the plaintiff's claim is barred by immunity); Arney, 680 S.W.2d at 874-75 (plaintiff claiming legislative waiver of immunity must demonstrate clear and unambiguous waiver, waiver is not presumed or implied); Hooper v. Midland County, 500 S.W.2d 552, 554 (Tex.App.—El Paso 1973, writ ref'd n.r.e.) (immunity still exists and precludes suit where the TCA does not apply). See also Hoffman v. Connecticut Dep't of Income Maint., 492 U.S. 96 (1989) ("[a]s we have repeatedly stated, to abrogate the States' Eleventh Amendment immunity from suit in federal court ... Congress must make its intention 'unmistakably clear in the language of the statute.'") (quoting Atascadero State Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)). In the case of a municipality, waiver can be established through pleading and proving that the defendant was involved in a proprietary activity. See Pike, 727 S.W.2d at 519; Turvey, 602 S.W.2d at 519; City of San Antonio v. Cortes, 5 S.W.3d 708 (Tex.App.—San Antonio 1999, no pet.) (giving examples of governmental vs. proprietary functions). Municipalities continue to have unlimited liability in common law proprietary functions claims. Pike, 727 S.W.2d at 519. York II, 284 S.W.3d at 847-48.

B. Plaintiffs Must Strictly Comply WIth the Statute Waiving Immunity.

Section III. A. above points out that when bringing suit under the TCA, the plaintiff's claim must strictly comply with the waiver created by that act. Indeed, any ambiguity in a statutory waiver is construed against the plaintiff, and against jurisdiction. Tex. Dep't of Transp. v.

York, 284 S.W.3d 844, 846 (Tex. 2009) ("York II") Taylor, 106 S.W.3d at 701. "Legislative consent to waive sovereign immunity by statute must be by 'clear and unambiguous language' and suit can then be brought 'only in the manner indicated by that consent.'" York II, 284 S.W.3d at 846. This is true of all waivers of immunity. A plaintiff bringing suit under a waiver of sovereign immunity must comply with the jurisdictional prerequisites for bringing suit and must make certain that his/her claim fits within the waiver created by the statute. See Prairie View A&M Univ. v. Chatha, 381 S.W.3d 500 (Tex 2012); Hawkins v. Cmty. Health Choice, Inc., 127 S.W.3d 322 (Tex.App. –Austin 2004, no pet.); Tex. Dep't of Criminal Justice v. Cooke, 149 S.W.3d 700, 704 (Tex.App.–Austin 2004, no pet). In addition to complying with any conditions precedent to filing suit, the plaintiff must also establish that his claim fits within the waiver of immunity created by the statute in question. See Hawkins, 127 S.W.3d at 322; Cooke, 149 S.W.3d at 700. A plaintiff bringing a premises claim under the TCA based on a licensee's theory, where the governmental entity is liable for special defects of which it had actual or constructive knowledge, must prove the condition at issue was a special defect in order to prevail. York II, 284 S.W.3d at 847-48.

C. Waiver of Immunity by the Governmental Unit Being Sued.

1. Waiver by Failure to Assert Immunity as a Defense.

A governmental entity can waive common law immunity from liability while immunity from suit cannot be waived. Jones, 8 S.W.3d at 638. In Jones, the supreme court noted that the two elements of sovereign immunity (immunity from liability as opposed to immunity from suit) serve different purposes that effect whether they can be waived by the governmental entity's failure to assert them in the litigation. Id.

> Immunity from liability and immunity from suit are two distinct principles. Immunity from liability protects the state from judgment even if the Legislature has expressly consented to the suit. Like other affirmative defenses to liability, it must be pleaded or else it is waived. Immunity from liability does not affect a court's jurisdiction to hear a case.
>
> In contrast, immunity from suit bars an action against the state unless the state expressly consents to the suit. The party suing the governmental entity must establish the state's consent, which may be alleged either by reference to a statute or to express legislative permission. Since as early as 1847, the law in Texas has been that absent the state's consent to suit, a trial court lacks subject matter jurisdiction.

Id. (citations omitted); University of Houston v. Barth, 403 S.W.3d 851, 854 (Tex. 2013); Tex. Dep't of Criminal Justice v. King, 2003 WL 22937252, *5 (Tex.App.–Waco 2003, pet. denied). See Rhule, 417 S.W.3d at 442 (subject matter jurisdiction is essential to a court's power to decide a case, a judgment rendered without subject matter jurisdiction is fundamental error; lack of subject matter jurisdiction can be raised for the first time on appeal, and all courts have the affirmative obligation to determine if they have subject matter jurisdiction). But see Rusk State Hospital v. Black, 392 S.W.3d at 103-106 (Lehrmann, J, concurring and dissenting)(immunity from suit implicates and impacts a trial court's jurisdiction, although three Texas Supreme Court Justices find that it primarily implicates the court's personal jurisdiction over the entity, which can be waived). The parties to a suit cannot even by agreement confer subject matter jurisdiction on a court. Therefore, immunity from suit cannot be waived, while immunity from liability can be waived.

Because jurisdiction is fundamental to a court's ability to hear a case, immunity from suit may be raised at any time (it can be raised for the first time on appeal) or even sua sponte by the trial court, or by an appellate court. Rhule, 417 S.W.3d at 442 (Tex. 2013). See Jones, 8 S.W.3d

at 638. See also Dallas Metrocare Serv. v. Juarez, 420 S.W.3d 39 (Tex. 2013) (additional grounds to assert immunity can be raised for the first time on appeal); Rusk State Hospital .v Black, 392 S.W.3d at 95 (immunity can even be raised for the first time on appeal where it was not raised at the trial court); See also Dallas Metrocare Services v. Juarez, 420 S.W.3d 39, 41 (Tex. 2013) (holding that additional grounds for immunity raised on appeal must be considered). The supreme court in Jones went on to hold that a plea to the jurisdiction is an appropriate means of challenging whether the plaintiff has established a waiver of immunity from suit. See Jones, 8 S.W.3d at 638. Moreover, the court went on to point out that a governmental entity is entitled to an interlocutory appeal from the denial of a plea to the jurisdiction based on immunity from suit. See Jones, 8 S.W.3d at 638 (holding that the court of appeals erred in affirming the denial of the plea to the jurisdiction without first determining whether the plaintiff's pleading alleged facts sufficient to establish a waiver of immunity from suit).

Thus, sovereign immunity (immunity from suit and liability) should be raised not only as affirmative defenses, but also should be asserted in special exceptions and/or in a plea to the jurisdiction or a motion for summary judgment. Id.; Burnet Cnty. Sheriff's Dep't v. Carlisle, 2001 WL 23204, fn. 6 (Tex.App.—Austin 2001). A prudent attorney may want to file special exceptions and a plea in abatement. In the Estate of Lindburg decision, the Texas Supreme Court held that sovereign immunity could properly be raised when asserted in special exceptions and on appeal. Mount Pleasant Indep. Sch. Dist. v. Estate of Lindburg, 766 S.W.2d 208, 211 (Tex. 1989). In Lueck the Supreme Court held that a governmental entity is not precluded from using a plea to the jurisdiction to dispose of a suit based on immunity from suit, even if that issue could also be raised by a motion for summary judgment or special exceptions. State v. Lueck, 290 S.W.3d 876, 884 (Tex. 2009). In fact, in many cases the best course of practice is to assert immunity from suit in a plea to the jurisdiction and pursue it through an interlocutory appeal to avoid the expense of discovery and trial. Id. See UIL, 319 S.W.3d at 963, fn.8, (citing Emp. Ret. Sys. v. Putnam, LLC, 294 S.W.3d 309, 323, holding trial court need not allow discovery before ruling on plea to jurisdiction where party's status as a public entity was conclusively resolved as a matter of law). See Creedmoor-Maha Water Supply Corp v. Texas Comm'n on Environmental Quality, 307 S.W.3d 505, 513 (Tex. App.—Austin 2010, no pet)(whenever a plea to the jurisdiction is based upon the plaintiff's pleadings, then no evidence is presented at the hearing and as a result, no discovery is needed before the court rules upon the plea to the jurisdiction); City of Galveston v. Gray, 93 S.W.3d 587, 590 (Tex.App.—Houston [14th Dist.] 2002, pet denied); In re Hays County Sheriff's Department, 2012 WL 6554815 (Tex.App.—Austin 2012)(Pemberton, J, concurring).

(a) Taking an interlocutory appeal from an interlocutory ruling on sovereign immunity.

An interlocutory appeal can be taken regardless of the type of motion (plea to the jurisdiction, motion to dismiss or motion for summary judgment) through which immunity from suit is raised. Austin State Hosp. v. Graham, 347 S.W.3d 298 (Tex. 2011). Because section 51.014(a) gives appellate court's jurisdiction over interlocutory appeals from rulings on sovereign immunity from pleas to the jurisdiction, motions to dismiss and motions for summary judgment, if a valid interlocutory appeal is otherwise taken sovereign immunity can be raised for the first time on appeal. Juarez, 420 S.W.3d at 41-42; Dallas County v. Logan, 407 S.W.3d 745 (Tex. 2014); Black, 392 S.W.3d at 95.

In Black, Graham brought suit against Austin State Hospital and two of its doctors alleging medical malpractice claims. Id. at 99. Because Graham sued both the hospital and two employees, the hospital moved to dismiss the doctors pursuant to Texas Civil Practice and Remedies Code § 101.106(e). Id. The doctors also moved to dismiss under sections 101.106(a) and (e). Id. Graham then nonsuited the hospital and asserted that its motion to dismiss was thereby mooted. The trial court denied the doctors' motion and did not rule on the hospital's motion. Id. The hospital and the doctors appealed and the Court of Appeals held that it did not have jurisdiction over the doctors' appeal because section 51.041(a) of the Civil Practice

and Remedies Code allowed the doctors to appeal only from a denial of a motion for summary judgment. Id. at 300.

The Supreme Court held that section 51.014 allows appeals by governmental entities or their employees where a motion in the trial court challenged that court's jurisdiction. Id.

> "[W]e have held under section 51.014(a) that an interlocutory appeal may be taken from a refusal to dismiss for want of jurisdiction whether the jurisdictional argument is presented by plea to the jurisdiction or some other vehicle such as a motion for summary judgment. . . . if the trial court denies the governmental entity's claim of no jurisdiction, whether it has been asserted by a plea to the jurisdiction, a motion for summary judgment, or otherwise, the Legislature has provided that an interlocutory appeal may be brought. The reference to plea to the jurisdiction is not a particular vehicle but the substance of the issue raised."

Id. (internal quotations and citations omitted). The Court explained that there is no reason for limiting appeals under section 51.014(a)(5) which references "motions for summary judgment", when section 51.014(a)(8) is not so limited. Id. The Texas Supreme Court concluded, "[t]he point of section 51.014(a)(5) . . . is to allow an interlocutory appeal from rulings on certain issues, not merely rulings in certain forms. Therefore, we hold that an appeal may be taken from orders denying an assertion of immunity . . . regardless of the procedural device used." Id. at 301. See Juarez, 420 S.W.3d at 41-42 (can raise additional basis for immunity for the first time on appeal); Dallas County v. Logan, 407 S.W.3d at 746. For further discussion of interlocutory appeals see section VII D Supra.

2. Waiver by Filing Suit or Bringing Counterclaim.

Texas courts have long held that by filing suit, a governmental entity waives immunity from suit. Pelzel, 77 S.W.3d at 250; IT-Davy, 74 S.W.3d at 861 (Hecht, J., concurring); Kinnear v. Tex. Comm'n on Human Rights, 14 S.W.3d 299, 300 (Tex. 2000); Shobe, 58 S.W. at 949; Anderson, Clayton & Co. v. State, 62 S.W.2d 107, 110 (Comm'n App. 1933, op. adopted). The Supreme Court explained that "[w]hen the State invokes the jurisdiction of one of its own courts it does so not as a sovereign, but as any other litigant." Anderson, Clayton & Co. v. State, 62 S.W.2d 107, 110 (Tex. 1933).

Subsequent to the Anderson, Clayton decision in June of 2006, the Texas Supreme Court held that when a governmental entity files suit its waives immunity from suit for counterclaims that are (1) related to (2) properly defensive to and (3) act as no more than an offset against the claims asserted by the government entity. Reata Construction Corp. v. City of Dallas, 197 S.W.3d 371 (Tex. 2006). The Supreme Court withdrew its 2004 opinion in Reata in which it held that, "by filing a suit for damages, a governmental entity waives immunity from suit for any claim that is incident to, connected with, arises out of, or is germane to the suit or controversy brought by the State." Reata Construction Corp. v. City of Dallas, 2004 WL 726906 (Tex., April 2, 2004, op. withdrawn). In the second Reata opinion, the Supreme Court pointed out that the purpose of sovereign immunity is to protect tax resources from being used to defend suits and paying judgments. Reata, 197 S.W.3d 371 (Tex. 2006). The court acknowledged that: (1) When a governmental entity files suit it has made a decision to expend resources to pay litigation costs; and (2) It is "fundamentally unfair to allow a governmental entity to assert affirmative claims against a party while claiming it [has] immunity as to the party's claims against it." Id. However, the court reasoned that the purpose of immunity to protect tax resources means that when a governmental entity files claims it waives immunity from suit only to the extent of allowing claims that offset the governmental entity's recovery. "If the opposing party's claims can operate only as an offset to reduce the government's recovery, no

tax resources will be called upon to pay a judgment, and the fiscal planning of the governmental entity should not be disrupted." Id. The court went on to hold that,

> "[W]here the governmental entity has joined into the litigation process by asserting its own affirmative claims for monetary relief, we see no ill befalling the governmental entity or hampering of its governmental functions by allowing adverse parties to assert, as an offset, claims germane to, connected with, and properly defensive to those asserted by the governmental entity. ... Once it asserts affirmative claims for monetary recovery, the City must participate in the litigation process as an ordinary litigant, save for the limitation that the City continues to have immunity from affirmative damage claims against it for monetary relief exceeding amounts necessary to offset the City's claims. ... Accordingly, when the City filled its affirmative claims for relief as an intervenor, the trial court acquired subject-matter jurisdiction over claims made against the City which were connected to, germane to, and properly defensive to the matters on which the City based its claim for damages. Absent the Legislature's waiver of the City's immunity from suit, however, the trial court did not acquire jurisdiction over a claim for damages against the City in excess of damages sufficient to offset the City's recovery, if any."

Id. at 377. (emphasis added, citations omitted.). See State v. Fid. & Deposit Co. of Maryland, 223 S.W.3d 309, 310-11 (Tex. 2007). Thus, the holding in Reata, allows governmental entities to give a trial court jurisdiction by bringing litigation without facing any risk of having a judgment rendered against it because opposing parties can bring claims only to offset the governmental entity's recovery. Id.

When a governmental entity files suit, the trial court and courts of appeal have to sort through each claim and the factual basis of each claim to determine which claims are germane to and connected to the claims being brought by the governmental entity. State v. Fid. & Deposit Co. of Maryland, 223 S.W.3d 309, 310 (Tex., 2007).

In Sweeny Community Hospital v. Mendez, the First Court of Appeals did a detailed analysis of when claims are connected to and germane to claims brought by the governmental entity. Sweeny Community Hosp. v. Mendez , 226 S. W.3d 584 (Tex.App.–Houston [1st Dist.] 2007). Sweeny Community Hospital sued Mendez for breach of contract. Mendez brought counterclaims for breach of contract, fraud, retaliation under section 161.134 of the Health & Safety Code, retaliation under section 161.134 of the Health & Safety Code, tortious interference, and defamation. Id. The hospital admitted that by filing suit it waived immunity as to Mendez's claims for breach of contract and fraud, but challenged the trial court's jurisdiction to entertain Mendez's other claims. Id.

The court began its legal analysis by noting that the dictionary defines "germane" as "closely akin," "relevant and appropriate," "closely or significantly related," and "relevant and pertinent." Id. Based on these definitions, the court of appeals held that the term germane means "incident to, connect with, arises out of" the same set of facts, and its breadth is not narrower than what would constitute a compulsory counterclaim. Sweeny Community Hosp. v. Mendez, 226 S. W.3d 584 (Tex.App.–Houston [1st Dist.] 2007, no pet.). A compulsory counterclaim is a claim which "arises out of the transaction or occurrence that is the subject of the opposing party's claims." TEX. R. CIV.P. 97. Next, the court pointed out that the term connected "means united, joined or lined and joined together in sequence; linked coherently and having parts or elements logically linked together." Sweeny Community Hosp. v. Mendez,

226 S.W.3d 584 (Tex.App.–Houston [1st Dist.] 2007, no pet.).

The First Court of Appeals held that, while the elements of the retaliation, tortious interference and defamation claims were materially different from the elements of the hospital's claims, "the core facts are the same and determining whether Sweeny and Mendez met their obligations under the contract is necessary to the claims asserted by both Sweeny and Mendez." Id.

The court then turned to the requirement that the counterclaims needed to be properly defensive to the claims of the governmental entity. Properly defensive means the "trial court does not acquire jurisdiction over a claim for damages against the governmental entity in excess of damages sufficient to offset the governmental entity's recovery." Riata II, 197 S.W.3d at 377. The fact that the amount of damages sought by the counterclaims exceeds the damages sought by the governmental entity does not mean the counterclaims are barred by immunity. Sweeny Community Hosp. v. Mendez , 226 S. W.3d 584 (Tex.App.–Houston [1st Dist.] 2007, no pet.). Offset claims can include causes of action seeking punitive and actual damages. Id. The fact that the offset claims seek damages in excess of those sought by the governmental entity "is a curable deficiency that can be fixed by amending the pleading to seek no more damages than the governmental entity may be awarded upon final trial." Id.

The waiver of immunity from suit is effectuated regardless of the form in which the claims are made. The Texas Supreme Court held that the waiver of immunity from suit is waived regardless of whether the claims are asserted by the entity as the plaintiff or intervenor. "[W]e see no substantive difference between a decision by the City to file an original suit and the City's decision to file its claim as an intervenor..." Reata, 2006 WL 1792219. Claims for relief asserted by counterclaim have also been held to waive immunity from suit. City of Dallas v. Saucedo-Falls, 172 S.W.3d 703 (Tex.App.–Dallas 2005, rev'd on other grounds, 218 S.W.3d 79 (Tex. 2007)); City of Grand Prairie v. Irwin Seating Co., 170 S.W.3d 216 (Tex.App.–Dallas 2005, pet. denied).

The Courts of Appeals were split on whether suing for attorney's fees invokes a general waiver of immunity from suit and made the governmental entity subject to counterclaims under Reata. A majority of the Courts of Appeals held that bringing a claim for attorney's fees alone did not constitute a general waiver of immunity. Tex. Dep't of Criminal Justice v. McBride, 317 S.W.3d 731 (Tex. 2010). Compare Bexar Metro. Water Dist. v. Educ. & Econ. Dev. Joint Venture, 220 S.W.3d 25, 32 (Tex.App.—San Antonio, pet. dism'd); Lamesa Indep. Sch. Dist. v. Booe, 251 S. W.3d 831, 833(Tex.App.—Eastland 2008, no pet.).

The Texas Supreme Court resolved this question in Tex. Dep't of Criminal Justice v. McBride. The court held:

> "In this case, McBride, not the Department, filed suit. In its answer, the Department denied McBride's allegations and prayed for attorney's fees and costs incurred in defending the case. Other than fees and costs, the Department asserted no claims for relief. Unlike Reata, in which the City injected itself into the litigation process and sought damages, the Department's request for attorney's fees was purely defensive in nature, unconnected to any claim for monetary relief. When that is the case, a request for attorney's fees incurred in defending a claim does not waive immunity under Reata…" Tex. Dep't of Criminal Justice v. McBride, 317 S. W. 731 (Tex. 2010).

Also because recovery under a counterclaim brought without a waiver of sovereign immunity offsets any recovery by the governmental entity bringing claims, the dismissal of the governmental claims by summary judgment or otherwise means the counterclaims must be dismissed based on sovereign immunity. Employees Ret. Sys. of

Tex. v. Putnam, 294 S.W.3d 309, 325 (Tex.App.—Austin 2009, no pet.).

The significance of the Reata decision is minimized by the fact that the legislature has waived immunity from suit for breach of contract actions against cities, school districts, junior colleges, and special purpose districts as well as for some contract claims against counties. See Chap. 262 and 271 TEX. CIV. PRAC.& REM. CODE. Thus, in most instances contractors will not have to assert a waiver of immunity from suit by the entity's filing of claims as a means for maintaining breach of contract claims against governmental entities.

However, filing suit does not waive immunity from liability. Thus, by filing suit, a governmental entity subjects itself to the jurisdiction of the trial court but, in order to prevail, an opposing party must still establish a waiver of immunity from liability. See Pelzel, 77 S.W.3d at 250; IT-Davy , 74 S.W.3d at 861 (Hecht, J., concurring). But see Meyers v. State of Tex., 410 F.3d at 239 (removing a case to federal court constitutes a waiver of immunity from suit in federal court and invokes the jurisdiction of the federal court; the court must still look to state law to determine if some form of immunity from liability exists).

a. Effect of Summary Disposition or Non-Suiting Governmental Entity's Claims

The Supreme Court has held that a governmental entity's decision to non-suit its claims or the granting summary judgment on the governmental entity's claims does not impact the trial court's jurisdiction. Sharyland Water Supply Corp. v. City of Alton, 354 S. W.3d 407, 413-414 (Tex. 2011); Albert, 354 S.W.3d 368, 377 (Tex. 2011). However, the trial court retaining jurisdiction is over very little real value to parties in litigation with governmental entities, because bringing a claim by a governmental entity grants the trial court jurisdiction only creates jurisdiction to the extent of an offset. Sharyland at 413-414; Albert, at 377.

3. Waiver by Estoppel.

The San Antonio Court of Appeals has held that sovereign immunity cannot be waived by promissory estoppel. In Maverick County Water and Improvement Dist. v. Reyes, 2003 WL 22900914 (Tex.App.—San Antonio, Dec. 10, 2003, no pet.), the plaintiff, Ms. Reyes, suffered damages after a canal broke and flooded her property. After the flood, the president of the board of Maverick County Water and Improvement District (the "District") allegedly admitted liability for Reyes' damages and promised to compensate her. Later, the District denied Reyes' claim in a letter. Reyes then brought suit against the District claiming breach of contract, promissory estoppel, inverse condemnation and nuisance. The appeals court agreed with the District that sovereign immunity protected it against all of Reyes' claims. With regard to the promissory estoppel claim, the court held that the doctrine of promissory estoppel does not apply against a governmental unit when it would impair the exercise of its public or governmental functions. Because Reyes' claim arose out of the District's distribution of its water for irrigation and electricity purposes, the application of promissory estoppel would impair the exercise of the District's governmental function. Id. at *2.

This argument—to the extent it would work against a City carrying out a governmental function—is precluded in suits against the State, because estoppel does not apply in suits where the State is a defendant. State v. Durham, 800 S.W.2d 63, 67 (Tex. 1993). Moreover the Supreme Court appears to have rejected the argument that the actions of a governmental entity can create an equitable waiver of immunity. Sharyland Water Supply Corp., 354 S. W.3d 407, 414.

However, the Texas Supreme Court has suggested that under certain circumstances it would find a waiver of immunity by estoppels where the governmental entities actions make it inequitable for a governmental entity to assert immunity. See Federal Sign, 951 S.W.2d at 412 (Hecht, J. concurring). Justice Hecht's concurring opinion in Federal Sign clearly indicated that under some circumstances a governmental entity behavior which induced the plaintiff to perform the contract would estop the governmental entity that received the benefits of the contract from asserting immunity from suit. Id. For many years litigants continued to bring "waiver by conduct" suits against governmental entities based on Hecht's concurring opinion in

Federal Sign and his subsequent opinions. See IT-Davy, 74 S.W.3d at 863 (Enoch, J., dissenting). Even when the Texas Supreme Court stated that it was rejecting the notion that a governmental entity can waive immunity from suit by conduct, the First Court of Appeals found that Texas Southern University had fraudulently induced performance and therefore had waived its immunity from suit by its conduct. . Tex. S. Univ. v. State Street Bank & Trust Co., 212 S.W.3d 893 (Tex.App.— Houston [1st Dist.] 2007, pet. denied) The First Court's reasoning in State Street was clearly predicated upon the notion that because Texas Southern University "lured" performance and then disclaimed the contract, it was stopped by its behavior from asserting immunity. Id. Compare to Tex. Parks & Wildlife Dep't v E. E. Lowrey Realty, Ltd., 235 S.W.3d 692, 695 n.2 (Tex. 2007) (stating that "Lowrey could only pursue a breach of contract claim against the State if he first obtained legislative consent . . .").

More recently, the Texas Supreme Court has acknowledged that it had found waiver by estoppel in cases other than breach of contract cases. "In [State v.] Biggar, 897 S.W.2d 11, 11-12, 14 (Tex. 1994)] we recognized an inverse condemnation claim [and found a waiver of sovereign immunity] in part because of the State's bad faith in using its power to gain an unfair economic advantage over the property owner." Hearts Bluff Game Ranch, Inc., v. State, 381 S.W.3d at 484. Thus the Supreme Court continues to acknowledge that under certain circumstances it will find a waiver of immunity by estoppels where a governmental entity would otherwise reap the benefits of unjust behavior. See id.

IV. COMMON-LAW PREMISES LIABILITY

Under the law of premises liability, landowners and those who control land and buildings can be held liable when a person is injured by a condition of or on the premises. Premises liability law developed separate from general negligence liability. Generally speaking, it has always been more difficult to prevail in a premises liability case than in a negligence suit.

The higher standard of liability in premises cases grew out of the preferential status given to landowners under British common law. According to Prosser, in a civilization based upon private ownership of land, it is important for economic development that liability not discourage land ownership and the development of real estate. Prosser, Law of Torts at 386 (5th ed. 1984). Thus, a possessor of land is obligated only to make use of his property in a manner which does not represent an unreasonable risk of harm to others. In striking a balance between encouraging economic development and the safety of the public, the courts looked to the plaintiff's "status" on the land to determine the owner's duty to him. Thus, the owner's duty depends upon whether the injured party is a trespasser, licensee, or invitee. A person injured by a dangerous condition on the premises must prove that the owner breached the duty owed to their class of premises users.

To serve the purpose of encouraging ownership and development of real property, the courts have dictated that a premises liability suit is not one of several causes of action that may be asserted against an owner/occupier -- it is the only cause of action. Pifer v. Muse, 984 S.W.2d 739, 742 (Tex.App.–Texarkana 1998, no pet.) ("If the injury was caused by a condition created by the activity rather than the activity itself, the plaintiff is limited to a premises liability theory of recovery."). This is a matter of substantive law that cannot be overcome by the plaintiff's artfulness in pleading his claim. Lucas v. Titus County Hosp. Dist., 964 S.W.2d 144, 153 (Tex.App.–Texarkana 1998, pet. denied) ("If the plaintiff was injured by a condition created by the activity rather than the activity itself, the plaintiff is limited to the premises liability theory of recovery."). A plaintiff may plead a cause of action based upon premises liability and other types of causes of action. However, when a plaintiff is injured by a "premises defect" he is entitled to recover only on the premises liability cause of action, and his judgment will stand up on appeal only if he pled, proved, and obtained findings on each element of a premises case. See H.E. Butt Grocery Co. v. Resendez, 988 S.W.2d 218, 219 (Tex. 1999).

If other avenues of ordinary negligence liability were available in suits against an owner/occupier, the essential protection premises liability law provided to owners/occupiers of

premises would be lost. For example, in the event a landowner could be held liable for ordinary negligence in connection with a dangerous premises condition, there would be no need for a claimant to prove the necessary elements of a premises liability case (gross negligence or the owner/occupier's prior knowledge of the dangerous condition). As a practical matter, virtually every premises case would be tried on a negligence theory, because liability would be so much easier to establish. Lucas, 964 S.W.2d at 153 ("It is true that a negligent activity is often more advantageous to the plaintiff than a premise liability theory because of additional elements that the plaintiff may be required to prove.").

A. Standard of Care.

Premises liability is limited liability. Owners and occupiers of land and buildings do not owe a duty of ordinary care to all persons who come onto their premises. "In Texas, the duty owed by a premises owner or occupier is determined by the status [trespasser, licensee, or invitee] of the complaining party." Gunn v. Harris Methodist Affiliated Hosp., 887 S.W.2d 248, 250 (Tex.App.–Fort Worth 1994, n.w.h.).

1. Trespasser.

A trespasser is one who enters upon another's property without right, lawful authority, or expressed or implied invitation, permission or license. Park v. Troy Dodson Const. Co., 761 S.W.2d 98, 100 (Tex.App.–Beaumont 1988, writ denied); Mendoza v. City of Corpus Christi, 700 S.W.2d 652, 654 (Tex.App.–Corpus Christi 1985, writ ref'd n.r.e.). A possessor of land owes a trespasser only the legal duty to refrain from injuring him willfully, wantonly, or through gross negligence. Lampasas v. Spring Ctr., Inc., 988 S.W.2d 428 (Tex.App.–Houston [14th Dist.] 1999, no pet.) ("The only duty a premises owner or occupier owes a trespasser is not to injure him willfully, wantonly, or through gross negligence. [citations omitted]. Moreover, a trespasser must take the premises as he finds it, and if he is injured by unexpected dangers, the loss is his own. [citations omitted]"). Spencer v. City of Dallas, 819 S.W.2d 612, 617 (Tex.App.—Dallas 1991, n.w.h.); Weaver v. KFC Mgmt., Inc., 750 S.W.2d 24, 26 (Tex.App.–Dallas 1988, writ denied).

2. Licensee.

"A licensee enters land of another with the permission of the landowner, but does so for his own convenience or on business for someone other than the owner. Consent to enter may be express or implied." Id.

The duty owed to a licensee is not to injure him through willful, wanton, or gross negligence. There is an exception to this rule when the: (1) occupier knows of a dangerous condition on the premises; (2) licensee does not know of the condition; and (3) condition is not perceptible to the licensee and cannot be inferred from facts within his present or past knowledge. Lower Neches Valley Auth. v. Murphy, 536 S.W.2d 561 (Tex. 1976). In the case of a dangerous condition of which the landowner has actual knowledge, he has a duty to warn of the defect or make the premises reasonably safe. State Dep't of Highways v. Payne, 838 S.W.2d 235, 237 (Tex. 1992); State v. Tennison, 509 S.W.2d 560, 562 (Tex. 1974). Tex. Parks & Wildlife Dep't v. Davis , 988 S.W.2d at 370.

3. Invitee.

An invitee has been described as one who enters on another's land with the owner's knowledge and for the mutual benefit of both. Rosas v. Buddies Food Store, 518 S.W.2d 534, 536 (Tex. 1975) (citing Restatement (Second) of Torts, § 332 (1965)).

The standard of care owed to an invitee is set out in the Texas Supreme Court's decision in Corbin:

> A possessor of land is subject to liability for physical harm caused to his invitees by a condition on the land if, but only if he (a) knows or by the exercise of reasonable care would discover the condition and should realize that it involves an unreasonable risk of harm to such invitees, and ... [b] fails to exercise reasonable care to protect them against the danger.
>
> Thus, when an occupier has actual or constructive knowledge

> of any condition on the premises that poses an unreasonable risk of harm to invitees, he has a duty to take whatever action is reasonably prudent under the circumstances to reduce or to eliminate the unreasonable risk from that condition. [5]

Corbin v. Safeway Stores, Inc., 648 S.W.2d 292, 295 (Tex. 1983); Meeks v. Rosa, 988 S.W.2d 216, 217 (Tex. 1999); Resendez, 988 S.W.2d at 219.

It is only in cases of injury to an invitee that the occupier must exercise reasonable care to inspect the premises and is charged with knowledge of dangerous conditions in which an inspection would disclose.

Even in the case of an invitee, a duty to act does not arise until there is a condition on the premises that creates an unreasonable risk of harm to users of the property. According to Corbin's statement of duty owed to invitees, it may appear that such suits are tried upon a general negligence standard. In fact, the supreme court's description of the invitee standard of care has encouraged this perception.

> The standard of conduct required of a premises occupier toward his invitees is the ordinary care that a reasonably prudent person would exercise under all pertinent circumstances.... Liability depends on whether the owner acted reasonably in light of what he knew or should have known about the risks accompanying a premises condition.

Mendoza, 700 S.W.2d at 654; Corbin, 648 S.W.2d at 295 ("[I]n subsequent cases, we emphasized that an invitee's suit against a store owner is a simple negligence action").

However, one critical difference remains between premises liability for invitees and a simple negligence case. A licensee must first establish the principal element of a premises liability case, namely the existence of a dangerous condition before the defendant has a duty to act. In Izaguirre, the supreme court held that an owner/occupier's duty arises only from the existence on the premises of a dangerous condition that could result in injury. The existence of a dangerous condition is the first element of any premises liability case. Brownsville Navigation Dist. v. Izaguirre, 829 S.W.2d 159, 160 (Tex. 1992). See Meeks, 988 S.W.2d at 306-07; Resendez, 988 S.W.2d at 219; Johnson County Sheriff's Posse, Inc. v. Endsley, 926 S.W.2d 284, 285 (Tex. 1996); Seideneck v. Cal Bayreuther Assoc., 451 S.W.2d 752, 754 (Tex. 1970).

Izaguirre involved a man who was loading a trailer that was disconnected from its tractor with its front resting on extendable supports. Id. The ground was soft and muddy from rain. The front supports of the trailer were resting on a board for stability. The board broke, causing the load to shift, and resulting in the trailer rolling over on Izaguirre. Plaintiffs contended the ground should have been covered with harder material that would not have given way, or that the district should have warned of the danger of the ground shifting. Id. The court held that ordinary dirt did not represent a dangerous condition, and in the absence of a premises defect, the premises occupier could not be held liable. Id.

B. Common Law Premises Liability Continues to Depend Upon the Classification of the Plaintiff's Entry Upon the Premises.

[5] Section 343 of the Restatement of Torts Second, from which the Texas Supreme Court established the standard of care owed to an invitee, also requires that the premises defect be one the possessor of land should expect that the plaintiff "will not discover or realize the danger, or will fail to protect themselves against." Corbin, 648 S.W.2d at 295. The Texas Supreme Court, however, eliminated this element of the invitee's cause of action when it "abolished the negligence defense of assumption of the risk and the 'no duty' doctrine." Id. at 295, fn. 1.

The supreme court has been presented with numerous opportunities to abolish the common law distinctions between trespasser, licensee, and invitee, and thereby establishing an ordinary care standard of duty for landowners. The supreme court has refused, however, to eliminate the common law classification standards of liability, despite the strong urging in several concurring opinions. Nixon v. Mr. Property Mgmt. Co., Inc., 690 S.W.2d 546 (Tex. 1985). Nixon was decided years after both Tennison and Murphy. The supreme court did not modify the holdings of those two cases at all. Id. The only conclusion that can be drawn from Nixon is that the supreme court intends that land occupiers, including governmental entities, will not be held to an ordinary negligence standard in premises liability cases. See id.; Valley Shamrock, Inc. v. Vasquez, 995 S.W.2d 302, 306-07 (Tex.App.—Corpus Christi 1999, no pet.); Richardson v. Wal-Mart Stores, Inc., 963 S.W.2d 162, 164 (Tex.App.—Texarkana 1998, no pet.).

C. What Constitutes a Dangerous Condition?

In cases brought by an invitee or licensee, the existence of a dangerous condition is the first element the plaintiff must establish in order to prevail. Seideneck, 451 S.W.2d at 754. Not every premises condition that causes injury is a dangerous condition. See Izaguirre, 829 S.W.2d at 160. To constitute a dangerous condition, a premises defect must meet two conditions. First, the premises must constitute an unreasonable risk to the licensee or invitee. Seideneck, 451 S.W.2d at 754. Second, the condition must have been one that the plaintiff should not have anticipated under the existing circumstances. See Izaguirre, 829 S.W.2d at 160; State Dep't of Highways and Pub. Transp. v. Kitchen, 867 S.W.2d 784 (Tex. 1993). As explained by the supreme court in Izaguirre, it is a matter of common knowledge that dirt becomes soft and muddy when wet. Id. Therefore, the premises owner should not have to warn of or make reasonably safe a condition that a reasonable and prudent person would have anticipated encountering under the applicable conditions. Izaguirre, 829 S.W.2d at 160; Kitchen, 867 S.W.2d at 786. See Cobb v. Tex. Dep't of Criminal Justice, 965 S.W.2d 59, 62 (Tex.App.—Houston [1st Dist.] 1998, no pet.) (a defect is an "imperfection, shortcoming, or want of something necessary for completion.").

D. Generally, a Defendant Landowner or Possessor Cannot be Held Liable on a Lesser Standard of Care.

An occupier being sued by a person injured on her premises has the right to claim the limitation of duty established under common law premises liability. A plaintiff who tries a premises liability case on a negligence theory does so at his own risk. See Clayton W. Williams, Jr., Inc. v. Olivo, 952 S.W.2d 523, 529 (Tex. 1997); Wal-Mart Stores, Inc. v. Bazan, 966 S.W.2d 745, 746 (Tex.App.—San Antonio 1998, no pet.); Physicians & Surgeons Gen. Hosp. v. Koblizek, 752 S.W.2d 657 (Tex.App.—Corpus Christi 1988, writ denied). Ms. Koblizek, an invitee at the hospital, alleged that she tripped in an area where two different types of floor surfaces came together. While their pleadings alleged all of the elements of an invitee premises liability case, the Koblizeks requested that the case be submitted to the jury on a general negligence charge. Id. at 659. In accordance with the charge, the jury found only that the hospital was negligent in allowing different surface levels to exist in between a bathroom hallway and lobby area and that this negligence was the proximate cause of the plaintiff's injury. Id. The defendant objected to the charge as failing to contain findings essential to a premises liability cause of action and failing to include definitions and instructions necessary to define the limited nature of the hospital's duty. Id. The court of appeals reversed and rendered a take nothing judgment based upon the plaintiffs ' failure to obtain jury findings essential to their premises liability cause of action (i.e., whether the defendant hospital knew or should have known of the condition of the floor or whether the condition presented an unreasonable risk of harm). Id. at 660. See Tennison, 509 S.W.2d at 562; State Dep't of Highways and Pub. Transp. v. Carson, 599 S.W.2d 852 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.). But see State v. McKinney, 886 S.W.2d 302, 303-04 (Tex.App.—Houston [1st Dist.] 1994, writ denied) (jury's affirmative answer to general negligence charge was

sufficient where all elements of a premises liability suit had been proven as a matter of law).

There are only two circumstances in which a premises occupant can be held liable on a lesser standard of liability. First, the occupier may waive limited liability and allow the case to proceed to the jury as a negligence case. Parker v. Highland Park, 565 S.W.2d 512, 519 (Tex. 1978). Under those circumstances, the defendant will be held to the standard of what a reasonable and prudent person would do under the same or similar circumstances. Second, the plaintiff can claim that she was injured not by a premises defect, but rather by an activity being conducted on the premises. This second group of cases are pled and tried under the "negligent activity" theory of liability.

While "negligent activity" liability is a means of circumventing the higher burden of proof in premises liability law, application is very limited. When a plaintiff is injured as a result of a "negligent activity" being conducted on the premise, the landowner is held to an ordinary care standard of liability. Keetch v. Kroger Co., 845 S.W.2d 262, 264 (Tex. 1992). "Negligent activity" liability exists only when the plaintiff was injured as a direct and immediate result of an activity conducted on the premises, rather than as a consequence of a defect in the premise. In Keetch, the supreme court held that a plaintiff can recover under the "negligent activity" theory rather than premises liability only if the: (1) injury was caused by or as a contemporaneous result of the activity; and (2) activity was the cause in fact of the injury. Id.

Keetch arose out of a slip and fall in a grocery store. The plaintiff alleged the store was negligent in spraying flowers with "Green Glo" in a way that overspray collected on the floor causing a dangerously slick condition. The trial court submitted the case to a jury on a premises liability theory and refused to submit the "negligent spraying activity" theory. The jury failed to find that Kroger knew or should have known of the dangerous condition, resulting in a take nothing verdict. The supreme court affirmed the decision of the court of appeals, while explaining the limited application of the negligent activity liability.

> Recovery on a negligent activity theory requires that the person had been injured by or as a contemporaneous result of the activity itself rather than by a condition created by the activity.
>
> There was no ongoing activity when Keetch was injured. Keetch may have been injured by a condition created by the spraying but she was not injured by the activity of spraying. At some point, almost every artificial condition can be said to have been created by an activity. We decline to eliminate all distinction between premises conditions and negligent activities.

Id. (emphasis added).

Following, the rationale set forth in Keetch, the Corpus Christi Court of Appeals held that the injury must not only be contemporaneous with the injury, but the injury must occur in the immediate area where the negligent activity was being conducted. Stanley Stores v. Veazy, 838 S.W.2d 884, 886 (Tex.App.—Beaumont 1992, writ denied). As explained by the Corpus Christi court:

> Our understanding of Keetch is that before submitting a negligence activity theory of recovery, a trial court should first consider from the evidence and pleadings if the injury was created by and contemporaneous to an ongoing activity.
>
> …
>
> [In this case], we have an ongoing activity [a Pepsi tasting display] in one area of the store and a slip and fall on a substance generated from that activity in another area of the store. Keetch says, "recovery on a negligent

> activity theory requires that a person has been injured by or as a contemporaneous result of the activity itself rather than by the condition created by the activity".
>
> [T]he evidence must show that the injuries were directly related to the activity itself.
>
> Applying Keetch to the case before this court, there is a lack of supportive evidence to justify the trial court's admission of a negligent activity cause of action. We find no connection between injury and the ongoing Pepsi display which would lead us to conclude that the injury occurred as a contemporary result of the ongoing activity.

Id. (emphasis in original).

Through Keetch and its progeny, the supreme court and the courts of appeals clearly intend for premises liability law to fulfill its historic function of providing meaningful limitations of a landowner's liability. Specifically, if the plaintiff's injuries are a result of the condition of the premises (i.e., a slick floor) then the case must be tried under the established principals of premises liability. Keetch, 845 S.W.2d at 264. A claimant may not avoid that limited liability simply by alleging that she was injured as a result of an "activity" carried out on the premises rather than the condition of the premises itself. See id. This same analysis is revisited by the courts in determining whether a TCA suit arises from a premises defect or from the condition or use of personal property. Simpson, 500 S.W.3d at 390.

E. Proving the Owner has Knowledge of the Dangerous Condition.

Keetch is also significant for its holding that an owner/occupier's creation of a condition does not conclusively establish that he had knowledge that the condition was dangerous.

> Proof that the premises owner or occupier created a condition which poses an unreasonable risk of harm may constitute circumstantial evidence that the owner or occupier knew of the condition. However, creating the condition does not establish knowledge as a matter of law for purposes of premises liability.

Id. at 266. As explained by Justice Hecht: "an employee may accidentally spray something on the floor without actually knowing it." Id. at 267 (Hecht, J., concurring).

F. Submission of a Premises Liability Case to the Jury.

Premises liability cases remain exempt from the requirements of Texas Rule of Civil Procedure 277, which dictates that whenever feasible a case should be submitted to the jury on broad form questions. TEX. R. CIV. P. 277 (Vernon Supp. 2001). The disjunctive submission of a premises liability case, requiring the jury to specifically find for the plaintiff on each element of his cause of action, is not a basis for reversal. H.E. Butt Grocery Co. v. Warner, 845 S.W.2d 258, 259-60 (Tex. 1992). Furthermore, even if a premises case is submitted in broad form, this does not abrogate the requirement that the court's charge includes in its definitions and instructions each and every element of a premises liability cause of action. Keetch, 845 S.W.2d at 266-67; Olivio, 952 S.W.2d at 529; Univ. of Tex. Med. Branch at Galveston v. Davidson, 882 S.W.2d 83, 86 (Tex.App.—Houston [14th Dist.] 1994, no writ) (reversing the trial court and rendering that the plaintiff take nothing because she could not recover on a general negligence theory as a matter of law).

G. Premises Liability for Governmental Entities at Common Law.

The classification of users of governmental premises and other principles of common law premises liability had no application to governmental entities before the enactment of the TCA, because they enjoyed sovereign

immunity. While the TCA constitutes a limited waiver of immunity, common law principles of sovereign immunity are still applicable in determining the extent of a governmental entity's liability. See also City of Bellaire v. Johnson, 400 S.W.3d 922, 924 (Tex. 2013)

V. THE TEXAS TORT CLAIMS ACT

This section of the paper addresses various provisions of the TCA as well as the cases interpreting the TCA. The discussion is broken down into the following topic areas: (1) whom is covered by the TCA; (2) under what circumstances does the Act permit suit; and (3) what are the exclusions and exceptions to liability under TCA.

One must keep in mind that the TCA is a limited waiver of immunity; meaning unless the waiver is clear then the immunity bars the plaintiff's claims. Ryder Integrated Logistics, Inc., v. Fayette County, 453 S.W.3d at 927. To prevail on a claim under the TCA the plaintiff must plead and prove all the elements of waiver. See id.

A. What Governmental Entities and Actions are Covered by the TCA?

Section 101.001 of the TCA sets forth the meanings of certain terms critical to the application of the TCA.

1. Section 101.001(3), Entities and Activities Covered by the TCA.

The TCA applies only to "governmental unit[s]." See TEX. CIV. PRAC. & REM. CODE §§ 101.001-101.021 (West 2005). Section 101.001(3) defines governmental units as including: (1) the state and all its agencies; (2) political subdivisions of the state (including but not limited to cities, counties, school districts, junior college districts, water improvement districts, and water control districts); (3) an emergency service organization; and (4) any other institution, agency, or organ of government the status and authority of which are derived from the Constitution of Texas or from laws passed by the Legislature under the Constitution. TEX. TORT CLAIMS ACT § 101.001(3) (a copy of the entire Act is provided at the end of this paper). Just as with sovereign immunity, the TCA applies and extends to all agencies, political subdivisions, and other institutions which are derived from the state constitution and laws." See Tarrant County v. Dobbins, 919 S.W.2d 877, 884 (Tex.App.—Fort Worth 1996, writ denied); Brown v. Montgomery County Hosp. Dist., 905 S.W.2d 481, 483 (Tex.App.—Beaumont 1995, writ denied); Dillard, 806 S.W.2d at 593. But see Dallas Area Rapid Transp., 242 F.3d at 319-22 (the standard for determining the applicability of the Eleventh Amendment is different from standard for determining applicability of TCA). Under these standards, the following governmental entities have been held to be covered by the TCA:

(a) County hospital districts and county owned hospitals, Sharpe v. Mem'l Hosp., 743 S.W.2d 717, 718 (Tex.App.—Houston [1st Dist.] 1987, no writ); Tarrant County Hosp. Dist. v. Ray, 712 S.W.2d 271, 273-74 (Tex.App.—Fort Worth 1986, writ ref'd n.r.e.); Wheeler v. Yettie Kersting Mem'l Hosp., 866 S.W.2d 32, 45 (Tex.App.—Houston [1st Dist.] 1993, no writ);

(b) A city owned hospital, City of Austin v. Davis, 693 S.W.2d 31, 34 (Tex.App.—Austin 1985, writ ref'd n.r.e.); Huckabay v. Irving Hosp. Auth., 879 S.W.2d 64, 66 (Tex.App.—Dallas 1993, no pet.);

(c) Independent school districts and junior college districts, Barr v. Bernhard, 562 S.W.2d 844, 846 (Tex. 1978); Brown v. Houston Indep. Sch. Dist., 763 F. Supp. 905, 908 (S.D. Tex. 1991); LeLeaux v. Hamshire-Fannett Indep. Sch. Dist., 835 S.W.2d 49, 51 (Tex. 1992); Freeman v. Del Mar College, 716 S.W.2d 729, 771 (Tex.App.—Corpus Christi 1986, no writ);

> (d) Community centers providing mental health and mental retardation services, Rodriguez v. Tex. Dep't of Mental Health and Mental Retardation, 942 S.W.2d 53 (Tex.App.—Corpus Christi 1997, no writ); Deep E. Tex. Reg'l Mental Health & Mental Retardation Servs. v. Kinnear, 877 S.W.2d 550, 564 (Tex.App.—Beaumont 1994, no writ); OP. TEX. ATT'Y GEN. NO. JM-538 (1986); and
>
> (e) Regional transit authorities created pursuant to state statute, OP. TEX. ATT'Y GEN. NO. MW-10 (1979).[6]

However, the San Antonio Court of Appeals held that the San Antonio Water System was not a "governmental unit" subject to suit, but merely a subdivision of the City of San Antonio. San Antonio Water System v. SmihSmith, 451 S.W.3d 442, 450–51 (Tex.App.—San Antonio 2014, no pet.). "The actual status and authority of SAWS and its board derives exclusively from the city ordinance and the encumbrance documents. See Guadalupe–Blanco River Auth. v. Tuttle, 171 S.W.2d 520, 521 (Tex.Civ.App.—San Antonio)See Guadalupe–Blanco River Auth. v. Tuttle, 171 S.W.2d 520, 521 (Tex.Civ.App.—San Antonio) (per curiam) (holding members of San Antonio Electric and Gas System board of trustees, created pursuant to article 1115,article 1115, are municipal agents whose powers and duties derive solely from the contract of encumbrance and the ordinance that created board and that their powers and duties are fixed and limited to those the municipality has expressly or by necessary implication conferred on them), *writ ref'd*, 141 Tex. 523, 174 S.W.2d 589 (1943).... . 174 S.W.2d 589 (Tex. 1943). Therefore, SAWS is not a "governmental unit" within the meaning of section 101.001(3) of the Texas Tort Claims Act". Id.

2. Section 101.001(2), Employees, Agents, and Independent Contractors.

The TCA creates liability for governmental units for the acts of its employees, agents, and officers. TEX. TORT CLAIMS ACT §§ 101.021-101.022. The Act defines "employee[s]" as:

> [A] person, including an officer or agent, who is in the paid service of governmental unit by competent authority, but does not include an independent contractor, an agent or employee of an independent contractor, or a person who performs tasks, the details of which the governmental unit does not have the right to control.

TEX. TORT CLAIMS ACT § 101.001(2). When the active tort-feasor is employed by a governmental unit and is subject to the control of any officer, agent, or elected official of that governmental unit, his actions can form the basis of liability. Id.

Liability is limited by the statute to that which arises from the actions of paid employees. See Harris County v. Dillard, 883 S.W.2d 166 (Tex. 1994); but see Tex. Dep' t of Family and Protective Servs. v. Atwood, 176 S.W.3d 522, 529-530 (Tex.App.—Houston [1st Dist.] 2004, pet. denied) (foster parents of regulated foster home not employees under TCA). Still, a governmental unit can be held vicariously liable for the negligence of an unpaid volunteer. See Smith v. Univ. of Tex., 664 S.W.2d 180, 190-91 (Tex.App.—Austin 1984, writ ref'd n.r.e.). The Smith case arose out of a track and field meet sponsored by the University of Texas. Id. at 181. Price, the head track coach and an employee of the University, was responsible for organizing and conducting the meet. Id. at 183. Price appointed a volunteer, Drolla, to oversee the

[6] The Texas Attorney General's Office opined that health districts are not included within the definition of "governmental unit." OP. TEX. ATT'Y GEN. NO. JM-1077 (1989).

shot-put event. Id. Drolla was charged with overseeing and running the event as well as the use of the shot-put area of the stadium. Id. Smith alleged that Drolla was negligent in failing to establish safety guidelines regarding the use of the shot-put facilities, which Smith claimed caused his injuries. Id. at 189. The factor which distinguishes Smith from Harris County and any other case that may involve the negligence of a volunteer is that the plaintiff in Smith alleged that a paid employee was responsible for the volunteer's actions. As the majority in Harris County recognized, Smith represents a way to get around the TCA's exclusion of the actions of volunteers from the state's waiver of immunity. See Harris County, 883 S.W.2d at 167-168, n.2; City of Dayton v. Gates, 126 S.W.3d 288, 289 (Tex.App. –Beaumont 2004, no pet. h.) (section 101.062's liability for volunteers does not expand scope of liability under section 101.021(1)). See also Rodriguez, 942 S.W.2d at 56 (governmental entity which is highly regulated by another state agency or is dependent on federal funds funneled through regulating agency is not an employee of agency or department).

The Texas Supreme Court confronted a fact situation similar to the Harris County case. Bishop v. Tex. A&M Univ., 35 S.W.3d 605 (Tex. 2000), arose from an injury in the production of a play by the Texas A&M drama club. Bishop was injured when stabbed with a knife that was used as a prop in a play. Id. Another student missed the stab pad and stabbed Bishop in chest. The decision to use the knife was made by a director and a prop assistant that the court of appeals found to be independent contractors. Id. The court of appeals reasoned that A&M could not be held liable for negligence of an independent contractor. Id. The actions of the drama club and the play were also overseen by two A&M faculty members. Since the faculty members were not paid specifically for work with the drama club, the court of appeals held that the faculty members were acting as volunteers for whom the university was not liable. Id.

The supreme court rejected the notion that the faculty advisors were not employees when they oversaw the drama club on two different basis. First the supreme court pointed out that:

> [First the] fact that Drs. Curley and Lesko [the faculty advisors] did not receive additional remuneration for their service to the university as faculty advisors is not dispositive of whether they were employees for purposes of liability under the Tort Claims Act. The evidence in support of the judgment demonstrates that although faculty members are not required to act as advisors, [A&M] considered Drs. Curley and Lesko's service to the university as faculty advisors when calculating their overall compensation. Unlike the volunteer reserve-deputy sheriff in Harris County v. Dillard, who was never in the paid service of a governmental unit and therefore was not an employee under the Tort Claims Act, Drs. Curley and Lesko remained in the paid service of the university while advising the Drama Club and received a benefit from their advisory positions.

Id.

The supreme court went on to point out that the purpose of having faculty advisors precluded them from being considered volunteers. In order to gain recognition as a student organization at A&M, an organization such as the Drama Club had to have faculty advisors. The official student-organizations policy manual provides that as an advisor to an organization such as the drama club, the advisors must know the rules pertaining to A&M organizations, be aware of liability issues and advise the organization to make reasonable and prudent decisions. Based upon this provision of the student-organization manual, the supreme court found that the faculty advisors were responsible for enforcing A&M's policies; including A&M's policy prohibiting the use of deadly weapons. Based upon the role of the faculty advisors and the fact they were paid by the University, the court found that there was

sufficient evidence to support a jury finding that the faculty advisors were acting as A&M's employees at the time Bishop was injured and that the TCA provided that A&M was liable for the negligence of its employees that resulted in injuries to Bishop. Id.

Following the Bishop I rationale, a governmental entity can be held liable even when its employees are carrying out functions for which they are not directly paid. Id. The chances of being held liable increase if the employee serving in the unpaid position is responsible for seeing that the organizations policies and procedures are followed. See id .

The actions of independent contractors are generally excluded from liability under the TCA. The Supreme Court had the opportunity to address this issue when the Bishop case returned to the Court in 2005. Tex. A&M Univ. v. Bishop, 156 S.W.3d 580 (Tex. 2005). In Bishop II, the court had to address the question of whether the play's directors were employees of the university or an independent contractor. The Court acknowledged its previous holding that the faculty advisors were acting as university employees in their involvement in the play where the plaintiff was injured. Id. at 582-82. But the court noted that the university could only be liable if one of its employees used or put into use the property that caused the injury. Id. at 583. The Supreme Court pointed out that the directors of the play selected the knife and the stab pad that resulted in the plaintiff's injuries. Id. Therefore, the plaintiff could only prevail if the directors were employees. Id.

The plaintiff argued that because the university could hire and fired the directors, the university could control the props to be used in the play, the university could approve the script for the play, and the directors were paid for their work with university funds, the directors must have been employees. Id. The Supreme Court acknowledged that this evidence was relevant but pointed out that the TCA defines an "employee" as a person in the paid service of a governmental unit, but provides that the term "does not include an independent contractor or a person who performs tasks the details of which the governmental unit does not have the legal right to control." Id. at 584. The court then looked to the factors for determining if someone is an independent contractor, namely: (1) The independent nature of his business; (2) his obligation to furnish necessary tools, supplies, and material to perform the job; (3) his right to control the progress of the work, except as to final results; (4) the time for which he is employed; and (5) the method of payment, whether by time or by the job. Id. at 584-85. The directors performed specialized tasks, were paid by the job, furnished their own props, had no contract with the university, and were not put on the university's tax rolls. The court then noted that the university' s ability to terminate the directors and oversee the script and props shows only a minimum form of control. Id. Thus the Supreme Court found the directors were independent contractors and Texas A&M could not be held liable for their negligent use of the props in the play. Id. See also Univ. of Tex. Health Science Center v. Schroeder, 190 S.W.3d 102 (Tex.App.–Houston [1st Dist.] 2005, no pet.)(university was not liable for the actions of a medical student because the student was not an employee of the university). See also Marino v. Lenoir, 526 S.W.3d 403 (Tex. 2017) (resident physician was not "in paid service" of governmental unit, and governmental unit did not have legal right of control, so she was not entitled to immunity).

The lower courts have typically followed Bishop, particularly in situations involving alleged medical malpractice. The Fourteenth Court of Appeals held that a county could not be held liable for the actions of a doctor with staff privileges at a county-owned hospital. Harris v. Galveston County, 799 S.W.2d 766, 788 (Tex.App.—Houston [14th Dist.] 1990, writ denied). Harris was injured while he was a patient at a county hospital. Id. She claimed her injuries resulted from the negligence of Dr. Borne. Borne was not a county employee, but had staff privileges and was entitled to use the hospital 's facilities. Id. at 767. The court of appeals affirmed the entry of summary judgment in favor of the county. Id. at 768.

Generally, a physician is considered to be an independent contractor with respect to hospitals at which he has staff privileges. The Texas Tort Claims Act provides that an independent contractor is not an employee. Thus, if we assume the facts alleged by appellant are

true, they do not establish a right of action under the Act against [Galveston County]. Id. See TEX. TORT CLAIMS ACT § 101.001(2).

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Id. See TEX. TORT CLAIMS ACT § 101.001(2).

3. Section 101.001(5), Scope of Employment.

As with respondeat superior liability, a governmental entity will be held liable only for the torts of its employees committed within the scope of their employment. Hein v. Harris County, 557 S.W.2d 366, 368 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref' d n.r.e.); TEX. TORT CLAIMS ACT § 101.001(5). The Act defines the "scope of employment" as being "the performance for a governmental unit of the duties of an employee's office or employment and includes being in or about the performance of a task lawfully assigned to an employee by competent authority." The scope of employment, therefore, establishes the limits of the governmental liability for the acts of its employees.

Hein demonstrates the application of this principal. Hein, a Harris County employee, was shot by another Harris County employee, Marvin Carlton. Id. at 367. Hein and Carlton were assigned to install traffic signs in a rural area of Harris County. On the day of the accident, Carlton brought a pistol to work in order to shoot snakes encountered while installing signs. After completing their work, they went to a nearby home owned by a friend of Carlton "for the purpose of calling back to the camp to receive further instructions as was customary." Id. Before they left the house, Carlton took out the pistol to show it to his friend. While attempting to remove the bullet clip, the gun accidentally discharged injuring Hein. Carlton was not within the scope of his employment at the time he shot Hein, despite the fact he went to a friend's house to call to the sign shop in accordance with the county's policy. Id.

> The evidence establishes that Carlton's negligent conduct occurred at the time when he was merely showing the pistol to a friend. He had completed the business which brought him to the friend's house and had delayed his departure for that purpose. The rule is that when a servant turns aside, no matter how short the time, from the prosecution at the master's work to engage in an affair wholly his own, he ceases to act for the master, and responsibility for his actions in pursuing his own business or pleasure is upon him alone. The actions of Carlton in attempting to remove the clip from the pistol ... was something wholly disconnected from his employment and not for the benefit of his employer. When he turned aside from the prosecution of his duties for the county, although for only a short time, he ceased to act for the county and the responsibility of any act done by him during this time rested on him alone.

Id. (citations omitted) (emphasis added).

Hein holds that any departure from an employee's assigned work will preclude liability under the TCA. Id. Other courts may limit the Hein decision as holding only that when the employee's actions bear no relationship to the performance of a governmental function, will they be held to be outside the scope of employment.

In contrast to the Hein decision is the recent Supreme Court of Texas decision in Laverie v. Wetherbe, 417 S.W.3d 748 (Tex. Apr. 7, 2017). The plaintiff in Laverie was a professor who claimed an associate dean, who oversaw faculty recruiting, defamed him when he was passed over for a promotion. Id. at 750. The defendant moved for summary judgment on the basis that her statements were made in the scope of employment and she was therefore immune from suit in her individual capacity. Id. The trial court denied this motion and the court of appeals affirmed on the basis that the defendant "failed to offer evidence that she was not furthering her own purposes, rather than her employer's, when she made the allegedly defamatory statements." Id. The Supreme Court reversed, noting that nothing "in the statutory definition of 'scope of employment' suggests subjective intent is a necessary component of the scope-of-employment analysis." Id. at 753. Instead, the scope-of-employment analysis "remains fundamentally objective: Is there a connection between the employee's job duties and the alleged tortious conduct?" Id. The Supreme Court concluded that the objective evidence showed that the defendant was acting in the scope of her employment as a dean who performed faculty recruiting and hiring, and she was entitled to dismissal under the election-of-remedies provision. Id. at 756.

Further contrast to Hein can be found in Harris County v. Gibbons, 150 S.W.3d 877 (Tex.App.—Houston [14th Dist.] 2004, no pet.), finding that an off duty deputy sheriff was in the course and scope of employment when he rear ended another vehicle in his patrol car. At the time of the accident, Deputy Robert Barber's shift had ended and he was driving his patrol car to a second job. He pulled up to a stop light and was checking the license of a truck stopped near him to see if it was stolen. As he was looking down to check his on-board computer, his car rolled forward and hit Gibbon's car. The County contended that it could not be held liable for Barber's negligence because he was not in the scope of his employment at the time of the accident. The Fourteenth Court of Appeals rejected this argument based on the following factors: (1) as a certified peace officer, he had a legal obligation to investigate the matter if he believed a crime, the truck being stolen, had occurred; (2) he was performing a function of his job at the time of the accident; (3) he signed onto his radio at the time he was checking on the truck; and (4) he was entitled to compensatory pay for his work in checking on the truck and taking any other action related to what he found; and (5) after the accident they went to his patrol station and filled out necessary paper work. Id.

The holdings in Hein, Laverie, and Gibbons establish that the determination of whether the employee is on duty at the time of the events giving rise to the suit is not determined by whether they are "on the clock" or even whether they *intended* their actions to be in furtherance of their employment. Rather, the courts look to whether the employee's actions were objectively related to their job duties in deciding whether the employees was working at the time of the events in question and whether the governmental entity is liable for their negligence. See Hein v. Harris County, 557 S.W.2d 366 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ refused n.r.e.); Gibbons, 150 S.W.3d at 877.

One exception may exist if the asserted job duty is inapplicable to the factual circumstances. In Garza v. Harrison, 531 S.W.3d 852 (Tex. App.—Houston [14th Dist.] 2017, pet. filed), a police officer claimed he was acting in course and scope when he shot and killed the plaintiff, who was attempting to escape in a vehicle. Id. at 855. At the time, the officer was off-duty and working as a courtesy patrol officer near an apartment complex outside his jurisdiction. Id. The court held that while the officer had a lawful duty to preserve the peace "within the officer's jurisdiction," because he was outside of his jurisdiction at the time of the incident, he was not obligated to intervene. Id. at 859 (quoting Tex. Code Crim. Proc. art. 2.13(a)).

The court concluded that the officer acted outside his duty, but cautioned that "determining whether the officer is immune is a context-specific inquiry that depends on the circumstances of the particular case and whether those circumstances dictate thtat the officer had a duty to act." Id. at 861.

Recent cases have begun to address the amount and quality of evidence needed to support the course-and-scope finding as a matter of law, particularly in the context of motions to dismiss under section 101.106(f). In Fryday v. Michaelski, 541 S.W.3d 345 (Tex. App.—Houston [14th Dist.] 2017, pet. denied), the court held that a defendant's affidavit was sufficient to establish that he was an employee when plaintiff's controverting evidence (which purportedly showed that defendant was a part-time subcontractor) was not filed properly with the court. Id. at 350–51. Similarly, in Perales v. Lara, No. 13-16-00285-CV, 2018 Tex. App. LEXIS 301, (Tex. App.—Corpus Christi Jan. 11, 2018, no pet.), when responding to accusations that they fraudulently prevented plaintiff's employment, two school district employees based their plea to the jurisdiction on affidavits that generally stated that their job duties included communications about employment scenarios. *Id.* at *5–6. The court held that these affidavits, in conjunction with the language of the Texas Education Code, were sufficient to support the employees' dismissal under 101.106(f). Id. at *14–15.

B. Extent of Waiver of Sovereign Immunity Under the TCA.[7]

1. Section 101.021: How an Employee's Immunity From Liability Affects the Plaintiff's Ability to Bring Suit Under This Section.

While section 101.021 clearly waives immunity, the plaintiff's ability to successfully pursue a claim under this section depends upon whether suit based on the tortious conduct of an employee and whether suit against that employee would be barred by official immunity. Section 101.021 is broken into two separate subsections. Subsection 1 provides that a governmental entity can be sued for property damages, personal injury, or death resulting from the operation or use of a motor-driven vehicle or motor-driven equipment. TEX. TORT CLAIMS ACT § 101.021(1). A person can bring suit arising from operation of a motor-driven vehicle or motor-driven equipment only if the employee operating that equipment would be personally liable to the claimant according to Texas law. Id. Thus, the Texas Supreme Court has held that if suit against the employee operating motor-driven equipment or motor-vehicle is barred by official immunity, then suit against his governmental employers is also barred. Tex. Dep't. of Pub. Safety v. Bonilla, 481 S.W.3d 640 (Tex. 2015); DeWitt v. Harris County, 904 S.W.2d 650, 653 (Tex. 1995); K.D.F. v. Rex, 878 S.W.2d 589, 597 (Tex. 1994); City of Houston v. Kilburn, 849 S.W.2d 810, 812 (Tex. 1993).

Subsection 2 of section 101.021 allows suit for personal injury or death caused by the condition or use of tangible personal or real property. TEX. TORT CLAIMS ACT § 101.021(2). It does not permit strict liability claims. See EPGT Tex. Pipeline, L.P. v. Harris County Flood Control Dist., 176 S.W.3d 330 (Tex.App.–Houston [1st Dist.] 2004, pet. dism'd). This section only allows suit, however, if the governmental unit would be liable under Texas law "were it a private person." Id. The supreme court has held that the "were it a private person" language precludes suit against a governmental entity if the claim is predicated on a respondeat

[7] It must be kept in mind that the remedies authorized and created by the TCA are in addition to any other remedies or redress a party may have against a governmental entity. TCA § 101.003. See Kerrville HRH, Inc. v. City of Kerrville, 803 S.W.2d 377, 381 (Tex.App.—San Antonio 1990, pet. denied) (plaintiff was not precluded from bringing Deceptive Trade Practices Act claims against the city by the TCA); Burgess v. City of Houston, 718 F.2d 151, 154-55 (5th Cir. 1983) ("the Act, however, preserves a claimant's common law right to seek unlimited damages for negligence of a municipality while performing a proprietary function").

superior theory and suit against the governmental employee would be barred by official immunity. DeWitt, 904 S.W.2d at 653-54.

> Consistent with subsection 1, we construed subsection 2 of section 101.021 to predicate the governmental unit's respondeat superior liability upon the liability of its employee.
>
> When, as in this case, the governmental unit's liability under section 101.021(2) is based on respondeat superior for an employee's negligence arising from the misuse of tangible personal property, the liability is derivative or indirect.
>
> ....
>
> Here, official immunity, like any other affirmative defense the employee may have, becomes relevant to the governmental entity 's liability. ... [W]ere it a private person, the county would be entitled to assert any affirmative defenses its employee has to liability. ... In this case, the affirmative defense is official immunity. It would serve no legislative purpose to declare a waiver of sovereign immunity when the basis of liability is respondeat superior and the acts of the employee are covered by official immunity.
>
> We hold that the county is not liable under section 101.021(2) for the negligence of its employee when the employee has no liability because of official immunity.

Id.; King, 2003 WL 22937252, at *5. When suit is based upon section 101.021(1) or a respondeat superior theory under 101.021(a), the plaintiff bears the burden of establishing that suit against the individual employees, who's actions caused the damages, is not entitled to official immunity. See id. at 654. Thus, a governmental entity can rely on the official immunity of its employee regardless of whether the employee is a party to the suit. City of Beverly Hills v. Guevara, 904 S.W.2d 655, 656 (Tex.1995).City of Beverly Hills v. Guevara, 904 S.W.2d 655, 656 (Tex.1995). Derivative immunity is an affirmative defense; it requires the governmental defendant to establish that its employee performed a discretionary act in good faith and within the scope of his or her authority. Wadewitz v. Montgomery, 951 S.W.2d 464, 466 (Tex.1997); City of Lancaster v. Chambers, 883 S.W.2d 650, 653 (Tex.1994). Wadewitz v. Montgomery, 951 S.W.2d 464, 465–466 (Tex.1997); City of Lancaster v. Chambers, 883 S.W.2d 650, 653 (Tex.1994).

To prevail on the affirmative defense of "derivative immunity," the governmental entity must establish the "objective legal reasonableness" of the officer/employee's actions. Bonilla, 481 S.W.3d at 642-43. Bonilla brought suit for injuries she sustained when she was struck by a DPS Trooper who was pursing a speeding vehicle. Id. The Supreme Court addressed the standard for proving the "derivative immunity defense" and applied that standard to the evidence offered by the DPS in support of its plea to the jurisdiction and motion for summary judgment.

> Official immunity is an affirmative defense that protects a governmental employee from personal liability and, in doing so, preserves a governmental employer's sovereign immunity from suit for vicarious liability. A governmental employee is entitled to official immunity for the good-faith performance of discretionary duties within the scope of the employee's authority. The issue in this case is whether DPS's summary-judgment evidence conclusively established the "good faith" element of the defense.

Good faith is a test of objective legal reasonableness. As we have consistently held, a law-enforcement officer can obtain summary judgment in a pursuit or emergency-response case by proving that a reasonably prudent officer, under the same or similar circumstances, could have believed the need for the officer's actions outweighed a clear risk of harm to the public from those actions. "'Need' refers to the urgency of the circumstances requiring police intervention, while 'risk' refers to the countervailing public safety concerns."

Good faith does not require proof that all reasonably prudent officers would have resolved the need/risk analysis in the same manner under similar circumstances.

Correspondingly, evidence of good faith is not controverted merely because a reasonably prudent officer could have made a different decision. Rather, when the summary-judgment record bears competent evidence of good faith, that element of the official-immunity defense is established unless the plaintiff shows that *no* reasonable person in the officer's position could have thought the facts justified the officer's actions.

...

Viewed properly, the good-faith standard is analogous to an abuse-of-discretion standard that protects "'all but the plainly incompetent or those who knowingly violate the law.'" It is "not equivalent to a general negligence test, which addresses what a reasonable person *would have done*"; thus, "[e]vidence of negligence alone will not controvert competent evidence of good faith." Similarly, evidence that a reasonable law-enforcement officer could have resolved the need/risk analysis differently does not overcome competent evidence of good faith. The appropriate focus is what a reasonable officer *could have believed*, and the determinative inquiry is whether any reasonably prudent officer possessed of the same information could have determined the trooper's actions were justified.

…

Evidence of an officer's good faith must be substantiated with facts showing the officer assessed both the need to apprehend the suspect and the risk of harm to the public. Summary-judgment proof does not provide a "suitable basis" for determining good faith if it fails to address several factors we have identified as bearing on the need/risk analysis, including the availability of any alternative action. Good faith is not necessarily negated if the summary-judgment evidence reveals that the officer had a viable alternative, but the evidence must nevertheless show the officer assessed the availability of any alternative course of action.

To establish good faith in this case, DPS relied almost exclusively on the trooper's account of the incident, as reflected in his affidavit,

deposition testimony, and incident report. The trooper testified that he observed a vehicle speed past him, weaving in and out of traffic. Although the trooper had decided to stop the vehicle, he explained that he did not immediately do so because there was no improved shoulder and he believed the location was unsafe to make a traffic stop. Very shortly thereafter, however, the vehicle failed to yield at a red light. The trooper testified that he believed the driver posed a risk of harm to the public but, at that point, he did not have sufficient time to call in the license-plate number to identify the driver of the vehicle. The trooper therefore decided to pursue the vehicle through the intersection and, according to him, did so only after slowing at the intersection and activating his emergency overhead lights. He stated that he did not have time to activate his emergency siren before he collided with Bonilla.

The court of appeals held that DPS's summary-judgment evidence was not competent to prove good faith because it did not "establish[] that [the trooper] considered whether any alternative course of action was available to stop the speeding truck." We disagree with the court's characterization of the evidence.

Magic words are not required to establish that a law-enforcement officer considered the need/risk balancing factors. Summary judgment on official immunity requires that a movant establish facts upon which the court could base its legal conclusion, but no particular words are required. In University of Houston v. Clark, we concluded that an officer's affidavit testimony adequately addressed alternatives to pursuit by stating:

> "[T]he suspect [in a physical altercation on university property] had not been identified before he fled the foot patrol officers[, and] [t]he manner in which the suspect operated his vehicle and the high rate of speed at which he traveled ... posed a danger to the public."

Another officer's affidavit was likewise sufficient to address alternatives by averring:

> "[I] followed the suspect at a distance and was not able to get close enough to the suspect vehicle to obtain its license plate number. I had expected the suspect vehicle to stop when the driver observed my overhead lights and siren behind him," but he did not.

...[W]e conclude DPS's evidence is not significantly different from the evidence in Clark that we found adequate to address the alternative-options element of the need/risk analysis. DPS's summary-judgment evidence detailed the specific circumstances giving rise to pursuit and emphasized the potential danger to the public due to the subject vehicle's erratic and unsafe activity. Although not explicitly addressing alternatives to

> pursuit, the trooper implicitly discounted the viability of other alternatives based on his stated belief that immediate action was necessary and his inability to identify the driver at that time. The fact that the trooper did not expressly identify "alternatives" that may have been considered does not render the evidence deficient. The court of appeals erred in holding otherwise.

Id. at 642-645.

Keep in mind, that the official immunity determination will not be relevant to all claims brought under section 101.021(2). As the supreme court noted in DeWitt, certain cases under the TCA, such as premise liability cases, are not predicated upon a respondeat superior theory. Id. at 653. These are typically cases that arise from the condition of tangible personal or real property. See City of Corinth v. Gladys, 916 S.W.2d 618, 623 (Tex.App.—Fort Worth 1996, no writ). In these cases, official immunity is not an available defense because suit is based upon the condition of the property, rather than how the property was used by an employee. See id.

2. Section 101.106: Election of Remedies.

Section 101.106 is intended to save the resources of governmental entitys and their employees by forcing a plaintiff to choose whether she wants to sue the governmental entity involved OR its employees and agents in their individual capacities. Section 101.106 may preclude the plaintiff from later suing other defendants. Alexander, 435 S.W.3d at 791. However, where the plaintiff sues employees the trial court must look to the substance of the plaintiff's claims, not the characterization in the pleading in deciding whether the suit is against the governmental entity rather than an employee or official in their individual capacities. Id.

Section 101.106 is entitled Election of Remedies and states:

> (a) The filing of a suit under this chapter against a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter.
>
> (b) The filing of a suit against any employee of a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents.
>
> (c) The settlement of a claim arising under this chapter shall immediately and forever bar the claimant from any suit against or recovery from any employee of the same governmental unit regarding the same subject matter.
>
> (d) A judgment against an employee of a governmental unit shall immediately and forever bar the party obtaining the judgment from any suit against or recovery from the governmental unit.
>
> (e) If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.
>
> (f) If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter

> against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.

TEX. TORT CLAIMS ACT §101.106

The purpose of section 101.106 is, in part, to preclude suits against governmental employees and officials, where the claim is properly against the entity. Alexander, 435 S.W.3d at 791.

> Application of the TTCA's election-of-remedies provision requires a determination as to whether an employee acted independently and is thus solely liable, or acted within the general scope of his or her employment such that the governmental unit is vicariously liable. The Legislature mandates this determination in order to reduce the resources that the government and its employees must use in defending redundant litigation and alternative theories of recovery. To that end, the statute compels dismissal of government employees when suit should have been brought against the government.
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> ...
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> [W]hen suit is brought against a government employee for conduct within the general scope of his employment, and suit could have been brought under the TTCA against the government, subsection 101.106(f) provides that the suit is considered to be against the employee in the employee's official capacity only. We explained that such a suit is *not* a suit against the employee; it is, in all but name only, a suit against the governmental unit." This is because a suit against an employee in his official capacity actually seeks to impose liability against the governmental unit rather than on the individual specifically named. Accordingly, we held ... that a suit against a government employee in his official capacity pursuant to subsection (f) is essentially a suit against the employer and therefore does not trigger the bar to suit against the government under subsection (b). We [have] also indicated ... that subsection (f) provides the appropriate avenue for dismissal of an employee who is considered to have been sued in his official capacity. ... [Thus on] the employee's motion, the suit against the employee shall be dismissed.

Alexander, 435 S.W.3d at 791 (internal quotations omitted); Tex. Dep't of Aging and Disability ServServs. v. Cannon, 453 S.W.3d 411, 415 (Tex. 2015)() ("The current version of the provision serves the additional purpose of easing the burden placed on governmental units and their employees in defending duplicative claims, in part by 'favor[ing] the expedient dismissal of ... employees when suit should have been brought against the government' under the Act.").

At the filing of suit the plaintiff must make an election to file suit against the entity or its employees. Molina v. Alvarado, 463 S.W.3d 867 (Tex. 2015); see also Univ. of Tex. Health Sci. Ctr. v. Rios, 542 S.W.3d 530, 538 (Tex. 2017).

a. 101.106 (a) and (b)

Sub-section (a) forces/requires a plaintiff to make an irrevocable selection of defendant; if she sues the governmental entity, then she cannot thereafter sue any employees in their individual capacities. As sub-section (a) clearly states, filing suit against the entity bars any effort to bring suit against the employee or employees involved in the incident that gives rise to the claims.. TEX. CIV. PRAC. & REM. CODE § 101.106 (a). Waxahachie Indep. School Dist. v. Johnson, 181 S.W.3d 781, 785 (Tex.App.–Waco 2005, pet. denied). Once the plaintiff files suit against the governmental entity she is forever barred from bringing claims against employees for tort claims arising from the same events or occurances. Molina, 463 S.W.3d 867. The only exception to the bar created by sub-paragraph (a) are claims for which immunity is otherwise waived by federal or state statutes. Id.

> We have held that tort claims against the government are (or could be) brought "under this chapter" regardless of whether the Tort Claims Act waives immunity for those claims. Franka v. Velasquez, 332 S.W.3d 367, 379–80 (Tex. 2011); Garcia, 253 S.W.3d at 659 ("Because the Tort Claims Act is the only, albeit limited, avenue for common-law recovery against the government, all tort theories alleged against a governmental unit, whether it is sued alone or together with its employees, are assumed to be 'under [the Tort Claims Act]' for purposes of section 101.106.").section 101.106."). However, claims asserted pursuant to independent statutory waivers of immunity are not brought "under" the Act.
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> But that election did not extend to section 1983But that election did not extend to section 1983 claims against the individual Employees that were *not* brought under the Tort Claims Act and thus were *not* otherwise subject to dismissal. ...
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> *** *** ***
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> The role of subsections (e) and (f) is to ensure that tort claims within the purview of the Act do not proceed against a government employee for conduct within the scope of his employment. See Ngakoue, 408 S.W.3d at 355. See Ngakoue, 408 S.W.3d at 355. But those provisions simply do not apply to claims against the employee individually that are outside the Act's scope.

Cannon, 453 S.W.3d at 415, 417–18.

The amended sub section (b) states that the filing of suit against an employee constitutes an "irrevocable election" barring any suit for recovery against the governmental entity regarding the same subject matter unless the governmental unit consents. TEX. TORT CLAIMS ACT § 101.106(b). Tex. Dep't of Ag. v. Calderon, 221 S.W.3d 918 (Tex.App.–Corpus Christi, 2007) (disapproved of on other grounds in Franka v. Velasquez, 332 S.W.3d 367 (Tex. 2011)).

Sub-section (b) provides that suit against the employees bars subsequent suit against the entity, unless the entity "consents." TEX. CIV. PRAC. & REM. CODE § 101.106 (b). The Supreme Court has held that, if a statute waives immunity from suit, then the governmental entity is held to have consented to suit under sub-section (b). Texas Adjutant General's Office v. Ngakoue, 408 S.W.3d 350, 356 (Tex. 2013); Mission Consol. Ind. School Dist., 372 S.W.3d at 655.

A trial court must look to the substance of plaintiff's claims to determine whether sub-sections bar claims against the individuals or the entity. Alexander, 435 S.W.3d 789, 791–92. Where the plaintiff's claim is based on actions taken in the course and scope of the official or employee's position with the entity, and the claim

is a tort claim, then the claim is properly one against the entity, regardless of whether the live pleading states the defendants are sued in their individual capacities. Id. Thus, in Alexander where the claims were based on torts allegedly taken in the course and scope of officer's work, the claim was against the County; and all claims against officers in their individual capacity were barred. Id.

In Molina, the Texas Supreme Court gave some sage advice to a plaintiff filing suit that is uncertain whether the individual employees acted in the course and scope of her employment.

> "Because the decision regarding whom to sue has irrevocable consequences, a plaintiff must proceed cautiously before filing suit and carefully consider whether to seek relief from the governmental unit or from the employee individually." Id. However, as we have previously noted, a plaintiff "may not be in the position of knowing whether the [employee] was acting within the scope of employment" when he files suit. TAGO, 408 S.W.3d at 359.
>
> In today's case, Alvarado filed suit and initially named only the governmental unit itself, not its employee. This action "constitute[d] an irrevocable election ... and immediately and forever bar[red] any suit or recovery by [Molina] against any individual employee of the governmental unit regarding the same subject matter." TEX. CIV. PRAC. & REM. CODEE § 101.106(a).TEX. CIV. PRAC. & REM. CODE § 101.106(a).
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> *** *** ***
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> If at the time Alvarado filed suit he possessed insufficient information to determine whether Molina was acting within the scope of his employment, the prudent choice would have been to sue Molina, and await a factual resolution of that question. See TEX. CIV. PRAC. & REM. CODEE § 101.106(f); Alexander, 435 S.W.3d at 791. Because Alvarado did not do so, he essentially chose his defendant before being required to do so by the election-of-remedies provision. That choice is still an irrevocable election under section 101.106, and the TTCA bars him from later filing suit against Molina.

Molina, 463 S.W.3d at 870.

Where the governmental entity or its employees move to substitute the entity as the proper defendant, 101.106(b) will not bar the plaintiff from pursuing claims against the entity. Tex. Tech Univ. Health Sciences Ctr. v. Villagran, 369 S.W.3d 523 (Tex.App.—Amarillo 2012, pet. pending). In Villagran the plaintiff initially brought suit against doctors employed by the Texas Tech University Hospital. When one of the doctors moved to dismiss claims against him pursuant to section 101.106(f) of the Civil Practice and Remedies Code, the plaintiffs amended their pleading and dismissed their claims against that doctor, retained other doctors as parties but added Texas Tech University as a defendant. Tech then filed a motion to dismiss all of the remaining doctors. By separate motion, Tech filed a motion to dismiss all claims against it contending that because the plaintiffs' had brought suit against the university's employees, the claims against the university were barred by section 101.106(b) of the TCA. The Amarillo Court rejected Tech's argument noting that subparagraph (f) of section 101.106 provides for the substitution of the governmental employer in place of an employee or official that has been sued. Id. The Court pointed out that Tech's reasoning that a suit against employees bars claims against the entity would make section 101.106(f) meaningless. Id.

b. 101.106(c) and (d)

Subections (c) and (d) bar subsequent litigation once a judgment is entered or the case is settled. Sub-section (c) provides that a settlement shall immediately and forever bar claims against employees of the governmental entity regarding the same subject matter. TEX. TORT CLAIMS ACT § 101.106(c). As with sub-sections (a) and (b), the prohibition applies to all claims that involve the same "subject matter," and bar claims even if they are not brought under the TCA. Thus, a plaintiff needs to be careful in settling claims because this will bar further litigation arising from the "subject matter" of the claims that were settled.

Once a judgment against the employee is entered, sub-section (d) bars other claims from being brought against the governmental entity. "A judgment against an employee of a governmental unit shall immediately and forever bar the party obtaining a judgment from any suit against or recovery from the governmental unit." Section 101.106(d). The bar under sub-section (d) applies even if the suit is dismissed for want of jurisdiction. A dismissal based on sovereign immunity is a final judgment that would bar claims under the act from being brought against governmental employees. Harris County v. Sykes, 136 S.W.3d 635 (Tex. 2004). The plaintiffs in Sykes initially brought suit against Harris County. Id. Harris County filed a plea to the jurisdiction asserting that there was no waiver of immunity from suit. Id. The plaintiffs then amended their petition and, in the amended petition, added Carl Borchers, a corrections officer in the Harris County jail, as a defendant, both individually and in his official capacity. Id. The trial court thereafter granted Harris County's plea to the jurisdiction, finding no waiver of immunity from suit. Id. After the County 's plea to the jurisdiction was granted, Borchers moved for summary judgment on the grounds that section 101.106 barred any suit against him because a final judgment had been entered on the plaintiffs' claims against the County. Id. The Supreme Court held that the old version of section 101.106, before the 2003 amendments, "applies not only when there has been a judgment against a governmental entity prior to suit against the employee but also when the settlement or judgment against the governmental entity occurs at any time before or during the pendency of the action against the employee. ... The bar applies regardless of whether the judgment is favorable or adverse to the governmental entity." Id. at 640. Earlier in the opinion the Texas Supreme Court had held that when a plaintiff has had a reasonable opportunity to amend its pleadings after a governmental entity filed the plea to the jurisdiction and the plaintiff's amended pleading does not allege facts establishing a waiver of immunity, the trial court should dismiss the suit. Id. See Texas Dep't of Crim. Justice v. Campos, 384 S.W.3d 810, 815-16) (where plaintiffs have amended their pleadings three times over 9 years after the first plea to the jurisdiction was filed, then they have had adequate opportunity to emend their pleadings to assert claims for which immunity has been waived and the case should be dismissed). "Such a dismissal is with prejudice because a plaintiff should not be permitted to relitigate jurisdiction once that issue has been fully determined." Sykes, 136 S.W.3d at 639. Based on the fact that any dismissal of the suit against the County would be with prejudice, the court held that section 101.106 barred the suit against Major Borchers. Id.; see Fiske v. Heller, No. 03-03-00387-CV, 2004 WL 1404100 (Tex.App.—Austin 2004, no pet.) (mem. op.).

Courts of appeals have held that section 101.106 barred claims arising from the same actions or circumstances and that the section applies regardless of whether the original action was filed in federal or state court. In Aguilar v. Ramirez, 2004 WL 1353723 (Tex.App.–Corpus Christi 2004, pet. denied) (mem. op.), the plaintiffs originally filed suit in federal court, bringing claims against Aguilar 's employer, the Department of Public Safety and the State of Texas. The federal court dismissed all of plaintiffs' claims, including their claims under the Texas Tort Claims Act. The dismissal of the claims under the Tort Claims Act was based on the absence of a waiver of immunity. Aguilar relied upon the dismissal in federal court to support his motion for summary judgment under section 101.106. The Corpus Christi court held that the dismissal of the federal court action was a judgment sufficient to trigger the bar created by section 101.106. The court specifically found that the federal court' s finding that sovereign immunity was not waived by the Tort Claims Act

was a judgment for purposes of application of section 101.106. Furthermore, the court rejected the plaintiffs' arguments that they were bringing negligence claims against Aguilar whereas they had brought constitutional and intentional tort claims in their federal causes of action. "Whether the plaintiff's claim against the governmental unit falls under the Tort Claims Act is relevant; whether the plaintiff's claim against the employee falls under the Tort Claims Act is not. ... [T]he legislature used the broad term 'same subject matter.' ... The term 'same subject matter' in section 101.106 means 'arising out of the same actions, transactions, or occurrences.' See Coronado v. Milam, 2004 WL 1195879 (Tex.App.—San Antonio 2004, pet. denied) (section 101.106 barred suit against individual officers based upon dismissal of federal action against the City of San Antonio where federal and state suit involved the same subject matter); McGown v. Huang, 120 S.W.3d 452 (Tex.App.—Texarkana 2003, pet. denied). In McGown, the Texarkana court noted that the terms of section 101.106 are read very broadly to convey immunity to all employees involved whose conduct gives rise to the claim, regardless of whether their conduct formed the basis of the judgment in the action against the governmental entity. In McGown, the plaintiffs' suit against the hospital district was dismissed because the two actors of whose conduct the plaintiffs complained were not employees of the hospital district. The fact that the plaintiff had brought claims against the hospital district however, barred a subsequent action against a nurse employed by the district. The court explained that section 101.106 applies when the second action involves the same subject matter regardless of whether it is based on the same causes of action. The court also explained that while the application of section 101.106 may be harsh, when a party chooses to bring an action pursuant to the Tort Claims Act, "she is bound by its provisions and limitations, including section 101.106." Id. at 459.

The Sykes and Aguilar cases were in line with cases that had interpreted section 101.106 broadly to restrict plaintiffs' rights under the Act. See, e.g., Gonzalez v. El Paso Hosp. Dist., 940 S.W.2d 793, 795 (Tex.App.—El Paso 1997, no writ)(judgment need not be against the governmental until before the procedural bar applies), and Putthoff v. Anchrum, 934 S.W.2d 164, 174 (Tex.App.—Fort Worth 1996, writ denied) (section 101.106 bars suit when the judgment is based on plaintiff's failure to comply with the Act's notice requirements).

c. 101.106(e)

A plaintiff cannot avoid the irrevocable election of defendant created by sub-sections (a) and (b) by naming both the entity and employees as defendants. If a plaintiff brings suit against both a governmental unit and its employee, the employee "shall immediately be dismissed on the filing of a motion by the governmental unit." Section 101.106(e).

While sub-paragraph (e) says the dismissal is "immediate," the dismissal is not effective until the court enters an order granting the dismissal. Cannon, 453 S.W.3d at 416. The reference to "immediate" in paragraph (e) does not mean claims are immediately dismissed, the dismissal is only effective upon the entry of an order and the filing of motion does preclude amending pleading before entry of an order of dismissal. Id. Thus while plaintiff could amend her pleadings prior to entry of the order of dismissal, Id., and while the plaintiff can choose to dismiss or non-suit claims, the dismissal cannot disadvantage another party. plaintiff. Plaintiff cannot use the filing of a non-suit as a means of prejudicing another party.

However, the *right* to dismissal arises upon filing of the motion to dismiss under Rule 101.106(e). Univ. of Tex. Health Sci. Ctr. v. Rios, 542 S.W.3d 530, 538 (Tex. 2017). The procedural implications of this timing mean that a plaintiff may not amend his suit after the 101.106(e) motion is filed to nonsuit claims against an employee and thereby avoid the election. Id. at 533–38. In Rios, plaintiff also argued that the defendants' amendment of their motion to dismiss precluded the effect of their original motion and allowed his amendment of his petition to take effect. Id. at 538. The Texas Supreme Court rejected this argument as well, noting that the right to dismissal was triggered when the defendants filed their motion. Id.

Similarly, in Austin State Hospital v. Graham, 347 S.W.3d 298 (Tex. 2011), the plaintiff brought health care liability claims against a state hospital and two employee

physicians. Id. at 299. The hospital filed a motion to dismiss the physicians under subsection (e), but, before the trial court entered a dismissal order, the plaintiff nonsuited his claims against the hospital. Id. The plaintiff argued that his nonsuit precluded the trial court from ruling on the hospital's subsection (e) motion. Id. The Supreme Court rejected that argument, holding that the hospital was entitled to a ruling on its subsection (e) motion notwithstanding plaintiff filing a notice of nonsuit. Id.

d. 101.106(f)

Finally, sub-section (f) provides that, if a suit is filed against an employee based on conduct within the general scope of the employee's employment that plaintiff could had brought under the Tort Claims Act against the governmental unit itself, the suit is considered an action brought against the employee in his official capacity. Moreover, the suit against the employee will be dismissed unless the plaintiff amends her pleadings dismissing the employee and naming the government unit as a defendant within 30 days after a motion is filed. TEX. CIV. PRAC. & REM. CODE § 101.106 (f).

Suits against an employee arising from actions within the scope of the employee's employment is, in effect, a suit against the governmental entity. Univ. of Tex. Health Sci. Ctr. v. Bailey, 332 S.W.3d 395, 400-01 (Tex. 2011). "The TTCA defines the term 'scope of employment' as 'the performance for a governmental unit of the duties of an employee's office or employment and includes being in or about the performance of a task lawfully assigned to an employee by competent authority.' Franka, 332 S.W.3d at 382–83. § 101.001(5). The Restatement (Third) of Agency provides additional clarity by defining the term negatively: "[a]n employee's act is not within the scope of employment when it occurs within an independent course of conduct not intended by the employee to serve any purpose of the employer." RESTATEMENT (THIRD) OF AGENCY § 7.07(2) (2006), cited by Franka, 332 S.W.3d at 381 n. 63." Alexander, 435 S.W.3d at 790, ("Application of the TTCA's election-of-remedies provision requires a determination as to whether an employee acted independently and is thus solely liable, or acted within the general scope of his or her employment such that the governmental unit is vicariously liable.").").

Consequently, when a suit against an employee is "based on conduct within the general scope of that employee's employment," the suit constitutes an action in the employee's official capacity and is, thus, a suit against the entity. Id. Therefore, even if the plaintiff later substitutes the entity in as the defendant, the statute of limitations is considered as tolled when the suit against the employee was filed. Id. Courts have further held that the government defendant's filing of a 101.106(f) motion constitutes its judicial admission that the employee was acting in the course and scope of his employment. See Ramos v. City of Laredo, No. 04-17-00099-CV, 2018 Tex. App. LEXIS 2204 (Tex. App.—San Antonio Mar. 28, 2018, no pet.) (jury question on course and scope was improper and harmful when city had judicially admitted course and scope in motion).

In Bailey, the plaintiff sued a physician who is a professor employed by a state university medical school. Id. at 397. After the statute of limitations on medical malpractice suits had run, Bailey moved the trial court to order the Baileys to substitute his employer as the defendant. Id. The Baileys brought the entity in to the suit as the defendant and non-suited the claims against the physician. Id. at 398. The medical school answered the suit and both plaintiff and the medical school moved for summary judgment regarding whether the claims were barred by the statute of limitations. Id. at 399. The Texas Supreme Court held that, because the plaintiff had sued the physician for actions within the scope of his employment, the physician was sued in his official capacity and, thus, the suit was, from inception, a suit against the medical school. Id. at 401. See Franka, 332 S.W.3d at 381. Thus, the substitution of the governmental entity as a party after the statute of limitations had run did not make the claims time barred because the governmental entity had been a party to the suit (regardless of whether they were joined as a defendant in their own name or sued in the name of their employee in his official capacity). Bailey, 332 S.W.3d at 401. But see Phelan v. Norville, 2014 WL 4808507, p.4-5–6 (Tex.App.—Amarillo Sept. 22, 2014, no pet.)

(engineering professor that slapped another engineering professor and then slandered him in a personal email acted outside the scope of his employment.)

Similarly, in *Laverie v. Wetherbe*, the Texas Supreme Court addressed the standard for determining whether allegedly defamatory statement made by an associate dean toward a professor seeking a deanship were made within the course-and-scope of her employment. 517 S.W.3d 748 (Tex. 2017). The plaintiff argued that the court must consider the employee's state of mind in determining whether she was acting within the course and scope of her employment. Id. The Court rejected this interpretation, restating: "The scope-of-employment analysis, therefore, remains fundamentally objective: Is there a connection between the employee's job duties and the alleged tortious conduct? The answer may be yes even if the employee performs negligently or is motivated by ulterior motives or personal animus so long as the conduct itself was pursuant to her job responsibilities." Id. at 752–53.

Like other provisions of 101.106, sub-section (f) applies to tort claims beyond those permitted by the TCA. See Franka, 332 S.W.3d at 381. Sub-section (f) provides that an employee who has been sued based on actions within the course and scope of her employment can move to dismiss the claims against her. Id. However, sub-section (f) references suits against the employee, "if [the suit] could have been brought under this chapter against the governmental entity…." TEX. CIV. PRAC. & REM.CODE § 101.106(f). Courts of Appeal have held that the employee could not get dismissed under sub-section f unless the employee proved that the plaintiff could bring suit against the governmental entity under the TCA. Id. at 371. Thus, the employee could not get dismissed unless she could prove that the immunity had been waived and her employer could be held liable under the TCA. Id.

In Franka, the Supreme Court held that an employee is entitled to dismissal under 101.106(f) if the suit is a tort claim regardless of whether or not the plaintiff can bring suit against the defendant's employer. Id. at 380-82. Thus, the employee can get dismissed under sub-section (f) if the claim sounds in tort whether or not sovereign immunity has been waived allowing suit to be brought against the defendant's employer. Id.

If a defendant moves to have the governmental entity substituted in as a party under sub-section (f), then the plaintiff has the choice to either agree to dismissal of the individual by joining the governmental entity as a party, or to fight the motion based on the argument that the individual was acting outside of the scope of his employment. Molina, 463 S.W.3d 867, 871; Mission Consol. Indep. Sch. Dist. v. Garcia, 253 S.W.3d 653, 657 (Tex. 2008).

Regardless, if a plaintiff joins the governmental entity after a motion to dismiss has been filed pursuant to sub-section (f), then whether or not he dismisses the individuals, his suit should not be dismissed. Id. *8. In Texas Adjutant General's Office v. Ngakoue, after the individual moved to dismiss the suit pursuant to sub-section (f), the plaintiff amended his petition to name the governmental entity as a defendant, but failed to state or move for dismissal. Id. at *1. The Supreme Court held that, under these facts, the trial court should have dismissed the claims against the individual defendant, but should not have dismissed the plaintiff's suit as long as there was a statute that waived the governmental entity's immunity from suit. Id. at *8.

The Supreme Court has also held that a non-suit cannot be used as a means of preventing the trial court from ruling on the issue of immunity from suit. The Supreme Court noted that the doctors had filed their own motion to dismiss and were entitled to immediate dismissal. Austin State Hosp. v. Graham, 347 S.W.3d 301 (Tex. 2011). "A nonsuit cannot prejudice the rights of an adverse party to be heard on a pending claim for affirmative relief. Id.

3. Section 101.021: Liability for Operation or Use of Motor-Driven Vehicle or Motor-Driven Equipment.

A governmental entity is liable for the property damage, personal injury and wrongful death resulting from the negligent operation or use of a motor-driven vehicle or motor-driven equipment. TEX. TORT CLAIMS ACT § 101.021(1). The Act does not define what constitutes a motor vehicle or motorized

equipment. Id.[8] In determining whether something constitutes a motor vehicle, courts look at how that term is defined in other statutes. Ozolins v. Northlake Cmty. Coll., 805 S.W.2d 614 (Tex.App.–Fort Worth 1991, no writ); Estate of Garza v. McAllen Indep. Sch. Dist., 613 S.W.2d 526, 527, n.1-2 (Tex.App.–Beaumont 1981, writ ref'd n.r.e.). Other statutes define motor vehicles as: (1) vehicles of every type in which persons can be transported or drawn upon that are self propelled, but excluding vehicles moved by human power or used exclusively on stationary rails or tracks; (2) land vehicles such as motorcycles, truck-tractors, farm-tractors, passenger cars, and buses; and (3) objects having two or more wheels. Id.; Ozolins, 805 S.W.2d at 615. Following these definitions, the Fort Worth Court of Appeals found that a sailboat did not constitute a motor-driven vehicle under the terms of the TCA. Id.[9]

The supreme court has also established a test for determining when the plaintiff's injuries arise from the "operation and use" of a motor vehicle. In Ryder v. Fayette County, the Texas Supreme Court set out what a plaintiff must prove to to establish a claim related to the operation of a motor vehicle. 453 S.W.3d 922, 928 (Tex. 2015).

> To begin with, a government employee must have been actively operating the vehicle at the time of the incident. See id. at 52 (finding no waiver where no government employee was present when student sustained injury in school bus). Moreover, the vehicle must have been used as a vehicle, and not, e.g., as a waiting area or holding cell. See, respectively, id. (explaining that unsupervised students were not using parked bus as a vehicle when they chose to meet there to talk); City of Kemah v. Vela, 149 S.W.3d 199 (Tex.App.–Houston [14th Dist.] 2004, pet. denied)City of Kemah v. Vela, 149 S.W.3d 199 (Tex.App.–Houston [14th Dist.] 2004, pet. denied) (finding no use where plaintiff was injured while sitting in parked police cruiser).

In addition, the tortious act alleged must relate to the defendant's operation of the vehicle rather than to some other aspect of the defendant's conduct. In other words, even where the plaintiff has alleged a tort on the part of a government driver, there is no immunity waiver absent the negligent or otherwise improper use of a motor-driven vehicle. For example, a driver's failure to supervise children at a bus stop may rise to the level of negligence, but that shortcoming cannot accurately be characterized as negligent operation of the bus. Mount Pleasant Indep. Sch. Dist. v. Estate of Lindburg, 766 S.W.2d 208 (Tex.1989). Similarly, a police officer may commit assault in his cruiser, and that assault may constitute a tort, but it is not tortious use of a vehicle. See generally Hernandez v. City of Lubbock, 253 S.W.3d 750 (Tex.App.–Amarillo 2007, no pet.). Where the vehicle itself "is only the setting" for the defendant's wrongful conduct,

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[8] The Act specifically excludes from motor-driven equipment, items used in the operation of flood gates or water release equipment by river authorities created under the laws of this state or medical equipment located in hospitals. TCA § 101.001(3). See Bennett v. Tarrant County Water Control and Improvement Dist. No. 1, 894 S.W.2d at 452.

[9] School districts and junior college districts can only be held liable for the negligent operation of a motor vehicle. Ozolins, 805 S.W.2d at 815; TCA § 101.051. Unlike other governmental units covered by the Act, school districts and junior college districts cannot be held liable under the TCA for the use and operation of personal and real property or for premises defects. See Gravely v. Lewisville Indep. Sch. Dist., 701 S.W.2d 956 (Tex.App.—Fort Worth 1986, writ ref'd n.r.e.) (school district was not liable for injuries sustained by spectator when bleachers at a school athletic event collapsed).

any resulting harm will not give rise to a claim for which immunity is waived under section 101.021. LeLeaux, 835 S.W.2d at 52; see also Davis v. City of Lubbock, No. 07-16-00080-CV, 2018 Tex. App. LEXIS 1034 (Tex. App.—Amarillo Feb. 6, 2018, no pet.) (use of hay baler to bale contaminated hay was not use of motor vehicle giving rise to claim).

Ryder, 453 S.W.3d at 927–28; See LeLeaux, 835 S.W. 2d at 51 ("'operation' refers to a doing or performing of a practical work and 'use' means to put or bring into action or service; to employ for or apply to a given purpose."); Tejano Center for Community Concerns, Inc., v. Olvera, 2014 WL 4402210 (Tex.App.—Corpus Christi Aug. 29, 2014, no pet.) (injury was from operation from motor vehicle where driver told student to take attendance while the bus was moving and then slammed on the brakes causing the girl to slip on wet floor and break her arm).

In order for the injuries to "arise from" the operation of the motor vehicle, there must be "a nexus between the injury negligently caused by a governmental employee and the operation or use of a motor-driven vehicle...." LeLeaux, 835 S.W.2d at 51; See also Dallas Area Rapid Transit v. Whitley, 104 S.W.3d 540, 543 (Tex. 2003).

> The statute itself does not define "arises from." We have defined this standard as a "nexus between the operation or use of the motor-driven vehicle or equipment and a plaintiff's injuries." We have also described the threshold as something more than actual cause but less than proximate cause. See Utica Nat'l Ins. Co. of Tex. v. Am. Indem. Co., 141 S.W.3d 198, 203 (Tex.2004) (" '[A]rise out of' means ... there is but[-]for causation, though not necessarily direct or proximate causation."). Accordingly, a plaintiff can satisfy the "arising from" standard by demonstrating proximate cause. This is particularly appropriate in the context of the TTCA, which only reaches injuries "proximately caused by the wrongful act or omission or the negligence of an employee." TEX. CIV. PRAC. & REM. CODEE § 101.021(1).TEX. CIV. PRAC. & REM. CODEE § 101.021(1).
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> The components of proximate cause are cause in fact and foreseeability. W. Invs., Inc. v. Urena, 162 S.W.3d 547, 551 (Tex. 2005). Because proximate cause is ultimately a question for a fact-finder, we need only determine whether the petition "creates a fact question" regarding the causal relationship between Thumann's conduct and the alleged injuries. Miranda, 133 S.W.3d at 228; see also Ark. Fuel Oil Co. v. State, 154 Tex. 573, 280 S.W.2d 723, 729 (1955) ("Question[s] of causation such as proximate cause are normally treated as questions of fact unless reasonable minds cannot differ.").

Ryder, 453 S.W.3d 922, 928–29; See Whitley, 104 S.W.3d at 540; Hopkins v. Spring Indep. Sch. Dist., 736 S.W.2d 617, 619 (Tex. 1987); Morales v. Barnett, 219 S.W.3d 477 (Tex.App.–Austin, 2007, no pet.) (no nexus between death of track athlete's death and use of car or blinkers on car); Estate of Garza, 613 S.W.2d at 528 (plaintiff's damages were caused by a knife and not the use of a motor vehicle); Jackson v. City of Corpus Christi, 484 S.W.2d 806, 809 (Tex. Civ. App.—Corpus Christi 1972, writ ref'd n.r.e.). Accordingly, injuries have been found to arise out of the negligent operation and use of a vehicle when:

> (a) Death caused when police officer drove his vehicle so that his high beem spot light and headlings into oncoming traffic causing truck to run

into a vehicle parks on the side of the road.

(b) The plaintiff was run over by a prisoner driving a stolen sheriff's department car that a deputy left running outside the jail. Finnigan v. Blanco County, 670 S.W.2d 313 (Tex.App.–Austin 1984, no writ);

(c) The plaintiffs alleged a bus driver's failure to activate warning flashers resulted in their daughter being struck by another car upon exiting the school bus, Hitchcock v. Garvin, 738 S.W.2d 34, 36-38 (Tex.App.–Dallas 1987, no writ) (holding that summary judgment evidence presented a fact question on whether the plaintiffs' injuries arose out of the operation and use of the school bus);

(d) The bus driver honked the bus horn to signal the plaintiff that it was safe to cross the street. Austin Indep. Sch. Dist. v. Gutierrez, 54 S.W.3d 860 (Tex.App.–Austin 2001, pet. denied). School district held liable because bus driver took affirmative action in honking the horn which contributed to cause plaintiff's injuries. Id. at 866.

(e) The plaintiff was struck by a police car, driven by an on-duty officer, Guzman v. City of San Antonio, 766 S.W.2d 858, 860-61 (Tex.App.–San Antonio 1989, no writ);

(f) The plaintiff was run down in the road after being dropped off in the wrong place by the school bus, Contreras v. Lufkin Indep. Sch. Dist., 810 S.W.2d 23, 26 (Tex.App.–Beaumont 1991, writ denied); but see Goston v. Hutchison, 853 S.W.2d 729, 734 (Tex.App.–Houston [1st Dist.] 1993, no writ) (questioning Contreras holding);

(g) Employee attached a rope to pickup truck and concrete picnic table to move table, and student became entangled in rope and was dragged. Vidor Ind. School Dist. v. Bentsen, 2005 WL 1653873 (Tex.App.–Beaumont 2005 no pet.)(mem. op.).

Conversely, injuries do not arise from the operation and use of a motor vehicle when the:

(a) Plaintiff was made to exit bus because of dispute with another passenger. The plaintiff was assaulted by other passenger after exiting the bus. Whitley, at 3.

(b) Plaintiff was injured in a classroom and was merely transported by bus when she left school, Hopkins, 736 S.W.2d at 619;

(c) Plaintiff struck her head on emergency door exit while playing in school bus that was parked and not in use, LeLeaux, 835 S.W.2d at 51-52;

(d) Plaintiff's injuries resulted from a student using a cigarette lighter to set off a smoke detector in a school district vehicle, Pierson v. Houston Indep. Sch. Dist., 698 S.W.2d 377, 380 (Tex.App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.);

(e) Student was stabbed while riding on a school bus, Estate of Garza, 613 S.W.2d at 527-28;

(f) Injuries allegedly resulted from the failure to transport patient in emergency ambulance, Brantley v. City of Dallas, 545 S.W.2d 284, 287 (Tex. Civ. App.—Amarillo 1976, writ ref'd n.r.e.);

(g) Injuries resulted from a police officer's failure to remove a stalled vehicle or direct traffic around the

stalled vehicle, Jackson, 484 S.W.2d at 809-10;

(h) Plaintiff students were injured in an automobile accident after being dropped off at an unauthorized bus stop and getting a ride with a friend, Goston, 853 S.W.2d at 733-34;

(i) Students were injured by the reckless driving of another student in a school parking lot, Heyer v. N. E. Indep. Sch. Dist., 730 S.W.2d 130, 131-32 (Tex.App.—San Antonio 1987, writ ref'd n.r.e.);

(j) Plaintiff was injured while working on a carburetor in an auto mechanics class, Naranjo v. Southwest Indep. Sch. Dist., 777 S.W.2d 190, 192-93 (Tex.App.—Houston [14th Dist.] 1989, writ denied);

(k) Plaintiff school children were injured as a result of allegedly negligent planning and layout of school bus stop locations, Luna v. Harlingen Consol. Indep. Sch. Dist., 821 S.W.2d 442 (Tex.App.—Corpus Christi 1991, pet. denied); and

(l) Plaintiff was injured as a result of failure to provide a stop arm on a school bus, Cortez v. Weatherford Indep. Sch. Dist., 925 S.W.2d 144 (Tex.App.—Fort Worth 1996, no writ).

(m) "Use" of equipment to perform road and ditch grade work was done two years before flooding. See Ector County v. Breedlove, 168 S.W.3d 864 (Tex.App.—Eastland 2004, no pet.).

(n) Arrestee was injured when a car hit the patrol car he was placed in. See City of Kemah v. Vela, 149 S.W.3d 199 (Tex.App.—Houston [14th Dist.] 2004, pet. denied).

(o) Student injured when he got off school bus and fell into ditch, where student left bus to help women injured in auto accident with bus. Arlington Ind. School Dist. v. Kellam, 2006 WL 240276 (Tex.App.–Fort Worth 2006, no pet.).

(p) Student injued from operation where driver told student to take attendance while the bus was moving and then slammed on the brakes causing the girl to slip on wet floor and break her arm). Olvera, 2014 WL 4402210.

(q) Inmate was injured while van was (allegedly negligently) parked on highway shoulder but driver was not in vehicle. Tex. Dep't of Criminal Justice v. Mendoza, No. 14-17-00117-CV, 2017 Tex. App. LEXIS 9015 (Tex. App.—Houston [14th Dist.] Sep. 26, 2017, no pet.).

Therefore, the mere involvement of or proximity of a motor vehicle to an accident will not give rise to liability. LeLeaux, 835 S.W.2d at 52; see State v. McAllister, 2004 WL 2434347 (Tex.App.—Amarillo 2004, pet. denied) (no liability where state employee picking up roadside trash hit by truck driven by third-party). Liability exists only when the injuries were actually caused by the operation or use of a motor vehicle under the control of the governmental unit named as a defendant. Id. at 51. In cases involving school buses, "when the allegations of negligence are related to the direction, control, and supervision of the students, the suit is barred; when the allegations of negligence are related to the negligent use of the motor vehicle itself, the suit is not barred." Goston, 853 S.W.2d at 733 (citing Estate of Garza, 613 S.W.2d at 528). See also City of El Campo v. Rubio , 980 S.W.2d 943, 945-46 (Tex.App.—Corpus Christi 1998, pet. dism'd w.o.j.) (affirming denial of City's plea in abatement where injuries were alleged to have resulted from a police officer's instructing a non-licensed passenger to drive vehicle to police station).

Furthermore, liability will not attach unless the motor vehicle is owned or controlled by the defendant governmental unit. Heyer, 730 S.W.2d at 131-32. The plaintiff in Heyer was struck by a car driven by another student and not owned by the school district. Id. The court held that because the school district did not own or control the car, the plaintiff could not bring suit under the TCA. Id.

At the same time, governmental entities can be liable for injuries caused by vehicles that they do not own if they control the vehicle. As explained by the Texas Supreme Court in LeLeaux, within the meaning of the TCA, "operation" of a motor vehicle means "doing or performing a practical work" and "use" of a motor vehicle means to put or bring into action or service, to employ for or apply to a given purpose." LeLeux, 835 S.W.2d at 51. See Robinson v. Univ. of Tex. Med. Branch, 171 S.W.3d 365, 369 (Tex.App.—Houston [14th Dist.] 2005, no pet.).

Based on this rationale, Galveston County was liable for injuries to a governmental employee injured when he fell from the raised bed of a dump truck that was not owned or driven by the governmental entity where county employees supervised the driver and provided spotters who signaled the driver when to move forward and when to stop. County of Galveston v. Morgan, 882 S.W.2d 485, 490 (Tex.App.—Houston [14th Dist.] 1994, writ denied).

The spotters were county employees. They were a necessary part of the job. The spotters told the truck driver when to move forward, how far to move, when to raise his bed, how far to raise it, when to lower his bed, and when to stop. The movement of the truck and the laying of the [roadway material] was within the spotters' sole discretion. If a driver moved his truck contrary to the spotters' direction he could be fired. Although the spotters were not the drivers of the trucks, the spotters "used or operated" the trucks by exercising complete control over their "use or operations" [and thus the County could be liable for their negligence]. Id.

One question that has recently arisen is whether an independent intentional tort by a third-party, while the government employee was still in control, could avoid the waiver of immunity for use of a motor vehicle. In City of Hous. v. Nicolai, 539 S.W.3d 378, 388 (Tex. App.—Houston [1st Dist.] 2017, pet. filed), the court rejected the City's defense that a drunk driver who ran a red light was an independent intentional tort that would prevent a waiver of immunity. Id. at 392. Instead, the court held that the negligence claims arose out of the officer's failure to employ a seatbelt for the passenger, and that said failure was use of a motor vehicle sufficient to provide for a waiver under the act. Id. at 391–92.

The standard of care and liability to which a governmental entity is held depends upon whether it is acting as a common carrier. If the governmental unit is a common carrier, it is held to a higher standard of care. Bryant v. Metro. Transit Auth., 722 S.W.2d 738, 739 (Tex.App.—Houston [14th Dist.] 1986, no writ). For example, a common carrier is obligated to prevent passengers from being assaulted on its vehicles and to offer care and assistance to any passenger that is attacked. Id. Compare Estate of Garza, 613 S.W.2d at 527-28 (school not required to prevent assaults on bus). A governmental entity, however, does not act as a common carrier in operating school buses or utilizing motor vehicles to carry out governmental functions. Estate of Lindburg, 766 S.W.2d at 212-13; Guzman, 766 S.W.2d at 860 (operation of police vehicle). In these circumstances, governmental entities are held only to a negligence standard of care, i.e. the actions of a reasonable person under this same or similar circumstance. Estate of Lindburg, 766 S.W.2d at 212-13. Thus, unless the defendant is acting as a common carrier, it is held to a negligence standard. Id.

Finally, keep in mind that the recovery of property damages is limited only to claims arising out of the use of motorized equipment or motor vehicles. Unless the plaintiff's damages were caused by the negligent operation or use of a motor-driven equipment vehicle, he is precluded from recovering property damage. State Dep't of Highways and Pub. Transp. v. Pruitt, 770 S.W.2d 638 (Tex.App.—Houston [14th Dist.] 1989, no writ). Thus, while a plaintiff may be able to maintain an action under the TCA, outside of the provisions regarding liability for the operation or use of a motor vehicle, he will not recover a

judgment for any property damage he has sustained. See id.

4. Section 101.021(2): Liability for the Condition or Use of Tangible Personal Property.

Section 101.021(2) establishes liability for personal injury and death caused by the condition or use of tangible personal property if a private person would be liable according to Texas law.[10] Whether the claim arises from the condition or use of property versus a premises defect is a question of law. Sampson v. Univ. of Texas, 500 S.W.3d 380, 385 (Tex. 2016). A claim is either for the condition or use of personal property or a premsised defect but not both. Id. "The Tort Claims Act's scheme of a limited waiver of immunity from suit does not allow plaintiffs to circumvent the heightened standards of a premises defect claim contained in section 101.022 by re-casting the same acts as a claim relating to the negligent condition or use of tangible property." *Miranda*, 133 S.W.3d at 233.

Condition or use comprise separate prongs of the Texas Tort Claims Act. See Dallas Metrocare Servs. v. Juarez, 420 S.W.3d 39, 42 (Tex.2013) (per curiam). The distinction between these two concepts is supported "by use of the disjunctive conjunction 'or' between the two [words], which signifies a separation between two distinct ideas." Spradlin v. Jim Walter Homes, Inc., 34 S.W.3d 578, 581 (Tex. 2000).

The Legislature's enunciation of the two concepts of 'condition or use' is consistent with the Court's common law jurisprudence.... .

> "[I]n a Texas Tort Claims Act ... we interpreted ... 'condition or use' to 'encompass disparate bases for liability, one of which is not dependant [sic] upon the actions of any employee.' DeWitt v. Harris Cnty., 904 S.W.2d 650, 653 (Tex.1995). We explained that the 'use' language "encompasses ... liability based on respondeat superior.' Id. We explained that the 'use' language 'encompasses ... liability based on respondeat superior.' We added that the inclusion of 'liability for a condition of real property' existed 'in addition to liability based on principles of respondeat superior,' and therefore liability for a condition imposed liability for premises defects. Id. (emphasis omitted). Quite plainly, in DeWitt we held that the inclusion of the 'use' language was meant to impose liability for the negligent actions of an employee based on principles of respondeat superior. Id.

Abutahoun v. Dow Chemical Co., 463 S.W.3d 42, 50 (Tex. 2015) (quoting DeWitt v. Harris Cnty., 904 S.W.2d 650, 653 (Tex.1995)). The cases interpreting this section have focused on several issues. First, what constitutes tangible personal property? Second, when do the plaintiff's damages arise from the condition or use of personal property? Third, when is there sufficient nexus between the condition or use of

[10] For four decades, Texas jurists have repeatedly expressed concerns about the difficulty of discerning the Legislature's intended meaning behind the words 'condition or useuse' as they appear in the Texas Tort Claims Act, another tort-related statute. See, e.g., Tex. Dep't of Crim. Justice v. Miller, 51 S.W.3d 583, 590 (Tex. 2001) (Hecht, J., concurring) (members of this Court 'have repeatedly beseeched the Legislature for guidance' on how to interpret the 'use-of-property standard' in the Texas Tort Claims Act to no avail); (Tex. State Technical Coll. v. Beavers, 218 S.W.3d 258, 261 (Tex.App.—Texarkana 2007, no pet.) ("The courts of Texas have struggled to define the limits of 'use' and 'condition' ... under the Texas Tort Claims Act.). "). "This Court has agreed, for purposes of the Texas Tort Claims Act, that the 'condition or use' provision is 'difficult to understand and difficult to apply'...." Abutahoun v. Dow Chemical Co., 463 S.W.3d 42, 49 (Tex. Sup. May 8, 2015)

property and the alleged injury told the governmental entity liable.

a. What constitutes "Tangible" Property?

While it is easy to define what constitutes tangible personal property, the courts have had considerable trouble applying the definition to records, documents and medical test results. The supreme court has defined tangible property to be "something that has a corporeal, concrete and palpable existence." York, 871 S.W.2d at 178 (footnote omitted). Even without the York definition, medical instruments, hospital beds, tools, equipment, football helmets, props in plays, etc., are obviously personal property. See City of Baytown v. Townsend, 548 S.W.2d 935, 939 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.) (bolt protruding from net post on municipal tennis courts was a piece of tangible property for which liability could attach); see also Univ. of Tex. M.D. Anderson Cancer Ctr. v. McKenzie, 529 S.W.3d 177 (Tex. App.—Houston [14th Dist.] 2017, pet. filed) (chemotherapy bag and chemicals were tangible personal property that gave rise to waiver under TCA).

Before York, Texas courts had generally held that documents do not constitute tangible personal property. See Montoya v. John Peter Smith Hosp., 760 S.W.2d 361, 364 (Tex.App.—Fort Worth 1988, pet. denied) (information written on a triage slip does not constitute tangible personal property, the use of which can give rise to liability); Seiler v. Guadalupe Hosp., 709 S.W.2d 37, 38-39 (Tex.App.—Corpus Christi 1986, writ ref'd n.r.e.) (information in emergency room records do not constitute tangible personal property); Robinson v. City of San Antonio, 727 S.W.2d 40, 43 (Tex.App.—San Antonio 1987, writ ref'd n.r.e.) (protective order reduced to writing deemed not tangible property); Wilkins v. State, 716 S.W.2d 96, 98 (Tex.App.—Waco 1986, writ ref'd n.r.e.) (permit authorizing use of state highway to transport mobile home was not a piece of tangible personal property).

With the York ruling, a line of decisions permitting governmental liability based on medical records and other documents based on liability for misuse of the machines that generated the documents has been effectively overruled. See, e.g., Tex. Youth Comm'n v. Ryan, 889 S.W.2d 340, 344-45 (Tex.App.—Houston [14th Dist.] 1994, n.w.h.). In Salcedo v. El Paso Hosp. Dist., 659 S.W.2d 30, 33 (Tex. 1983), the supreme court held that a graph depicting results of an electrocardiogram was a piece of tangible personal property. The court reasoned that because the document reflected the results of a test performed by a piece of tangible property, the document must also be tangible personal property. Id. Similarly, the Beaumont Court of Appeals held that a plaintiff could recover against the Department of Corrections for the negligent sending of a telegram. Tex. Dep't of Corrections v. Winters, 765 S.W.2d 531, 532 (Tex.App.—Beaumont 1989, writ denied). Cf. Thomas v. Brown, 927 S.W.2d 122, 127-28 (Tex.App.—Houston [14th Dist.] 1996, writ denied) (policy implemented by Texas Department of Corrections was not tangible property and liability could not be based on enforcing policy). The Winters court concluded that the results of the use of tangible personal property, a computer system, were tangible personal property. Id. Although it stopped short of explicitly disapproving Salcedo, the supreme court's decision in York has imposed a new rule of law with regard to allegedly negligent use of medical records and documents.

In York, the plaintiff's medical record had noted a red and swollen hip and significant change in demeanor. York, 871 S.W.2d at 176. The treating physician was found at trial to have misused tangible property by failing to correctly interpret these symptoms as indicating a need to have the hip x-rayed, resulting in a delay in the diagnosis of a broken hip. Id. The supreme court rejected this reasoning, arguing instead that "[i]nformation ... is intangible; the fact that information is recorded in writing does not render the information tangible property." Id. at 179. See also Tex. Dep't of Pub. Safety v. Petta, 44 S.W.3d 575 (Tex. 2001) (while instructional manuals are tangible, the information contained in the manual is not tangible property, thus inadequacies in manuals cannot be the basis of suit under TCA because negligent training and supervision claims must be predicated on condition or use of tangible property); Kassen v. Hartley, 887 S.W.2d 4, 14 (Tex. 1994) (use, misuse or non-use of medical records, patient file,

and emergency room procedures manual will not support a claim under TCA); Christus Spohn Health System, v. Young, 2014 WL 6602287, *4 (Tex.App.—Corpus Christi)(Nov. 20, 2014, no pet.). Young argued that the hospital caused delay in the diagnosis of her injury through "misinterpretation of results of [her] CT scan,"CT scan," which worsened her condition. Id. The Court of appeals held that if medical diagnostic equipment is correctly used, "any subsequent misuse or nonuse of the information it reveals about a patient's medical condition does not waive immunity" under the TCA because it was the use or non-use of the information, not the tangible property, which proximately caused the injury. Id.; see City of El Paso v. Wilkins, 281 S.W.3d 73, 75 (Tex.App.—El Paso 2008, no pet.) (See City of El Paso v. Wilkins, 281 S.W.3d 73, 75 (Tex.App.—El Paso 2008, no pet.) (where a police unit did not respond to a 911 emergency call until two and one-half hours after the call made, plaintiffs alleged that there was a problem with the telephones or computer systems used; there were no allegations that they "were in any defective or inadequate condition" or were misused and without any such allegations, the claims did not fall within the statutory waiver of immunity); Terry A. Leonard, P.A., 293 S.W.3d at 685, rev'd on other grounds Franka v. Velasquez, 332 S.W.3d 367, 379–80 (Tex. 2011) (holding the failure to review medical records that would have shown the prescribed medicine was contra-indicated was not a use of property); Riggs v. City of Pearland, 177 F.R.D. 395, 406 (S.D. Tex. 1997) (allegations of inadequate medical care and treatment does not allege a "use of tangible property" with the ambit of the TCA); Marroquin v. Life Mgmt. Ctr., 927 S.W.2d 228, 230 (Tex.App.—El Paso 1996, writ dism'd w.o.j.) ("Injuries resulting from the misuse of information, even if that information is recorded in writing, does not provide a waiver of governmental immunity for injuries caused by the use of tangible personal property."); Holland v. City of Houston, 41 F. Supp. 2d 678, 712 (S.D. Tex. 1999) (misinterpreting or reaching incorrect conclusions from information does not involve use of tangible property under TCA). The Salcedo holding was distinguished from this case by the reasoning that interpretation of the graph in that case was actually an intended use of the machine, and therefore within the waiver of immunity. York, 871 S.W.2d at 178.

The distinction is unsatisfactory; the logic of York suggests that Salcedo should have been overruled and it should not be relied upon in the future. The York court did, however, note that "Salcedo does not permit claims against the State for misuse of information." Id. at 179. Thus, the new rule appears to be that any negligence action against the state based upon misuse of a report of any kind will be rejected on the grounds of the state's sovereign immunity from the suit. See, e.g., Kelso v. Gonzales Healthcare Sys., 136 S.W.3d 377 (Tex.App.—Corpus Christi 2004, no pet.) (immunity not waived by allegation that results of EKG were improperly used); Salas v. Wilson Mem'l Hosp., 139 S.W.3d 398 (Tex.App.—San Antonio 2004, no pet.) (immunity not waived by allegation that results of test for sexually transmitted disease (STD) were misused by staff's failure to recognize that there was no STD).

The Texas Supreme Court has applied the York rationale outside the context of medical records. Dallas County v. Harper, 913 S.W.2d 207 (Tex. 1995), arose from a suit based upon a District Clerk's releasing the plaintiff's indictment for theft. The Waco Court of Appeals held that sovereign immunity did not bar the plaintiff's claims against Dallas County because the indictment was "tangible personal property" within the definition of the TCA. Id. The supreme court reversed the court of appeals and rendered judgment for the County because:

> In University of Tex. Med. Branch v. York, we held that simply reducing information to writing on paper does not make the information "tangible personal property." ... An "indictment" is "the written statement of a grand jury accusing a person ... of some act or omission." ... An indictment is no more than a grand jury's pronouncement reduced to writing. It is not tangible personal property for purposes of waiver under the Texas Tort

> Claims Act in these circumstances.

Id. at 207–08 (citations omitted). Similarly the failure to train, as well as the failure to furnish training materials and instructions to officers is not actionable because the property at issue is not tangible within the meaning of the TCA. Petta, 44 S.W.3d at 580–81 (immunity was not waived for claims of failure to train or provide training materials to law enforcement officers). Therefore, neither the use or misuse of information contained in governmental records, nor the release of governmental records can constitute a use or misuse of "personal property" that will give rise to liability under the TCA. Id.; York, 871 S.W.2d at 179; see also City of Dallas v. Rivera, 146 S.W.3d 334 (Tex.App.—Dallas 2004, no pet.) (city's written force guidelines, training manuals, or other documentary evidence are not tangible personal property); Seamans, 934 S.W.2d at 393 (failure to transit information regarding donation of daughter's body to science not actionable); Marroquin, 927 S.W.2d at 230–31 (failure to use building was not use of tangible property).

(b) What constitutes the "Use" of Personal Property.

(1) The Governmental Entity Must Use the Property.

Assuming the items in question constitute personal property, their condition or use gives rise to liability in three different ways. One basis of liability under section 101.021(2) is liability predicated upon injuries resulting from the negligent use of tangible property by an employee acting within the scope of his employment. Winters, 765 S.W.2d at 532; Hein, 557 S.W.2d at 366. Thus, a governmental entity will be held liable for its agent's use or misuse of personal property. Id.; see also Borrego v. City of El Paso, 964 S.W.2d 954, 957 (Tex.App.—El Paso 1998, pet. denied) (allegation of defect or inadequacy of tangible property is not necessary to state a cause of action if some use of the property as opposed to some condition of the property caused the injury). Negligent entrustment, however, does not state a cause of action under the TCA. Durbin v. City of Winnsboro, 135 S.W.3d 317, 321–25 (Tex.App.—Eastland 2004, pet. denied); Tex. Dep't. of Criminal Justice v. Lone Star Gas Co., 978 S.W.2d 176, 178 (Tex.App.—Texarkana 1998, no pet.)

The Borrego decision demonstrates how an actionable injury can arise from use of property when there is no allegation that the property was defective. 964 S.W.2d at 957. In Borrego, the plaintiff was injured when he was strapped to a backboard after an auto accident. EMS technicians left Borrego tied to the board in the middle of the street. When a car came through police barriers, City personnel ran. Borrego could not move, and was hit by the car. There was no contention that the backboard was defective. Rather, the City was held liable because it was the negligent use of the property that caused the injury. Id. However, the Borrego decision is not to suggest that under the TCA, suit cannot be predicated upon injuries caused by defective property. In San Antonio State Hosp. v. Cowan, 128 S.W.3d 244 (Tex. 2004), the Texas Supreme Court confirmed that the "use" must be by the governmental unit, and that merely allowing someone to use his personal property does not constitute "use" such as to waive immunity. "[S]ince 1973 we have consistently defined 'use' to mean '"to put or bring into action or service; to employ for or apply to a given purpose.'" Id. at 246 (citations omitted). Therefore, the hospital did not waive immunity by allowing a suicidal patient to retain his walker and suspenders, which he then used to hang himself. The court distinguished the case of Overton Mem'l Hosp. v. McGuire, 518 S.W.2d 528 (Tex. 1975), in which a hospital waived immunity by its use of a hospital bed without rails. "The hospital did not merely allow the patient access to the bed; it actually put the patient in the bed as part of his treatment. The use of property respondents allege does not rise to this level." Id.; see also Cowen, 128 S.W.3d at 246–47. Dallas Cnty. v. Posey, 290 S.W.3d 869 (Tex. 2009); Tex. Dep't of Criminal Justice v. Hawkins,169 S.W.3d 529, 533 (Tex.App.—Dallas 2005, no pet.) (holding that TDCJ's allowing escaping convicts access to weapons, which the convicts later used to kill a security guard, did not constitute TDCJ's using the weapons).

In Rusk State Hospital, the Texas Supreme Court evaluated whether a plaintiffs' pleadings and the trial court record could establish the "use" of property for a plastic bag that a psychiatric patient utilized to commit suicide. 392 S.W.3d at 97. The court again explained that Section 101.021(2) of the Act waives immunity for the use of tangible property, only when the governmental entity itself uses the property. Id. at 97. The court again explains that under the TCA a governmental entity does not "use" property within the meaning of the TCA when it "merely allows someone else to use it." Id. For a waiver of immunity to be based on the condition of tangible property under Section 101.021(2), the condition of the property must approximately cause the injury or death.

> A condition does not proximately cause an injury or death if it does no more than furnish the means to make the injury or death possible; that is, immunity is waived only if the condition (1) poses a hazard in the intended and ordinary use of the property and (2) actually causes an injury or death.

Id. at 97-98. The Supreme Court then addressed the Blacks' claims with respect to the plastic bag that decedent used to attempt suicide. The Blacks pointed to evidence in the record that the hospital's own policy classified a plastic bag as inherently dangerous for inpatient psychiatric hospitals. The Blacks' pleadings asserted that the hospital was negligent in providing, furnishing, or allowing their son to have access to the bag and that this constituted the condition or use of tangible personal property for which immunity would be waived by the TCA.

The Supreme Court rejected the Blacks' arguments noting that their contention about the use of property would mean that any time a governmental entity provided, furnished, or allowed access to tangible property it would constitute the use of property under the Act. Id. at 98. The court noted that it had previously held that in order for something to constitute a use of property, the governmental entity must put or bring the property into action or service and employ the property for or apply it to its given purpose. Id. The court noted that it had previously held in Cowan that the San Antonio State Hospital allowing a patient access to suspenders and a walker, did not constitute the use of property within the meaning of Section 101.102(2).

Following Cowan, the Texas Supreme Court held that merely putting an inmate into a holding cell with a phone that had a cord attached was not actionable when the inmate hung himself on the cord. Posey, 290 S.W.3d at 871. The Supreme Court pointed out that liability under section 101.021(2) requires that the property be put to use by the governmental entity. Id. Additionally, in Dallas Metrocare Services v. Juarez, the Texas Supreme Court once again evaluated whether a plaintiff's pleadings and the trial court record could establish the "use" of property for a white board that fell and injured a patient. 420 S.W.3d 39, 40 (Tex. 2013). The court, relying on Rusk, rejected the notion that Juarez' injury arose from the organization's "use" of property because the organization did not "use" the white board within the meaning of the Act by merely making it available for use. Id.

Lower courts have continued to follow the "non-use" rationale. See, e.g., Oakbend Med. Ctr. v. Martinez, 515 S.W.3d 536, 543 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (failure to use restraints for patient on bed were non-use of property that could not result in waiver); City of Hous. v. Gutkowski, 532 S.W.3d 855 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (alleged failure to use necessary lifting equipment for medical procedure was non-use that did not support waiver).

Furthermore, there is no waiver of immunity where the property is "used" for the purpose of committing an intentional tort. City of Watauga v. Gordon, 434 S.W.3d at 592-93(excessive force suit based on handcuffs being too tight was barred by TCA's exclusion of intentional tort claims); Texas Department of Criminal Justice v.Campos, 384 S.W.3d 810 (Tex. 2012). The plaintiffs in Campos allged the officers used tangible personal property for the purpose of helping them perpetuate intentional torts, sexually assaulting the plaintiffs. Id. at 814. The plaintiffs asserted that the TCA waived immunity for their claims against the department

because the officers used tangible personal property to carry out the assaults. Id. The Texas Supreme Court held that because liability for intention torts is expressly excluded from liability under the TCA, where the property was only used for the purpose of committing an intentional tort there is no waiver of immunity under the TCA. Id.; see also Petta, 44 S.W.3d at 576 (officer hitting the plaintiff's window and shooting out her tires for the purpose of committing a sexual assault was not a use of property because those actions were intentional and fell within the exclusions for claims arising from intentional torts).

The intentional tort exception can be fairly broad when a plaintiff's case is improperly pleaded: in City of Fort Worth v. Deal, No. 02-17-00413-CV, 2018 Tex. App. LEXIS 3918 (Tex. App.—Fort Worth May 31, 2018, no pet.), the court concluded that plaintiff's pleadings established that the intentional deployment of a tire deflation device was an intentional battery rather than negligence, and there was no waiver of immunity as a result. Id. at *11–13.

(2) There Must be a Nexus Between the Condition of the Property and Injury.

Moreover, Posey reinforces the requirement that there must be a nexus between the condition of the property and the injury. 290 S.W.3d at 872. "To find proximate cause, there must be a nexus between the condition of the property and the injury." Id. While the phone cord allowed Posey to commit suicide, there was nothing defective about the cord which caused injury to Posey. Id. Similarly, if a landowner fails to show the necessary nexus between the alleged use of property and his injuries, then the use of property is inadequate as a matter of law to support a lawsuit. Tex. Parks & Wildlife Dep't v. E.E. Lowery Realty, Ltd., 235 S.W.3d 692 (Tex. 2007) (holding that fire caused during repair work on dock was insufficient to support claim based on use of a motor vehicle); Christus Spohn Health System, Corp. v. Young, 2014 WL 6602287, *4 (Tex.App.—Corpus Christi-Edinburg Nov. 20, 2014, no pet.) (plaintiff's allegations do not imply that the actual use or misuse of the stethoscopes caused plaintiff's injuries; any purported misuse of the stethoscope neither hurt her nor made her ureteral injury worse in and of itself).

When medicine is properly administered, *i.e.*, according to the non-state physician's directive, there is no condition or use of property that will result in a waiver of immunity. Somervell Cnty. Healthcare Auth. v. Sanders, 169 S.W.3d 724 (Tex.App.—Waco 2005, no pet.) (holding that giving medication as directed by patient's private physician did not constitute waiver of immunity even though medication had tendency to exacerbate patient's fall risk and patient ultimately died from a fall).

The condition of the plaintiff does not alter the scope of the governmental entity's duty under the Act. The plaintiffs in both Posey and Cowan argued that the governmental entity was liable because they knew, or should have known, of the suicidal ideation of the patient/inmate. In both instances, the Texas Supreme Court rejected this argument. "Posey's parents argue that the county failed to properly assess Posey as a suicide risk…. However, the quality of Posey's [suicide] assessment has no bearing on the county's immunity. In Cowan, we held that immunity was not waived even though the patient was committed for having suicidal tendencies. … So, even if Posey had apparent suicidal tendencies, the county would still be immune under Cowan because it did no more than place Posey in a cell with a corded telephone which he, himself, used to commit suicide. Posey, 290 S.W.3d at 872.

Finally, decisions regarding the location of tangible property may not be actionable. Campos, 384 S.W.3d at 815. In Campos the plaintiffs alleged the failure to locate surveillance cameras within the correctional facility was a use of property. Id. The Texas Supreme Court held that the improper placement or location of cameras were not a "use" of property under the TCA. Id.

(3) The Property Must Be Defective.

Another way that the state may waive its immunity is by furnishing property that is defective, inadequate or lacking an integral safety component. Jenkins v. Tex. Dep't of Criminal Justice, 2004 WL 1117171, p. 3 (Tex.App.—Corpus Christi Edinburg May 20, 2004, no pet.); McBride v. TDCJ-ID, 964 S.W.2d 18, 22 (Tex.App.—Tyler 1997, no pet.); Tex. Dep't of

MHMR v. McClain, 947 S.W.2d 694, 697–98 (Tex.App.—Austin 1997, writ denied); and Tex. Dep't of Corrections v. Jackson, 661 S.W.2d 154, 158 (Tex.App.—Houston [1st. Dist.] 1983, writ ref'd n.r.e.). Additionally, that the act causing the injury was undertaken by a third party does not relieve the state from liability. McClain, 947 S.W.2d at 697; see also Lowe, 540 S.W.2d at 300–01; Overton Mem'l Hosp. v. McGuire, 518 S.W.2d 528, 529 (Tex. 1975); Tex. State Technical College v. Beavers, 218 S.W.3d 258 (Tex.App.—Texarkana 2007, no pet.). In these cases, the agent supplies the instrumentality through which the plaintiff is injured. Lowe, 540 S.W.2d at 300 ("[W]e hold that the affirmative allegation of furnishing defective equipment to Lowe states a case within the statutory waiver of immunity arising from some condition or some use of tangible property."); McGuire, 518 S.W.2d at 528–29 ("We believe that injuries proximately caused by negligently providing a bed without bed rails are proximately caused by some condition or some use of tangible property under circumstances where a private person would be liable."); Tarrant Cnty. Hosp. Dist. v. Henry, 52 S.W.3d 434 (Tex.App.—Fort Worth 2001, no pet.); City of Midland v. Sullivan, 33 S.W.3d 1, 7–8 (Tex.App.—El Paso 2000, pet. dism'd w.o.j.) ("The injury must be proximately cause by the condition or use of the property.").

The Fourteenth Court and the Waco Courts of Appeals have recently disagreed on whether immunity is waived when medical equipment is misused, causing the plaintiff's illness to be improperly diagnosed. In Univ. of Tex. Med. Branch v. Thompson, 2006 WL 1675401 (Tex.App.—Houston [14th Dist.] June 6, 2006, no pet.), the court held that sovereign immunity was not waived when the plaintiff's appendicitis went undiagnosed by use of stethoscopes and other equipment in such a way that medical personnel failed to recognize the illness, because the real substance of the suit was failure to detect and treat the illness. In Univ. of Tex. Med. Branch v. Blackmon, 169 S.W.3d 712 (Tex.App.—Waco 2005, pet. granted), vacated for lack of jurisdiction, 195 S.W.3d 98 (Tex. 2006), the court held that improper use of a stethoscope and pulse oxymeter caused the failure to diagnose the plaintiff' s pneumonia and thus immunity was waived. The facts in Blackmon were egregious, including the plaintiff prisoner turning blue, her fellow inmates yelling to no avail for her to be given medical attention, and her dying in her room within twelve hours of her last visit to the clinic.

In Rusk State Hospital, the Supreme Court rejected the argument that the plaintiff's could establish a waiver of immunity based on the "condition or use" or property where the property, a plastic bag used to commit suicide was not defective. Rusk State Hospital, 392 S.W.3d at 98. In Rusk State Hospital, the plaintiffs contended that the plastic bag used by their son constituted a condition of personal property identical to the condition of the football player's uniform that the Supreme Court found was a condition or use of property in Lowe v. Texas Tech University, 540 S.W.2d 297 (Tex. 1976). The Supreme Court, however, pointed out that in Lowe, the plaintiff, a football player, was ordered to remove his knee brace and re-enter the game and play without the brace. Lowe, 540 S.W.2d at 302. The Supreme Court then explained that the holding in Lowe was based on the fact that Texas Tech had effectively given Lowe a uniform that was defective because it lacked a knee brace. Id. at 99. The court pointed out that it had limited the holding in Lowe to cases in which a governmental actor provides property that lacks an integral safety component and the lack of the integral safety component caused the plaintiff's injuries. Id. (citing Kerrville State Hosp. v. Clark, 923 S.W.2d 582, 585 (Tex. 1996)). By contrast, the Supreme Court pointed out that the plastic bag at issue was not inherently unsafe. Id. " [T]he TCA waives immunity for an inherently dangerous condition of tangible personal property only if the condition poses a hazard when the property is put to its intended and ordinary use, which the plastic bag was not." Id. The court rejected the contention that the plastic bag was inherently unsafe and constituted a condition for which suit could be brought under the TCA because there were no inherently dangerous aspects to the bag that made the decedent's death possible. Id.

(4) "Use" versus "Non-Use" of Property

The third means of potential liability under Section 101.021(2) is for the non-use of property. Whether, liability can arise from the

non-use of personal property has been a question of reoccurring debate and uncertainty. Until 1989, numerous courts had held the non-use of property could not form the basis of a claim for "condition or use of personal property" under the Act. Cf. Tex. Dep't of Corrections v. Herring, 513 S.W.2d 6 (Tex. 1974) (failure to provide adequate medical care and treatment does not constitute an allegation of the use of tangible property within the TCA); Diaz v. Central Plains Reg'l Hosp., 802 F.2d 141 (5th Cir. 1986) (refusal to admit patient does not fall within waiver of governmental immunity for the condition or use of tangible property); Vela v. Cameron Cnty., 703 S.W.2d 721 (Tex.App.—Corpus Christi 1985, writ ref'd n.r.e.) (failure to provide life guards and/or life saving measures did not constitute negligent condition or use of tangible property). This all seemed to change with the supreme court's opinion in Robinson v. Central Tex. Mental Health and Mental Retardation Ctr., 780 S.W.2d 169 (Tex. 1989). The plaintiff in Robinson alleged that her son died because he was not provided with a life jacket when taken swimming by MHMR employees. Id. at 169. The supreme court held that the failure to provide a life preserver was a condition or use of personal property. Id. at 171. See Lowe, 540 S.W.2d at 300 (the failure to provide a football player with protective equipment constituted actionable use of property). But cf. Marroquin, 927 S.W.2d at 230 (decision to keep doors unlocked on the inside of building was not an incomplete use of tangible property).

Thereafter, relying on supreme court opinions in Robinson and Lowe, the plaintiffs in Kassen brought suit claiming that non-use of medication was an actionable use of personal property under the TCA. The supreme court rejected this argument and noted:

> We have never held that a non-use of property can support a claim under the Texas Tort Claims Act. Section 101.021, which requires the property's condition or use to cause the injury, does not support this interpretation. See LeLeaux, 835 S.W.2d at 51 (stating that "use" means "to put or bring into action or service; to employ for or apply to a given purpose"). ... We conclude that the non-use of available drugs during emergency medical treatment is not a use of tangible personal property that triggers waiver of sovereign immunity [under the TCA].

Kassen, 887 S.W.2d at 14 (some citations omitted). The supreme court reiterated the Kassen rationale in Kerrville State Hosp. v. Clark, 923 S.W.2d 582 (Tex. 1995). Clark holds that the "failure to administer an injectionable drug is 'non-use' of tangible personal property and therefore does not fall under the waiver provisions of the Act." Id.; see also Dallas Cnty. v. Alegjo, 243 S.W.3d 21 (Tex.App.—Dallas 2007, no pet.) (failure to administer a different anti-psychotic medicine was not a use of property); McCall v. Dallas Cnty. Hosp. Dist., 997 S.W.2d 287, 289–90 (Tex.App.—Eastland 1999, no pet.) (hospital's failure to use available medical equipment is not actionable under the TCA); accord, Spindletop MHMR Ctr. v. Beauchamp, 130 S.W.3d 368, 371 (Tex.App.—Beaumont 2004, pet. denied).

Despite the strong language of the Kassen opinion, there appears to be limited room for continued application of the Robinson and Lowe holdings. In Clark , the supreme court explained:

> [Robinson and Lowe] represent perhaps the outer bounds of what we have defined as use of tangible personal property. We did not intend, in deciding these cases, to allow both use and non-use of property to result in waiver of immunity under the Act. Such a result would be tantamount to abolishing governmental immunity, contrary to the limited waiver the Legislature clearly intended. The precedential value of these cases is therefore limited to claims in which a plaintiff alleges that a state actor has

> provided property that lacks an integral safety component and that the lack of this integral component led to the plaintiff' s injuries. For example, if a hospital provided a patient with a bed lacking bed rails and the lack of this protective equipment led to the patient's injury, the Act's waiver provisions would be implicated.

Id. at 585 (citations omitted, emphasis added).[11] See also Beavers, 218 S.W.3d at 260; Weeks v. Harris Cnty. Hosp. Dist., 785 S.W.2d 169 (Tex.App.—Houston [14th Dist.] 1990, writ denied). Thus, the imposition of liability in Lowe and Robinson is appropriate under the TCA when the plaintiff: (1) was provided with defective equipment; or (2) was not provided with safety equipment that would necessarily accompany the items that were provided.

The holding in City of North Richland Hills v. Friend, 370 S.W.3d 369 (Tex. 2012), reiterates the Texas Supreme Court's holding in Kassen that the nonuse of property will rarely state a cause of action under the TCA. Sara Friend collapsed while standing in line at a water park owned by the City of North Richland Hills. City employees attempted to resuscitate Friend but were unable to retrieve a defibrillator from a storage closet in the park. Sara Friend ultimately died and her family brought suit against the City alleging that the failure to use a defibrillator constituted a condition or use of personal property actionable under the TCA. Id. **

City of Dallas v. Sanchez points out how the same facts can give rise to claims based on the use and non-use of property. City of Dallas v. Sanchez, 449 S.W.3d 645 (Tex.App.—Dallas 2014, pet. filed), rev'd on other grounds *City of Dallas v. Sanchez*, 494 S.W.3d 722, 724–25 (Tex. 2016)(reversing on the grounds the plaintiff's could not establish proximate cause). . The City of Dallas received two 911 calls regarding a drug overdoes from the same complex. One of the calls was disconnected before EMS arrived and the operator did not call back or determine whether the two calls were redudent. The Dallas Court of Appeals held that allegations regarding the failure of (1) a City to determine that there were two separate 911 calls from two separate locations within the same apartment complex; (2) the 911 employee's hanging up the phone before the arrival of the responders; and (3) the 911 employee's failure to redial the caller were allegations of the nonuse of property and not actionable under the TCA. Id. at 651.. Also the failure to use the telephone and computer systems to determine that the two calls regarding a drug overdose at an apartment complex were not redundant, was a claim based on the non-use of property. SeeOn occasion, the same facts can give rise to claims based on both the use and non-use of property. Compare City of N. Richland Hills v. Friend, 370 S.W.3d 369, 372 (Tex. 2012) (claim that City failed to retrieve and use automatic external defibrillator device to revive swimmer at water park was non-use claim, not sufficient to waive City's immunity); and City of El Paso v. Hernandez, 16 S.W.3d 409, 411 (Tex.App.—El Paso 2000, pet. denied), where appellees alleged that the delay in dispatching an ambulance from one El Paso hospital to another resulted in the death; the court concluded that "the gravamen of Appellees' complaint is that EMS personnel made an incorrect medical decision" about whether Hernandez had a life-threatening emergency, which was a. complaint "about a non-use of the vehicle" and did not fall within Section 101.021's waiver of immunity).

However, as the Dallas Court of Appeals decision in Sanchez holds, allegations regarding a malfunction of the telephone system in its use by the 911 operator was an actionable claim for the condition of property. "A failure or malfunction of the equipment allegedly cut off the caller before the call was completed and contributed to the City's failure to provide

[11] The Clark opinion defines the use of property as putting or bringing the property "into action or service; to employ for or apply to a given purpose." Clark, 923 S.W.2d at 584; Marroquin, 927 S.W.2d at 230-31.

emergency medical attention to Matthew. These allegations were sufficient to allege that a condition of tangible personal property caused injury." Sanchez, 449 S.W.3d at 652, rev'd on other grounds *City of Dallas v. Sanchez*, 494 S.W.3d 722, 724–25 (Tex. 2016)(reversing on the grounds the plaintiff's could not establish proximate cause). See also Michael v. Travis Cnty. Hous. Auth., 995 S.W.2d 909, 913–14 (Tex.App.—Austin 1999, no pet.) (allegation that two pit bulls escaped through defective fence and attacked two children sufficiently alleged that condition or use of tangible personal property caused injury).

While the Texas Supreme Court acknowledged earlier cases holding that the failure to use property could be actionable under the TCA it reinforced that nonuse of equipment will rarely be actionable under the TCA. The Court began by pointing out that it is well-settled that mere nonuse of property does not suffice to invoke Section 101.021(2)'s waiver of immunity from suit. Friend, 370 S.W.3d at 372. The Court acknowledged that the Lowe and Robinson decisions held that where the property used lacked an "integral safety component" then failure to use property stated a cause of action within Section 101.021(2) of the TCA. Id. The Court found that if Friend's allegation that the failure to use the defibrillator constituted a claim that an "integral safety component" was missing, then a plaintiff could always state a cause of action by identify some type or piece of equipment that could have been used in a particular instance. Id. at 373. "Such a formulation threatens to eviscerate any limiting principle on 'condition or use' entirely and would enable plaintiffs . . . to enlarge the scope of the waiver provided by Section 101.021(2) . . .." Id. The supreme court also noted that adopting the plaintiff's argument that identifying a related piece of equipment that was not used as meeting the integral safety component exception "would create a disincentive for governmental units to provide any form of health or safety equipment at their establishments. Counsel for the Friends acknowledged at oral argument that the Friends' theory would, paradoxically, fail if the City had stood by and watched Sara die rather than attempt to use the oxygen mask and other airway equipment [to save her life]." Id.

The Fort Worth Court of Appeals cited Robinson and Lowe in holding that immunity was waived because ice scoops were integral safety components of ice barrels, and the lack of the scoops caused injuries. Univ. of N. Tex. v. Harvey, 124 S.W.3d 216 (Tex.App.—Fort Worth 2003, pet. denied); see also Posey, 290 S.W.3d 869, 871 (failure to replace phone with one that did not have a cord was misuse or non-use of property, neither of which is actionable under the TCA). In Harvey, a participant in a drill camp at the University of North Texas sued after she contracted severe food poisoning there. The camp staff had placed ice out in barrels for the campers to use, but did not provide scoops. Witnesses testified that there was debris in the ice and that it was not safe to provide the ice without scoops. 73% of the campers who consumed the ice became ill. Plaintiff's expert testified that the E. coli outbreak was likely caused by the ice. The court held, however, that sovereign immunity was not waived for strict liability claims or for negligence claims based on failure to wash food, undercooking food, or lack of hygiene in food preparation. Id. at 224–25; see also Beavers, 218 S.W.3d at 260.

A patient in a state hospital, however, cannot prove a waiver of immunity by alleging that he was provided property lacking an integral safety component when he is really alleging a failure to care for or supervise him. State v. King, 2003 WL 22839389 (Tex.App.—Tyler Nov. 26, 2003, pet. denied) (hospital staff's failure to monitor suicidal patient who then hung himself with his shoelaces, was not waiver of immunity by providing beds without sufficient identification and shoes with shoelaces). Note that King was decided before Cowan, discussed above. Presumably if the Tyler court had had the benefit of the Cowan opinion, the Tyler court could have had yet another rationale to support its holding.

(5) There Must Be a Nexus Between the Use of the Property and Plaintiffs Injuries.

Regardless of the basis on which the plaintiff seeks to establish liability under 101.021(2), she must prove a nexus between the

property at issue and injuries that are the basis of the suit. Posey, 290 S.W.3d 869. The property itself need not be the instrumentality of the alleged injury, but it must have been a contributing factor to the injury. See Holder, 954 S.W.2d at 807; Gonzales v. City of El Paso, 978 S.W.2d 619, 623 (Tex.App.—El Paso 1998, no pet); Salcedo, 659 S.W.2d at 32; Smith, 946 S.W.2d at 501. As pointed out by the Texas Supreme Court, medical personnel in state medical facilities "use some form of tangible personal property nearly every time they treat a patient," and that, because of this fact, a patient suing for negligence could always complain that a different form of treatment than the one employed would have been more effective and still claim waiver under the [TCA]." Kerrville State Hosp. v. Clark, 923 S.W.2d 582, 585–86 (Tex. 1996). To conclude that all of these complaints are enough to constitute the use of tangible personal property under the TCA would render the doctrine of sovereign immunity a nullity, which is not what the Legislature intended in acting the TCA. See Id. at 586. Thus the requirement of causation under the TCA mandates more than mere involvement of property; property does not cause injury if it does no more than further the condition that makes the injury possible. See Bossley, 968 S.W.2d at 343.

However,, there is no bright line test of exactly how much involvement is required to establish causation. First, "[f]or a defective condition to be the basis for complaint, the defect must pose a hazard in the intended and ordinary use of the property." Posey, 290 S.W.3d at 872 (while the cord on the phone allowed the inmate to commit suicide, there was no defect in the cord which caused an injury); Miller, 51 S.W.3d at 588 (misuse of medication that masked illness is not use of property that caused the injury); Bossley, 968 S.W.2d at 342–43; Holder, 954 S.W.2d at 807. Second, the property does not cause the injury if it does no more than furnish the condition that makes the injury possible. Posey, 290 S.W.3d 869, 872 (the exposed wires on the telephone cord would have been actionable if they had caused electric shock to the inmate, but the fact that the exposed wires allowed inmate to hang himself, was not actionable); Bossley, 968 S.W.2d at 343 (citing Union Pump Co. v. Allbritton, 898 S.W.2d 773, 776 (Tex. 1995)); accord Robinson, 171 S.W.3d at 369 (for the use of property to be the basis of liability, it must be the instrumentality of the harm); Ordonez v. El Paso Cnty., 224 S.W.3d 240 (Tex.App.—El Paso 2005, no pet.) (no waiver when arrestee killed after being placed in prison holding tank with rival gang members); Hawkins, 169 S.W.3d at 533–35 (no waiver when security guard was shot by escaped convicts using a gun stolen from the prison during the escape when the shooting occurred 11 days and 300 miles after the escape); Tex. Tech Univ. v. Gates, 2004 WL 2559937 (Tex.App.—Amarillo Nov. 9, 2004, pet. denied) (use of adjustable awning and tape for play stage ceased when stage completed; their presence only created condition that made student's fall possible); King, 2003 WL 22839389, at p. 3–4 (hospital staff's confusion about which bed suicidal patient was in, and subsequent failure to monitor him, was not use of bed such as to waive immunity); Webb Cnty. v. Sandoval, 126 S.W.3d 264, 267 (Tex.App.—San Antonio 2003, no pet.) (nothing about chicken nuggets caused the child to choke; rather it was her failure to chew them). Similarly, the failure to install elevaated lifeguard stands or position them so they could see the entire pool were not instruementality that caused the child to drown, and therefore there was no nexus betweel the personal property and injury at issue. Henry v. City of Angleton, 2014 WL 5465704, 4 (Tex.App.—Houston [1st Dist.] Oct. 28, 2014, no pet.); see also Dimas v. Tex. State Univ. Sys., 201 S.W.3d 260, 267 (Tex.App.—Houston [14th Dist.] 2006, no pet.) ("[A]lthough malfunctioning light timers may have caused the area near [the scene] to be dark, thus furnishing the condition that made the attack possible, this condition does not establish the requisite causal nexus...."); Fryman v. Wilbarger Gen. Hosp., 207 S.W.3d 440, 441–42 (Tex.App.—Amarillo 2006, no pet.) (sovereign immunity not waived where hospital grounds were simply location of assault, pleadings do not show hospital grounds caused assault, and plaintiff complained about failure to use or, in effect, non-use of property). But see Delaney v. Univ. of Houston, 835 S.W.2d 56, 59 (Tex. 1992) (university could be held liable for rape of student in her dorm room based on its failure to repair a broken lock on the door of the dorm that allowed the attacker to enter the building).

The use of the property must have been directly involved in the injury for there to be a waiver of immunity and not be geographically, or temporarlly attunuated from injury. Compare Dallas County Mental Health & Mental Retardation v. Bossley, 968 S.W.2d 339, 343 (Tex.1998) (escaped mental patient's death on a freeway was "distant geographically, temporally, and causally" from the unlocked doors through which he escaped) and Churchwell v. City of Big Spring, 2004 WL 905951 (Tex.App.—Eastland April 29, 2004, no pet.) (no waiver of immunity when dog was released from city pound two weeks before he attacked plaintiff) with Michael v. Travis Cnty. Hous. Auth., 995 S.W.2d 909, 913–14 (Tex.App.—Austin 1999, no pet.) (allegation that two pit bulls escaped through defective fence and attacked two children sufficiently alleged that condition or use of tangible personal property proximately caused injuries, as required by TCA Section 101.021(2)).section 101.021(2)).

In City of Dallas v. Sanchez, the plaintiffs alleged that a malfunction of the telephone system, prematurely disconnecting the call between the 911 operator and the caller, was a cause of their son's death. 494 S.W.3d 722, 727 (Tex. 2016). The decedent died of a drug overdose after "emergency responders erroneously concluded separate 9-1-1 calls were redundant and left the apartment complex without checking the specific apartment unit the dispatcher had provided to them." The court of appeals denied the City's motion to dismiss under Texas Rule of Civil procedure 91a, but the Supreme Court of Texas reversed on the basis that the condition of the property was "too attenuated from the cause of Sanchez's death—a drug overdose—to be a proximate cause." Id. at 727. The Supreme Court concluded that immunity was not waived because the plaintiffs did not show proximate cause on the face of the pleadings. Id. This shows the importance of demonstrating a causal nexus between the condition and the injury on the face of the pleadings.

5. Section 101.022: Standard of Liability for All Premises and Special Defect Cases.

While Section 101.021(2) establishes liability for the condition or use of real property, its application is very limited as a result of another provision of the TCA. Section 101.022 establishes the standard of liability for all premises and special defect cases. Suits involving premises or special defect must be tried in accordance with Section 101.022 or the defendant is entitled to judgment as a matter of law. See York II, 284 S.W.3d at 847–48 (failure to get jury finding on ordinary defect meant there was no waiver of sovereign immunity); Koblizek, 752 S.W.2d at 657 (plaintiff's failure to obtain jury findings as to the elements of a premises liability case means the governmental unit cannot be held liable); Carson, 599 S.W.2d at 852 (same). Consequently, claims that appear to arise out of defects in real property are usually brought under Section 101.022.

Liability under Section 101.021 has arisen only in cases where the plaintiff is injured from negligence involving activities conducted on real property and not as a result of defects in the real property. See Smith, 664 S.W.2d at 187–90. As discussed previously, Smith involved injuries sustained during a track meet held on real property owned by the University of Texas. Id. Liability did not arise from a defect in the real property, but from the use of the property for a track meet. Id. The Austin Court of Appeals held that the plaintiff could maintain an action for injuries he sustained as a result of the use of the real property for a track meet. Id.; see also Genzer v. City of Mission, 666 S.W.2d 116, 120–21 (Tex.App.—Corpus Christi 1983, writ ref'd n.r.e.) (property used for fireworks display).

An argument can be made that every action taken by a governmental employee occurs on real property. However, to afford plaintiffs a cause of action for injuries sustained while "using" the real property would effectively abrogate the TCA.

6. Joint Enterprise Liability Under Section 101.021(2).

Under the TCA, a governmental entity that enters into a joint enterprise is liable for the torts of other members of the joint enterprise. See Tex. Dep't of Transp. v. Able, 35 S.W.3d 608, 616 (Tex. 2000). Able arose out of an auto accident that occurred in a high occupancy

vehicle ("HOV") lane on U.S. Highway 290. The Ables collided head-on with a vehicle driving with its lights off in the wrong direction down the HOV lane. The operation and control of the HOV lane, including the barriers that would stop a car from driving the wrong way down the HOV lane, were under the control of the Houston Metropolitan Transit Authority ("Metro"). The jury found that Metro was negligent and grossly negligent. The jury also found that the Texas Department of Transportation ("TxDOT") was not negligent but that TxDOT was engaged in a joint enterprise with Metro related to the operation of the HOV lane on the day of the accident. Based upon the joint enterprise finding, the trial court entered a judgment against TxDOT that was affirmed by the court of appeals.

In its appeal to the Texas Supreme Court, TxDOT sought to have the judgment reversed on the grounds that there was no waiver of immunity under the TCA that would allow it to be held liable once the jury had found that TxDOT was not negligent. In the alternative, TxDOT argued there was no evidence to support the jury's finding that TxDOT had entered into a joint enterprise with Metro.

The supreme court turned first to the contention that there was no waiver of immunity under which TxDOT could be held liable. The court pointed out that §101.021(2) provides liability for the condition or use of real or personal property when a governmental entity would be liable to the plaintiff if the governmental entity was a private person. See id. at 612–13. The court pointed out that subsection 2, unlike section 101.021, does not require a governmental employee to have been negligent as a condition precedent to the governmental entity's being liable to the plaintiff. See id. at 612. The court then noted that

> in the context of private parties ... "the theory of joint enterprise is to make each party thereto the agent of the other and thereby to hold each responsible for the negligent act of the other." If there is a joint enterprise between Metro and TxDOT, and if TxDOT would have been liable for Metro's negligence had TxDOT been a private person, then we must conclude that the state had waived its immunity and that TxDOT is liable under the plain meaning of section 101.021(2).

Id. at 613 (quoting Shoemaker v. Estate of Whistler, 513 S.W.2d 10, 14 (Tex. 1974)).

The court then turned to TxDOT's complaint that there was no evidence to support the jury's finding that it had entered into a joint enterprise with Metro. The court pointed out that under Texas law there are four elements of a joint enterprise: (1) an express or implied agreement among the members of the group, (2) a common purpose to be carried out by the group, (3) a community of pecuniary interest among the members of the group, and (4) an equal right to voice in the management of the joint enterprise that gives each party an equal right of control. TxDOT asserted that the plaintiffs failed to produce evidence of a common pecuniary interest or an equal right of control.

With regard to a common pecuniary interest, the supreme court pointed out that the Master Agreement entered into by TxDOT and Metro regarding the construction and operation of the HOV lanes stated that "the parties also acknowledge that the construction, operation, and maintenance of the transit ways involves the investment of substantial sums for mass transit purposes." Id. at 614. The court went on to note that the construction of the HOV lanes involved the use of federal, state, and local funds. See id. The court concluded that there was a common pecuniary interest because

> [t]he Master Agreement plainly recognizes that the Transitway Project involved substantial sums of money and contemplated a sharing of resources in order to make better use of this money. It may well have been that the monetary and personal savings produced from the pooling of resources was substantial. The documents also clearly contemplate an economic gain

> that could be realized by undertaking the activities in this manner. The Transitway Project was not a matter of "friendly or family cooperation and accommodation" but was instead a transaction by two parties that had a community of pecuniary interest in that purpose.

Next, the court considered whether there was any evidence to support the jury's finding that TxDOT had an equal right of control. The court began by noting that an equal right to control means "'each [participant] must have an authoritative voice or, . . . must have some voice and right to be heard.'" Id. (quoting Shoemaker, 513 S.W.2d at 16). With this predicate, the court pointed out that under the Master Agreement, Metro was primarily responsible for day-to-day operations and maintenance of the HOV lanes, but the HOV lanes affected operations of a controlled-access highway that was under TxDOT's control. "[T]herefore, [TxDOT] has an interest and responsibility in the operation and maintenance of [the HOV lanes]." The court pointed out that the Master Agreement states that TxDOT had ultimate control and supervision of the highway upon which the HOV lanes were constructed. See id. at 615. TxDOT argued that the Master Agreement gave Metro sole control over the enterprise and that it had no equal right of control. See id. The supreme court rejected this argument stating that "a member of a joint enterprise [cannot] escape liability to a third party simply by delegating responsibility for [a] component of the joint enterprise that caused injury to the third party . . . ." Id. The court also pointed out that TxDOT had employees that were members of the Transitway Management Team. The Team met monthly to address issues including operation plans for the HOV lanes. Additionally, any amendments or changes to the operation plans for the HOV lanes could be made only with consent of both TxDOT and Metro. See id. at 616. Finally, the Team developed Transitway rules that were designed to insure safe and effective operation of the HOV lanes and was responsible for evaluating and recommending changes to traffic control devices used in connection with the HOV lanes. Thus, the court concluded that while Metro employees may have carried out procedures and been principally responsible for day-to-day operations of the HOV lanes, TxDOT had a voice and a right to be heard in matters affecting the day-to-day operations. The court overruled TxDOT's point of error that there was no evidence to support the jury's finding of joint enterprise. See id.[12]

The Able case has far reaching implications for suits brought under the TCA for condition or use of real or personal property. Governmental entities frequently enter into agreements related to maintenance and operations of roadways. However, in Sipes, the Fort Worth court of appeals considered whether an agreement where the State would improve the highway and the City would fund improvements and do other work was a waiver of immunity. Although the City had "a voice to be heard concerning limited aspects of the construction," the court found that there was no joint enterprise because the City did not have equal control over the construction project. Sipes v. City of Grapevine, 146 S.W.3d 273 (Tex.App.—Fort Worth 2004, pet. filed) rev'd on other gounds, City of Grapevine v. Sipes, 195 S.W.3d 689 (Tex. 2006). These agreements may be sufficient to create a joint enterprise between the parties. Under the Able decision, if a plaintiff is able to establish liability of any party to that agreement, each other party will also be liable. Moreover, governmental entities frequently enter into agreements related to the operation of facilities that are funded jointly. Each of these agreements may be sufficient to create a joint enterprise under which each will be liable for the negligence of another party related to the condition or use of personal property. But see Sipes, 146 S.W.3d at 273. In fact, a substantial number of

[12] Because TxDOT was raising a no evidence point, the court was required to affirm the jury's finding if its review of the record revealed more than a scintilla of evidence to support each element of the joint enterprise finding. See id.

governmental entities are reporting that they are seeing a dramatic number of joint enterprise claims since the supreme court released its opinion in Able.

Joint enterprise no longer appears to be a viable means of recovery against all local governmental entities other than counties with the passage in 2005 of HB 2039. The purpose of the bill was to amend chapter 271 of the Local Government Code to allow suits for breach of contract against cities, school districts, junior college districts, and special purpose districts. However, the bill also provides that contracts entered into by a local governmental entity is not a joint enterprise for liability purposes. Thus, the bill would seem to exclude local governmental entities from potential liability under the joint enterprise theory of recovery. Interestingly, HB 2039 protects cities, school districts, junior college districts, and special purpose districts from joint enterprise liability, but leaves counties still subject to liability under the Able decision.

7. Section 101.0215: Municipal Liability for Proprietary and Governmental Functions.

Section 101.0215 establishes both what constitutes a proprietary rather than a governmental activity as well as a municipality's liability for each. Subsection (a) contains a laundry list of governmental functions for which a municipality can be held liable only under the TCA.[13] Generally, entities acting in their governmental capacity are not subject to estoppel. Weatherford v. City of San Marcos, 157 S.W.3d 473 (Tex.App.—Austin 2004, pet. denied). Since the provision is not an independent waiver of governmental immunity, a plaintiff must still establish the applicability of the TCA under some other section (usually section 101.021 or 101.022) before invoking section 101.0215 to establish municipal liability. Bellnoa v. City of Austin, 894 S.W.2d 821, 826 (Tex.App.—Austin 1995, no writ); City of San Antonio v. Winkenhower, 875 S.W.2d 388, 391 (Tex.App.—San Antonio 1994, writ denied).

Subsection (b) provides that the TCA

> does not apply to the liability of a municipality for damages arising from its proprietary functions, which are those functions that a municipality may, in its discretion, perform in the interest of the inhabitants of the municipality, including but not limited to: (1) the operation and maintenance of a public utility; (2) amusements owned and operated by the municipality; and (3) any activity that is abnormally dangerous or ultra hazardous.

TEX. CIV. PRAC. & REM. CODE § 101.0215(b) (West 2005). Carrying out any function constituting a proprietary activity under subsection (b) means that the municipality enjoys no immunity from suit or liability and there is no limitation upon the amount of damages the plaintiff can recover. Pontarelli Trust v. City of McAllen, 465 S.W.2d 804, 807–08 (Tex. Civ. App.—Corpus Christi 1971, no writ); Dillard, 806 S.W.2d at 593–94; Pike, 727 S.W.2d at 521. However, any conflict between subsections (a) and (b) regarding whether a given activity is proprietary or governmental is resolved in favor of the finding that it is governmental. TEX. TORT CLAIMS ACT § 101.0215(c). See Gen. Elec. Co. v. City of Abilene, 795 S.W.2d 311, 312–13 (Tex.App.—Eastland 1990, no writ).

The courts look to the nature of the activity and the persons benefited in determining

[13] Prior to the enactment of this section, the determination of what activities were proprietary was left to the courts. See City of San Antonio v. Hamilton, 714 S.W.2d 372, 374–75 (Tex.App.—San Antonio 1986, writ ref'd n.r.e.). The determination of what is proprietary and governmental is now addressed by this section, but the list of governmental functions has been held to be non-exhaustive. De La Garza v. City of McAllen, 881 S.W.2d 599, 606 (Tex.App.—Corpus Christi 1994), *rev'd on other grounds*, 898 S.W.2d 809 (Tex. 1995).

whether a function is governmental or proprietary. The laundry list of governmental functions contained in section 101.0215(a) is not exhaustive. See TEX. TORT CLAIMS ACT § 101.0215(a). If the activity in question is not on the laundry list, the test of whether it is proprietary is whether it benefits the public-at-large or just persons living within the municipality.

> The governmental function of a city has been defined as those acts which are public in nature, and performed by the municipality "as the agent of the state in the furtherance of general law for the interest of the public at large."
>
> Proprietary functions ... are intended primarily for the benefit of those within the corporate limits of the municipality.

See Gates v. City of Dallas, 704 S.W.2d 737, 738–39 (Tex. 1986).

If some aspects of the activity are governmental and others are proprietary, the City will be held to have engaged in a proprietary function. City of Port Arthur v. Wallace, 171 S.W.2d 480, 481 (Tex. 1943); City of Dallas v. Moreau, 718 S.W.2d 776, 780 (Tex.App.—Corpus Christ 1986, writ ref'd n.r.e.). Moreover, the municipality bears the burden of establishing that the activity in which it was engaged was governmental in nature. See City of Houston v. Bush, 566 S.W.2d 33, 35 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.); see also City of El Paso v. Morales, 2004 WL 1859912, p. 9 (Tex.App.—El Paso Aug. 20, 2004, pet. denied) (finding question of fact whether city was performing proprietary or governmental function).

The following municipal activities have been found to be proprietary functions, for which the City enjoyed no immunity or limits on its liability:

> (a) Acting as a self insurance plan for provision of health benefits to its employees and their dependents. Gates, 704 S.W.2d at 738;
>
> (b) Undertaking the management of a firefighters' retirement fund. Herschbach v. City of Corpus Christi, 883 S.W.2d 720, 730 (Tex.App.—Corpus Christ 1994, pet. denied);
>
> (c) Operation of a municipal cemetery. Pike, 727 S.W.2d at 519;
>
> (d) Maintenance of municipal storm sewers. City of Round Rock v. Smith, 687 S.W.2d 300, 302–03 (Tex. 1985);
>
> (e) Operation of an electric utility. Wheelabrator Air Pollution Control, Inc., v. City of San Antonio, -- S.W.3d --, 59 Tex. Sup. Ct. J. 662 (Tex. 2016); and
>
> (f) Lease of property owned by municipality. Wasson, 489 S.W.3d 427 (Tex. 2016).

As in common law, the determination of whether an activity is a proprietary or governmental function applies only to municipalities. Neither states nor counties perform any proprietary functions. Jezek v. City of Midland, 605 S.W.2d 544 (Tex. 1980); Atchison, Topeka & Santa Fe Ry. Co. v. Tex. State Dep't of Highways, 783 S.W.2d 646 (Tex.App.—Houston [14th Dist.] 1989, no writ). Accordingly, section 101.0215 has no application to governmental units that are not municipalities.

8. Section 101.022: Liability for Premises Defects.

This section of the paper addresses: (1) whether a claim arises from a premises defect or the condition or use of personal property; and (2) the two standards of liability for premises defects (ordinary premises defects and special defects).

Whether the claim arises from the condition or use of property versus a premises defect is a question of law. Sampson v. Univ. of Texas, 500 S.W.3d at 385. Moreover, a claim is either a premises claim or for the condition or use of property. Id. The liability standard for premises defects claims cannot be reduced by attempting to make it into a condition or use of property claim. Id.

a. Determining Whether the Suit is Based Upon the "Condition or Use of Property" or a "Premises Defect."

There are two very different waivers of immunity and standards of liability under the TCA. For claims arising from the "condition or use of property" the standard of liability is the same as the "governmental unit would [face], were it a private person ... according to Texas law." See Tex. Dep't of Transp. v. Ramming, 861 S.W.2d 460, 466 (Tex.App.—Houston [14th Dist.] 1993, writ denied). On the other hand, the waiver of immunity and extent of liability are very limited in premise defect cases. See Hawley v. State Dep't of Highways and Pub. Transp., 830 S.W.2d 278, 281 (Tex.App.—Amarillo 1992, no pet).

> Section 101.022 [entitled Duty Owed: Premises and Special Defects] does not purport to create governmental liability but rather to limit the duty owed by the government. Thus, the language of § 101.022 still creates a limitation upon the liability created under § 101.021 and does not, ... create a separate cause of action measured by an ordinary care standard.

Therefore, one of the first issues that should be addressed in analyzing a suit under the TCA is whether claim arises from: (1) the "condition or use of property"; or (2) a "premises" defect.

The courts look to the common definitions of "premises" and "defect" to decide whether or not the case at bar arises from a "premises defect." Tex. Dep't of Transp. v. Henson, 843 S.W.2d 648, 652 (Tex.App.—Houston [14th Dist.] 1992, writ denied); Univ. of Tex.-Pan Am. v. Valdez, 869 S.W.2d 446, 448–49 (Tex.App.—Corpus Christi 1993, writ denied); see Davidson, 882 S.W.2d at 86.

> The word "premises" is commonly defined as "a building or part of a building with its grounds or other appurtenances." A legal definition of premises is "land and tenements; an estate including land and buildings their own; ... land and its appurtenances."

Henson, 843 S.W.2d at 652; see also Davidson, 882 S.W.2d at 85–86; Valdez, 869 S.W.2d at 448–49.

The permanent or temporary status of the object that caused the injury can determine whether it is an "appurtenance," thus making it part of the "premises." Henson, 843 S.W.2d at 652. Following this rationale, the Fourteenth Court of Appeals found that an injury resulting from a barrel sign did not constitute a premises liability claim. Henson's pickup truck stuck two barrel signs on a state highway. The barrel signs were used as warning devices to demark the edge of traffic lanes and a construction area. Henson was injured when a warning sign panel became detached from the barrel and came through the windshield of his vehicle. The barrel signs were "movable, portable, and temporary in nature, much like construction equipment ... not intended to be a permanent part of the highway." Id. at 653. Based upon these temporary characteristics of the barrel sign, the court concluded that the barrel signs did not constitute part of the premises. Accordingly, the plaintiff's injury arose from the "condition or use" of property rather than a premises defect.

Other courts of appeals have also followed the temporary versus permanent rationale to find that other claims did not arise from "premises defects." In Townsend, 548 S.W.2d at 939–40, the plaintiff was injured by a bolt protruding from the turnbuckle of a tennis court net. The bolt was part of the mechanism used to adjust the level of the net. The court held that the bolt and the turnbuckle to which it was attached were not part of the premises.

Consequently, the claims did not represent a premises defect claim. Id.; see Harris Cnty. v. Dowlearn, 489 S.W.2d 140 (Tex. Civ. App.—Houston [14th Dist.] 1972, writ ref'd n.r.e.) (unattached wall panel used to divide rooms was not part of premises; injury resulting therefrom is not a premise liability claim); see also Mokry v. Univ. of Tex. Health Sci. Ctr., 529 S.W.2d 802 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.); Lowe, 540 S.W.2d at 297; Robinson, 780 S.W.2d at 169; Ramming, 861 S.W.2d at 460; McGuire, 518 S.W.2d at 528 (injury caused by a hospital bed without side rails).

At the same time, suits that focus on permanent parts of a building or real property are "premises" liability claims. Billstrom arose from injuries to a mental patient injured when he fell to the ground while trying to climb out of a window. Billstrom v. Mem'l Med. Ctr., 598 S.W.2d 642 (Tex.App—Corpus Christi 1980). The plaintiffs complained of the condition of the security screen and the window. The court found the screen and window to be permanent parts of the building and held that the claim arose from a premises defect. As explained by the court of appeals:

> Although appellant's allegations regarding the screen and window concern the condition of tangible property, they are actually "premise defects" within both the generally accepted common and legal definitions of the words. The appellant's allegations deal with a defect in the appurtenance to a room itself, rather than a defect in a distinct piece of equipment, irrespective of whether or not that piece of equipment is classified as a fixture. As such, we are of the opinion that appellant's allegations come within §101.022. The condition of the alleged defective security screen and window are more closely analogous to a defect in a floor or in maintaining a floor in a slippery (defective) condition.

Id. at 646-47; see also Tennison, 509 S.W.2d at 561–62 (plaintiff injured as a result of a slick floor was bringing premises liability claims under the TCA, regardless of her claims of how the floor became slick).

Following similar rationale, the Fourteenth Court of Appeals held that injuries caused by a defective elevator door also arose from a premises defect as opposed to the condition or use of property. As explained by the Davidson court:

> We find [Billstrom's] reasoning sound. Despite the fact that an elevator is a separate piece of equipment it is also undeniably an integral part of the building, like a stairwell, floor, or, as in Billstrom, a security screen permanently attached to a window. And, although an elevator can be removed, in truth, it is not a "temporary" installation in any sense; it is a permanent addition to the building. Furthermore, being attached to the building and an integral part of its construction, an elevator is clearly an appurtenance, in fact, more so than the security screen in Billstrom.

882 S.W.2d at 86.

More importantly, the Davidson case seems to imply that when a court is in doubt regarding the proper classification of the instrumentality causing the injury, it should find that the instrumentality was a premises defect. The Fourteenth Court of Appeals states that Billstrom found that the hospital security screen constituted both a piece of tangible property and a permanent part of the hospital premises. Id. at 86. The court goes on to explain that Billstrom implicitly holds that because section 101.022(a), the premises liability provision of the TCA, limits the state's general liability under §101.021(2), liability for the condition or use of property, the Legislature clearly intended the lesser standard of

liability to apply when the item at issue can be characterized as a part of the premises. If the Legislature specifically establishes a lessor standard of care for governmental entities in premises cases, any doubt regarding whether something is a premises defect for condition or use of property should be resolved in favor of the former rather than the latter. Therefore, the court suggests that if the instrumentality causing the injury can be characterized both as a condition of the premises as well as a use of tangible property, the case should be treated as a premises defect claim. No other court has followed this analysis.

(1) The Instrumentality Causing the Injury Rather Than the Means by Which it Became Defective Determines Whether Plaintiff is Bringing a Premises Liability Claim.

Tennison arose from a slip and fall accident in a state building. Tennison, 509 S.W.2d at 560. The plaintiff argued that the negligence standard of liability was applicable because the injury arose out of the active use of the State's property. Specifically, plaintiff asserted that her cause of action was based upon the negligent use of floor wax, not upon an allegation that the slick floor was a premises defect. Further, she asserted that the premises liability limitation of liability in former § 18(b) (now §101.022) was not applicable because of the active negligence of the State's agent in creating the dangerous condition by the manner in which it maintained the floor (i.e., the premises). Id. at 561–62. The supreme court rejected this, saying that section 18(b) (now §101.022) provides an exception to negligence liability where the claim arises from premise defects. The court reversed and rendered judgment that Tennison take nothing because she failed to get jury findings necessary to support a premises liability claim. Id.; Billstrom, 598 S.W.2d at 647–48 (plaintiff injured by a building fixture had a premises liability, not a condition or use claim).

Under the Tennison rationale, a governmental entity, like a private landowner or occupant, may claim the limitations of liability provided by premises liability law. See Tennison, 509 S.W.2d at 561–62. A plaintiff injured by a premises defect on government property is limited to bringing a premises liability claim as provided for in the TCA. A plaintiff may not deprive the government of that limited liability by taking the position that a premises defect is a negligent "use of property" under the TCA.

> Once the claim is determined to be a premises defect, the claimant is limited to the provisions delineated by that section and has no right to assert a general "negligent use" theory based on the continued use of the alleged defective property ....

Hawley, 830 S.W.2d at 281.

The Texas Supreme Court revisited this issue in Simpson v. University of Texas. Simpson was injured when he tripped over an extention cord across a sidewalk. Simpson, 500 S.W.3d at 385. Simpson claimed that the liability was based either on the condition or use of personal property or a negligent activity being conducted on the premsises at the time of the injury. Id. The Supreme Court rejected Simpson's argument. Distinguishing between a claim for the use or condition of tangible personal property as opposed to a premises defect claim depends on whether the activity was the contemporaneous, affirmative action or service (use) or the state of being (condition) of the tangible property itself that caused the injury, as opposed to whether it was a condition created on the real property by the tangible personal property (a premises defect). Simpson, 500 S.W.3d at 390. *See Shumake*, 199 S.W.3d at 284 (explaining that negligent activity claims require that "the claimant's injury result from [the] contemporaneous activity itself rather than from a condition created on the premises by the activity"); *Keetch*, 845 S.W.2d at 264 (explaining that a premises defect claim exists when the injury allegedly occurred as a result of a condition created by the activity). "In *Aguilar* and *Hayes*, the water hose and metal chain allegedly caused the injuries not because of the inherent nature of the tangible personal property itself or the contemporaneous use of the tangible

personal property, but because of the tangible item's placement—strung, pulled taut—creating a hazardous real-property condition. *Aguilar*, 251 S.W.3d at 512; *Hayes*, 327 S.W.3d at 115; *cf. Overton Mem. Hosp. v. McGuire*, 518 S.W.2d 528, 528–29 (Tex.1975) (per curiam) (characterizing a claim for injuries sustained after a patient fell from a hospital bed without rails as a claim based on condition or use of tangible personal property under the predecessor to the Tort Claims Act—it was the hospital bed itself that allegedly caused an injury and not a dangerous real property condition created by the bed's placement or position)." Simpson, 500 S.W.3d at 390. In Simpson, the electrical extension cord was strung across the pedestrian walkway hours before the injury. Id. "The dangerous condition was the way the extension cord was positioned over the concrete retaining wall, resulting in a gap between the ground and the cord. The injury did not result from the use of tangible personal property because a UT employee was not putting or bringing the cord into action or service *at the time* of the injury." Id.

Accordingly, plaintiffs who have prevailed at trial upon a negligence standard have seen their judgments reversed on appeal because their claims arose from a premises defect. See Tennison, 509 S.W.2d at 561–62.

(i) Ordinary Premises Defects.

The TCA establishes a limited duty for governmental units with regard to ordinary premises defects. Payne, 838 S.W.2d at 237. Section 101.022 provides that "the governmental entity owes to the claimant only the duty that a private person owes to a licensee on private property...." TEX. TORT CLAIMS ACT § 101.022(a); Tex. Dep't of Transp. v. Fontenot, 151 S.W.3d 753, 760 (Tex.App.—Beaumont 2004, pet. denied).[14] The Texas Supreme Court clearly laid out the licensee/licensor standard of care in Tennison.

> It is well settled in this state that if a person injured was on the premises as a licensee, the duty that the proprietor or licensor owed him was not to injure him by willful, wanton or gross negligence ... an exception to this general rule is when the licensor has knowledge of a dangerous condition, and the licensee does not, a duty is owed on the part of the licensor to either warn the licensee or make the condition reasonably safe .... [T]he duty to warn licensees of dangerous conditions arises only in those instances where the licensor knows of the condition likely to cause the injury .... Actual knowledge rather than constructive knowledge of the dangerous condition is required.

[14] An exception to this rule exists where the injured party has paid for the use of the premises. In that case, the governmental entity owes the same duty as that owed to an invitee. TCA § 101.022(a). Tex. Parks and Wildlife Dep't, 988 S.W.2d at 372–-74; M.D. Anderson Hosp. v. Felter, 837 S.W.2d 245, 247–-48 (Tex.App.—Houston [1st Dist.] 1992, no pet.). The mere payment of a fee related to the premises does not establish that the plaintiff has paid for the use of the premises. The "payment" must be "for the use" of the premises at issue in the litigation. Kitchen, 867 S.W.2d at 786–-87. Thus, in Kitchen, the supreme court held that the payment of vehicle registration and licensing fees did not constitute payment for the use of a state highway. Id.; Garcia v. State, 817 S.W.2d 741 (Tex.App.—San Antonio 1991, writ denied). Garcia holds that the payment of fuel taxes was not a payment for the use of the roadway. Id.; sSee also Brazoria County v. Davenport, 780 S.W.2d 827, 828 (Tex.App.—Houston [1st Dist.] 1989, no writ) (plaintiff who did not pay for care at prenatal clinic was licensee on premises). Under Kitchen, only the payment of a toll for the use of toll roads could create a situation where the plaintiff will be considered as having paid for the use of the particular roadway. Additionally, the payment of state, county, or city taxes will not mean that a plaintiff has paid for the use of a particular government building or property. Only a fee charged for entry onto a particular premises, such as the purchase of a ticket to get into a zoo, museum, gallery, concert hall, or theater, will mean that the plaintiff must be considered as an invitee under §101.022(a). See id.; Tex. Parks and Wildlife Dep't, 988 S.W.2d at 372–-74.

509 S.W.2d at 562.[15] See also Prairie View A&M v. Brooks, 180 S.W.3d 694 (Tex.App.—Houston [14th Dist.] 2005, no pet.) (no evidence the university knew of the dangerous condition); Thompson v. City of Dallas, 167 S.W.3d 571, 575 (Tex.App.—Dallas 2005, pet. filed) rev'd on other grounds, City of Dalles v. Thompson, 210 S.W.3d 601 (Tex.2007), (constructive notice of premises defect does not give rise to a duty to warn a licensee).

Thus, in order to establish liability for an ordinary premises defect, a plaintiff must prove:

(a) The existence of a premises defect. A premises defect has been held to be something other than a condition normally connected with the use of the premises which creates an unreasonable risk of harm. Payne, 838 S.W.2d at 237; State Dep't of Highways and Pub. Transp. v. Zachary, 824 S.W.2d 813, 820 (Tex.App.—Beaumont 1992, writ denied); State Dep't of Highways and Pub. Transp. v. Bacon, 754 S.W.2d 279, 282 (Tex.App.—Texarkana 1988, writ denied). See also Izaguirre, 829 S.W.2d at 160 (holding that ordinary dirt did not represent a dangerous condition, and in the absence of a premises defect, the premises occupier could not be held liable); Seideneck, 451 S.W.2d at 754; Cobb, 965 S.W.2d at 62 (defect means imperfection, shortcoming, or want of something necessary for completion). "Whether a particular set of circumstances creates a 'dangerous condition' has been held to present a fact question for the jury." Blankenship v. Cnty. of Galveston, 775 S.W.2d 439 (Tex.App.—Houston [1st Dist.] 1989, no writ).[16]

The Supreme Court's decision in County of Cameron v. Brown may have a significant effect on what courts have deemed to be premises defects. Part of the problem with the Brown decision is that the case came to the Supreme Court from the trial court's granting of the defendants' pleas to the jurisdiction. Cnty. of Cameron v. Brown, 80 S.W.3d 549, 552 (Tex. 2002). The suit arose from an accident on the Queen Isabella Causeway in a section of the causeway where the overhead lighting had gone out. Id. The court found that, under the allegations and evidence presented, a "malfunctioning block of artificial lighting that the defendants to maintain causing a sudden and unexpected change in driving conditions" could constitute a dangerous condition. Id. at 557. Those allegations and that evidence included the following: the plaintiff had alleged the accident was caused in part by the lights on the causeway going out, an agent for one defendant had found there was a problem with the lights going out and that this represented a risk to drivers on the causeway, the causeway had curves, the causeway's shoulders were narrow, and once a motorist entered the causeway they were prohibited from turning around. Thus, the court reversed the granting of the plea to the jurisdiction and remanded the case to the trial court. Id.

Without consideration of the fact that the court was examining the case to determine whether the plaintiff's pleadings and evidence were sufficient to survive a plea to the jurisdiction, some will argue that the Supreme Court has held that when artificial lights go out on roadways with narrow shoulders a dangerous condition has been created. Id. at 561 (Jefferson, J., concurring), id. at 563 (Hecht, J., dissenting). The holding in Brown should not be overstated. The issue before the court was merely whether the plaintiff's pleadings and evidence were sufficient to survive a plea to the jurisdiction. See also Perches, 388 S.W.3d at 656 (plaintiff's

[15] One court of appeals has held that governmental entities owe a lower standard of care to independent contractors. Durbin v. Culberson County, 132 S.W.3d 650 (Tex.App. –El Paso 2004, no pet. h.).

[16] The Texas Pattern Jury Charge ("TJC"), Volume 3, Section 66.05, states that the condition must create an unreasonable risk that results in physical harm, before liability can be imposed upon the occupier of the premises. The TJC does not indicate whether this issue should be presented to the jury in the form of an instruction or a separate question.

pleadings as a matter of law were insufficient to allege a claim for an ordinary premises defect).

(b) The licensor must have knowledge of the condition and that it is unreasonably dangerous at the time of the injury. The Tennison decision clearly holds that before liability can attach, a governmental unit must have knowledge of the dangerous condition. Tennison, 509 S.W.2d at 562; York II, 284 S.W.3d at 847–48; Kitchen, 867 S.W.2d at 786; Payne, 838 S.W.2d at 237.

Actual knowledge "requires knowledge that the dangerous condition existed at the time of the accident, as opposed to constructive knowledge which can be established by facts or inferences that a dangerous condition could develop over time." City of Corsicana v. Stewart, 249 S.W.3d 412 (Tex. 2008); Reyes v. City of Laredo, 335 S.W.3d 605, 608-09 (Tex. 2010); Univ. of Tex. v. Hayes, 327 S.W.3d 113, 117 (Tex. 2010); City of Dallas v. Reed, 258 SW3d 620, 623 (Tex. 2003). The fact that the governmental entity did work on the premises does not mean it had knowledge of a condition that a premises defect would subsequently develops as a result of the work. City of Denton v. Paper, 376 S.W.3d 762, 766–67 (Tex. 2012). In Paper, City had done work on the street a week before the accident and at the conclusion of the work there was no pothole or depression in the street and the condition of the street "was no hazardous." Id. at 767. There was no evidence the city had received complaints of the pothole. Id. Accordingly, the city's knowledge that it had done work on the street and that a pothole might develop as a result of the work was insufficient to establish that the city has actual knowledge of the premises defect. Id.

Actual, rather than constructive, knowledge is required. Reyes, 335 S.W.3d at 608–09 (testimony that a man living near the flooded road called 911 four or five times about rising water stating there was going to be a problem with cars getting swept away proved that the City knew that, at some time, there was going to be a problem, but was insufficient to establish knowledge of the condition at the time of the accident that occurred several hours later); Fontenot, 151 S.W.3d at 764 (witness testimony that "everybody knew" insufficient to prove actual knowledge); Kitchen, 867 S.W.2d at 786; Payne, 838 S.W.2d at 237; Brooks, 180 S.W.3d at 696; Thompson, 167 S.W.3d at 575. But see Tex. Tech Med. Ctr. v. Garcia, 190 S.W.3d 774 (Tex.App.—El Paso 2006 no pet.) (allegations defendant knew of dangerous condition and failed to warn of condition, plead sufficient facts to state premises claim). In determining in whether a premises owner has actual knowledge, "courts generally consider whether the premises owner has received reports of prior injuries or reports of the potential dander presented by the condition. Reed, 258 S.W.3d at 623, Univ. of Tex.-Pan Am. v. Aguilar, 251 S.W.3d 511 (Tex. 2008).

However, the Texas Supreme Court has set a very high standard for when circumstantial evidence can establish a government entity's actual knowledge of a dangerous condition. As explained by the Texas Supreme Court in City of Corsicana v. Stewart, 249 SW3d 412, 414 (Tex. 2008) (per curiam): "Here the Legislature required that the city actually know that the crossing was flooded at the time of the accident. … Circumstantial evidence establishes actual knowledge only when it 'either directly or by reasonable inference' supports that conclusion." Id.; State v. Gonzalez, 82 S.W.3d 322, 330 (Tex. 2002). The Stewart decision arose from two children drowning in a car that was swept away by flood waters after it stalled at a low-water crossing. Stewart, 249 S.W.3d at 414. In Stewart, in support of its plea to the jurisdiction, the city submitted the affidavit of its Director of Public Works in which he stated that the city first became aware of the flooded road crossing when the decedent's father called 911 asking for help. The Court noted that this testimony established that the city had actual knowledge of the flood waters at the crossing only after the car in which the children were left had become stuck in the flood waters. Id. at 415. The Supreme Court noted that the Plaintiffs offered substantial circumstantial evidence that the City had actual notice of the flood waters at the crossing. Id. The plaintiffs offered testimony including: (1) testimony from the Public Works Director that the crossing had flooded in the past and the city had closed the crossing on several previous occasions due to flooding; (2) A study commissioned by the city identifying the crossing

as vulnerable to future flooding; (3) Testimony from a former city council member that she told city personnel of dangerous conditions at the crossing during light and heavy rain; (4) Four severe weather warnings issued by the National Weather Service on the afternoon and evening proceeding the accident; (5) Evidence that TxDOT closed a road one mile upstream from the crossing, several hours before the accident due to flooding; and (6) Testimony from the responding officer that he had assisted another officer in the area and was aware of heavy rainfall in the proximity of the crossing. The Supreme Court found that the circumstantial evidence was not sufficient to establish actual knowledge in face of affidavit from the city public works director, stating that the city did not have actual knowledge. Id.; see also Reyes, 335 S.W.3d at 608–09 (four or five calls to 911 in advance of the accident from a man living near the flooded intersection, stating that flood waters were rising and there was going to be a problem with cars getting swept away was not sufficient to establish the City's knowledge).

The Texas Supreme Court contrasted the circumstantial evidence offered by the Stewart's with the circumstantial evidence offered in City of San Antonio v. Rodriguez, 931 SW 2d 535, 537 (Tex. 1996). Rodriguez involved a suit arising from injuries suffered as a result of a fall on a wet basement basketball court. The evidence in the case showed that the city knew that the rain dripped through and fell on the gym floor because of leaks in the roof of the recreation center. Id. In Rodriguez, a city employee also had contemporaneous knowledge of water on the floor elsewhere in the recreation center as a result of leaks. Id. The clear lesson of the Stewart decision, is that it will be very difficult to establish a governmental entity has actual knowledge of a dangerous condition through circumstantial evidence, especially where a governmental entity offers testimony that it did not have actual knowledge at the time of the accident. Stewart, 249 SW3d 412, 414; see also State v. Gonzalez, 82 S.W.3d 322, 330 (Tex. 2002) (evidence that defendant was aware of repeated vandalism/removal of a sign, did not establish that defendant knew sign was missing where there was no evidence someone had reported the sign missing on the day of the accident).

Thus, the Supreme Court has held that "actual knowledge requires the [governmental entity] to know 'that the dangerous condition existed at the time of the accident, not merely of the possibility that a dangerous condition could develop over time.'" Hayes, 327 S.W.3d at 117 (quoting City of Corsicana, 249 S.W.3d at 414–15). "Awareness of a potential problem is not actual knowledge of an existing danger. Had there been testimony that a 911 operator received a credible report at about the time of the accident that the crossing had actually flooded and was imperiling motorists, there would have been evidence the City had actual knowledge of a dangerous condition." Reyes, 335 S.W.3d at 609.

Furthermore, the licensor must not only prove the entity's actual knowledge of the existence of the condition at the time of the accident, but must also prove that the entity knew that the defect is likely to cause injury. Id.; City of Dallas v. Reed, 258 S.W.3d at 622 (defendant must have actual knowledge of the danger presented by the condition); Keetch, 845 S.W.2d at 265, 267; Tennison, 509 S.W.2d at 561–62. See also Barker v. City of Galveston, 907 S.W.2d 879, 885–87 (Tex.App.—Houston [1st Dist.] 1995, writ denied) (where only one person was ever reported injured by the swing set, and swing sets were regularly inspected, knowledge of condition that caused injury was not knowledge defect was likely to cause injury; while plaintiff's evidence might raise jury issue on constructive knowledge, it failed as a matter of law on issue of actual notice); Hastings v. De Leon, 532 S.W.2d 147, 149 (Tex. Civ. App.—San Antonio 1975, writ ref'd n.r.e.) (licensee who slipped and fell on a throw rug inside host's home could not recover, absent proof the licensor knew, prior to the fall, that the rug created a "dangerous condition"). In Reyes, the Supreme Court held that the University of Texas did not know the alleged premised defect, a chain across a campus roadway that plaintiff ran into on his bicycle, was dangerous. 335 S.W.3d at 609. The court pointed out that the University "had no reason to know that the chain was dangerous to a user of the road … because it had closed the roadway to road users." Id. In the City of Dallas v. Reed, the plea to the jurisdiction was granted because, while the

plaintiff established the city knew of the premises condition, he did not prove the city knew the condition presented a potential danger to motorists. But see Harris Cnty. v. Eaton, 573 S.W.2d 177, 178–79 (Tex. 1978) (when condition is a special defect county held liable because it should have discovered the pot holes and known they presented an unreasonable risk of harm to drivers).

(c) The plaintiff did not have knowledge of the dangerous condition. If the licensee knows of the dangerous condition, the governmental occupier of the property owes no duty to him. Payne v. City of Galveston, 772 S.W.2d 473 (Tex.App.—Houston [14th Dist.] 1989, writ denied) ("Payne II"); York II, 284 S.W.3d at 847–48. The plaintiff must not only prove, but also obtain a finding of lack of knowledge of the dangerous condition on his part in order to establish liability. Payne, 838 S.W.2d at 237. The courts of appeals are split on whether constructive knowledge of the dangerous condition will defeat the licensee's suit. "A licensee is imputed with knowledge of those conditions perceivable to him, or the existence of which can be inferred from the facts within his present or past knowledge." Weaver, 750 S.W.2d at 26. Weaver was walking across a Kentucky Fried Chicken parking lot when he slipped and fell on some cooking grease. The color of the grease was in stark contrast with the surface of the parking lot, making the grease "open and obvious." "While the evidence does not establish actual knowledge, it does establish that the hazard was easily perceivable. We hold that this is enough to relieve KFC of the duty to warn." Id. at 27. See Kitchen, 867 S.W.2d at 786; City of San Benito v. Cantu, 831 S.W.2d 416, 425 (Tex.App.—Corpus Christi 1992, no writ). But see McKinney, 886 S.W.2d at 303–04 (court presumed absence of knowledge by the licensee); Bacon, 754 S.W.2d at 281 (licensee must establish absence of actual knowledge of dangerous condition, not absence of constructive knowledge).

(d) The governmental unit failed to both warn of the dangerous condition and to make the condition reasonably safe. When a governmental entity either warns of the dangerous condition or makes the dangerous condition reasonably safe, it has fully discharged its obligations to the licensee and cannot be held liable. Tex. Dep't of Transp. v. Guerra, 858 S.W.2d 44, 46–47 (Tex.App. —Houston [14th Dist.] 1993, writ denied); Smith v. State, 716 S.W.2d 177, 179 (Tex.App.—El Paso 1986, writ ref'd n.r.e.).[17]

(e) The failure to warn was a proximate cause of the injury. Payne, 838 S.W.2d at 237; Barron v. Tex. Dep't of Transp., 880 S.W.2d 300, 303–04 (Tex.App.—Waco 1994, writ denied); Keetch, 845 S.W.2d at 264; Corbin, 648 S.W.2d at 296. See also Tex. S. Univ. v. Mouton, 541 S.W.3d 908, 915 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (no proximate

[17] The duty to warn of a dangerous condition is to adequately warn. The warning must provide adequate notice of the condition the licensee will encounter. State v. McBride, 601 S.W.2d 552, 557 (Tex. Civ. Ann.—Waco 1980, writ ref'd n.r.e.). The premises defect in McBride was a section of roadway under construction that was so slick that cars traveling at about 15 miles per hour would lose control as they drove through the construction area. The state had posted "Slow" and "35 MPH" signs. The Waco court held that these signs were insufficient to provide an adequate warning. Id. at 557.

On the other hand, a sign is not required to spell out the particular danger, but merely give sufficient information to put the plaintiff on notice of the danger she may encounter. Shives v. State of Texas, 743 S.W.2d 714, 717 (Tex.App.—El Paso 1987, writ denied). For example, a stop sign has been held to constitute adequate warning of the danger of cross traffic on an intersecting road. Plaintiff "had a duty by statute to remain stopped at the stop sign until she could enter the intersection in question with safety." Whether the warning provides adequate notice of the dangerous condition should be a question of fact for the jury. See Guerra, 858 S.W.2d at 45–47. But see Maxwell v. Tex. Dep't of Transp., 880 S.W.2d 461, 465 (Tex.App.—Austin 1994, pet. denied) (holding that "type 2" marker consisting of post with three amber reflectors was sufficient warning of culvert adjacent to roadway).

cause for failure to warn or make safe during threat of active shooter on campus).

The majority of licensor/licensee cases are tried under the dangerous condition theory laid out above. A licensor, however, also has a duty not to injure a licensee willfully, wantonly, or through gross negligence. Therefore, liability of a governmental entity/licensor may be predicated upon gross negligence in allowing the condition to exist. Davenport, 780 S.W.2d at 827. In Davenport, the county's actions were held to constitute gross negligence where he allowed a slippery condition on a sidewalk at the entrance of a prenatal clinic to develop from an accumulation of water, mud, and slime coming from a water line where the county had been aware of the condition for some time. Id.; see also City of Houston v. Cavazos, 811 S.W.2d 231, 233 (Tex.App.—Houston [14th Dist.] 1991, writ dism'd).

Due to the difficulty of establishing all of the elements of a licensee dangerous condition suit, more and more governmental premises liability cases are being tried under a gross negligence theory. See Graf v. Harris, 877 S.W.2d 82 (Tex.App.—Houston [1st Dist.] 1994, writ denied); Horrocks, 841 S.W.2d at 415.

(ii) Special Defects.

The TCA provides that under certain circumstances, a governmental defendant has a greater duty than a licensor owes to a licensee. One of the instances in which a greater duty is owed is when the premises defect involved constitutes a "special defect." TCA § 101.022.[18]

Most property defects are ordinary premises defects not special defects. Hayes, 327 S.W.3d at116; Payne, 838 S.W.2d at 238; Horrocks, 841 S.W.2d at 416. Thus, a special defect is the exception and not the rule. Payne, 838 S.W.2d at 238. "The class of special defects contemplated by the statute is narrow. It does not include common potholes or similar depressions in the roadway. … Such irregularities in the roadway unfortunately are to be expected." City of Denton v. Paper, 376 S.W.3d 762, 764 (Tex. 2012) (internal quotations and citations omitted).

A special defect need not have been created by the governmental unit itself. Eaton, 573 S.W.2d at 179 (a "special defect" need not have been created by the government itself, but could conceivably result from a natural occurrence such as an obstruction created by an avalanche or from the act of a third party); Horrocks, 841 S.W.2d at 416–17.

The Supreme Court's decisions establish five principles to consider in determining whether a condition on the premises constitutes a special defect. Hayes, 327 S.W.3d at 116. As the Texas Supreme Court explained in Paper,

> [A]s we have said, "the central inquiry is whether the condition is of the same kind or falls within the same class as an excavation or obstruction." York, 284 S.W.3d at 847 (citing Cnty of Harris v. Eaton, 573 S.W.2d 177, 179 (Tex. 1978)). In determining whether a particular condition is like an excavation or obstruction and therefore a special defect, we have mentioned several helpful characteristics, such as: (1) the size of the condition; (2) whether the condition unexpectedly and physically impairs an ordinary user's ability to travel on the road; (3) whether the condition presents some unusual quality apart from the ordinary course of events; and (4) whether the condition presents an unexpected and unusual danger. The Univ. of Tex. at Austin v. Hayes, 327 S.W.3d 113,116 (Tex. 2010) (per curiam) (citing York, 327 S.W.3d at 847).

376 S.W.3d at 765

[18] The duty and limitations on the obligation to install, maintain, and repair traffic control devices is discussed in section II(C)(4).

A special defect must be a condition that can be categorized as similar to an excavation or obstruction.

> "The [Act] does not define 'special defect' but does give guidance by likening special defects to 'excavations or obstructions. Thus,… we are to construe 'special defect' to include those defects of the same kind or class as excavations and obstructions. While these specific examples are not exclusive and do not exhaust the category, the central inquiry is whether the condition is of the same kind or falls within the same class as an excavation or obstruction. … A special defect, then, cannot be a condition that falls outside of this class. To the extent courts classify as 'special' a defect that is not like an excavation or obstruction on a roadway, we disapprove of them."

York II, 284 S.W.3d at 847 (internal citations and quotations omitted; City of Grapevine v. Roberts, 946 S.W.2d 841, 843 (Tex. 1997) (per curiam). Thus, loose gravel is not a special defect because it "does not form a hole in the road or physically block the road like an obstruction or excavation. York II, 284 S.W.3d at 847. Similarly, "construing a partially cracked and crumbling sidewalk step to be an excavation or obstruction grossly strains the definitions of those conditions. Roberts, 946 S.W.2d at 843. "A guardrail on a highway does impede travel or otherwise 'block' the road for an ordinary user in the normal course of travel, but rather, in accordance with its intended purpose, delineates the roadway's bounds", and thus was not a special defect. Perches, 388 S.W.3d at 656. Unless the condition constitutes an excavation or obstruction that impedes travel on the roadway, then it does not constitute a special defect under the Act. Denton Cnty. v. Beynon, 283 S.W.3d 329 (Tex. 2009).*. Special defects unexpectedly and physically impede or impair a car's ability to travel on the road. at 331;; State v. Rodriguez, 985 S.W.2d 83, 86 (Tex. 1999). See also Eaton, 573 S.W.2d at 178–79 ("chughole" that varied from six to ten inches in depth and extended over ninety percent of the width of the highway was a special defect); Hindman v. State Dep't of Highways., 906 S.W.2d 43 (Tex.App.—Tyler 1994, writ denied); Morse v. State, 905 S.W.2d 470, 475 (Tex.App.—Beaumont 1995, writ denied); Zachary, 824 S.W.2d at 819. Thus the condition must be one that cannot be avoided as the plaintiff's travels down the roadway. Paper, 376 S.W.3d at 766. For example the hole in the roadway in Eaton covered 90% of the roadway and varied from six to ten inches in depth and was four to nine-feet wide. Eaton, 573 S.W.2d at 178. The Supreme Court described the condition as reaching "the proportion s of a ditch across the highway." Id. at 179. By stark contrast the pothole in Paper was two inches to several more inches deep, located near the center of the lane; but could have easily been avoided by the plaintiff bicyclist without entering into the other lane of traffic. 376 S.W.3d at 765–67.

The defect must "present an unexpected and unusual danger to ordinary users of roadways." Payne, 838 S.W.2d at 238–39. The Supreme Court uses an Objective Expectations test for determining if a premises condition represents an unexpected and unusual danger to ordinary users of roadways. Denton County, 283 S.W.3d at 331. Where the premises condition would be encountered only where the driver went careening uncontrollably off the road, then that is not a special defect. Perches, 388 S.W.3d at 656 ("A guardrail … does impede … the road for an ordinary user in the normal course of travel, but rather … delineates the roadway's bounds"); Denton County, 283 S.W.3d 329, 332 (a floodgate arm that was three feet from the travel lanes of the road but was only encountered because the driver left the road and was out of control was not a special defect); City of Dallas v. Reed, 258 SW3d at 522 (there is nothing usually dangerous about a slight (two inch) drop-off between traffic lanes on a road). See also Payne, 838 S.W.2d at 238-39 (end of culvert located 22 feet from the edge of the road surface did not represent danger to the ordinary users of the roadway); Kitchen, 867 S.W.2d at 786 ("[w]hen there is precipitation accompanied by

near-freezing temperatures ... an icy bridge is neither unexpected nor unusual").

In order to be found to be a special defect the premises condition must be on or in very close proximity to a highway, road, or street. Payne, 838 S.W.2d at 238-39, n.3 ("conditions threatening normal users of a road may be special defects even though they do not occur on the surface of a road"); Barker, 907 S.W.2d at 885. "Our special-defect jurisprudence turns on the objective expectations of an 'ordinary user' who follows the 'normal course of travel.' In Beynon, the motorist struck a floodgate arm that was three feet off the roadway after the motorist lost control of his car. We held that an 'ordinary user' would not have left the roadway in this manner, and that the 'normal course of travel' would be on the actual road. Similarly, here, [plaintiff] did not take the normal course of travel. Road users in the normal course of travel should turn back or take an alternate route when a barricade is erected to alert them of a closed roadway." Hayes, 327 S.W.3d at 116 (quoting Denton County v. Beynon, 283 S.W.3d 329, 332 (Tex. 2009)). While many cases refer to conditions actually located on a roadway as special defects, some courts have held that a defect located close enough to road to present a threat to ordinary users of the roadway can be a special defect. See Taylor v. Wood County, 133 S.W.3d 811, 813 (Tex.App.–Texarkana 2004, no pet.); Harris County v. Ciccia , 125 S.W.3d, 749 (Tex.App. – Houston [1st Dist.] 2003, pet. denied)(a culvert yards beyond the road's end where a right turn only land directed traffic was held to be a special defect). As reasoned by the dissenting Justices in the Denton County opinion, "'ordinary users' of roads sometimes stray outside the lines, where there would be no need for shoulders. … [I]t is certainly not inconceivable that a normal user of a road might pull off or leave the edge of a road onto the unimproved shoulder for one reason or another, either intentionally or accidently. In the ordinary course of driving, hazards like road debris, livestock and other drivers who don't respect their lanes are often encountered that require prudent drivers to take advantage of the shoulder, where improved or unimproved." Denton County, 283 S.W.3d 329, 335 (J. O'Neill, Dissenting).

While these rules may assist in determining whether something is a special defect, the ultimate decision is made on a case by case basis. Set forth below are lists of premises conditions that have been found to be special defects, and other examples that have been found not to be special defects.

Premises Conditions That Have Been Found to be Special Defects.

(a) An oval shaped hole varying from six to ten inches deep and extending over ninety percent of the width of the highway, four feet wide at some points and nine feet wide at others, with the deepest part astride the center stripe, so big that one could not stay on the pavement and miss it, which had reached the proportions of a ditch across the highway and so severe that it made a car going 35 miles per hour flip and turn upside down in a bar ditch is a special defect. Eaton, 573 S.W.2d at 178-79; Wood County, 133 S.W.3d at 813 (collapsed culvert which ran across a road and was 6-8 feet wide and 4-6 feet deep was a special defect); Durham v. Bowie County, 135 S.W.3d 294, 297-98 (Tex.App. –Texarkana 2004, pet. denied); Stambaugh v. City of White Oak, 894 S.W.2d 818 (Tex.App.—Tyler 1994, no writ) (holding that collapsed portion of roadway fifteen feet wide and ten feet long was special defect).

(b) In a paved highway, a slick, muddy excavation that was so severe that a car going over it at about 15 miles per hour would slide and a car traveling at less than 35 miles per hour went out of control, off the road and turned over, is a "special defect." McBride, 601 S.W.2d at 552; City of San Antonio v. Schneider, 787 S.W.2d 459, 466-68 (Tex.App.—San Antonio 1990, writ denied) (wet, slippery road).

(c) A roadway with right-turn-only markings leading into a short road that ended in a culvert where there was no warning or indication of the culvert in the absence of roadway lighting at night was a special defect. Harris County v. Estate of Ciccia, 125 S.W.3d 749 (Tex.App. –

Houston [1st Dist.] 2003, pet. denied). There was no indication that the road simply ended, and no lighting by which to see this at night. While the sudden ending of the road onto which traffic was directed could simply have been a nuisance if a car had become mired in unpaved earth, the culvert located just beyond the end of road presented an unusual and unexpected danger to ordinary users of the designated right turn lane. ... Id.

(d) In the virtual absence of artificial lighting, a ditch four feet from the edge of road surface and adjacent to a street forming a "T" at which another street dead ended was a "special defect." City of Houston v. Jean, 517 S.W.2d 596, 599 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.).

(e) An opening in brush alongside a road, although appearing to be an intersecting road, was actually only an opening into a deep arroyo parallel to the road is a "special defect" according to dicta in Chappell v. Dwyer, 611 S.W.2d 158 (Tex.App.—El Paso 1981, no writ). The opening had been protected by a barrier in the past, but it had not been maintained and was not there at the time of the accident.

(f) A traffic signal base, which extended twenty-six inches above the travel portion of highway, was a special defect. Andres v. City of Dallas, 580 S.W.2d 908, 909-11 (Tex. Civ. App.—Eastland 1979, no writ).

(g) A large metal sign lying face down on lane of road is a special defect as a matter of law. State of Tex. v. Williams, 932 S.W.2d 546 (Tex.App.—Tyler 1995, writ denied) (with per curiam opinion).

(h) Ten-inch drop off along shoulder of road that prevented car's tire from re-entering the roadway was a special defect. State v. Rodriguez, 985 S.W.2d at 86; Morse, 905 S.W.2d at 475. See Tex.Dep't of TransTransp. v. Lopez, 436 S.W.3d 95, 105 (Tex.App.—Eastland 2015)() reh'g overruled (Aug. 14, 2014), review denied (Nov. 7, 2014) (summary judgment evidence raised fact quesitonquestion whether edge drop off was a special defect.).

(i) An 11-inch opening in a sidewalk caused by a missing meter box cover that was 20 feet from the curb and 2 feet from a building was a special defect. City of Austin v. Rangel, 184 S.W.3d 377, 384 (Tex.App.–Austin 2006, no pet. hist.). See City of El Paso v. Chacon, 148 S.W.3d 417, 422-23 (Tex.App.– El Paso, pet. denied) (because pedestrians walking up the street had to walk on the sidewalk, a condition on sidewalk could be a special defect.) But see City of El Paso v. Bernal , 986 S.W.2d 610 (Tex. 1999) (hole on sidewalk was an ordinary defect not a special defect).

Premises Conditions That Have Been Found **Not** to be Special Defects.

(a) Storm flooded road was not a special defect because it was not unexpected or unusual in times of heavy rains. Reyes, 335 S.W.3d at 608. Flood water two feet deep across a highway is an obstruction constituting a "special defect." But see Miranda v. State, 591 S.W.2d 568 (Tex.App.—El Paso 1979, no writ)(water flooding roadway as a special defect); Zachary, 824 S.W.2d at 818 (likewise, standing water extending from the curb to the middle of the two eastbound lanes of traffic, when the right lane was completely covered with a large amount of water that was at least three inches deep and at least to the top of the curb and out just past the center lane of the left lane, was a special defect).

(b) Confusing striping caused by old stripes showing through the worn pavement surface of a detour are not anything like a roadway obstruction or excavation and are not a "special defect." Carson, 599 S.W.2d at 854-55.

(c) A defective screen that allowed a mental patient to escape from a hospital was not a "special defect." Billstrom, 598 S.W.2d at 646-47.

(d) The Galveston Seawall is not a "special defect," it is "a unique condition designed to protect the public from dangers of storm water." Payne II, 772 S.W.2d at 473. Even slippery wet algae growth on rocks at the base of stairs descending the Galveston Seawall, causing plaintiff to slip and fall, was not a special defect. Blankenship, 775 S.W.2d at 439.

(e) A median cut on a city street creating a dangerous and confusing condition allowing a driver to enter the exit ramp traveling in the wrong direction is not a "special defect," because it was a long standing condition. Villarreal v. State Dep't of Highways and Pub. Transp., 810 S.W.2d 419, 421 (Tex.App.—Dallas 1991, writ denied). A long standing condition cannot constitute an unexpected or unusual condition on the roadway. Id. During bad weather, the temporary presence of four inches of water on the highway was not a special defect as a matter of law. Fontenot, 151 S.W.3d at 753.

(f) Dicta in Zachary states that water on a roadway is not a special defect unless it covers more than half of all the lanes of traffic. The defendant argued that the water did not constitute a special defect as a matter of law. Specifically, the State's brief claimed: "The evidence showed that the water did not cover the entirety of one lane much less two" and "[t]he evidence in this case is that water either partially or totally covered only one lane of a two lane, single directional roadway." Zachary, 824 S.W.2d at 819. In response to these assertions, the Fourteenth Court of Appeals concluded:

> [I]f either of appellant's statements constituted the entirety of the evidence in this case, we would be tempted to agree with appellant that, as a matter of law, no evidence of 'special defect' existed. Id.

(g) The leaf spring from a truck, measuring three inches wide, nine inches long, and less than a quarter inch thick, located off the road surface on the shoulder is not a special defect. Horrocks, 841 S.W.2d at 417.

(h) When there is precipitation accompanied by near-freezing temperatures, an icy bridge is not a special defect. Kitchen, 867 S.W.2d at 786. Under the circumstances, ice on the bridge was not unexpected or unusual. Id.

(i) Cars legally parked on the street are not special defects. Palmer v. City of Benbrook, 607 S.W.2d 295, 300 (Tex. Civ. App.—Fort Worth 1980, writ ref'd n.r.e.).

(j) Depression in a highway where asphalt sunk below abutting concrete bridge was not a special defect. Sutton v. State Highway Dep't, 549 S.W.2d 59, 60-61 (Tex. Civ. App.—Waco 1977, writ ref'd n.r.e.).

(k) Reservoir located at the edge of a city park was not a special defect because "danger is open and obvious and observable to anyone." Cantu, 831 S.W.2d at 421.

(l) A fully operational motor vehicle making an illegal movement or momentarily stopped on a highway is neither a defect in the highway premises, nor an excavation or obstruction or similar condition. State v. Burris, 877 S.W.2d 298 (Tex. 1994). See Barron, 880 S.W.2d at 303 (stalled car on bridge did not constitute a special defect).

(m) A culvert located twenty-two feet from the edge of the highway was not a special defect because it would not be encountered by ordinary users of the highway. Payne, 838 S.W.2d at 238-39; Maxwell, 880 S.W.2d at 465 (in reaching their decision, the Austin Court of Appeals cited evidence that the culvert had been in

place since the 1950's and that there had been no reported accidents at the site).

(n) An irregular oval shaped bump that was two-and-a-half-inches high and occupied the center of a shoulder ten feet wide with sufficient space for a bicycle to travel on either side of the bump was not a special defect, even for cyclists traveling on the shoulder of the road. Hindman, 906 S.W.2d at 45-46.

(o) Detour along frontage road that eventually led to a ninety degree turn was not a special defect as it was not an excavation or obstruction and did not impair a vehicle's ability to travel along the roadway. State v. Rodriguez, 985 S.W.2d at 86.

(p) The absence of a turn lane or safety devices is not a special defect–it is a "condition that is longstanding, routine, or permanent." Tex. Dep't of Transp. v. Phillips, 153 S.W.3d 121, 123 (Tex.App.—Beaumont 2004, no pet.).

(q) "Open and obvious" drainage block that plaintiff hit while riding her bicycle was not objectively unexpected and thus, not a special defect. City of Galveston v. Albright, 2004 WL 2439231 (Tex.App.—Houston [14th Dist.] 2004, no pet.).

(r) Embankment at end of extension was not a special defect because it was not a condition encountered by normal users of the roadway. Tex. Dep't of Transp. v. Andrews, 155 S.W.3d 351 (Tex.App.—Fort Worth 2005, pet. denied).

(s) Assuming a hole or gap in curb could be a special defect, 12-18 inch hole or gap in the curb did not constitute a special defect. Porter v. Grayson County, Tex., 224 S.W.3d 855 (Tex.App.–Dallas 2007, no pet.).

(t) Two to three inch change in height between lanes of roadway is not a special defect. City of Dallas v. Reed, 258 SW3d at 622. A pothole that was two inches to four inches in depth that could be easily avoided by the plaintiff bicyclist without going into the opposing land of traffic was not a special defect. Paper, 376 S.W.3d at 765-67.

(u) Half to three-quarters of an inch of gravel was not a special defect because it was not similar to an excavation or obstruction and did not present an unexpected or unusual danger to ordinary users of a roadway. York II, 284 S.W.3d at 847-48. "[W]e hold today… loose gravel… does not form a hole in the road or physically block the road like an obstruction or excavation." Tex. Dep't of Transp. v. Gutierrez, 284 S.W.3d 848 (Tex. 2009). However, the York II decision does suggest, in dicta, that "a sizeable mound of gravel left on a roadway could constitute a special defect. York II, 284 S.W.3d at 847-48.

(v) A seventeen-foot floodgate arm located approximately three feet off a two-lane road that was not properly secured and was pointing toward on-coming traffic was not a special defect where the driver struck the arm only because he lost control of his car and went off the road. Denton County, 283 S.W.3d 329, 332.

(w) A ninety-degree turn in a detour from a road construction project was not a special defect. Rodriguez, 985 S.W.2d at 86. See York II, 284 S.W.3d at 847-48.

(x) A bulldozer parked eight to ten feet off the edge of the road was not a special defect because it was not comparable to an excavation or obstruction and did not pose a threat to ordinary users of the roadway. City of Dallas v. Giraldo, 262 S.W.3d 864, 871 (Tex.App.—Dallas 2008, no pet).

(y) A guardrail is intended to mark the bounds of a roadway and thus as matter of law does not present a risk to the ordinary users of the roadway and does not constitute a special defect. Perches, 388 S.W.3d at 655-56. The Supreme Court's ruling was predicated upon that fact that driver in

> Perches ran into the guardrail only because he failed to make a turn in accordance with the roadway's design. Id.

(iii) Whether the Condition is a Special Defect is Determined by the Court Not the Jury.

Whether a condition is a premise defect or a special defect is a question of duty involving statutory interpretation and thus an issue of law for the court to decide.

York II, 284 S.W.3d at 847-48.; Payne, 838 S.W.2d at 238; State v. Rodriguez, 985 S.W.2d at 86; Burris, 877 S.W.2d at 298. Accordingly, the question of whether or not a premises condition is a special defect is not submitted to the jury. Payne, 838 S.W.2d at 238.

(iv) Duty Owed in Case of a Special Defect.

A special defect eliminates the requirement of actual knowledge before the government occupant is obligated to act. In the case of a special defect, the plaintiff obtains the status of an invitee. Consequently, the governmental occupant has the duty to use ordinary care to reduce or eliminate an unreasonable risk of harm of which the defendant knew or reasonably should have known. City of Dallas v Reed. 258 SW3d at 622; Eaton, 573 S.W.2d at 179; York II, 284 S.W.3d at 847. (duty to warn of a condition the governmental entity should have known or a condition that created an unreasonable risk of harm). Therefore, the first question the jury must decide is whether the defendant knew or in the exercise of ordinary care should have discovered the existence of the premises defect that represented an unreasonable risk of harm. Id.; Horrocks , 841 S.W.2d at 417; Eaton 573, S.W.2d 179. See also Taylor, 133 S.W.3d at 814-15 (county had no notice of washout as would give rise to the duty to work).

While there is agreement that a special defect requires the occupant to act based upon constructive knowledge, there is a disagreement regarding the governmental occupant's duty of care in the case of a special defect. Payne describes the duty owed in a special defect case as follows:

> If the culvert was a special defect, the State owed Payne the same duty to warn that a private landowner owes an invitee .... That duty requires an owner to use ordinary care to reduce or eliminate an unreasonable risk of harm created by a premises condition of which the owner is or reasonably should be aware.

Payne, 838 S.W.2d at 237. Eaton, however, held that a governmental defendant discharges its duty in the case of a special defect by warning of the condition. Eaton, 573 S.W.2d at 180.

Eaton's view of duty is supported by the language of the TCA. Subsection (b) of 101.022 states that the limitation of liability to that of a licensee "does not apply to the duty to warn of special defects." TEX. TORT CLAIMS ACT § 101.022. As explained by the supreme court:

> [T]his proviso of section 18(b) [now section 101.022(b)] was meant to enlarge the liability in some instances by imposing the duty to warn when there was a special defect. Accordingly, we hold that ... the County had the duty to warn as in the case of the duty one owes to an invitee.

Id. (emphasis added). See Horrocks , 841 S.W.2d at 417 (the presence of a special defect imposes the duty of an invitor to warn of or make reasonably safe dangerous conditions when it knows of them or could have discovered them with reasonable diligence). See also Maxwell, 880 S.W.2d at 464-65 (motorist was warned of culvert by amber reflectors). See Durham, 135 S.W.3d at 297-98 (county discharged its duty by putting up a warning sign, even though that sign was removed by third parties).

Again, the nature of the premises controlled and activities that governmental entities must conduct requires that they be able to discharge their duty by warning of the defect. The supreme court in Eaton held that a "special defect" could result from an avalanche, some other natural disaster, or from the acts of third persons. Eaton, 573 S.W.2d at 179. If a rock

slide blocks a roadway, or if an earthquake destroys a bridge, the government must be able to discharge its duty by warning of the dangerous condition until it can be repaired. Furthermore, in repairing the damage done by such a natural disaster it may be impossible to make the premises reasonably safe while construction is ongoing. Unless the governmental occupant discharges obligations by warning of the condition, it would face absolute strict liability because it would be impossible to discharge its duty.

(v) The other exclusions from liability set forth in the TCA apply to special defect claims.

In Perches the court of appeals had found that the guardrail in question was a special defect because the roadway abruptly ended, there was a lack of signage showing the drivers could only turn one direction, and the possibility that lighting was insufficient at the time of the accident. Perches, 388 S.W.3d at 655. The Supreme Court rejected the court of appeal's analysis holding that the design of the roadway is discretionary and the TCA provides that governmental entities cannot be held liable for discretionary decisions. Id. at 655-56.

(2) The Standards of Liability in Special Defects Versus Ordinary Premises Defects Cases.

The central difference between liability in ordinary premises cases and special defect cases is the knowledge of the plaintiff and defendant. As explained by the Texas Supreme Court:

> There are two differences between these theories. The first is that a licensee must prove that the premises owner actually knew of the dangerous condition, while an invitee need only prove that the owner knew or reasonably should have known. The second difference is that a licensee must prove that he did not know of the dangerous condition, while an invitee need not do so.

Payne, 838 S.W.2d at 237.

The second difference is critical to a plaintiff. For a licensee, knowledge of the condition is a complete bar to his recovery and a licensee must prove and obtain a jury finding that he was without knowledge of the dangerous condition in order to recover damages. Id. An invitee's knowledge goes only to his comparative negligence. Id.

9. Section 101.022(a): Liability for Premises Defects When the Plaintiff Pays for the Use of the Premises.

a. When Has the Plaintiff Paid for the Use of the Premises?

The mere payment of a fee related to the premises does not establish that the plaintiff has paid for the use of the premises. Section 101.022(a) provides that the licensor/licensee standard of care does not apply when the plaintiff pays for the use of the premises. TEX. TORT CLAIMS ACT § 101.022(a). The "payment" must be "for the use" of the premises at issue in the litigation. Kitchen, 867 S.W.2d at 786-87. See Tex. Parks & Wildlife Dep't, 988 S.W.2d at 372-374. Thus, in Kitchen, the Texas Supreme Court held that the payment of vehicle registration and licensing fees did not constitute payment for the use of a state highway. Id.; Garcia, 817 S.W.2d at 741. Garcia further holds that the payment of fuel taxes was not a payment for the use of the roadway. Id. In Daniels v. Univ. of Tex. Health Sci. Ctr., the First District Court of Appeals in Houston refused to extend Kitchen to cover a bus driver at the medical center injured when she stepped in a hole. 2004 WL 2613282 (Tex.App.—Houston [1st Dist.] 2004, no pet. h.). The court rejected Daniels's argument that a property owner should not receive more protection when one he pays for services is injured than when someone who pays for entry onto the property is injured. Id.

However, the payment of fees for services provided at the premises may mean that the plaintiff is an invitee. For example, the First Court of Appeals held that the payment of medical charges at a government owned hospital constituted payment for the use of the hospital premises. Felter, 837 S.W.2d at 247-48. Thus, a

couple's payment of hospital charges meant that a wife injured while visiting her husband was an invitee rather than a licensee. Similarly, the Austin court found the fee to enter a state park was a payment for the use of that premises and granted the plaintiff status as an invitee in the park. Tex. Parks & Wildlife Dep't , 988 S.W.2d at 372-74.

Following Kitchen, section 101.022(a) will have very limited applications in the case of defects on roadways. Clearly, the payment of vehicle registration and licensing fees, as well as fuel taxes, will be insufficient to establish that the plaintiff has paid for the use of any road on the state highway system. Kitchen, 867 S.W.2d at 786-87. Similarly, the payment of supplemental county vehicle registration fees should not constitute payment for the use of county or city roads. Under Kitchen, only the payment of a toll for the use of toll roads could create a situation where the plaintiff will be considered as having paid for the use of the particular roadway. See id.; Tex. Parks & Wildlife Dep't, 988 S.W.2d 372-74.

Kitchen also has long reaching implications when the plaintiff will be considered to have paid for the use of other types of governmental premises. Under Kitchen, the payment of state, county, or city taxes will not mean that a plaintiff has paid for the use of a particular government building or property. Only a fee charged for entry onto a particular premises, such as the purchase of a ticket to get into a zoo, museum, gallery, concert hall, or theater, will mean that the plaintiff must be considered as an invitee under § 101.022(a).

(1) Section 101.022(a) does not apply to recreational facilities. As set forth in section VIII c below, Chapter 75 of the Civil Practice and Remedies Code establishes the standard of care that landowners, including governmental entities, owe to persons who use recreational facilities (such as parks).

Chapter 75 provides that the duty owed to users of recreational facilities is that owned to a trespasser, namely not injuring willfully, wantonly or through gross negligence. See TEX. CIV. PRAC. & REM. CODE § 75.002. Chapter 75 sets the standard of care for recreational facilities even when the plaintiff pays an admission fee to get into the park or other recreational facility. State v. Shumake, 131 S.W.3d 66, 81 (Tex.App.—Austin 2003, pet. filed), aff'd, 199 S.W.3d 279 (Tex. 2006).

b. Duty Owed to Plaintiff That Has Paid for the Use of the Premises.

If the injured person paid for the use of the premises, then the government owes the person a duty owed to an invitee on private property. Tex. Parks & Wildlife Dep't, 988 S.W.2d 372-74. Therefore, the governmental entity's duty arises when it has actual or constructive knowledge of a dangerous condition. Id.; Rawlings v. Angelo State Univ., 648 S.W.2d 430, 433 (Tex.App.—Austin 1983, writ ref'd n.r.e.). However, the extent of the governmental defendant's duty is the same as if the plaintiff were a licensee.

> As to invitees, an occupier of property owes a duty to maintain the premises in a reasonably safe condition; a duty of reasonable care to inspect and discover a condition involving an unreasonable risk of harm; and a duty to protect against the danger and make safe any defects or to give an adequate warning thereof. Id.

Once again, the governmental occupant discharges its duty if it warns of the premises defect. Id.

10. Sections 101.022(a) and 101.060: Liability for Signs, Signals and Traffic Control Devices.

Claims involving signs, signals and traffic control devices are special categories of premises liability cases to which additional liability limitations apply under the TCA. Section 101.022 provides two exceptions to the basic premises liability licensor duty of care. One exception for special defects and another for cases involving the "... absence, condition, or malfunction of traffic signs, signals, or warning devices as is required by section 101.060." Section 101.060 states:

Traffic and Road Control Devices

> (a) This chapter does not apply to a claim arising from:
>
> > (1) the failure of a governmental unit initially to place a traffic or road sign, signal, or warning device if the failure is the result of discretionary action of the governmental unit;
> >
> > (2) the absence, condition, or malfunction of a traffic, or road sign, signal, or warning device unless the absence, condition, or malfunction is not corrected by the responsible governmental unit within a reasonable time after notice; or
> >
> > (3) the removal or destruction of a traffic or road sign, signal, or warning device by a third person unless the governmental unit fails to correct the removal or destruction within a reasonable time after actual notice.
>
> (b) The signs, signals, and warning devices referred to in this section are those used in connection with hazards normally connected with the use of the roadway.[19]

TEX. CIV. PRAC. & REM. CODE ANN. § 101.060 (West 2005).

Section 101.060 does more than simply define the government's duty in connection with the absence, condition, or malfunction of a traffic or road sign, signal, or warning device. A claimant's failure to establish that the government has breached this duty results in the claim's being barred because there is no waiver of sovereign immunity.

The term "condition" as used in subsection (2) "refers to either an intentional or an inadvertent state of being." For example, a city could be liable for not fixing a red arrow stop signal that it knew caused problems for drivers deciding what to do when confronted with the red arrow. Sparkman v. Maxwell, 519 S.W.2d 852 (Tex. 1975). Similarly, the failure to replace a stop sign within a reasonable time of learning that it had been stolen could be the basis of liability. City of Dallas v. Donovan, 768 S.W.2d 905, 908-909 (Tex.App.—Dallas 1989, no writ). On the other hand, the fact that a stop sign could be stolen easily by vandals could not form the basis of suit under section 101.060. Lawson v. Estate of McDonald, 524 S.W.2d 351, 356 (Tex. Civ. App.—Waco 1975, writ ref'd n.r.e.).

> [T]he term ["condition" as used in the Act] refers to the maintenance of a sign or signal in a condition sufficient to properly perform the function of traffic control for which it is relied upon by the traveling public. This must be so, inasmuch as there are other provisions in the statute expressly relieving the State from liability for claims growing out of the removal of signs, signals and devices by third parties without a reasonable time for replacement after actual notice to the State of the removal.

Id. "[T]he Texas Tort Claims Act will hold the state is liable only if it has knowledge that a sign is not performing its function." Creek v. Tex. State Dep't of Highways, 826 S.W.2d 797, 802 (Tex.App. —Houston [14th Dist.] 1992, writ denied) (emphasis added).

[19] Section 101.060(c) further provides that: "This section does not apply to the duty to warn of special defects such as excavations or roadway obstructions."

In Tex. Dep't of Transp. v. Garza, 70 S.W.3d 802 (Tex. 2002), the Supreme Court had to determine what constituted a "condition" that would give rise to liability for a road sign under §101.060(a)(2). As noted above, TCA §101.060(a)(2) provides that a governmental entity can be held liable for the condition or malfunction of a traffic sign or traffic control device if it fails to correct the problem within a reasonable time after learning that the device or signal is not functioning properly. Garza, 70 S.W.3d at 807-08.

The Supreme Court noted that a governmental entity can be held liable under (a)(2) where the view of a traffic sign or signal is obstructed, the sign or signal has fallen down or is not functioning, or the sign or signal conveyed the wrong traffic control information. Id. at 887-08. The Garzas, however, were complaining about a speed limit sign that was in place and showed the proper speed limit. The Garzas contended that the speed limit sign was not functioning properly because its location did not cause cars to slow down far enough in advance of the school zone it marked. The Supreme Court rejected this argument and found that the Department of Transportation cannot be liable because the sign correctly displayed the speed limit.

> Accordingly, under sections 101.021(2) and 101.060(a)(2), no 'condition' was present requiring corrective action by TxDOT. At most, the Garzas have alleged that TxDOT improperly set the speed limit in the area of 45 miles per hour ... 'the source of the alleged problem ... is the setting of the legal speed limit, not the sign displaying that limit.'

Id. at 808 (quoting Bellnoa v. City of Austin, 894 S.W.2d 821, 825 (Tex.App.–Austin 1995, no writ)).

However, even if the Department of Transportation knows that a sign is being stolen frequently, the Supreme Court held that it is not liable unless it failed to replace the sign within a reasonable time of its "actual" notice that it was stolen. State v. Gonzalez, 82 S.W.3d 322 (Tex. 2002). In Gonzalez, the issue was whether liability for a stop sign that had been repeatedly stolen by vandals was covered by TCA §101.060(a)(2) or (a)(3). The accident in Gonzalez resulted from a stop sign being stolen at the intersection of two farm-to-market roads. It was uncontested that TxDOT regularly had to replace the stop sign at issue because it was being stolen or vandalized so frequently. Because of the frequency with which the stop sign was being stolen, the plaintiffs contended that §101.060(a)(2) controlled the determination of liability. The plaintiffs argued that because TxDOT knew the sign was being stolen and vandalized frequently, it had actual notice that the sign was not serving its intended purpose and had not made efforts to cure the malfunction within a reasonable time after having such notice. Id. at 327-28. The plaintiffs contended that the highway department was liable for failing to put up additional signs or signals indicating that traffic on one of the farm-to-market roads should stop or for failure to prevent vandals from being able to remove the stop signs.

The Supreme Court rejected the plaintiffs' arguments, stating that §101.060(a)(3) controls liability in all cases where third persons remove a traffic control device or cause that device not to work. Id. at 321-30. "The removal or destruction of a traffic or road sign ... by a third person [cannot be the basis of liability] unless the governmental unit fails to correct the removal or destruction within a reasonable time [of having] actual notice [of removal or destruction]." TEX. CIV. PRAC. & REM. CODE § 101.060(a)(3). Consequently, because the stop sign had been removed by vandals, TxDOT could not be held liable unless it failed to replace the stop sign within a reasonable time of when it had "actual" notice of the stop sign being stolen. Id. at 329-30. There was no evidence that TxDOT had notice that the stop sign had been stolen at the time of the auto accident. Id. Therefore, judgment was rendered that the plaintiffs take nothing. Gonzalez is in accord with earlier courts of appeals cases on similar issues.

Creek demonstrates the extent of liability under this section of the TCA. Creek arose out of

an intersection collision allegedly caused by a missing stop sign. There was no allegation or evidence that the state had actual knowledge the stop sign was down. Plaintiff alleged, and the jury found, that the stop sign had been installed without enough concrete around the base, thus creating a dangerous condition likely to result in its being knocked down, and that the state had actual knowledge of this. Following the reasoning of Estate of McDonald, the Creek court rejected plaintiff's theory that liability under §101.060 could be predicated upon the failure to install a stop sign with sufficient concrete to hold the sign upright. The Fourteenth Court of Appeals held that "'condition' ... of ... property contained in Section 101.021 of the Act does not refer to the original installation of a stop sign insofar as whether it was imbedded in a sufficient amount of concrete or in a hole of sufficient depth." Id. The court went on to hold that the plaintiff could establish liability in the case of a missing stop sign only by showing that the government had actual knowledge that the sign was absent. Id.

Plaintiff's theory that the dangerous condition was the negligently installed stop sign, and not the downed stop sign, is a variation on the negligent activity theory rejected in Keetch, which was decided by the supreme court after Creek. In a premises liability case, an owner/occupier has potential liability only for a dangerous condition that actually causes the accident. Creek's accident was caused by the stop sign's being down, not by the way the sign had been installed in the first place. See id.

In City of Grapevine v. Sipes, the Texas Supreme Court addressed a governmental entity's liability under section 101.060(a)(2) when the entity decides to put a traffic control device in place but does not do so in a timely manner. City of Grapevine v. Sipes, 195 S.W.3d 689 (Tex. 2006). In Sipes, a series of accidents at the intersection of two highways near construction of a large mall led the city to decide to install a traffic signal. Id. The city set a target date for installing the signal, but the signal was not actually installed until over a month later. Id. Between the time the signal was to be installed and the date it was actually installed, Sipes and her daughter were injured in an accident at the intersection. Id. Sipes brought suit alleging the city was liable under Section 101.060(a)(2). Sipes argued that the delay in installing the signal created liability because the city failed to act within a "reasonable time after notice" of the need for the light. Id. The Supreme Court held that the city could not be liable because liability under Section 101.060(a)(2) requires the preexistence of the signal. The court pointed out that while an entity may decide to install a traffic signal at a given location, intervening events may lead to a decision to delay or cancel installation because there are other more important priorities. Id.

The obstruction of a stop sign from view by trees or branches is a "condition" that can form the basis of liability.

> Accordingly if a city has prior notice of such a condition and fails to remedy such condition within a reasonable time, it may be liable under the Texas Tort Claims Act.

Lorig v. City of Mission, 629 S.W.2d 699, 701 (Tex. 1982). See Tex. Dep't. Transp. v. Pate, 170 S.W.3d 840 (Tex App.–Texarkana 2005, pet. denied); Parker County v. Shankles, 2003 WL 22026592 (Tex.App. –Fort Worth 2003, pet. denied) (vegetation off of county property was a condition affecting stop sign).

a. Liability Based Upon "Notice" or "Actual Notice."

(1) "Actual Notice" Defined.

Actual notice is "information concerning a fact actually communicated to or obtained by a city employee responsible for acting on the information so received or obtained." Donovan, 768 S.W.2d at 905, 908.

(2) "Notice" Defined.

Notice may be defined as information concerning a fact actually communicated to a person by an authorized person, as information actually derived by him from a proper source, or else as information presumed by the law to have been acquired. Presumed information is considered the equivalent, in legal effect, of full knowledge. It has also been determined that "imputed actual notice carries with it the same legal consequences as conscious knowledge"."

State v. Norris, 550 S.W.2d 386, 389 (Tex. Civ. App.–Corpus Christi 1977, writ ref'd n.r.e.).

b. Section 101.060 Applies Only if the Defendant's Employees Did Not Cause the Malfunction or Absence.

The standard of liability established by §101.060 applies only if an employee of the defendant did not cause or contribute to the absence or malfunction of the traffic control device. Ramming, 861 S.W.2d at 465-66. The Ramming court held that this section of the TCA is applicable only when the absence or malfunction of a traffic sign or signal is the result of an act of God, or the result of some third party not under the control of the defendant. When a traffic signal is disconnected through the actions of the defendant's agent, however, the plaintiff does not need to establish that the defendant failed to fix or repair the device within a reasonable time of learning that the device was absent or malfunctioning. Id. Following the Ramming decision, if a traffic sign or signal is removed, non-functioning, or otherwise not operating properly as a result of the actions of defendant's employees, defendant will be held liable under a negligence standard for any injuries resulting from the employee's removal of the traffic control device. Id.

c. Traffic Control Devices Covered by Section 101.060.

The signs, signals, and traffic control devices to which section 101.060 applies are those used in connection with hazards normally connected with the use of the roadway, and not to special defects. Palmer made this distinction and held that legally parked cars are not special defects:

> We hold that, as a matter of law, a legally parked car and the consequences of a narrowed passageway, is a "hazard[s] normally connected with the use of the roadway" under Sec. 101.060 of the Act and therefore the City cannot be held liable for failing to warn of the "condition" because its failure to warn was the result of discretionary actions of said governmental unit.

Palmer, 607 S.W.2d at 300; Burris, 877 S.W.2d at 299 (motor vehicle momentarily stopped on the highway was not a special defect).

d. Discretionary Signal Placement and the Texas Manual on Uniform Traffic Control Devices.

For a period of time the significance of the Texas Manual on Uniform Traffic Control Devices (the "Manual") in signage cases was uncertain. The Manual was adopted by the State Highway and Public Transportation Commission under authority conferred by TRANSPORTATION CODE § 544.001 (West 1999). Section 544.002 authorizes the State Department of Highways and Public Transportation to place signs conforming to the Manual on state highways. Id. Transportation Code §544.002 also authorizes local governmental units to place signs conforming to the Manual on highways under their jurisdiction. Id.

Sign applications are either mandatory, advisory or permissive under the Manual. The Supreme Court has held that even the placement of signs that the Manual provides as "mandatory," is discretionary and subject to the exemption from liability provided in section 101.060(a) of the Act. State Dep't of Highways v. King, 808 S.W.2d 465 (Tex. 1991); see Tex. Dep't of Transp. v. Andrews, 155 S.W.3d 351 (Tex.App.–Fort Worth 2005, pet. denied) (neither state nor federal manual waives immunity). The Court noted that the Manual itself declares that it is no substitute for engineering judgment, and that the statute authorizing adoption of the Manual affords the State discretion in placing traffic control devices. Id. at 466. TEX. TRANSP. CODE §§ 544.001-544.002 (Vernon 1999), provided for discretion in the initial placement of signs. TEX. CIV. PRAC. & REM. CODE ANN. § 101.060(a)(1) exempts from liability the initial failure to place signs, signals, or warning devices, assuming the failure is a result of discretionary action. Villarreal, 810 S.W.2d at 420-21. Additionally, other traffic sign and signal manuals containing language similar to the Manual do not override the exemption from liability created by section 101.060. Bellnoa, 894

S.W.2d at 827 (provisions of the City of Austin School Safety Manual that was similar to the Manual "does not impose a non-discretionary duty on the City"). However, a local governmental entity can be held liable for failure to install traffic control devices in accordance with the local governmental entity's ordinance or law. Sullivan, 33 S.W.3d at 13-15 (city could be held liable for failing to operate school zone cross-walk signals in manner consistent with city ordinance.)

The protection afforded by TCA §101.060 does not extend to a governmental entity's duty to warn of special defects or repair traffic control devices it chooses to install. Section 101.060(c) requires governmental entities to warn of special defects. Moreover, it requires governmental entities to warn of special defects even if the decision to place signs, signals or traffic control warnings would otherwise be considered discretionary. Maxwell, 880 S.W.2d at 463-64. Following this rationale, the Austin court concluded that a governmental entity could not rely upon the discretionary act defense established by §101.060(a) when the premises condition at issue is a special defect. Id. The court concluded that when a special defect exists, there is a "mandatory duty" to warn of that defect. Id.

Additionally, while the initial installation of signs and signals may be discretionary, once installed the governmental entity has the duty to maintain them under TCA §101.060(a)(2). Sullivan, 33 S.W.3d at 11-12.

11. Section 101.023: Limitations on the Amount of a Governmental Unit's Liability.

Section 101.023 establishes four liability caps based upon the governmental entity's being sued. State government liability for money damages is limited to $250,000.00 for each person, $500,000.00 for each single occurrence of bodily injury or death, and $100,000.00 for a single occurrence of damage to or destruction of property. For local governmental entities other than cities, their liability for money damages is limited to $100,000.00 for each person, $300,000.00 for each single occurrence of bodily injury or death, and $100,000.00 for each single occurrence of injury or destruction of property. A municipality's liability under the TCA is limited to a maximum amount of $250,000.00 for each person, $500,000.00 for each single occurrence of bodily injury or death, and $100,000.00 for each single occurrence of damage or destruction to property.[20] Finally, the liability that may be incurred by an emergency service organization is limited to money damages in a maximum amount of $100,000.00 for each person, $300,000.00 for each single occurrence for bodily injury or death, and $100,000.00 for injury to or destruction of property.

Texas courts have upheld the constitutionality of liability limits established by the Act. At common law, plaintiffs could not bring a tort claim against governmental entities, therefore, the liability cap does not violate the due process and equal protection clauses of the United States and Texas Constitutions. Ray, 712 S.W.2d at 273; Tarrant County Water Control & Improvement Dist. No. 1 v. Crossland, 781 S.W.2d 427, 439 (Tex.App.–Fort Worth 1989, writ denied*), rev'd on other grounds*, City of Dallas v. Mitchell, 870 S.W.2d 21 (Tex. 1994) . See Univ. of Tex. Med. Branch v. York, 808 S.W.2d 106, 111 (Tex.App.–Houston [1st Dist.] 1991), *rev'd on other grounds*, 871 S.W.2d 175 (Tex. 1994). Additionally, the liability cap has withstood challenges that it deprives plaintiffs of the right to trial by jury. Ray, 712 S.W.2d at 273. In upholding the constitutionality of the liability limitations, the courts point out that before the enactment of the TCA, governmental units, except for municipalities, were immune from tort liability. City of Austin v. Cooksey, 570 S.W.2d 386, 387 (Tex. 1978). Accordingly, if plaintiffs are going to enjoy the benefits of the TCA, they must also accept the liability limits established therein. Id.

[20] Of the various types of local governmental entities, only municipalities have the higher liability cap. Edinburg Hosp. Auth. v. Trevino, 941 S.W.2d 76, 82-83 (Tex. 1997) (J. Hecht, concurring). Thus, a hospital district's liability is limited to a $100,000/$300,000 cap. Id.

The courts have also interpreted section 101.023 so as to further limit the liability of governmental units. In Cooksey, the supreme court held that a governmental unit's maximum liability is determined by the number of persons actually involved in the accident, as opposed to the number of plaintiffs and an intervenor. Only one individual was involved in the accident that gave rise to the suit. At that time, a county's maximum liability was limited to $100,000.00 per person and $300,000.00 per single occurrence. The court held that:

> When one person is injured or killed, and one plaintiff brings suit, the applicable limit of liability is $100,000.00. That limit should not change simply because the deceased is survived by two or more statutory beneficiaries under the wrongful death statute.
>
> The controversy here centers around whether the term "per person" in the statute refers to the person injured or those persons who suffered a loss as a result of the injury to someone else. We think the clear meaning of the statute is that it refers to the person or persons who sustain injury.

Id. at 387-88; Whipple v. Deltscheff, 731 S.W.2d 700, 705 (Tex.App.–Houston [14th Dist.] 1987, writ ref'd n.r.e.). Furthermore, the plaintiff's total recovery, including prejudgment interest, cannot exceed the liability cap. Weller v. State, 682 S.W.2d 234 (Tex. 1984); York II, 808 S.W.2d at 111-12. The statutory cap on award of damages applies to and limits the recovery of prejudgment interest even when the plaintiff makes an offer to settle for the maximum statutory amount and the offer is rejected. Id. The statutory maximum amount of recovery under the TCA, however, does not apply to recovery of post-judgment interest. Id.

On the other hand, a governmental entity's offsets for contribution, indemnity, or reductions for the percentage of negligence attributable to another party are calculated from the plaintiff's total damages rather than the defendant's liability cap. Trevino, 941 S.W.2d at 81-82; Univ. of Tex. v. Nava, 701 S.W.2d 71, 72-73 (Tex.App.–El Paso 1985, no writ). In Nava, the plaintiff's total damages were $160,000.00 and responsibility for these damages were assigned 50% to the plaintiff and 50% to the defendant. The trial court reduced the plaintiff's recovery to $80,000.00. The State argued that the 50% reduction should be made from its maximum liability, $100,000.00, limiting plaintiff's recovery to $50,000.00. The El Paso court found that there was no justification for calculating the offset from the defendant's liability cap. Id. Similarly, any adjustments for contribution for payments made by settling defendants is applied to the plaintiff's total recovery, not from the governmental entity's liability cap. Trevino, 941 S.W.2d at 81-82. Accordingly, any reduction for settlements, or comparative negligence should be calculated from the plaintiff's total damages. Id.; Nava, 701 S.W.2d at 72-73.

Finally, the TCA's prohibition on the recovery of exemplary damages does not extend to proprietary activities claims against municipalities. Section 101.024 states that the Act does not authorize the recovery of exemplary damages for suits brought thereunder. The TCA does not control suits against municipalities involved in proprietary activities. Turvey, 602 S.W.2d at 519. Thus, the TCA preserves a plaintiff's common law right to seek "unlimited damages" for negligent acts of municipalities engaged in proprietary functions. Id.

In Pike, 727 S.W.2d at 518-24, the supreme court held that unlimited common law liability extended to claims for punitive damages and established a standard for their recovery. Municipalities can be held liable for punitive damages as a result of proprietary activities when the plaintiff proves: (1) the active tort feasor "engaged in willful, wanton, malicious, or grossly negligent conduct ... [demonstrating] that the acts giving rise to the claim were committed with such malice or evil intent, or such gross negligence as to be equivalent to such intent;" and (2) the acts were attributable to the municipality through a showing that they "were expressly authorized by the municipal government or that they were done 'bona fide in pursuance of general authority to act for the municipality on the subject which they relate' ... [l]iability must rest on

official policy, meaning the city government's policy and not the policy of an individual officer." Id. at 523.

VI. LIMITATIONS ON WAIVER OF SOVEREIGN IMMUNITY UNDER THE TCA

This section of the paper addresses particular defenses to governmental liability aside and apart of establishing that the defendant was not negligent or defeating one element of a premises liability claim. Generally speaking, the defenses break down into two different categories: (1) those defenses that carry over from common law; and (2) the special defenses (or exclusions from liability) created by the TCA

A. Common Law Defenses.

1. Sovereign Immunity.

As set out in Section III A above, sovereign immunity remains a defense to both suit and liability. Governmental entities continue to enjoy sovereign immunity from suit and liability. York, 871 S.W.2d at 445-46; Horrocks, 841 S.W.2d at 416. See City of Watauga v. Gordon, 434 S.W.3d at 589 (Tex. 2014) ("[g]overnmental immunity generally protects municipalities and other state subdivisions from suit unless the immuniy has been waived by the constitution or state law.); Alexander v. Walker, 2014 WL 293549, *2 (Tex. 2014). A plaintiff has permission to sue and assert a waiver of immunity only if liability arises under the TCA or other statute. York, 871 S.W.2d at 445-46; Horrocks, 841 S.W.2d at 416. See City of Watauga v. Gordon, 434 S.W.3d at 589; City of Bellaire v. Johnson, 400 S.W.3d 922, 924 (Tex. 2013) (unless the TCA creates a waiver of immunity, then the suit is barred by sovereign/governmental immunity). TEX. CIV. PRAC. & REM. CODE § 101.025. As explained by the Eastland Court of Appeals, "[w]hen the [Tort Claims Act] does not apply, immunity is still the rule." General Elec. Co., 795 S.W.2d at 313; Maxwell, 880 S.W.2d at 463. Thus, a plaintiff must be able to point to a clear waiver of immunity, or his suit is barred. Ramming, 861 S.W.2d at 486-87; Valdez, 869 S.W.2d at 447; Schaefer v. City of San Antonio, 838 S.W.2d 688, 691, 693 (Tex.App.–San Antonio 1992, no writ).

The defense of sovereign immunity is often applied in cases where the TCA recognizes a cause of action, but the plaintiff seeks to hold the defendant liable under the wrong standard of liability. In the premises liability context, this arises typically in two very similar types of cases. The first instance occurs in cases such as Tennison, in which the defect is a "dangerous condition," and liability is predicated upon a negligence standard of liability. Tennison, 509 S.W.2d at 560. The plaintiff's failure to establish that the defendant had actual knowledge of the condition precludes liability. The second instance also involves the application of the wrong standard of liability. In these cases, such as Payne III and Kitchen, the plaintiff alleges that the premises defect constitutes a "special defect," but in fact it is merely a "dangerous condition." Dep't of Highways. and Pub. Transp. v. Payne, 781 S.W.2d 318 (Tex.App.–Houston [1st Dist.] 1989) *rev'd on other grounds* , 838 S.W.2d 235 (Tex. 1992) ("Payne III"); Kitchen, 867 S.W.2d at 784. Again, the failure to obtain a finding of actual knowledge means the defendant cannot be held liable.

These cases hold lessons of critical importance for both plaintiffs and defendants. A plaintiff must make certain there is a waiver of immunity. Furthermore, a plaintiff must also insure that he obtains from the jury all of the findings necessary to support a judgment against the governmental defendant based upon the type of defect at issue. If there is any doubt as to the applicable standards of liability, both standards should be submitted to the jury. See Tex. Dep't of Transp. v. Cotner, 877 S.W.2d 64, 66-67 (Tex.App.–Waco 1994, writ denied) (whether ice on bridge was not a special defect was immaterial where jury found for plaintiff licensor/licensee liability issues). See also Zachary, 824 S.W.2d at 813. Defense attorneys, on the other hand, must make sure to take the procedural steps necessary to assert the standard of limited liability created by the TCA in premises liability cases. Pleading sovereign immunity, however, is not sufficient to perfect a record for appeal. Defense counsel must make sure that her objections and exceptions are sufficient to obtain a reversal on appeal. See Payne, 838 S.W.2d at 239-41; Koblizek, 752 S.W.2d at 660.

2. Exhaustion of Administrative Remedies

Generally, a plaintiff must exhaust his administrative remedies prior to filing suit. The requirement to exhaust administrative remedies may arise as an express prerequisite to filing suit or because an administrative agency has exclusive jurisidiction initially.

Where the Legislature grants an adminstrative agency sole authority to make an initial determination, the agency has exclusive jurisdiction. City of Houston v. Rhule, 417 S.W.3d 440, 442 (Tex. 2013). In those cases, the plaintiff must exhaust his administrative remedies before filing suit. Id. Whether the administrative agency has exclusive jurisdiction is a question of law. Id. A trial court lacks subject matter jurisdiction where the plaintiff fails to exhaust administrative remedies. Id. Thus, Rhule's failure to assert his breach of workers compensation settlement to the Division of Workers' Compensation deprived the trial court of subject matter jurisdiction. Id. at 442-43.

Similarly, a plaintiff cannot bring suit under the Whistleblower statute unless he exhausts any available grievance process in accordance with that statute. Harris County, 122 SW3d at 277 ("that statutory prerequisite that a plaintiff in a Whistleblower action timely initiate a grievance is a jurisdictional requirement, the failure of which may be challenges by way of a plea to the jurisdiction"); Texas S. Univ., 84 SW3d at 792; Leatherwood, 2004 WL 253275, at *3. In fact, a plaintiff cannot bring suit under the Whistleblower statute, until he exhausts his administrative remedies before the Human Rights Commission, if his claim also falls within the exclusive jurisdiction of the Texas Commission, City of Waco, 259 SW3d 156. See also Texas Commission on Human Rights Act. Prairie View A&M Univ. v. Chatha, 381 S.W.3d 510-514 (a plaintiff must file a timely charge of discrimination with the THC in order to bring a discrimination suit under the TCHRA).

There are a few, rare exceptions to the requirement of exhausting administrative remedies. The Supreme Court began its opinion in State v. Fid. & Deposit Co. of Maryland, 223, S.W.3d 309, 310 (Tex., 2007), by stating that a party must exhaust any administrative remedies before filing suit. While the court did not hold that exhaustion of administrative remedies was a prerequisite to filing suit, the holding was based solely on the fast that the contract at issue was not subject to mandatory administrative resolution of the statute. However, the lesson from City of Waco v. Lopez, is that a plaintiff who fails to exhaust all available administrative remedies proceeds at the risk of having viable claims dismissed with prejudice. See City of Waco, 259 SW3d at 156.

3. In Premises Case; Lack of Ownership or Control of the Premises.

Premises liability under the TCA is subject to the principles of common law premises liability cases. Accordingly, a governmental entity is entitled to the defenses a premises occupant enjoys at common law.

The principle common law defense that carries over to governmental premises liability is the defense of lack of ownership or control of the premises. The first requirement in premises liability is proof of the defendant's possession or control of the premises. After all, a defendant cannot be held liable for the condition of real property if he lacks the authority to inspect and improve the premises. See Gunn, 887 S.W.2d at 251-52. Accordingly, a governmental entity must own, occupy, or control the premises, or create the dangerous condition before it can be held liable for a premise defect. Cantu, 831 S.W.2d at 425. See also Vela, 703 S.W.2d at 721 (plaintiff's decedent drowned in water beyond state beach park). But see Nichols, 609 S.W.2d at 573-74 (DPS held liable for failure to report to the Highway Department or to remain at the scene of a washed out section of roadway three to five feet wide and three to four feet deep, extending across the entire highway discovered by two of its officers).

Cantu exemplifies the requirement that the defendant must control the premises on which the defect is located. In Cantu, a child drowned when he fell into a reservoir. The plaintiffs sued the City based upon the City's lease of the park adjacent to the reservoir. The park came to the edge of the reservoir. Cantu, 831 S.W.2d at 419-20. The court focused on the fact that the child drowned in the reservoir that was not controlled by the City. Id. at 424-25. The San Antonio Court of Appeals held that because the child drowned in the reservoir, not the park, the

premises containing the dangerous condition was not controlled by the defendant. Id.; see Gunn, 887 S.W.2d at 251-52.

Recently, the Fort Worth Court of Appeals held that "control" over the premises is the threshold issue in a premises liability case. In Gunn, the defendant hospital moved for, and was granted, summary judgment based upon an affidavit which stated that it "did not own, operate or maintain the premises where Gunn was injured." Id. at 251. In affirming summary judgment for the hospital, the Fort Worth court stated "[o]ur review of the case law reveals that the critical inquiry in a premise liability case does not focus on occupancy, but on 'control' over the premises." Id. (emphasis added). The Fort Worth court then turned to the Restatement (Second) of Torts, § 328E which establishes the test of whether the defendant is an owner or occupier of land based upon whether or not he is a "possessor."

> A possessor of land is:
>
> (a) a person who is in occupation of the land with intent to control it; or
>
> (b) a person who is or has been in occupation of land with intent to control it, if no other person has subsequently occupied it with intent to control it; or
>
> (c) a person who is entitled to immediate occupancy of the land if no other person is in possession under Clauses (a) and (b).

Id. (quoting Restatement (Second) of Torts, § 328E (1965)). The Fort Worth court held that a defendant's duty to warn of a defect in the premises arises only if he is "an occupier with control of the premises." Id. (citations omitted, emphasis in original). The Fort Worth court went on to explain:

> We recognize that the phrase "occupier of premises" has been interpreted in Texas to mean the party in control of the premises. However, a party may occupy a premises, in whole or in part, without actually controlling it. Therefore, instead of focusing on the term "occupy" as [the plaintiff] argues we must review the [defendant's] summary judgment evidence to determine if ... it proves that the hospital did not exercise control over the premises.
>
> . . .
>
> The term "control" is defined as the power or authority to manage, direct, superintend, restrict, regulate, govern, administer, or oversee. Further, the meaning of words "operate" and "own" are generally understood to indicate an ability to manage and control.

Id. (emphasis in original, citations omitted). Thus, the court concluded that in the absence of controverting evidence, the hospital's affidavit stating that it did not own, operate, or maintain the premises where the plaintiff was injured, established its entitlement to summary judgment based upon lack of control. Id. But see Couch v. Ector County, 860 S.W.2d 659 (Tex.App.—El Paso 1993, no writ) (reversing summary judgment where defendant did not prove lack of control over off-road premise).

B. Special Statutory Exclusions to the Act's Waiver of Sovereign Immunity.

As well as common law defenses, the liability of a governmental entity is subject to the exceptions provided elsewhere in the TCA. Therefore, governmental entities can also avail themselves of defenses or exclusions from liability created by the TCA.

1. Section 101.061, Liability for Actions and Omissions Before and After 1970.

The TCA exempts from liability actions taken before January 1, 1970. The TCA expressly provides that it does not apply to, and nor can a governmental entity be held liable for, acts or omissions that occurred before January 1, 1970. TEX. CIV. PRAC. & REM. CODE § 101.061

(Vernon 1997). Section 101.061 bars suits in which the plaintiff's premises liability cause of action is based upon the design and construction of a road completed prior to January 1970. Shives, 743 S.W.2d at 716; Burnett v. State Dep't of Highways and Pub. Transp., 694 S.W.2d 210, 211 (Tex.App.—Eastland 1985, writ ref'd n.r.e.). See Crossland, 781 S.W.2d at 431-32 (defendants could not be held liable where bridge and reservoir, that allegedly caused the accident, were designed and construction completed prior to the effective date of the TCA). But see Tex. Parks & Wildlife Dep't, 988 S.W.2d at 372 (state cannot be held liable if structure was completed before 1970 and remains in the same condition; but 1970 exclusion does not protect entity from liability for failure to maintain); City of Tyler v. Likes, 962 S.W.2d 489, 501 (Tex. 1997) (while city's pre-1970 decision on whether to construct public improvements are exercises of governmental power for which it cannot be held liable, however construction and maintenance of a storm sewer before 1970 was a proprietary for which the City could be held liable); City of Fort Worth v. Adams, 888 S.W.2d 607 (Tex.App.—Fort Worth 1994, writ denied) (city could be liable for pre-1970 drainage design, because until 1987 the design of public works was a proprietary function for which cities could be held liable). As explained by the Austin Court of Appeals:

> If the [governmental defendant] proves that the culvert was completed before 1970 and has remained in the same condition since that time, then, as a matter of law, the [governmental defendant] is entitled to immunity under section 101.061.

Maxwell, 880 S.W.2d at 465. Thus, section 101.061 bars suits based solely upon acts and omissions that occurred before the effective date of the Act or upon the failure to maintain (i.e., preserve as was originally constructed) thereafter. Tex. Parks & Wildlife Dep't, 988 S.W.2d at 372; Barron, 880 S.W.2d at 302; Maxwell, 880 S.W.2d at 465.

a. Is There a Duty to Improve or Warn of Premises Constructed Before 1970?

Pre-1970 immunity extends to the failure to improve roadways, buildings, and other structures built before 1970. Courts of appeals have held that governmental entities cannot be held liable for failing to add warning signs or signals to roads, bridges, and other public works completed before 1970. Id. at 465-66; Valdez, 869 S.W.2d at 446-47; Crossland, 781 S.W.2d at 431-33; Burnett, 694 S.W.2d at 211 (the Highway Department could not be held liable for failing to modify a median guard fence on a roadway which was built before 1970). Thus, section 101.061 bars suits based solely upon acts and omissions that occurred before the effective date of the TCA or upon the failure to make improvements thereafter. Id. "The act or omission is the actual building of the structure.... Failure to provide additional safety features and devices after 1970 does not constitute an act or omission within the meaning of section 101.061." Maxwell, 880 S.W.2d at 466.

Reviewing the Crossland opinion is helpful in understanding the extent of the pre-1970 defense to liability. This case arose out of an accident involving a boat striking a bridge across a lake, killing the driver and passenger. Crossland, 781 S.W.2d at 430. The bridge was designed and built prior to January 1, 1970. Plaintiffs argued that their cause of action was based on an act or omission that occurred after the effective date of the TCA, namely the defendant 's failure to take some action on the night of the accident. The court rejected this contention by first reiterating that a claimant "may not state a claim under the Tort Claims Act for any defect in the bridge or reservoir because any such defect would be due to an act or omission that occurred before 1970...." Id. at 431. The Fort Worth court then went on to deal with the more difficult question of whether there is a duty to warn or make safe a dangerous condition resulting from a pre-1970 design. The court found that the failure to take action after 1970 could not form the basis of a claim under the TCA.

> When the bridge and reservoir were completed the State did not provide instructions, lights, warnings, signs or barriers, so these omissions occurred before 1970. After 1970, the State

> continued to leave undone the installation of warnings, so the omissions continued to exist, but appellees have not identified any new act or omission that occurred after 1970.

Id. at 432; Valdez, 869 S.W.2d at 446-47 (rejecting the argument that the date of the injury is the date of the act or omission).

Requiring a governmental occupant to improve and/or warn of defects on premises constructed before the effective date of the TCA, would render section 101.061 meaningless.

> The Texas Supreme Court has not settled the question as to whether an "act or omission" means the actual building of a structure in dispute, including any warning signs or lighting. Nevertheless, the appellate courts that have addressed this question have stated that where claims concern a structure constructed prior to the Texas Tort Claims Act, the state has governmental immunity.... Clearly article 101.061 intended to provide for abolishment of governmental immunity without causing havoc. Subjecting the state to liability for structures built prior to the act places the state in an unfair position of trying to analyze every structure under its control and then rebuild, redesign and make safe all of those structures quick enough in order to protect the state from liability.

Chapman v. City of Houston, 839 S.W.2d 95, 99 (Tex.App.—Houston [14th Dist] 1992, writ denied); Valdez, 869 S.W.2d at 446-47. See also Payne II, 772 S.W.2d at 475-78 (while there is a duty to maintain a structure as it was built, there is no duty under the TCA to redesign and add new features to update the old design). In short, requiring post-1970 modifications or other actions would obviate the purpose for section 101.061. Id. After all, what would be served by a provision that precludes liability for structures built before 1970 when the defendant can be held liable for failing to improve the pre-1970 design? See id.

The courts of appeals have consistently followed this rationale in refusing to predicate liability based upon the failure to improve premises completed before 1970. The following is a list of cases in which the plaintiff's claims were held to be barred based upon the pre-1970 defense:

> (a) Defendant is not liable for failing to add lights and warning devices to bridges constructed before effective date of the TCA. Crossland, 781 S.W.2d at 431-33.
>
> (b) Suit could not be based upon a university's failure to add a warning track in the outfield of a baseball field constructed before 1970. Valdez, 869 S.W.2d at 446-47.
>
> (c) Defendant could not be required to add guardrail to roadway completed before 1970. Stanford v. State Dep't of Highways and Pub. Transp., 635 S.W.2d 581 (Tex.App.—Dallas 1982, writ ref'd n.r.e.).
>
> (d) Failure to improve median fence divider between oncoming lanes of traffic could not be the basis of liability for highway constructed before 1970. Burnett, 694 S.W.2d at 211-12. See Maxwell, 880 S.W.2d at 466.

b. Post-1970 Actions Must Have Caused the Premises Defect.

When a governmental unit does work after the effective date of the TCA, courts look to whether the post-1970 actions contributed to the premise defect in order to determine if liability can be attached. The fact that some work was

done after January 1970 does not automatically waive the defense created by section 101.061. When construction is completed prior to January 1, 1970, and where there have not been structural changes that affected the condition that caused the injury, the state retains sovereign immunity. Valdez, 869 S.W.2d at 446-47. For example, in Shives, the Highway Department did maintenance work and made some slight design changes to the street where the accident occurred after 1970. Shives, 743 S.W.2d at 716. The court found the post-1970 work did not cause or contribute to the accident. Id. The El Paso Court of Appeals held that the actions of which plaintiffs complained all occurred before the effective date of the TCA and could not be the basis of governmental liability. Id.; Maxwell, 880 S.W.2d at 466 (failure to upgrade or improve the safety features of a culvert during a highway renovation in 1979 did not constitute an act or omission occurring after 1970). See Barron, 880 S.W.2d at 302 (plaintiff could not point to any maintenance after the effective date of the TCA which contributed to the collision); Crossland, 781 S.W.2d at 431-34 (plaintiffs could not identify any actions taken after 1970, thus their suit was predicated upon acts or omissions which predated the TCA and were excluded from liability). Similarly, renovations or work on one part of a premises did not obligate a governmental entity to add warning devices and safety features to another portion of the premises. Maxwell, 880 S.W.2d at 463 (renovations to the roadway did not obligate the Highway Department to make improvements in the safety features or warning devices for an adjacent culvert).

On the other hand, a governmental entity can be held liable if, after January 1970, it did work that contributed to the accident. See Villarreal, 810 S.W.2d at 421. Furthermore, actions taken after 1970, may give rise to a continuing obligation to act. The Dallas Court of Appeals has held that once a governmental entity erects signs or warning devices after 1970, it can be liable for the negligent construction or maintenance of those items, regardless of the age of the roadway where they were installed. Id.

c. The Age of the Premises, However, Does Not Excuse a Lack of Maintenance.

Finally, the pre-1970 defense does not create a shield from liability for failing to "maintain" the premises. Tex. Parks & Wildlife Dep't, 988 S.W.2d at 372. All governmental units have an obligation to maintain property and to warn of dangerous conditions such as pot holes, regardless of the age of the structure involved. Smith v. State, 716 S.W.2d at 179-80; McBride, 601 S.W.2d at 556-58. See Davis, 988 S.W.2d at 372.

The Davis decision demonstrates how a governmental entity can be held liable for failing to maintain a structure built before 1970. 988 S.W.2d at 372. The plaintiff was injured when a concrete park bench collapsed under him. It was uncontested that the bench had been built before 1970. However, in December 1991, the Department's legal counsel recommended an inspection of all concrete benches in the park system and removal of unsafe benches. The bench in question was identified as a bench needing replacement, yet was never replaced. The Austin court held that the "failure to reduce or eliminate the dangerous condition posed by the cracks [in the bench] constitutes acts" after 1970 for which the Department could be held liable under the TCA. Id. at 373.

At the same time, the duty to maintain is limited to the work necessary to preserve the original design. Barron, 880 S.W.2d at 302; Villarreal, 810 S.W.2d at 421; Shives, 743 S.W.2d at 716; Burnett, 694 S.W.2d at 212. Thus, maintaining property does not require making improvements to the original design. Villarreal, 810 S.W.2d at 421; Payne II, 772 S.W.2d at 475-78. See Burnett, 694 S.W.2d at 212.

2. Section 101.055: Immunity For Tax Collection, Reponding to Emergency Call or Emergency Situation and Provision of Police and Fire Protection.

The TCA recognizes that there are certain governmental functions that should not be subject to scrutiny and second guessing by the courts. See Terrell, 588 S.W.2d at 787; Ross v. City of Houston, 807 S.W.2d 336, 337-38 (Tex.App.—Houston [1st Dist.] 1990, writ denied). Therefore, the Legislature has provided that suits cannot be premised upon the assessment or collection of taxes, or the method of providing

police and fire protection. See Driskill v. State, 787 S.W.2d 369 (Tex. 1990); Terrell, 588 S.W.2d at 787. This section retains immunity only for the formulation of policy related to tax collection and police/fire protection, but not for the negligent implementation of a policy. Ryder Integrated Logistics, Inc., 453 S.W.3d at 298928; Petta v. Rivera, 985 S.W.2d 199, 206 (Tex.App.—Corpus Christi 1998) rev'd on other grounds, 44 S.W.3d 575 (Tex. 2001); Driskill, 787 S.W.2d at 370; Terrell, 588 S.W.2d at 787; Orozco v. Dallas Morning News, Inc., 975 S.W.2d 392, 397 (Tex.App.–Dallas 1998, no pet.); Riggs, 177 F.R.D. at 405; Ross, 807 S.W.2d at 337-38; Poncar v. City of Mission, 797 S.W.2d 236 (Tex.App.–Corpus Christi 1990, no writ); City of Dallas v. Cox, 793 S.W.2d 701 (Tex.App.—Dallas 1990, no writ); Robinson v. City of San Antonio, 727 S.W.2d at 40. If the negligence that is the basis of suit lies in the formulation of policy, the complaint is with how police protection is provided, and the City remains immune from liability. Orozco, 975 S.W.2d at 397; Riggs, 177 F.R.D. at 406. Accordingly, a governmental body cannot be held liable for deciding to utilize radar to pursue speeders, its policy regarding monitoring extinguished fires, or its policy of inspecting fire hydrants. Terrell, 588 S.W.2d at 787; Ryder Integrated Logistics, Inc., 453 S.W.3d at 298928; Poncar, 797 S.W.2d at 237; Ross, 807 S.W.2d at 337–38.

This section also retains sovereign immunity for actions of employees who are responding to emergency calls or emergency situations, so long as they comply with all applicable laws, or in the absence thereof, do not act with conscious indifference or reckless disregard for the safety of others. Borrego, 964 S.W.2d at 958; City of Arlington v. Whitaker, 977 S.W.2d 742, 744—45 (Tex.App.—Fort Worth 1998, pet. denied); TEX. TORT CLAIMS ACT § 101.055(2). This provision also seeks to insure that employees and agents providing emergency care are not second guessed. City of Amarillo v. Martin, 971 S.W.2d 426, 430-31 (Tex.1998) ("To recover damages resulting from the emergency operation of an emergency vehicle, a plaintiff must show that the operator has committed an act that the operator knew or should have known posed a high degree of risk of serious injury."). This requires showing more than a momentary judgment lapse—it requires showing that the driver has committed an act he knew or should have known posed a high degree of risk of serious injury. Id. at 429-30; City of Pasadena v. Kuhn, 260 S.W.3d 93, 99 (Tex.App.—Houston [1st Dist.] 2008, no pet.).

When the governmental unit raises the emergency exception, the plaintiff has the burden to raise disputed fact issues as to whether the actions were taken in response to an emergency, violated applicable laws, and were reckless. City of San Antonio v. Hartman, 201 S.W.3d 667, 672 (Tex. 2006); Tex. Dep't of Pub. Safety v. Little, 259 S.W.3d 236, 238-39 (Tex.App.—Houston [14th Dist.] 2008, no pet.). Making a routine traffic stop does not qualify as responding to an emergency situation. See Texas Dept. of Public Safety v. Rodriguez, 344 S.W.3d 483, 496 (Tex.App.—Houston [1st Dist.] 2011, no pet.). However, pursuing an actively dangerous driver, such as a motorcyclist operating without lights or a speeding driver who was making multiple lane changes and disobeying traffic control devices, may constitute an emergency for purposes of the emergency exception. City of Hous. v. Collins, 515 S.W.3d 467 (Tex. App.—Houston [14th Dist.] 2017, no pet.) (need to respond to motorcyclist driving without lights and standing on vehicle was valid emergency for exception); Texas Dep't of Pub. Safety v. Bonilla, 2014 WL 2451176 (Tex.App—El Paso May 30, 2014), rev'd on other grounds 481 S.W.3d 640 (Tex. 2015).

When the provision of emergency service does not meet the standards established by a municipal procedures manual or relevant state rules and statutes, a governmental unit can be held liable for the actions of its agents and employees. Mejia v. City of San Antonio, 759 S.W.2d 198, 199–200 (Tex.App.—San Antonio 1988, no pet.). Thus, the provision of emergency, medical, or other services must meet established standards. Id. Additionally, where officer pursuing a suspect did not remove his foot from his vehicle's accelerator pedal until .5 seconds before impact; was distracted by turning on his in-car camera as he entered the intersection and thus was not "fully aware of his surroundings;" and there was a building to the side of the direction from which plaintiff was traveling that

"created a sight restriction interfering with officer's ability to fully observe all vehicles at the intersection he was approaching a fact issue existed whether the officer was acting conscious indifference or reckless disregard. Bonilla, 2014 WL 2451176, at *6. However, where officer was responding to a call to a scene by his SWAT team commander he was responding to a call for emergency services. Quested v. City of Houston, 440 S.W.3d 275, 285 (Tex.App.—Houston [14th Dist.] 2014, no pet.). See also City of San Antonio v. Rosenbaum, 2011 WL 6739583, *3 (Tex.App.—San Antonio Dec. 21, 2011, no pet.) (mem. op.)(even if officer subjectively did not believe he was on-duty at the time of the accident, his belief would not change the nature of the call to which he was responding). Additionally, fact that an officer was exceeding tollway speed limit by driving 60 miles per hour, but keep proper look-out and steered to avoid accident, established he did not act with conscious indifference or reckless disregard to others. Quested v. City of Houston, 440 S.W.3d 274, 285-86. See, e.g., City of Pasadena v. Kuhn, 260 S.W.3d 93, 99–100 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (holding that officer's actions in entering intersection with activated lights and siren to respond to house fire were not taken with conscious disregard or reckless indifference to safety when officer slowed down before entering intersection and colliding with plaintiff); Pakdimounivong v. City of Arlington, 219 S.W.3d 401, 411–12 (Tex.App.—Fort Worth 2006, pet. denied) (holding that officers' actions were not taken with conscious indifference or reckless disregard for safety of deceased when no evidence showed that officers did not care what happened to deceased); City of San Angelo Fire Dep't v. Hudson, 179 S.W.3d 695, 701–02 (Tex.App.—Austin 2005, no pet.) (concluding there was no evidence of reckless disregard for safety of others when officer drove into intersection without stopping and witness did not hear brakes being applied). The mere fact that governmental employees began responding to an emergency does not mean all of their actions are automatically exempt from liability. See Borrego, 964 S.W.2d at 958 (EMS immobilized Borrego by strapping him to backboard; Borrego, was later hit by car because he could not get out of the car's way). The El Paso court held that the emergency technicians were not responding to an emergency when they tied Borrego to the backboard and left him in the street. Id. Thus, the City could be held liable for the negligence of the emergency medical technicians. Id.

Governmental entities, however, do not enjoy immunity from claims arising from tax collection, or the police and fire protection, if the Act or other statute creates liability. To illustrate, a premises liability claim can be brought against a county for injuries sustained while in a tax assessor/collector office. Dowlearn, 489 S.W.2d at 146-47. Likewise, a governmental entity can be held liable for the negligent operation of a motor vehicle by a police officer. County of Brazoria v. Radtke, 566 S.W.2d 326, 328-29 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.); Guzman, 766 S.W.2d at 860. More importantly though, governmental entities can be subject to claims brought under other statutes waiving sovereign immunity. See Cox, 793 S.W.2d at 726-28. The Cox plaintiffs brought suit under both the TCA and Section 1983 of the United States Code. They were able to maintain suit under §1983 without regard to any provisions of the TCA or defendants being on duty police officers. See id.

3. Section 101.062 : Limits on Liablity for Provision of 9-1-1 Services

Section 101.062 controls and limits liability of governemtantalgovernmental entities that provide 9-1-1 services. Section 101.062 "applies to a claim against a public agency that arises from an action of an employee of the public agency or a volunterr under direction of the public agency and that involves providing 9-1-1 service or responding to a 9-1-1 emergeny call only if the action violates a statute or ordinance applicable to the action." TEX. CIV. PRAC. & REM.CODE ANN. § 101.062(b) TEX. CIV. PRAC. & REM.CODE ANN. § 101.062(b) (West 2011). Under section 101.062, when providing emergency services, a governmental entity waives immunity only when the action of its agents "violates a statute or ordinance applicable to the action." Guillen v. City of San Antonio, 13 S.W.3d 428, 434 (Tex.App.—San Antonio 2000, pet. denied); Fernandez v. City of El Paso, 876 S.W.2d 370, 376 (Tex.App.—El Paso 1993, writ denied); TEX. CIV. PRAC. & REM.CODE

ANN. § 101.062(b).

In order to form the basis of a claim under this section of the TCA, the statutes or ordinances at issue must set standards of care applicable to the provision of care or services. Guillen, 13 S.W.3d at 434; Fernandez, 876 S.W.2d at, 376. In Guillen, the court concluded that the standard medical operating procedures of the San Antonio fire department were "guidelines" rather than a statute or ordinance to which section 101.062 applied. See Guillen, 13 S.W.3d at 433–34. In both Guillen and Fernandez, the courts concluded that the statutes and ordinances pleaded did not impose affirmative duties on the emergency responders that were violated. See Guillen, 13 S.W.3d at 433–34 (Medical Practice Act does not affirmatively impose duty on paramedics to yield authority to physician as alleged by plaintiffs); Fernandez, 876 S.W.2d at 376 (provisions of Health and Safety Code and City of El Paso municipal code pleaded by appellants did not impose affirmative duty on appellee to respond to emergency situation within certain period of time).

The Supreme Court of Texas's expansion of the causal nexus requirement provides further difficulties with alleging liability on the basis of provision of emergency services. In Sanchez, plaintiffs alleged that city personnel's failure to adequately respond to a 9-1-1 call violated city ordinances setting forth employee standards of conduct. 494 S.W.3d at 724. On review, the Supreme Court of Texas did not reach the question of whether the alleged ordinances established standards for care that would be actionable under 101.062(b), but rather decided that the pleadings did not establish proximate cause as a matter of law. Id. at 727. Given that many emergency services are only provided when someone is already at risk of injury or death, the burden to show that the emergency service providers are the proximate cause of the injury will be very high.

4. Section 101.056: Exclusions for Exercising Discretionary Powers.

Section 101.056 of the Act entitled "Discretionary Powers," provides:

> [The TCA] does not apply to a claim based on:
>
> (1) the failure of a governmental unit to perform an act that the unit is not required by law to perform; or
>
> (2) a governmental unit's decision not to perform an act or on its failure to make a decision on the performance or nonperformance of an act if the law leaves the performance or nonperformance of the act to the discretion of the governmental unit.

TEX. CIV. PRAC. & REM. CODE ANN. § 101.056 (West 2005). The discretionary powers exemptions, embodied in §101.056, extend policymaking immunity beyond the assessment of taxes and method of providing policy and fire protection contained in section 101.055. The purpose of this exception is to avoid judicial review of governmental policy decisions. Loyd, 956 S.W.2d at 123; Golden Harvest, 942 S.W.2d at 686-87; Bennett v. Tarrant County Water Control and Improvement Dist. No. 1, 894 S.W.2d at 452. A governmental entity cannot be held liable for policy decisions, regardless of the activity involved. TEX. TORT CLAIMS ACT § 101.056. The exclusion applies to failure to act and omissions, as well as positive acts of governments. Bellnoa, 894 S.W.2d at n.3. However, "once a government has decided to perform a discretionary act, the act must be performed in a nonnegligent manner." Cortez, 925 S.W.2d at 149-50.

Unfortunately, there is no bright line test for when an activity is a discretionary decision made at the policymaking level as opposed to decisions regarding the implementation of policies that are made at the operational level. Ryder Integrated Logistics, Inc., 453 S.W.3d at 298; City of Fort Worth v. Gay, 977 S.W.2d 814, 817 (Tex.App.–Fort Worth 1998, no pet.). The courts use different tests for determining if a decision is a discretionary act and thereby excluded from the TCA's waiver of immunity. Stephen F. Austin v. Flynn, 228 S.W.3d 653 (Tex. 2007). The courts seek to determine whether the plaintiff's complaints are with policy level decision as opposed to the implementation

of policy decisions. Id.; Bennett, 894 S.W.2d at 452. Some courts attempt to focus on whether the matter requires exercising judgment that is discretionary, as opposed to carrying out an obligation mandated by law in which nothing is left to the discretion of the officer. State v. Rodriguez, 985 S.W.2d at 85; City of Lancaster v. Chambers, 883 S.W.2d 650, 654 (Tex. 1994); Loyd, 956 S.W.2d at 124. At the same time, the exercise of professional judgment does not fall within the ambient of the discretionary act protection. Davis, 988 S.W.2d at 374 (park manager's decision not to remove bench was implementation of policy level decision for which Department could be held liable).

Cases addressing the discretionary exemption from liability break down into two categories. The first set of cases addresses general governmental functions, while the second focuses on discretion in the design, construction, maintenance of roadways, bridges, and highways.

a. Discretionary Governmental Decisions.

Governmental entities cannot be held liable for policymaking decisions or decisions made at a policymaking level. They are liable only for the negligent implementation of policy, sometimes referred to as operational level decisions. Flynn, 228 S.W.3d 653; Tex. Dep't of Transp. v. Andrews, 155 S.W.3d 351 (Tex.App.–Fort Worth 2005, pet. denied) (citing Mogayzel v. Tex. Dep't of Transp., 66 S.W.3d 459, 465 (Tex.App.–Fort Worth 2001, pet. denied)). The courts have held that the following decisions are a reflection of governmental policy and, therefore, cannot form the basis of liability:

(a) A university's decision to hold classes in inclement weather. Univ. of Tex. v. Akers, 607 S.W.2d 283 (Tex. Civ. App.–Fort Worth 1980, writ ref'd n.r.e.);

(b) The decision of whether or not to purchase insurance for a city. Westbrook v. City of Edna, 552 S.W.2d 608 (Tex. Civ. App.–Corpus Christi 1977, writ ref'd n.r.e.);

(c) Decision regarding the training and supervision of personnel. Radtke, 566 S.W.2d at 330;

(d) The decision to have a kitchen in a county jail. Norton v. Brazos, 640 S.W.2d 690, 693 (Tex.App.–Houston [14th Dist.] 1982, no writ);

(e) The decision to raise a speed limit. Bellnoa, 894 S.W.2d at 827;

(f) Decisions regarding the placement of a stop sign, subject to the provisions of §101.060. Miller v. City of Fort Worth, 893 S.W.2d 27, 32-32 (Tex.App.–Fort Worth 1994, pet. dism'd by agr.) (citing Shives, 743 S.W.2d at 714);

(g) Decision regarding performing an inquest. Tarrant County v. Dobbins, 919 S.W.2d at 877;

(h) Decision whether to retrofit school buses with "Stop Sign" arms, even if new buses are required to have them. Cortez, 925 S.W.2d at 149-150; and

(i) Decision to have an "open door" policy at mental health facility. Marroquin, 927 S.W.2d at 232.

(j) Decision on whether or not to add corrosion inhibitors to a water supply. Loyd, 956 S.W.2d at 124; and

(k) Decisions on timing and quantity of release of water from dam or reservoir. Golden Harvest., 942 S.W.2d at 686; Bennett, 894 S.W.2d at 452.

(l) Decisions regarding design of a stage and theater. Gates, 2004 WL 2559937 at *3.

(m) Auditing city records. City of Roman Forest v. Stockman, 141 S.W.3d 805, 811 (Tex.App.–Beaumont 2004, no pet.).

Decisions in carrying out policy, however, are not exempt from liability. Therefore, governmental units have been held liable for negligent implementation of policy as illustrated by:

(a) A police officer's negligent operation of his patrol car while pursuing a speeder causing plaintiff's injuries. Terrell, 588 S.W.2d at 790; see Ryder Integrated Logistics, Inc., 453 S.W.3d at 298 (officer negligently shinning spotlight and headlights into oncoming traffic after making a traffic stop);

(b) A director's decision to use a glass as a prop in a school play. Christilles v. Sw. Tex. State Univ., 639 S.W.2d 38, 43 (Tex.App.–Austin 1982, writ ref'd n.r.e.);

(c) Operation, use, and maintenance of kitchen equipment in county jail. Norton, 640 S.W.2d at 63;

(d) The manner in which a public work is constructed. Mitchell v. City of Dallas, 855 S.W.2d 741 (Tex.App.–Dallas 1993), aff'd, 870 S.W.2d 21 (Tex. 1994);

(e) Decision not to remove cracked park bench. Davis, 988 S.W.2d at 374;

(f) Failure to maintain public works. Gay, 977 S.W.2d at 817; and

(g) Unreasonable delay in making improvements to traffic signals or warning devices approved by city council. Zambory v. City of Dallas, 838 S.W.2d 580, 582-83 (Tex.App. – Dallas 1992, writ denied).

(h) Decisions regarding when and where to run sprinklers on campus. Flynn, 228 S.W.3d 653.

Thus, whether something constitutes a discretionary matter is determined by whether it is a policy level decision or a decision regarding the implementation of policy made at an operational level. Terrell, 588 S.W.2d at 790.

b. Discretion in the Design and Construction of Roadways and Other Public Works.

Twice in 1999 the Texas Supreme Court made it clear that the design of roads, bridges, and highways, and decisions regarding improvement of public works are policy level decisions under §101.056. "Decisions about highway design and about the type of safety features to install are discretionary policy decisions." State v. Miguel, 2 S.W.3d 249, 251 (Tex. 1999); see Tex. Dep't of Transp. v. Arzate, 159 S.W.3d 188 (Tex.App.–El Paso 2004, no pet.). "Design of any public work, such as a roadway, is a discretionary function involving many policy decisions, and the governmental entity responsible may not be sued for such decisions." State v. Rodriguez, 985 S.W.2d at 85; see Andrews, 155 S.W.3d at 358; Harris County v. Demny, 886 S.W.2d 330, 335-36 (Tex.App.–Houston [1st Dist.] 1994, pet. denied); Maxwell, 880 S.W.2d at 463 ("[a] governmental entity's discretion in the design of roads and bridges, which includes the installation of safety features such as guardrails and barricades, is protected from liability by section 101.056(2) of the Tort Claims Act"); Shives, 743 S.W.2d at 717; Burnett, 694 S.W.2d at 212; Stanford, 635 S.W.2d at 582. But see Likes, 962 S.W.2d at 501 (while city's pre-1970 decision on

whether to construct public improvements are exercises of governmental powers for which it cannot be held liable, construction and maintenance of a storm sewer before 1970 was a proprietary for which the City could be held liable); Adams, 888 S.W.2d at 614 (city could be liable for pre-1987 design of public works, because before the 1987 amendments, design was a proprietary function for which cities could be held liable). Specifically, suit cannot be based upon:

(a) Dangerous condition arising from the design of a highway. Tex. Dep't of Transp. v. Ramsey, 74 S.W.3d 864, 867 (Tex. 2002).

(b) Dangerous condition that arises from the government's regulation of traffic and parking, and the width of traffic lanes or the width of streets. Palmer, 607 S.W.2d at 300;

(c) The design of an overpass. City of El Paso v. Ayoub, 787 S.W.2d 553 (Tex.App.–El Paso 1990, writ denied);

(d) Decision regarding whether or not to install guardrails, erect barricade, warning sign, or similar warning devices. Barron, 880 S.W.2d at 302; Wenzel v. City of New Braunfels, 852 S.W.2d 97, 98 (Tex.App.–Austin 1993, no writ); Stanford, 635 S.W.2d at 582; and

(e) Decision on whether to improve or upgrade a roadway, or change median barrier. Crossland, 781 S.W.2d at 432-33; Burnett, 694 S.W.2d at 212. But see Zambory v. City of Dallas, 838 S.W.2d 580 (Tex.App.–Dallas 1992, writ denied) (area of potential liability for negligent implementation of a design).

(f) Decision on whether to add safety devices or warning signals to a culvert located off a roadway is discretionary. Maxwell, 880 S.W.2d at 463-64.

(g) Decision on whether to raise or lower the speed limit is discretionary. Tex. Dep't of Transp. v. Phillips, 153 S.W.3d 121, 123 (Tex.App.–Beaumont 2004, no pet.); Bellnoa**,** 894 S.W.2d at 827; Shives, 743 S.W.2d at 715. But see Garza v. State, 878 S.W.2d 671 (Tex.App.–Corpus Christi 1994, no writ) (45 mile-per-hour speed limit sign misled the public into believing that it was reasonable and safe to drive 45 miles-per-hour when the speed was actually excessive for that portion of the roadway).

(h) Design of roadway detours. State v. Rodriguez, 985 S.W.2d at 85-86.

(i) Decisions regarding materials to use to warn of premises defects. Miguel, 2 S.W.3d at 250-51.

(j) Preliminary approval of changes to roadway was not a final decision and entity was exercising discretion in determining whether to go forward with changes and/or the types of changes to make. Tex. Dep't of Transp. v. Garrison, 121 S.W.3d 808 (Tex.App. – Beaumont 2003, no pet.).

(k) Decision to widen only a portion of bridge was discretionary. Sanchez v. Matagorda County, 124 S.W.3d

> 350 Tex.App. –Corpus Christi 2003, no pet.).
>
> (l) Failure to create left turn lane. Phillips, 153 S.W.3d at 123.

Allegations that the governmental entity should be interested in building a "safe" premises does not get around the discretionary act exemption. Crossland, 781 S.W.2d at 433.

> Appellees do not identify any law which required appellants to warn boaters of the bridge. Instead, they argue each appellant made a policy decision to warn of danger because each appellant has posted other warnings, e.g., clearance signs on highway bridges. Therefore, appellees argue the policy decision was to warn of danger and the decision not to light the bridge was an operational one. Doubtless, the state desires to make Texas a safer place, but this general policy goal does not make the state liable for all possible failures to warn. The State will make the civic policy decisions about the design of State projects such as whether to include lights in the design. Id.

Finally, the Supreme Court's ruling in Ramirez makes it clear that even if the design of a roadway creates a dangerous condition, there is no duty to warn of the condition because to do so would allow a governmental entity to be held liable for a discretionary act. Ramirez, 74 S.W.3d at 867.

c. Decisions Involving the Design of Roadways Constitute Policy Level Decisions.

In interpreting section 101.056(2) of the TCA, the courts have distinguished between policy level decisions and professional or occupational discretion involved in the implementation of policy level decisions. Maxwell, 880 S.W.2d at 464; Eakle v. Tex. Dep't of Human Serv., 815 S.W.2d 869, 874 (Tex.App.–Austin 1991, writ denied). Only policy level decisions are protected from liability by section 101.056(2). Maxwell, 880 S.W.2d at 464. Professional or occupational discretion applied in the implementation of policy level decisions is not protected from liability by the "discretionary act" exemption created by section 101.056(2). Christilles, 639 S.W.2d at 42. In the Maxwell opinion, however, the Austin Court of Appeals found that roadway design decisions inherently involved policy level decisions that are exempt from liability under the TCA.

> In her first point of error [appellant] insists that the trial court erred in granting summary judgment based on immunity for discretionary acts because the Department's decisions regarding the placement of the culvert and its safety features involve professional or occupational discretion not protected by section 101.056(2) [of the Texas Tort Claims Act]. ... We disagree.
>
> Actions involving occupational or professional discretion are devoid of policy implications. Examples include decisions made in driving a mail truck, ... or the decisions by drama instructor to use a glass rather than a plastic prop in a university production.
>
> Decisions regarding the design of a highway and the installation of safety features, however, do not fall in this category. It is not proper for a court to second-guess the agency's decisions that some other type of marker or safety device would have been more appropriate ..., or that the culvert was placed too close to the highway. To do so would displace the authority of

> the agency responsible for making such decisions.
>
> Contrary to [appellant's] argument a "professional," such as an engineer may use his or her skills in designing adequate safety features for a highway without subjecting the process to judicial review as an occupational or professional class of agency action. Thus, even though the Department may have used engineering expertise and discretion in the planning and design of the culvert, the action remains in the informed discretion of the agency and exempt from liability under section 101.056(2) [of the TCA].

Maxwell, 880 S.W.2d at 464.

d. The Duty to Maintain is not Discretionary.

Again, the discretionary act defense does not excuse a defendant's failure to maintain the premises. Maintenance of roadways and other premises is a ministerial and non-discretionary duty. Tex. Parks & Wildlife Dep't, 988 S.W.2d at 374; Gay, 977 S.W.2d at 817; Sutton, 549 S.W.2d at 62. Governmental units will be held liable for the failure to properly maintain public roadways. Davis, 988 S.W.2d at 374; Gay, 977 S.W.2d at 817; Sutton, 549 S.W.2d at 62. Therefore, a governmental defendant can be held liable for potholes on a roadway, even if the original decision regarding the design of the premises are exempt from liability. See id .;see also Sullivan, 33 S.W.3d at 13-15; Sutton, 549 S.W.2d at 62. The non-discretionary obligation of maintenance, however, does not include a duty to redesign, improve, or add safety features to the roadway. Crossland, 781 S.W.2d at 433-34; Burnett, 694 S.W.2d at 211-12. Thus, the ministerial duty of maintenance requires only the preservation of the premises as originally designed and constructed. Arzate, 159 S.W.3d at 192; Stanford, 635 S.W.2d at 582.

e. Is There an Obligation to Warn of or Make Design Defects Safe?

Although there are no cases that address this issue, governmental premises occupants should not be obligated to warn of or make safe dangerous conditions resulting from discretionary acts. It could be argued that governmental entities should be obligated to warn of dangerous conditions even if they result from a discretionary act that is exempt from liability. Allowing such a claim, however, would void the purpose of the defense established by §101.056. Clearly, the purpose of the discretionary act defense was to allow governmental entities to carry out certain actions and conditions without concern for liability. Allowing liability to be predicated upon the failure to warn of a condition resulting from a discretionary act would void the very purpose of this section of the TCA. See also Demny, 886 S.W.2d at 335-36 (O'Connor, J., dissenting). Section 101.056 would be meaningless if a governmental entity could not be held liable for the design of a roadway, but could be sued based upon the failure to warn of the width of traffic lanes, or the absence of guardrails.

f. Determining Whether a Decision Falls Within the Discretionary Act Exclusion From Liability is a Question of Law.

The question of whether an act or omission is discretionary is a question of law for the court to decide. Sullivan, 33 S.W.3d at 13-14; Miguel, 2 S.W.3d at 251; State v. Rodriguez, 985 S.W.2d at 85. Accordingly, many cases involving discretionary governmental decisions are resolved through summary judgment. See Bellnoa, 894 S.W.2d at 827; Maxwell, 880 S.W.2d 463-64; Barron, 880 S.W.2d at 302; Stanford, 635 S.W.2d at 582; Burnett, 694 S.W.2d at 212.

5. Section 101.021: Exclusion From Liability for Property Damage Resulting From Premises Defects.

Property damage cannot be recovered in a premises liability case under the TCA. A governmental entity is not liable under the TCA for property damage caused by a premise defect. Winkenhower, 875 S.W.2d at 388; DeAnda v. County of El Paso, 581 S.W.2d 795 (Tex. Civ.

App.–El Paso 1979, no writ). A plaintiff is not allowed to recover property damage in a premises liability case regardless of whether the dangerous condition that caused the damage is characterized as an ordinary premise defect or a "special defect." Pruitt, 770 S.W.2d at 638. Winkenhower, 875 S.W.2d at 388 (no liability where property damage was caused by a pothole in the roadway). Under the TCA, recovery for property damage is available only when the property damage is caused by the negligence of a governmental employee in the operation of motor driven equipment or a motor vehicle. Id. (vehicle must be operated by governmental employee or agent, not the plaintiff); Pruitt, 770 S.W.2d at 639; TEX. TORT CLAIMS ACT § 101.021(1). But see Morgan, 882 S.W.2d at 490 (governmental entity need not own the motor driven vehicle, it need only be controlled or directed by a governmental employee).

6. Section 101.057: Exclusion for Civil Disobedience and Certain Intentional Torts.

Governmental units cannot be held liable for actions taken in response to large scale civil disobedience. TEX. TORT CLAIMS ACT §101.057(a). "The Texas Tort Claims Act waives governmental immunity for certain negligent conduct, but it does not waive immunity for claims arising out of intentional torts, such as battery. City of Watauga v. Gordon, 434 S.W.3d 589, 593-94 (Tex. 2014).

The Act's exclusions of claims connected with civil disobedience or riots was intended to preclude liability for injuries resulting from efforts to control riots, as well as to exclude liability for governmental decisions on how to control a riot or whether to control it at all. Terrell, 588 S.W.2d at 786-87. Thus, actions taken in response to a fire started in a jail by a prisoner were actions in response to civil disobedience and injuries resulting therefrom could not form the basis of suit. Forbes v. City of Denton, 595 S.W.2d 621, 623 (Tex. Civ. App.–Fort Worth 1980, writ ref'd n.r.e.). The civil disobedience exclusion was intended to encompass public commotions involving large numbers of persons acting unlawfully in concert. Id.; see City of Amarillo v. Langley, 651 S.W.2d 906 (Tex.App.–Amarillo 1983, no writ). Consequently, the actions of two motorcyclists did not constitute large scale civil disobedience and the City could be held liable for its handling of that matter. Id.

a. Section 101.057(a)'s Exclusion for Intentional Torts Does Not Refer to Intentional Torts Committed by Third-Parties.

The scope of §101.057's exclusion from the waiver of immunity for intentional torts has been the subject of considerable debate and litigation for the last decade. The debate was brought to a head when the Fourteenth Court of Appeals rendered its decision in Delaney, holding that the University of Houston could not be held liable because the plaintiff's claim involved an intentional tort (plaintiff was raped by an intruder in her dormitory room), and the Waco Court of Appeals' holding in City of Waco v. Hester, that the City could be held liable because the employees' negligence that involved the use of personal property allowed the intentional tort (an inmate on inmate sexual assault) to occur. Compare Delaney v. Univ. of Houston, 792 S.W.2d 733 (Tex.App.–Houston [14th Dist.] 1990) *rev'd* 835 S.W.2d 56 (Tex. 1992) with City of Waco v. Hester, 805 S.W.2d 807, 810 (Tex.App.–Waco 1990, writ denied).

In the Rusk State Hospital decision, the Texas Supreme Court addressed whether a §101.057(2) precluded a governmental entity to be held liable if one of its employees assisted an in-patient in a psychiatric hospital to commit suicide. Rusk State Hospital, 392 S.W.3d at 99-100. The Supreme Court noted that a person commits a crime if they act, "with intent to promote or assist the commission of suicide by another…" Id. The court also pointed out that a person commits a crime if they take actions with specific intent to inflict harm, such as would be the case with an intentional tort. Id. Based on the fact that intent was a required element of the crime of assisted suicide and that acting with intent to harm would constitute an intentional tort, the court rejected the plaintiffs' argument that the hospital could be liable for the actions of an intern who committed murder or in assisted a psychiatric patient to commit suicide. Id. at 100.

The Supreme Court of Texas's decision in Delaney dramatically limited the scope of

§101.057(2) exclusion from the Act's waiver of sovereign immunity. During her second semester at the University, Ms. Delaney noticed that an outside door to her dormitory was broken and that the door was often propped open to allow entry into the building. Concerned that the broken door lock and the practice of propping the door open would allow intruders easy access to the dormitory, Delaney and other students repeatedly complained to the University. The University disregarded the complaints and never repaired the lock. One night, an intruder entered the dormitory through the door with the broken lock and while holding Delaney and her boyfriend at gunpoint, raped Delaney in her room. Id.

Delaney brought various claims against the University, including claims that it failed to provide her a secure residence because it failed to repair the broken dormitory door lock. The trial court granted the University's motion for summary judgment finding that Delaney's claim was barred by the §101.057(2) exclusion from waiver of sovereign immunity for intentional torts. Id. at 58.

The Supreme Court began its analysis by focusing on the language of §101.057(2) of the Act to determine its intended scope. "[T]he Act's waiver of immunity [does not extend] to claims 'arising out of assault, battery, false imprisonment, or any other intentional tort.'" Id. at 59; see City of Dallas v. Rivera, 146 S.W.3d 334, 338 (Tex.App.–Dallas 2004, no pet.) (no waiver for use of pepper spray, handcuffs, K-9 police service dog). The University contended that any claim involving an intentional tort was precluded by §101.057(2). Id. The supreme court rejected this construction, saying that it was far too expansive.

> We think that "arising out of" in [section 101.057(2)] ... requires a certain nexus for the provision to apply. In section 101.057(2), the nexus is between the claim and an intentional tort. In essence, section 101.057(2) excludes from the Act's waiver of immunity claims *for* intentional torts. That section ... does not state whether the tortfeasor must be the governmental employee or a third party. ... [W]e think that the more plausible reading of the provision is that the tortfeasor must be that the governmental employee whose conduct is the subject of the complaint.

Id. at 59 (emphasis in original). The supreme court was persuaded to following this interpretation and to reject the University's argument for two reasons.

First, the court turned to the United States Supreme Court's interpretation of a similar provision of the Federal Tort Claims Act that excludes from the waiver of federal immunity "any claim arising out of" assault, battery, or false imprisonment. In Sheridan v. U.S., 487 U.S. 392 (1988), the United States Supreme Court held that the intentional torts exclusion did not bar claims that arose from the negligence of federal employees in allowing the intentional tort to be committed. Id. The Texas Supreme Court quoted a portion of the Sheridan decision:

> The words "any claim arising out of" an assault or battery [as contained in the Federal Tort Claims Act] are unquestionably broad enough to bar all claims based *entirely* on an assault or battery. The import of these words is less clear, however, when they are applied to a claim arising out of two tortious acts, one of which is an assault or battery and the other which is the mere act of negligence. Id. (emphasis in original).

The Texas Supreme Court then focused on the second basis for rejecting the University's argument regarding the scope of 101.057(2)'s application.

> The other reason we reach the conclusion we do is because it is more consistent with the legal principal that intentional conduct intervening between a negligent act and the result

> does not always vitiate liability for the negligence.

Id. at 60. The court noted that the Restatement (Second) of Torts, § 448 (1965) provides:

> The act of a third person in committing an intentional tort is a superseding cause of harm to another resulting therefrom, although the actor's negligent conduct created a situation which afforded an opportunity to the third party to commit such a tort or crime, unless the actor at the time of his negligent conduct realized or should have realized the likelihood that such a situation might be created, and that a third person might avail himself of the opportunity to commit such a tort or crime.

Id. Thus the court concluded that to apply section 101.057(2) so broadly as to except from the Act's waiver of immunity any claim for injuries resulting from an intentional tort, "is to ignore a distinction which the law recognizes when negligent and intentional acts both contribute to the occasion of injury. The better view, we believe, is a construction of section 101.057(2) which accommodates this distinction." Id. Thus, the Texas Supreme Court reversed the take nothing judgment that had been entered based upon the University's motion for summary judgment, because it found that Delaney's claims were distinct and separate from the rape that she suffered. "The University's alleged failure to repair the dormitory door lock and the alleged breach of contract to provide a secure residence for Delaney are readily distinguishable from the intruder's conduct. ... Had an intruder gained entrance to Delaney's dormitory through the broken door and injured her negligently rather than intentionally, the University could not invoke section 101.057(2) to avoid liability. We hold that it cannot do so in these circumstances either." Id.

Following the supreme court's decision in Delaney, it appeared that 101.057(2) applied only to intentional torts committed by governmental employees. In the eighth year since the issuance of the Delaney decision, the rationale of the court regarding whether the gravamen of the plaintiff's complaint is the intentional tort, has been used to allow suits to be brought against governmental entities even when the intentional tort was committed by a governmental employee. Dillard v. Austin Indep. Sch. Dist., 806 S.W.2d 589, 592 (Tex.App.—Austin 1991, writ denied) v. Denton County, 119 F.3d 381, 389-90 (5th Cir. 1997). But see Petta, 44 S.W.3d 575, at 4; Henry, 52 S.W.3d 434, *4.

The Downey case arose from the rape of a jail inmate by an employee of the Denton County Sheriff's Department. While in custody at the Denton County jail, Downey was ordered from her cell to repair a tear in the pants of a Denton County Sheriff's Department employee, Adorphus Bell. Bell had asked that his pants be repaired by Ms. Downey. It was the policy of the Sheriff's Department that repair of guard uniforms was done by trustees. The female officer on duty, Sadler, explained to Bell that Downey was not a trustee. Despite these circumstances, Sadler decided not to call her supervisor, and instead awoke Downey to repair Bell's uniform. Downey told Sadler to ask one of the trustees, but Sadler responded that the trustees were asleep. Sadler then escorted Downey and Bell to a multipurpose room that contained sewing machines. Id.

The multipurpose room was a room with access controlled by a door that could be closed and locked. The room contained a surveillance camera and was equipped with a voice activated security devise. There was a blind spot in the room that could not be viewed from the observation window, but could be monitored only via the video camera at the matron's station. Once the door to the multipurpose room was closed, the voice activated security device was the only means for someone outside the multipurpose room to listen to what was happening in the room. On the day of the rape, the voice activated security device had been disconnected and was not functioning. Id. at 384.

Initially, Sadler remained in the multipurpose room, but then left locking Bell and Downey alone in the room. Sadler checked on Downey and Bell approximately fifteen minutes later. Sadler did not check on Downey and Bell

again for an hour and forty-five minutes. It was during this time that Bell sexually assaulted Downey. Id.

Denton County sought summary judgment under §101.057(2) alleging that Downey was complaining of an intentional tort committed by a governmental employee. After reviewing the Supreme Court's opinion in Delaney and the Waco court decision in Hester, the Fifth Circuit rejected this argument. Id. at 388. The Fifth Circuit held that Downey's claim was not barred by section 101.057(2) because her claim did not arise out of the assault, but instead out of Sadler's negligence. The court specifically pointed out that Sadler violated the customary practice of having a trustee repair a guard's pants, that Sadler acknowledged that it was unusual for a guard to request a specific inmate to do repairs, that Sadler left Bell and Downey alone in the multipurpose room for almost two hours without monitoring them in any fashion, and that this action was taken at the time when the voice activated security device for the room had been disconnected. Id. at 389. The supreme court found that as in the Hester case, Downey's claim arose from the antecedent negligence of Sadler that was a proximate cause of Bell raping Downey. Id. The Fifth Circuit found Downey could pursue her claim regardless of whether the person who raped her was or was not a governmental employee.

At the same time, courts have found claims barred where the gravamen of the plaintiff's suit is an intentional tort. See Gonzales v. City of El Paso, 978 S.W.2d 619, 622-23 (Tex.App.–El Paso 1998, no pet.); Holder, 954 S.W.2d at 806-08. Holder was raped by Potter, an on-duty City of Houston police officer. Potter had pulled Holder over in the early morning hours for a supposed traffic violation and ordered Holder to follow him. Holder followed Potter as he drove his patrol car to a downtown parking garage. Once there, Potter sexually assaulted Holder. Id. at 786.

Holder contended that she was not bringing suit based upon her having been sexually assaulted, but rather upon the City's negligence in failing to properly supervise or monitor Potter's use of his patrol car. Holder contended that the car constituted tangible personal property, negligent use of which could subject the City to liability under the Act. Id. at 805. Specifically, Holder linked her injury to the car by alleging that the City was negligent in its supervision and monitoring of Potter and the use of his patrol car. Holder relied heavily on the fact that the patrol car was the instrument that Potter used to stop her and in which he later assaulted her. Id.

The Fourteenth Court of Appeals rejected Holder's argument, finding that there was no nexus between the City's actions with regard to the patrol car and the sexual assault. Id. at 807. "In this case, the use of the patrol car was not the 'direct device' causing Holder's injury, and the 'required causal nexus' for liability [Act] is missing." Id.; see also Henry, 52 S.W. 434, *4-5 (condition or use of property did not proximately cause sexual assault on plaintiff); Ryan, 889 S.W.2d at 344-45.

Moreover, even where the plaintiff can allege some antecedent negligence that proximately caused the intentional tort, mere allegations alone will not be sufficient to avoid entry of a take nothing judgment. See Medrano, 989 S.W.2d at 144. The Medrano case arises from alleged assaults upon the plaintiffs by on duty police officers. Id. at 143. The plaintiffs asserted that they were bringing suit based not upon the intentional torts, but rather upon the City's negligent hiring, negligent training, and negligent failure to train the officers who committed the assault. The City moved for and was granted summary judgment based upon sovereign immunity because the TCA did not waive immunity for suits based upon intentional torts. Id. The San Antonio Court of Appeals affirmed the summary judgment holding that the plaintiff's global allegations without specific factual evidence to support negligent hiring, negligent training, and negligent failure to train was insufficient to defeat the City's motion for summary judgment based upon sovereign immunity. Id. at 144-45. See Delaney, 835 S.W.2d at 60 ("although the [U.S. Supreme] Court added that the intentional tort exception could not be circumvented merely by alleging that the government was negligent in supervising the employee-tort feasor, the claim in that case went beyond such allegations."); see Harris County v. Cabazos,177 S.W.3d 105 (Tex.App.–Houston [1st Dist.] 2005, no pet. h.) (plaintiff

cannot circumvent intentional tort exception by couching claim in terms of negligence). Thus, a plaintiff must be able to **both plead and prove** acts of negligence that proximately caused their injury in order to avoid having their suits dismissed or a take nothing judgment entered based upon sovereign immunity as retained by §101.057(2) of the Act.

b. In Determining if the Intentional Tort Exception Applies, the Courts May Consider Whether the Active Tortfeasor Intended the Injury or Intended the Act or That Caused the Injury.

Courts of appeal have had to distinguish between intent to cause injury, as opposed to the cause of a particular event, in determining the scope of §101.057(2)'s exclusion from liability. Durbin v. City of Winnsboro, 135 S.W.3d 317, 321-25 (Tex.App–Texarkana 2004, pet filed); Pineda v. City of Houston, 175 S.W.3d 276 (Tex.App. –Houston [1st Dist.] 2004, no pet.). Durbin arose out of a high speed chase in which the plaintiffs' son was killed after his motorcycle was intentionally bumped by a police car. Durbin, 135 S.W.3d at 321. The Durbins brought suit predicating liability upon the officer's intentionally bumping the motorcycle. The city filed a plea to the jurisdiction on the grounds that the act of bumping the motorcycle was an intentional act. The city offered plaintiffs' pleadings and deposition testimony to establish that having the police car hit the motorcycle was an intentional act. The plaintiffs opposed the plea to the jurisdiction on the grounds that the officer intended to end the chase by hitting the motorcycle with his car, his actions did not constitute an intentional tort. Id.

The Texarkana Court of Appeals explained that §101.057(2) excludes from liability under the TCA those actions by a governmental employee or officer that would constitute an intentional tort. Id. The court went on to note that intending to cause a particular action was not sufficient to be liable for an intentional tort. The Texarkana Court held that the difference between negligence and an intentional tort is not whether the defendant intended the act that caused the injury, but whether the defendant intended to injure the other person. Id. at 321. The court noted that, in some instances, such as rape or a physical beating, the intent to cause injury can be established by the defendant's actions. Because the testimony before the court established that there was a dispute as to whether the officer intended to cause injury to the motorcycle rider or not, the court could not find, as a matter of law, that plaintiffs' claims were barred by section 101.057(2) and it was error to grant the defendant's plea to the jurisdiction. Id. at 325. But see Pineda, 175 S.W.3d 276, 283 (although the officers' may not have intended their initial actions, they did intend the ultimate injury and because the focus of appellants' claims is on the officers' intentional tortious conduct, the city's immunity is not waived).

However in Gordon, the Texas Supreme Court held that an excessive force claim based on an officer putting handcuffs on an arrestee were barred by the TCA's intentional tort exclusion. City of Watauga v. Gordon, 434 S.W.3d 593-94. Gordon brought suit alleging that he was negligently injured when the arresting officer put handcuffs on too tight. Id. The City filed a plea to the jurisdiction asserting that the plaintiff's claim was barred by the intentional tort exclusion in the TCA. Id. Gordon asserted that the officer did not commit the torts of assault or battery because the officer did not intend to injure him. Id. at 5. The Texas Supreme Court rejected this argument. The Court noted that, under the Texas Penal Code, an assault includes "intentionally or knowingly caus[ing] physical contact with another when he or she knows or should reasonably believe that the other will regard the contact as offensive." Id. at 4 (quoting Tex. Pen. Code Section 22.01(a)). The Court then pointed out that the plaintiff complained the handcuffs were too tight and that any person would find the act of being handcuffed offensive. Id.

> [T]he actions of a police officer in making an arrest necessarily involve a battery, although the conduct may not be actionable because of privilege. The officer is privileged to use reasonable force. But a police officer's mistaken or accidental use of more force than reasonably necessary to make an arrest still

> "arises out of" the battery claim. "As the saying goes, there is no such thing as a negligent battery, since battery is defined to require an intentional touching without consent not a negligent one."

Id. (citations ommitted). Accordingly, the Court held that, "Although a specific intent to inflict injury is without question an intentional tort, and many batteries are of this type, a specific intent to injure is not an essential element of battery." Id. at 5. Thus, all excessive force cases are barred because the officer's conduct would constitute assault/battery, and the intentional tort exclusion bars such claims. Id. at 7.[21]

7. Section 101.060: Placement and Repair of Traffic Control Devices.

As discussed in section IVB8 above, the Act addresses liability based on the failure to erect road signs, the failure to replace road signs, and damages resulting from the absence, condition or malfunction of traffic or road signs and signal devices. The first provision of section 101.060, together with section 101.022(b), establish that a governmental entity can be held liable only for the failure to erect and place signs and signals required by law. TEX. TORT CLAIMS ACT §§ 101.060, 101.022(b); see State v. Rodriguez, 985 S.W.2d at 85; Villarreal, 810 S.W.2d at 421. Subsection (a)(1) of section 101.060 specifically states that liability cannot be based upon the failure to erect and use discretionary signs and signals.[22]

The supreme court has determined that all signs, signals, and warning devices provided for in the Manual are discretionary and cannot form the basis of liability. The Manual was adopted by the highway department under Transportation Code section 544.001. The Manual purports to obligate all governmental units in the state to act in compliance with its terms. The Manual identifies certain signs and signals as discretionary, while appearing to mandate the use of other signs. King, 808 S.W.2d at 466. The supreme court held that other provisions of the Manual establish that its terms are not mandatory, in a legal sense. Id. at 466; Villarreal, 610 S.W.2d at 420-21. Therefore, while the Manual may appear to require the use or erection of certain signs, it does not establish a legal standard under which a governmental entity can be held liable. King, 808 S.W.2d at 466; Villarreal, 810 S.W.2d at 421 (holding that the Manual merely establishes construction standards for signs which an entity chooses to erect, but does not require the erection of any signs, signals or warning devices).

Once a governmental entity chooses to erect signs or warning devices, it can be held liable for the malfunction, removal, or destruction of those items. The erection of signs, signals, or warning devices, whether required by law or out of the exercise of discretion, creates an obligation to maintain them and insure they are working properly. Sullivan, 33 S.W.3d at 13-14; Reyes v. City of Houston, 4 S.W.3d 459, 462 (Tex.App.—Houston [1st Dist.] 1999, pet. denied); Norris, 550 S.W.2d at 386; Lawson, 524 S.W.2d at 351. See Donovan, 768 S.W.2d at 908-909. Thus, the placement of a traffic control device creates a duty to replace or repair that device within a reasonable time of learning that it is absent or malfunctioning. See Sullivan, 33 S.W.3d 13-14; Sparkman, 519 S.W.2d at 852; Donovan, 768 S.W.2d at 908-909; TEX. TORT CLAIMS ACT § 101.060.

The issue of whether or not a governmental entity failed to repair or replace absent or malfunctioning signs/signals in a reasonable time, typically comes down to a question of whether the governmental body had notice of the problem. McKnight v. Calvert, 539

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[21] Gordon argued that no tort was committed because he consented to being handcuffed and consent negates the existance of a tort. City of Watauga v. Gordon, 434 S.W.3d 586, 591 (Tex. 2014). The Supreme Court also rejected Gordon's argument holding that, "yielding to the assertion of legal authority ...must be treated as no consent at all...." Id. at 5 (quoting Prosser & Keeton on the Law of Torts, 121 (5th ed. 1984).

[22] The provisions of this chapter do not apply, however, to special defects. TEX. CIV. PRAC. & REM. CODE § 101.060(c); Adams, 888 S.W.2d at 612.

S.W.3d 447, 455–56 (Tex. App.—Houston [1st Dist.] 2017, pet. filed) (fact issue existed regarding whether officer patrolling area should have noticed vegetation obscuring stop sign, and would thereby support constructive notice); Miller, 893 S.W.2d at 27, 33. See, e.g., Garza, 878 S.W.2d at 675; Zambory, 838 S.W.2d at 582.

The Donovan case has some significant consequences regarding how a plaintiff can establish liability for a downed sign or malfunctioning traffic signal. The Donovans presented testimony of an "excited utterance" made by a passerby after the accident. Id. at 906-08. This person, who was never identified, volunteered that days prior to the accident she had reported to the City that the stop sign was down. Id. at 906. The Donovans also presented testimony of four other witnesses who estimated the stop sign was down for a period of time ranging from several days to two or three weeks. Id. at 909. To refute this testimony, the City called police officers, sanitation workers and an engineer to testify regarding: (1) how often the City employees would be in or through the intersection; and (2) city employees' training to report any problem with traffic control devices.

The engineer also testified that the City keeps a log of telephone calls regarding missing traffic signs and that the log contained no calls concerning the downed stop sign for the six weeks prior to the accident. Id. The City apparently argued at trial that if the stop sign was down, the City would have received immediate notice of that fact, and that the absence of any notation to that effect established the City' s lack of notice. See id.

The Dallas Court of Appeals, however, concluded that the City's employee proved that it had notice. The court found that the plaintiff's witnesses established the absence of the sign for at least several days. The City meanwhile established that its employees, who have an obligation to check on and report missing signs, would have gone through the intersection within the days preceding the accident. Id. Consequently, the court of appeals found the City's attempts to defend suits by establishing procedures for checking on and reporting down stop signs, helped establish notice once the plaintiff puts on proof of the absence, destruction, or malfunction of traffic control devices. Id. The Austin Court of Appeals has held that §101.060(a)(2) does not require actual notice. City of Austin v. Lamas, 160 S.W.3d 97 (Tex.App.–Austin 2004, no pet.). In Lamas, a passenger on a city bus was injured after the bus failed to observe a stop sign and ran over a dip in the road. There was evidence that the City had actual notice that the sign was obscured by foliage. Distinguishing the language in §101.060(a)(2) from §101.060(a)(3), the court held that actual notice was not required.

A governmental unit is given a reasonable time to replace a missing sign or to repair a malfunctioning signal only if the malfunction or absence was the result of component failure, act of God, or act of a third-party. Ramming, 861 S.W.2d at 465. A governmental entity may be held strictly liable for injuries and deaths if the absence or malfunction of a traffic control device was caused by its employee. Id.

A governmental entity cannot defeat a suit based on the failure to maintain traffic control devises based the discretionary act defense. As noted above, section 101.056 of the Act precludes a governmental entity from being held liable for discretionary acts. TEX. TORT CLAIMS ACT § 101.056. The discretionary act exclusion to liability is carried over to subsection (a)(1) of section 101.060 of the TCA. Sullivan, 33 S.W.3d at 14-15. In fact, section 101.060(a)(1) expressly provides that liability for traffic control devices cannot be predicated upon the initial placement of signs, signals and warning devices if the failure to have that device in place was the result of a discretionary decision of the governmental entity. Id. (however a governmental entity can be liable for failure to have control devices in place that are consistent with municipal ordinance). The discretionary exclusion to liability is not included in subsections (a)(2) and (a)(3) of section 101.060 that provide a governmental entity can be held liable for the absence, condition, malfunction, or removal of traffic control devices if it fails to fix the problem within a reasonable time after having notice of the problem. Id. at 14; TEX. TORT CLAIMS ACT § 101.060(a). Thus, a governmental entity cannot defend its failure to maintain a traffic control device based upon the discretionary act defense set forth in section 101.056 of the TCA. Id. at 14-15 ("[the

plaintiffs] are permitted to maintain their allegation that the city negligently installed and maintained [the school] crosswalk"); Reyes, 4 S.W.3d at 462. Moreover, there is no immunity when the entity exercises its discretion in making the decision to install safety devices, but does not actually install the device within a reasonable time. Sipes, 146 S.W.3d at 280; City of Fort Worth v. Robles, 51 S.W.3d 436, 442 (Tex.App.—Fort Worth 2001, pet. denied). Reasonableness is a question of fact precluding summary judgment. Sipes, 146 S.W.3d at 280.

8. Section 101.101: Exclusion From Liability Unless the Governmental Entity Has Notice Within Six Months After the Incident Occurred.

Subchapter D of the TCA provides the procedures for bringing suit. Under the Code Construction Act, compliance with the statutory prerequisites to any statutory cause of action is a jurisdictional prerequisite to suit, at least against the State. TEX. GOV'T CODE § 311.034. The most important of these procedures is the requirement that a governmental entity receive prompt notice of the plaintiff's claim. In the absence of notice, the governmental entity maintains all of its common law immunities. Putthoff, 934 S.W.2d at 173 .

In 2004, the Texas Supreme Court held that the notice of claim was not a jurisdictional pre-requisite for bringing suit under the TCA. Univ. of Tex. Sw. Med. Ctr. v. Loutzenhiser, 140 S.W.3d 351, 365-66 (Tex. 2004). In 2005, the Legislature amended section 101.101 of the TCA making the giving of notice a requirement to establishing the court's jurisdiction to hear the case. Univ. of Tex. Sw. Med Ctr., v. Arancibia, 324 S.W.3d 544, 546 (Tex. 2010). While the amended version of section 101.101 does not state that it is retroactive, the Supreme Court has held that the requirement to give notice in order to establish jurisdiction is retroactive to suits filed before the amendments came into effect. Id. at 548.

A governmental unit must have actual or formal notice of the accident giving rise to the suit within six months of its occurrence. TEX. TORT CLAIMS ACT § 101.101. Notice is a jurisdictional prerequisite to the bringing of suit under the TCA. Arancibia, 324 S.W.3d at 46. However, suit can be filed within six months of the incident without the plaintiff having given notice. Colquitt v. Brazoria County, 324 S.W.3d 539, 544, (Tex. 2010). If suit is filed within six months of the incident without having given formal notice, then the pleading must give the entity all of the information it would have received had it been given formal notice. Id.

The purpose of the TCA's notice provision is to enable the governmental unit to investigate while the facts are fresh and the conditions are substantially similar in order to guard against unfounded claims, settle claims, and prepare for trial. Cathey v. Booth, 900 S.W.2d 339, 341 (Tex. 1995) (per curiam); Colquitt v. Brazoria County, 324 S.W.3d at 544; City of Houston v. Torres, 621 S.W.2d 588, 591 (Tex. 1981); Garcia v. Tex. Dep't of Criminal Justice, 902 S.W.2d 728, 731 (Tex.App.—Houston [14th Dist.] 1995, no writ); McDonald v. State, 936 S.W.2d 734, 738 (Tex.App.—Waco 1997, no pet.); Putthoff, 934 S.W.2d at 163; Bell v. Dallas-Fort Worth Reg'l Airport Bd., 427 F. Supp. 927, 929 (N.D. Tex. 1977). Notice also aids governmental entities in managing and controlling their finances. Colquitt, 324 S.W.3d at 543.

Accordingly, formal notice must apprise the defendant of the injury, and the time, manner, and place of the incident. Id. A letter from a lawyer that enclosed a copy of a police report that provided all the information required by the statute as well as the notation that plaintiff broke her arm when she slipped on water in a school bus was sufficient formal notice. Tejano Ctr. for Cmyt. Concerns, Inc. v. Olvera, 2014 WL 4402210, *4-5. See also San Antonio Water Sys. v. Smith, 451 S.W.3d 442, 451-52 (letter from lawyer stating his client was hurt when she feel into hole with exposed pipes and stating a demand would be sent when details of her injuries were known was sufficient to give rise to need to investigate). In the absence of notice within six months, plaintiff is precluded from bringing suit. State v. McAllister, 2004 WL 2434347 (Tex.App.–Amarillo 2004, pet. denied); Rath v. State, 788 S.W.2d 48 (Tex.App.–Corpus Christi 1990, writ denied).

While actual notice will substitute for formal notice, actual notice is effective only if the

governmental entity has knowledge of its probable fault in causing the accident. Arancibia, 324 S.W.3d at 548-49; Cathey v. Booth, 900 S.W.2d 339, 341, 347-48 (Tex. 1995); see Bourne v. Nueces Cnty. Hosp. Dist., 749 S.W.2d 630, 632 (Tex.App.—Corpus Christi 1988, writ denied) ("'[a]ctual notice' under [Section 101.101 of the TCA] . . . mean[s] that knowledge which the governmental unit would have had if the claimant had complied with the formal notice requirement")..."). Section 101.101 provides that formal notice is not required if the governmental unit has actual knowledge of the incident giving rise to the suit. TEX. TORT CLAIMS ACT § 101.010(c). Actual notice must provide information comparable to what the governmental entity would have if it received formal notice. City of San Antonio v. Tenorio, 543 S.W.3d 772, 776 (Tex. 2018) ("If a governmental unit investigates an accident, whether the information acquired through its investigation meets the actual notice requirements of the TTCA depends upon the particular facts of the case."); Bell, 427 F. Supp. at 927. Actual notice must also apprise the defendant of the need to investigate the claim. See Rosales v. Brazoria County, 764 S.W.2d 342, 344 (Tex.App.—Texarkana 1989, no writ); Bourne, 749 S.W.2d at 632; Ray, 712 S.W.2d at 274.

A governmental entity is held to have actual notice only when it has knowledge of the name and address of those injured, the damage or injuries sustained, the time and place of the incident, and its probable fault in causing the accident or injuries. Cathey, 900 S.W.2d at 341 (Tex. 1995); Rosales, 764 S.W.2d at 344; Bourne, 749 S.W.2d at 633; Ray, 712 S.W.2d at 274. If a governmental unit has this subjective awareness of fault, then requiring formal, written notice would do nothing to further the statutory purposes of information gathering, settling claims, and preparing for trial. Arancibia, 324 S.W.3d at 549 ("Fault, as it pertains to actual notice, is not synonymous with liability; rather it implies responsibility for the injury claimed. Subjective.") "[S]ubjective awareness often will be proved 'if at all, by circumstantial evidence.");.'" Id. (quoting Tex. Dept. of Criminal Justice v. Simons, 140 S.W.3d 338 (Tex. 2004)). If the governmental unit does not have knowledge of all of this information, the plaintiff's failure to provide formal notice will preclude suit. Huffine v. Tomball Hosp. Auth., 979 S.W.2d 795, 800 (Tex.App.–Houston [14th Dist.] 1998, no pet.); Gonzalez, 940 S.W.2d at 795; Ray, 712 S.W.2d at 274; Vela, 703 S.W.2d at 725-26.

Consequently, a governmental entity is held to have actual notice only when it has "knowledge of the information [the entity] is entitled to be given under section 101.101(a) and a subjective awareness that its fault produced or contributed to the claimed injury." City of San Antonio v. Johnson, 140 S.W.3d 350, 351 (Tex. 2004); Tex. Dep't of Criminal Justice v. Simons, 140 S.W.3d 338 (Tex. 2004); see Tenorio, 543 S.W.3d at 778 (holding that "[e]vidence that a vehicle being pursued by the police is involved in a collision is not, by itself, sufficient to raise a fact question about whether the [defendant], for purposes of the TTCA, had subjective awareness that it was in some manner at fault in connection with the collision"); Blevins v. Tex. Dep't of Transp., 140 S.W.3d 337 (Tex. 2004); Thus, actual notice MUST put the entity on notice of the need to investigate the incident, including the entity's subjective awareness of its fault in the matter. City of Dallas v. Carbajal, 324 S.W.3d 537 (Tex. 2010). See also Rivera, 985 S.W.2d at 206 (actual notice requires knowledge of probable fault in causing the accident or injuries; Rosales, 764 S.W.2d at 344; Bourne, 749 S.W.2d at 633; Ray, 712 S.W.2d at 274.[23]

A governmental entity can be charged with actual notice based upon the knowledge of their agents and employees. City of Texarkana v. Nard, 575 S.W.2d 648, 651-52 (Tex. Civ. App.–Tyler 1978, writ ref'd n.r.e.); Ray, 712 S.W.2d at 274. Actual notice is imputed to the entity when an official, or employee charged with a duty to investigate or report the incident has knowledge

[23] The Rivera decision suggests that an answer denying a governmental defendant had actual or constructive notice must be verified. Rivera, 2001 WL 35962, 44 Tex. Sup. Ct. J. 597.

of all three elements of actual/forward notice. Gonzalez, 940 S.W.2d at 795-96; McDonald, 936 S.W.2d at 738. See Univ. of Tex. Health Sci. Ctr. at San Antonio v. Stevens, 330 S.W.3d 335, 339–40 (Tex.App.—San Antonio 2010, no pet.) (actual notice imputed where pediatrics residency program director conducted faculty review of chemical burn incident involving mistaken injection of topical anesthetic into woundwound by resident and, according to operating agreement between residency program and hospital, had agreed to conduct investigations into problems involving residents); Dinh v. Harris Cnty. Hosp. Dist., 896 S.W.2d 248, 253 (Tex.App.—Houston [1st Dist.] 1995, writ dism'd w.o.j.). Actual notice thus is not limited to only a particular government official or employee, such as a director of risk management or hospital administrator. See Stevens, 330 S.W.3d at 339; Dinh, 896 S.W.2d at 253.

> "[A] governmental entity cannot put on metaphorical blinders and designate only one person in its entire organization through whom actual notice may be imputed when the facts support that there are other representatives who have a duty to gather facts and investigate on behalf of the governmental entity."

Id. Accordingly the San Antonio Court of Appeals held that a governmental entity cannot avoid receiving notice by "self-imposed compartmentalization of claims processing and the lack of communication among City agencies and departments." San Antonio Water Sys.,, 451 S.W.3d at 452 ("("The purpose of the notice requirement is to ensure prompt reporting of claims to enable governmental units to gather the information necessary to guard against unfounded claims, facilitate settlement, and prepare for trial. .... . . In this case, that purpose was served" even if the water department was not the entity that received actual notice).

In Nard, the City was held to have actual notice as a consequence of an investigation of the traffic accident by its police department. Nard, 575 S.W.2d at 651-52. The court held that the City had actual notice not only because it had the names and addresses of the plaintiffs, but also because its employees investigated the accident, made a report reflecting plaintiff's injuries and noted the malfunctioning traffic light that caused the accident. Id.

In La Joya Indep. Sch. Dist. v. Gonzalez, 532 S.W.3d 892 (Tex. App.—Corpus Christi 2017, pet. filed), the court found a fact issue on whether the District had notice that a bus driver was at fault for a wrongful death. Id. at 895–96. The plaintiff argued that the involvement of the local police department, as well as the suspension, drug-testing, and eventual resignation of the bus driver, were signs that the District was aware of its potential fault in the incident. Id. at 899. The court also considered the transcript of audio from the incident, and concluded that the driver had notice of potential fault, which could possibly be imputed to the District from his recorded statements where he reported the incident to an unknown individual. Id. at 901–02.

Ray involved injuries to a child while in the defendant hospital. The Fort Worth Court of Appeals held that because the plaintiff was in the hospital at the time of her injuries, the county had knowledge through its agents and employees of both the incident and its probable fault. Ray, 712 S.W.2d at 274; see also Tex. Tech Univ. Health Scis. Ctr. v. Bonewit, No. 07-16-00211-CV, 2017 Tex. App. LEXIS 10775 (Tex. App.—Amarillo Nov. 15, 2017, pet. filed) (negative outcome of surgery with surgeons present was sufficient to impute actual awareness). Compare Arancibia, 324 S.W.3d at 549-50 (patient died three days after two resident physicians performed laparoscopic herniahernia surgery, emergency surgery showed that during the herniahernia operation, her bowel was perforated, leading to acute peritonitis,acute peritonitis, there was only one possible instrumentality of the harm—the governmental actor, an attending physician, was present while the two resident physicians performed the hernia repair and the day after hernia repair and the day after patient's death, the attending physician emailed his immediate supervisor, who was the chief of the gastrointestinal/endocrine division to give his supervisor a "heads up on a terrible outcome with" a patient) with Univ. of Tex. Health Sci.

Ctr.v. McQueen, 431 S.W.3d 750, 758 (Tex.App.—Houston [14th Dist] 2014, no pet.)(while there was a note of bowel injury during surgery, patient returned to the hospital twice after surgery, but no physicialphysician here spoke with or notified risk management or any supervisor—such as the head of the department—and no investigation was conducted).

However, the mere fact that an employee of an entity or agency conducted an investigation or prepared a report related to the event will not constitute actual notice for purposes of the TCA. Carbajal, 324 S.W.3d at 538. As the Supreme Court explained:

> It is not enough that a governmental unit should have investigated an incident ..., or that it did investigate, perhaps as part of routine safety procedures, or that it should have known from the investigation it conducted that it might have been at fault. If a governmental unit is not subjectively aware of its fault, it does not have the same incentive to gather information that the statute is designed to provide, even when it would not be unreasonable to believe that the governmental unit was at fault.
>
> [M]erely investigating an accident is insufficient to provide actual notice. See, e.g., id. at 347 ("Cathey cannot fairly be read to suggest that a governmental unit has actual notice of a claim if it could or even should have learned of its possible fault by investigating the incident."); Id. at 347 ("[A] governmental unit cannot acquire actual notice merely by conducting an investigation, or even by obtaining information that would reasonably suggest its culpability. The governmental unit must have actual, subjective awareness of its fault in the matter.").

Although both parties agree that the road was not properly blocked, the report here did not provide the City with subjective awareness of fault because it did not even imply, let alone expressly state, that the City was at fault. The report only describes what apparently caused the accident (missing barricades). It does not say who failed to erect or maintain the barricades. [Plaintiff] ignores the possibility that a private contractor or another governmental entity (such as the county or state) could have been responsible for the road's condition. Indeed, after investigating the accident, the City determined that the Texas Department of Transportation was at fault. Simply put, the police report here is no more than a routine safety investigation, which is insufficient to provide actual notice.

> By holding that the officer's "perception of the cause of the accident" sufficed to provide actual notice, the court of appeals overlooked the policy underlying actual notice: " 'to enable governmental units to gather information necessary to guard against unfounded claims, settle claims, and prepare for trial,' " Simons, 140 S.W.3d at 347 (quoting Cathey, 900 S.W.2d at 341). When a police report does not indicate that the governmental unit was at fault, the governmental unit has little, if any, incentive to investigate its potential liability because it is unaware that liability is even at issue. See Id. But one must note that, in reaching this holding, the Supreme Court expressly stated that it was not deciding whether the City would have had actual notice if the report had expressly stated that the City was at fault.

Id. at fn 1 See;see Tex. Dep't Dep't of State Health Serv. v. Gonzalez, No. 13–14–00259–CV, 2014 WL 7205332 (Tex.App.—-

Corpus Christi)(Dec. 18, 2014, no pet.)(employee taking photos of accident and sending them to his supervisor is not sufficient to give agency actual notice).

At the same time, the knowledge of or notice given to one agency or unit of state government is not sufficient to satisfy section 101.101 if suit is to be brought against another agency or unit of state government. Reese v. Tex. State Dep't of Highways and Pub. Transp., 831 S.W.2d 529, 530 (Tex.App.–Tyler 1992, writ denied). But see Stevens, 330 S.W.3d at 339–40 ("[A] governmental entity cannot put on metaphorical blinders and designate only one person in its entire organization through whom actual notice may be imputed when the facts support that there are other representatives who have a duty to gather facts and investigate on behalf of the governmental entity"); San Antonio Water Sys., 451 S.W.3d at 452 (a local governmental entity cannot avoid receiving notice by "self-imposed compartmentalization of claims processing and the lack of communication among City agencies and departments")"). The time for giving notice runs from the date of the incident and not the plaintiff's discovery of injury. Putthoff, 934 S.W.2d at 174; Sanford v. Tex. A&M Univ., 680 S.W.2d 650 (Tex.App.–Beaumont 1984, writ ref'd n.r.e.). Sanford was a telephone repair man working at Texas A&M University's agricultural research and extension center in 1975. Id. at 651. While working at the research and extension center, Sanford was exposed to strong pesticides. Over the next five years, Sanford suffered fainting spells, dizziness, and kidney problems. It was not until 1980 that a doctor told Sanford that his symptoms were consistent with exposure to pesticides. Sanford claimed that he did not and could not have discovered the defendant's wrongful conduct prior to 1980. He argued that the discovery rule excused him from failing to file suit within the statute of limitations and giving notice within six months of the incident. The Beaumont Court of Appeals rejected this argument and held that while the discovery rule extends the statute of limitations, it does not affect the time period for giving notice. Id. at 651-652. The Beaumont court, therefore, affirmed the entry of summary judgment in favor of the defendant because Sanford failed to provide notice in a timely manner. Id. See Univ. of Tex. Med. Branch v. Greenhouse, 889 S.W.2d 427, 432 (Tex.App.—Houston [1st Dist.] 1994, writ denied) (medical malpractice plaintiff's time for giving notice under the TCA ran from event giving rise to suit even if she did not discover injury until years later). In Greenhouse, the First Court of Appeals reasoned:

> The Texas Supreme Court has said of the Act, "Once a plaintiff invokes the procedural devices of the Texas Tort Claims Act, to bring a cause of action against the State, then he is also bound by the limitations and remedies provided in the statute"...
>
> While we believe it is remarkably unfair to deprive Greenhouse of her right of recourse against UTMB because she was unable, through no fault of her own, to comply with the notice requirements, we must agree with UTMB that the trial court erred in applying the discovery rule.

Greenhouse, 889 S.W.2d at 431-32 (citation omitted).

A year later, the same Houston court found that the notice requirement is not tolled by the mental incapacity of a claimant. Dinh v. Harris County Hosp. Dist., 896 S.W.2d 248 (Tex.App.–Houston [1st Dist.] 1995, writ dism'd w.o.j.). In 1997, the San Antonio court adopted the Greenhouse reasoning and found that the discovery rule did not apply when two years had passed since an alleged misdiagnosis of cancer. Streetman v. Univ. of Tex. Health Science Ctr. at San Antonio, 952 S.W.2d 53 (Tex.App.—San Antonio 1997, no writ).

Assuming that the majority rule is that an incapacity tolls the notice requirement, a plaintiff is no longer excused from giving notice, once that incapacity has been removed. Id.; see McCrary, 642 S.W.2d at 154. However, in 2004, the supreme court held that the six month notice

period is not tolled by the claimant's minority. Martinez v. Val Verde County Hosp. Dist., 140 S.W.3d 370, 372 (Tex. 2004). The Court reasoned that the Act does not toll the period by its express terms. Id.; see TEX. CIV. PRAC. & REM. CODE ANN. § 16.001 (tolling period limited to chapter 16).

Prior to the Dinh and Streetman decisions, it was generally accepted that minors and incompetents were excused from giving notice under section 101.101 until such time as their incapacity was removed. Torres, 621 S.W.2d at 591; McCrary v. Odessa, 482 S.W.2d 151, 154-55 (Tex. 1972); Rath, 788 S.W.2d at 48. The Corpus Christi court has held that, "[o]nce a guardian is appointed, the disability is removed; a guardian of the estate is empowered to initiate a lawsuit." Rath, 788 S.W.2d at 51. The guardian's failure to give notice within six months of his appointment barred Rath's suit. Id . It could be argued that a parent's hiring of an attorney to represent a minor also removes any disability, obligating someone acting on the minor's behalf to give notice within six months. See id.

The Supreme Court has also held that the time for giving notice for an injury to a fetus runs from birth. Univ. of Tex. v. Loutzenhiser, 140 S.W.3d 351 (Tex. 2004). Thus, while actual or formal notice was not received within six months after the procedure alleged to have caused the injury, suit under TCA was not barred as notice was received within six months of injured child's birth. See id.

While a city's charter can shorten the period of time required for giving notice, the restrictions must be reasonable. The Act ratified and approved city charters and ordinance provisions requiring notice in less than six months of the date of the accident. TEX. TORT CLAIMS ACT § 101.101(b). Claims against cities, therefore, must be supported by evidence of actual or formal notice within the time period provided in the charter. Torres, 621 S.W.2d at 590-91. Texas courts will enforce and uphold charter provisions establishing shorter time periods for providing notice, as long as they are reasonable. Id. at 591. Consequently, a claimant may have less than six months in which to give notice of his claim if a city charter so provides. Id.

VII. ASSERTING SOVEREIGN IMMUNITY AND SUBMISSION OF A GOVERNMENTAL PREMISES LIABILITY CASE TO THE JURY

Both the assertion of sovereign immunity and the submission to jury in cases where sovereign immunity is at issue raises particular issues the practitioner must consider.

A. Asserting Immunity from Suit in a Plea to the Jurisdiction.

Because immunity from suit deprives a trial court of jurisdiction, it can properly be raised through a plea to the jurisdiction. Jones, 8 S.W.3d 637. By contrast, immunity from liability does not affect a trial court's jurisdiction and, thus, cannot be asserted through a plea to the jurisdiction. Id. at 638-39; Lueck, 290 S.W.3d at 882. A plea to the jurisdiction contests the trial court's authority to determine the subject matter of a pending suit or cause of action. Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 554 (Tex. 2000).

Plaintiffs must be very careful to ensure that the facts alleged in their pleadings and any evidence they offer at a hearing on a plea to the jurisdiction are sufficient to establish a waiver of immunity from suit. An order granting a plea to the jurisdiction constitutes a final judgment. Harris County v. Sykes, 136 S.W.3d 635 (Tex. 2004). That final judgment will not only conclude that litigation, but will likely bar claims against any other defendants (the governmental entity or other governmental employees). Id.; TEX. CIV. PRAC. & REM. CODE § 101.106. Therefore, a plaintiff must make certain that the pleadings on file at the time of the hearing and the evidence offered at the hearing establish that their claims and causes of action fall within a waiver of immunity. Tex. Dep't of Criminal Justice v. Miller, 51 S.W.3d 583, 587 (Tex. 2001).

In a suit against a governmental defendant, the plaintiff has the burden of affirmatively pleading a valid waiver of immunity from suit that vests the trial court with jurisdiction. Dallas Area Rapid Transit v. Whitley, 104 S.W.3d 540 (Tex. 2003). See Rhule, 417 S.W.3d at 442 (every court has an obligation to determine if it has subject matter jurisdiction, a judgment entered when the court

lacks jurisdiction is fundamental error and such a judgment is not final). While plaintiff's allegations are liberally construed, plaintiff's live pleading must demonstrate, by the facts alleged and reference to statute or other provision of law, that immunity from suit had been waived. Leatherwood v. Prairie View A&M Univ., 2004 WL 253275 (Tex.App.–Houston [1st Dist.], 2004, no pet. h.); City of Weslaco v. Cantu, 2004 WL 210790 (Tex.App.–Corpus Christi, 2004, no pet.); City of Canyon v. McBroom, 121 S.W.3d 410 (Tex.App.–Amarillo 2003, no pet. h.); Hardin Cty. Community Supervision and Corrections Dep't v. Sullivan, 106 S.W.3d 186, 189 (Tex.App.–Austin 2003, pet. denied). Conclusory allegations, such as statements that a plaintiff's constitutional rights have been violated or that a person or agency exceeded its authority, are insufficient to establish a waiver of immunity from suit. Creedmoor-Maha Water Supply Corp., 307 S.W.3d at 516. Thus, a plaintiff must plead specific facts, not just conclusory allegations or legal conclusions. See Texans Uniting for Reform and Freedom v. Saenz, 319 S.W.3d 914, 920 (Tex.App.—Austin 2010); Creedmoor, 307 S.W.3d at 516; Good Shepard Med. Ctr., Inc. v. State, 306 S.W.3d 825, 836 (Tex.App.—Austin 2010). Furthermore, the court does not have to accept a plaintiff's allegations if its pleadings relate to issues of law rather than issues of fact. Hearts Bluff Game Ranch, Inc., 381 S.W.3d at 487 (plaintiff's pleading must not negate the cause of action by asserting a taking claim against the state when the actions in question were taken by the federal government). In Hearts Bluff the plaintiff alleged a taking claim but the court found that alleged action of the governmental entity could not as a matter of law constitute a taking.

(a). The Basis of the Plea to the Jurisdiction—the Plaintiff's Pleadings or the Factual Basis of the Plaintiff's Claims

If the plea to the jurisdiction challenges the facts alleged in plaintiff's live pleading, then the court must consider the evidence offered by both sides as necessary to resolve the question of jurisdiction. Lueck, 290 S.W.3d at 884 (to allow the plaintiff to stand on allegations alone, would eliminate the use of pleas to challenge a court's jurisdiction); Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217 (Tex. 2004).

At the same time, "to determine if the plaintiff has met [the burden of pleading immunity from suit], 'we consider the facts alleged by the plaintiff and, to the extent it is relevant to the jurisdictional issue, the evidence submitted by the parties'." Dallas Area Rapid Transit, 104 S.W.3d at 542. In some instances, establishing a waiver of immunity requires establishing liability. Lueck, 290 S.W.3d at 883; Creedmoor, 307 S.W.3d at 516, fn.8; Combs v. City of Webster, 311 S.W.3d at 94-95 (in some instances, courts must construe statutes in connection with a plea to the jurisdiction in order to determine whether a defendant acted within her statutory authority). See also Leach, 335 S.W.3d at 396-97. See Tex. Dep't. of Transp. v. Perches, 388 S.W.3d 652, 656 (Tex. 2012)(plaintiff's pleading was insufficient as a matter of law to assert an ordinary defect claim); Hearts Bluff Game Ranch, Inc., 381 S.W.3d at 487 (plaintiff's pleading must not negate the cause of action by asserting a taking claim against the state when the actions in question were taken by the federal government). When determining if the court has jurisdiction that implicates the merits of the plaintiff's claims, the relevant evidence must be reviewed to determine if there are fact questions as to the elements of plaintiff's claims. Leach, 335 S.W.3d at 396-97.; Miranda, 133 S.W.3d at 217. However, when the waiver of immunity from suit and waiver of immunity from liability are not co-extensive, then the court must only consider pleadings and evidence related to whether there is a waiver of immunity from suit. See Lueck, 290 S.W.3d at 883.

In deciding a plea to the jurisdiction, the court cannot weigh the merits of the plaintiff's claims, but must consider only the pleadings and evidence pertinent to the jurisdictional inquiry. Lueck, 290 S.W.3d at 884; Miranda, 133 S.W.3d 217 (Tex. 2004). While the court cannot rule based upon its opinion of the merits of plaintiff's claim when immunity from liability and damages are "co-extensive" under a statute, the court must determine whether the plaintiff has plead and all of the offered evidence raise a fact question as to the elements of liability that are necessary to establish jurisdiction. Lueck, 290 S.W.3d at 880-81. "[W]hen the facts underlying the merits and subject-matter jurisdiction are intertwined, the State may assert sovereign immunity from suit by

a plea to the jurisdiction, even when the trial court must consider evidence 'necessary to resolve the jurisdictional issues raised'." Id. at 880. Thus, in order to defeat a plea to the jurisdiction a plaintiff must plead all of the elements of the cause of action they are brining. See Tex. Dep't. of Transp. v. Perches, 388 S.W.3d 652, 656 (Tex. 2012)(plaintiff's pleading was insufficient as a matter of law to assert an ordinary defect claim). Similarly, the plaintiff must allege facts that will support the elements of the plaintiff's claims. Hearts Bluff Game Ranch, Inc., 381 S.W.3d at 482-84. Hearts Bluff brought a takings claims against the state based on the designating their property as a potential location for a reservoir and responding to request for comment from a federal agency and stated the state opposed designation of plaintiff's property as federal mitigation bank. Id. The Texas Supreme Court held that as a matter of law the actions upon which plaintiff predicated the taking claim could not constitute a the proximate cause of the taking of the property at issue, and therefore held there was no waive of immunity for plaintiff's taking claim. Id. Thus, the plaintiff needs to: 1. plead the elements of the claim, and make sure that its pleadings don't negate the elements of a claim; and 2. may be required to offer evidence regarding liability that is relevant to establishing the court's jurisdiction. Id.; Lueck, 290 S.W.3d at 880-81.

When a defendant challenges the allegations in a petition that would establish jurisdiction, the standard for reviewing the plea changes. The Garcia II court noted that where a defendant challenges the existence of facts that establish jurisdiction, the standard for reviewing the defendant's motion mirrors that of a traditional motion for summary judgment. Mission Consol. Ind. School Dist. v. Garcia, 372 S.W.3d 629 (Tex. 2012); Miranda, 133 S.W.3d at 228. Under this standard of review, the defendant carries the burden of proof by its assertion that the trial court lacks jurisdiction. Garcia II at 635; Miranda, 133 S.W.3d at 228. Once the defendant meets the initial burden to challenge jurisdictional facts, then the plaintiff is required to offer evidence that a disputed material fact exists regarding the challenged jurisdictional issue. Garcia II at 635; Miranda, 133 S.W.3d at 228. If a fact issue exists, the trial court should deny the plea to the jurisdiction, but if the relevant evidence is undisputed or the plaintiff fails to raise a fact question on the jurisdictional issues, the trial court must grant the plea to the jurisdiction. Garcia II at 635; Miranda, 133 S.W.3d at 229-231.

Furthermore, when immunity from suit and jurisdiction are co-extensive , then submission of evidence regarding the merits of plaintiff's claims will determine whether claims are dismissed. See Univ. of N. Tex. v. Harvey, 124 S.W.3d 216 (Tex.App.–Fort Worth 2003, pet. denied) (finding jurisdiction as to claims where evidence at hearing established a strong causal connection to plaintiff's injuries); Tex. Ass'n of Bus. v. Tex. Air Control Bd., 852 S.W.2d 440 (Tex. 1993). Similarly, the Whistleblower suit in Lueck was dismissed when the plaintiff could not show that he had reported a violation of law to an appropriate law enforcement authority. Lueck, 290 S.W.3d at 886; see also Univ. of Houston v. Barth, 403 S.W.3d 851, 858 (Tex. 2013) (dismissing suit when the plaintiff failed to demonstrate that he satisfed the objective prong under the Whistleblower Act because, given his legal training, , he could not have believed in good faith that a violation of the administrative policies were violations of "law" or believed in good faith that a report to University administrative personnel was a report to a law enforcement entity). When suit is brought under a statute where immunity from suit and liability are "co-existent, then the plaintiff must offer evidence sufficient to raise fact questions as to each element of liability in order to defeat the plea to the jurisdiction. Lueck, 290 S.W.3d at 880-81. See also Tex. Dep't. of Transp. v. Perches, 388 S.W.3d 652, 656 (Tex. 2012)(plaintiff's pleading was insufficient as a matter of law to assert an ordinary defect claim); Hearts Bluff Game Ranch, Inc., 381 S.W.3d at 482-84 (plaintiff's pleading must not negate the cause of action).

For example, in Miranda, the Texas Supreme Court held the department's plea to the jurisdiction should have been granted because evidence established, as a matter of law, that the defendant was not guilty of gross negligence. Miranda, 133 S.W.3d at 230; County of Cameron v. Brown, 80 S.W.3d 549, 555. Tex. Natural Res. Conservation Comm'n v. White, 46 S.W.3d 864, 868 (Tex. 2001).

The plaintiff in Miranda was bringing suit under the recreation liability provision of the Tort Claims Act and, as such, she had to establish gross negligence in order to prevail in the suit. Miranda, 133 S.W.3d at 229-231. The Parks & Wildlife Department filed a plea to the jurisdiction and specifically denied that there was evidence that it acted with gross negligence. The Texas Supreme Court held that granting the plea was proper because the plaintiff did not offer evidence sufficient to establish a fact issue on whether the department's conduct constituted gross negligence. Id. In ruling on pleas to the jurisdiction and in reviewing rulings on such pleas, the trial courts and appellate courts are required to examine the evidence as to all jurisdictional facts. Id.; Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 555 (Tex. 2000). Thus, where immunity from suit and liability are co-existent, to defeat a plea to the jurisdiction, the plaintiff must plead and offer evidence at least creating a fact issue for each element of liability for the claims and causes of action she is bringing. Miranda, 133 S.W.3d at 229-31. See Tex. Dep't. of Transp. v. Perches, 388 S.W.3d 652, 656 (Tex. 2012)(plaintiff's pleading was insufficient as a matter of law to assert an ordinary defect claim); Hearts Bluff Game Ranch, Inc., 381 S.W.3d at 482-84 (plaintiff's pleading must not negate the cause of action).. As previously noted some statutes, such as the TCA and the Whistleblower Act, make the waiver of immunity from suit and immunity from liability co-existent. Miranda, 133. S.W.3d at 229-31.; See Combs v. City of Webster, 311 S.W.3d 85 (Tex.App—Austin, 2009) (holding that plaintiff has to offer evidence sufficient to establish each element of a breach of contract claim to defeat a motion for summary judgment). Therefore, to establish a waiver of immunity from suit in a Whistleblower claim, the plaintiff must plead and offer evidence sufficient to create a fact issue as to each challenged element of proving liability under the statute at issue. Id. In these instances, the trial court must look at whether the plaintiff has plead and, if the plead facts are challenged, offered evidence establishing a waiver of immunity from liability in ruling on a plea to the jurisdiction. Id.

However, a court cannot consider pleadings and evidence related to liability where it does not relate to the determination of jurisdiction. "We have limited the use of a plea to the jurisdiction in these circumstances by holding that such a plea may only be used to address jurisdictional facts." Id. at 880-81.

Like Miranda, the plaintiff in Garcia II was required to offer evidence raising a question of liability in order to survive a plea to the jurisdiction. See Mission Consol. Indep. Sch. Dist. v. Garcia, 372 S.W.3d 629 (Tex. 2012). Ms. Garcia was fired after working for the Mission Consolidated Independent School District for more than 27 years. Garcia filed an employment discrimination suit alleging she was discriminated against based upon her race, national origin, gender, and age. The school district filed a plea to the jurisdiction asserting the Garcia's pleadings failed to establish a prima facie case for discrimination. In particular, the District attached evidence in support of its plea to the jurisdiction that Garcia was replaced by another Mexican-American woman who was three years older than Garcia. Id.

The Court pointed out that where a defendant challenges the existence of facts that establish jurisdiction, the standard for reviewing the defendant's motion mirrors that of a traditional motion for summary judgment. Garcia II at 635; Miranda, 133 S.W.3d at 228. Under this standard of review, the defendant carries the burden of proof by its assertion that the trial court lacks jurisdiction. Garcia II at 635; Miranda, 133 S.W.3d at 228. Once the defendant meets the initial burden to challenge jurisdictional facts, then the plaintiff is required to offer evidence that a disputed material fact exists regarding the challenged jurisdictional issue. Garcia II at 635; Miranda, 133 S.W.3d at 228. If a fact issue exists, the trial court should deny the plea to the jurisdiction, but if the relevant evidence is undisputed or the plaintiff fails to raise a fact question on the jurisdictional issues, the trial court must grant the plea to the jurisdiction. Garcia II at 635; Miranda, 133 S.W.3d at 228.

Ms. Garcia did not submit any evidence in opposition to the plea to the jurisdiction. Furthermore, Ms. Garcia did not seek to continue the hearing on the plea to the jurisdiction or seek discovery in order to gather evidence from which

she could submit evidence in opposition to the plea to the jurisdiction. Garcia II at 633.

In considering whether the District's plea to the jurisdiction should be granted, the Supreme Court first evaluated the elements of a prima facie employment case and the shifting burden of proof followed by federal courts evaluating employment discrimination claims. Garcia II at 635. The Supreme Court pointed out that discrimination, including age discrimination, can be established either by direct evidence or by inference through proof of a prima facie case of discrimination. Id. In order to prove a prima facie case of age discrimination, plaintiff must proof that: (1) at termination her age, sex and/or race placed her within the protected class; (2) she was qualified for her employment position; (3) she was terminated by the employer; and (4) she was replaced by someone who was not within the protected class. The Court pointed out that if a plaintiff, such as Ms. Garcia, cannot establish a prima facie case of discrimination, then she "will simply be limited to the traditional method of proof requiring direct evidence of discriminatory animus." Garcia II, 372 S.W.3d 629, 635. Because the school district offered evidence which negated the prima facie case of age discrimination (namely that she was not replaced by someone outside of the protected class), Ms. Garcia was obligated to either offer evidence that created a fact issue as to the challenge aspects of proving a prima facie case or offering direct evidence of discriminatory animus in her termination. See id. The Court noted that Garcia did not offer any evidence to contest the elements of the prima facia case of discrimination and/or evidence of discriminatory intent in her termination and/or sought a continuance or seek specific discovery, and thus held that the plea to the jurisdiction was proper and should have been granted.

The Supreme Court noted that "trial courts considering a plea to the jurisdiction have broad discretion to allow 'reasonable opportunity for targeted discovery' and to grant parties more time to gather evidence and prepare for such a hearing." Garcia II, 372 S.W.3d 629, 642-643 (quoting Miranda, 133 S.W.3d at 235-36.)

Both the trial court and the court of appeals must construe the pleadings in plaintiff's favor and look to plaintiff's intent in determining if plaintiff sought to plead an immunity from suit. Brown, 80 S.W.3d at 555; Tex. Ass'n of Bus. v. Tex. Air Control, 852 S.W.2d 440, 446 (Tex. 1993). In other words, the courts are obligated to construe the pleadings liberally in the plaintiff's favor in determining whether, as plead, there is a waiver of immunity from suit. Tex. Dep't of Transp. v. Ramirez, 74 S.W.3d 864, 867 (Tex 2002). If evidence is submitted, the trial court must take as true all evidence favorable to the plaintiff and indulge every inference and resolve any doubts in the plaintiff's favor. Miranda, 133 S.W.3d at 225-26. But see Creedmoor-Maha Water Supply Corp., 307 S.W.3d at 513, fn.4 ("[a] somewhat different standard applies when a challenge to a jurisdictional fact's existence does not implicate the merits [of plaintiff's claims]").

The deferential standard of reviewing a plaintiff's pleadings and evidence does not extend to the construction of the underlying statute that is alleged to have waived immunity—that is construed in favor of finding no waiver of immunity from suit and, thus, in favor of the governmental defendant. Taylor, at 701.

The trial court has discretion on whether to resolve jurisdiction at a preliminary hearing or await a fuller development of the merits. Bland v. Blue, 34 S.W.3d 557, 554 (Tex. 2000). The trial court has a duty to determine whether it has jurisdiction at its earliest opportunity considering the circumstances of the particular case, before allowing the litigation to proceed. Id. at 226. Miranda, 133 S.W.3d at 226. When the determination of jurisdiction requires the trial court to hear evidence, the court should allow time for development of the case, but mindful that the jurisdictional issue should be resolved as quickly as possible. Id. at 228. However a trial court should not delay a ruling on a please to the jurisdiction when discovery is not necessary. In re Hays County Sheriff's Department, 2012 WL 6554815 (Tex.App.—Austin 2012)(Pemberton, J, concurring)(trial court abused its discretion when it chose to withhold a ruling on a plea to the jurisdiction until after some discovery was completed, where discovery was not necessary for ruling on plea). See also City of Galveston v. Gray, 93 S.W.3d 587, 590 (Tex.App.—Houston [14th Dist.] 2002, pet denied)(trial court abused discretion in ordering mediation and not ruling on plea to the jurisdiction).

When the evidence presented by the parties in connection with the plea to the jurisdiction creates fact questions regarding the jurisdictional issues, then the trial court must deny the plea and allow the fact issues to be resolved by the fact finder at trial. Id. at 226-27. But see Creedmoor, 307 S.W.3d at 513, fn.4, (if the question of fact does not implicate juris, then Court and not jury resolves the issue). If the relevant evidence is undisputed or fails to create a fact issue on the jurisdictional question, the trial court rules on the plea as a matter of law. Miranda, 133 S.W.3d at 228.

Because the courts will look at both the pleadings and the evidence offered at the hearing, plaintiffs and defendants must carefully analyze the evidence that they will offer at a plea to the jurisdiction hearing. In many cases, plea to the jurisdiction hearings are becoming mini trials, similar to the old plea of privilege hearings. For example, in Durbin v. City of Winnsboro, 135 S.W.3d 317, 321-25 (Tex.App. –Texarkana 2004, pet. denied), the court of appeals found the trial court had jurisdiction only after reviewing extensive deposition testimony offered by the plaintiffs and defendants at the plea hearing. This case exemplifies the importance the evidence offered at the plea hearing will have in determining whether the plaintiff's claims are forever barred based on immunity from suit. Id. See Harris County v. Sykes, 136 S.W.3d 635 (Tex. 2004). But see Lueck, 290 S.W.3d 876, 884 ("if a plea to the jurisdiction requires the trial court to wade deeply into the lawsuit's merits, it is not a valid plea.").

The court's ruling on the plea to the jurisdiction is not limited to the question of whether the plaintiff has plead a viable basis for waiver from immunity from suit. If the court determines that the plaintiff's pleadings are insufficient to allege a waiver of immunity from suit, the court must then decide whether to allow the plaintiff to re-plead. The Supreme Court has repeatedly restated the standard: if the pleadings cannot be repleaded because, on their face, the facts alleged preclude or negate the existence of jurisdiction, then the plea to the jurisdiction may be granted without allowing the plaintiff an opportunity to amend. Lueck, 290 S.W.3d at 884-85. (plaintiff's allegations in petition negated his ability to prove a Whistleblower Act claim and therefore no reason to give him an opportunity to replead); See Texas Dep't of Crim. Justice v. Campos, 384 S.W.3d 810, 815-16 (where plaintiffs have amended their pleadings three times over 9 years after the first plea to the jurisdiction was filed, then they have had adequate opportunity to amend their pleadings to assert claims for which immunity has been waived and the case should be dismissed); Tex. A&M Univ. Sys. v. Koseoglu, 233 S.W.3d 835 (Tex. 2007); . Miranda, 133 S.W.3d at 227. This bar is equally applicable to the Tort Claims Act. Harris Cty. v. Annab, No. 17-0329, 2018 Tex. LEXIS 402 (Tex. May 11, 2018) (plaintiff's failure to establish any viable legal theory that would show waiver under TCA precluded her right to replead). Even where it appears the plaintiff could amend pleadings to state a claim for injunctive relief, a majority of the Texas Supreme Court held dismissal was appropriate where the plaintiff had sought monetary relief in its pleadings. Tomball Reg'l Hosp., 283 S.W.3d at 849.

B. Methods and means plaintiffs are using to avoid put-off rulings on immunity.

Over the last 10 years, the most significant changes in litigation against governmental entities and their employees/officials has been governmental entities' use of the plea to the jurisdiction as a means of raising immunity from suit early in litigation. As noted elsewhere in this paper, whenever a plea to the jurisdiction is based upon the plaintiff's pleadings, then no evidence is presented at the hearing and as a result, no discovery is needed before the court rules upon the plea to the jurisdiction. Creedmoor-Maha Water Supply Corp v. Texas Comm'n on Environmental Quality, 307 S.W.3d 505 (Tex.App.—Austin 2010, no pet); City of Galveston v. Gray, 93 S.W.3d 587, 590 (Tex.App.—Houston [14th Dist.] 2002, pet denied); In re Hays County Sheriff's Department, 2012 WL 6554815 (Tex.App.—Austin 2012)(Pemberton, J, concurring).

Plaintiffs are now using three means to get discovery for their claims prior to a defendant obtaining a ruling on a plea to the jurisdiction. First, some plaintiffs are using the Public

Information Act, formerly known as the Open Records Act, which is codified in Chapter 552 of the Texas Gov't Code, to get discovery in the form of documents from a governmental entity. The PIA can be a very effective means of getting pre-suit discovery, but it is limited to obtaining copies of documents currently in existence. The Public Information Act cannot be used to require a governmental entity to create documents or answer questions. A&T Consultants, Inc. v. Sharp, 904 S.W.2d 668, 676 (Tex. 1995); Dallas Indep. Sch. Dist., 31 S.W.3d 678, 681 (Tex.App.—Eastland 2000, pet. denied); Open Records Decision No. 563 at 8 (1990). The Public Information Act includes a provision which prohibits the use of the Act for the purpose of gathering information related to a matter in litigation or for which litigation is reasonably anticipated. Tex. Gov't. Code section 552.103(a). In order to assert this exception to disclosure under the Public Information Act, a governmental entity must establish that it subjectively believes litigation is likely, and there are objective facts which establish litigation is reasonably anticipated. Tex.Gov't Code section 552.103(a).

The second means that plaintiffs have used to obtain discovery prior to a governmental entity's filing a plea to the jurisdiction based on immunity, is Texas Rule of Civil Procedure 202 which authorizes pre-suit discovery in certain limited circumstances. Texas Rule of Civil Procedure 202 authorizes the taking of depositions prior to filing suit for one of two reasons: (1) to perpetuate or obtain the person's own testimony or that of any other person for use in an anticipated suit; or (2) to investigate a potential claim or suit. Tex.R.Civ.P 202.1 The first justification for using Rule 202 arises when the death of a witness, or another event making the deponent unavailable in the future, is anticipated. The second justification for discovery under Rule 202 is used to develop information about potential defendants or to obtain information about the proper party to serve. Id. Under Rule 202, to authorize a pre-suit deposition, the trial court must find that: (1) allowing the petitioner to take the requested deposition may prevent a failure or delay of justice in an anticipated suit; or (2) the likely benefit of allowing the petitioner to take the requested deposition to investigate a potential claim outweighs the burden or expense of the procedure. In re Hochheim Prairie Farm Mut. Ins. Assoc, et al., 115 S.W.3d 793 (Tex.App.—Beaumont 2003, no pet.).

Four courts of appeals have held that immunity from suit will not prohibit a governmental entity giving discovery pursuant to Rule 202 if the discovery relates to claims that the plaintiff may have against a third party. See University of Texas M.D. Anderson Cancer Center v. Tcholakia, 2012 WL 4465349 (Tex.App.—Houston [1st Dist.] 2012). See also City of Houston v. U.S. Filter Wastewater Group, Inc, 190 S.W.3d 242 (Tex.App.—Houston [1st Dist.] 2006, no pet.); City of Willow Park v. Squaw Creek Downs, L.P., 166 S.W.3d 336, 340 (Tex.App.—Fort Worth 2005, no pet) and In re Dallas County Hosp. Dist., 2014 WL 1407415, *3 (Tex.App.—Dallas April 1, 2014, no pet.). However, the Austin Court of Appeals has held that immunity from suit bars Rule 202 suits against governmental entities. Combs v. Texas Civil Rights Project, 410 S.W.3d 529, 533 Tex.App.—Austin 2013, no pet.)

Finally, plaintiffs have either sought to continue hearings on pleas to the jurisdiction or ask courts to delay rulings on pleas to the jurisdiction so they can conduct necessary discovery. Where discovery is appropriate and needed for court to rule on jurisdiction, allowing discovery is proper. However, where a governmental entity's plea to the jurisdiction is based upon the plaintiff's pleadings, delaying a ruling on the plea and/or allowing time to conduct discovery constitutes an abuse of the trial court's discretion for which mandamus is an appropriate remedy. In the City of Galveston decision, the Fourteenth Court of Appeals ruled that a trial court abuses its discretion if it orders mediation be conducted prior to a ruling on a plea to the jurisdiction based upon the plaintiff's pleadings. City of Galveston v. Gray, 93 S.W.3d 587, 592 (Tex.App.—Houston [14th Dist.] 2002, orig. proc The Austin Court of Appeals has similarly held that the trial court abuses its discretion by ordering discovery to go forward and unreasonably delaying a ruling on a plea to the jurisdiction. See In re Hays County Sheriff's Department, 2012 WL 6554815. Again, the plea to the jurisdiction in that case was predicated upon inadequacies in the plaintiff's pleadings as

opposed to challenging whether the plaintiff could prove facts sufficient to establish a waiver of immunity from suit.

C. Trial Courts Are Obligated to Promptly Rule on Pleas to the Jurisdiction Based on Immunity.

A trial court's failure to rule on a pending matter within a reasonable amount of time constitutes an abuse of discretion. See In re Shredder Co., 225 S.W.3d 676, 679 (Tex.App.—El Paso 2006, orig. proceeding). When a motion is properly filed and pending before the trial court, the act of considering and ruling on that motion is a ministerial act, and mandamus may issue to compel the trial court to act. In re Chavez, 62, S.W.3d 225, 228 (Tex.App.—Amarillo 2001, orig. proceeding); Safety-Kleen Corp. v. Garcia, 945 S.W.2d 268, 269 (Tex. App.—San Antonio 1997, orig. proceeding).

"[N]o bright-line demarcates the boundaries of a reasonable time period." In re Chavez, 62 S.W.3d at 228. Whether a reasonable time for ruling has lapsed is dependent on the circumstances of each case. In re Blakeney, 254 S.W.3d 659, 662 (Tex.App.—Texarkana 2008, orig. proceeding); In re Chavez, 62 S.W.3d at 228. Reasonableness of the time taken to rule on a plea to the jurisdiction is dependent upon a various circumstances including whether the trial court had actual knowledge of the motion, its overt refusal to act, the state of its docket, and the existence of other judicial and administrative matters which must be addressed first. In re Chavez, 62 S.W.3d at 228-29.

The trial court in In Re Hays County withheld any ruling on the plea to the jurisdiction until discovery would show whether the defendants waived immunity from suit in a breach of contract case by their conduct. In re Hays County Sheriff's Department, 2012 WL 6554815. The Austin Court analyzed the history of waiver of immunity cases and concluded that it was impossible to find a set of facts under which a governmental entity can be held to have waived immunity from suit in a contract case by its conduct. Id. Therefore the court found that, "[b]ecause this Court does not recognize the waiver-by-conduct exception asserted by [plaintiff], there can be no factual dispute in need of resolution with respect to this theory. The trial court abused its discretion in deferring its ruling on the County's plea to the jurisdiction in order to allow discovery on this ground." Id.

Additionally, Austin Court held that the trial court's waiting more than thirteen-month to rule on the plea to the jurisdiction was unreasonable. Id. See City of Galveston v. Gray, 93 S.W.3d 587, 592 (Tex.App.—Houston [14th Dist.] 2002, orig. proceeding) (thirteen-month delay on ruling on plea to jurisdiction was abuse of discretion).

D. Interlocutory Appeals From Rulings on Immunity.

An interlocutory appeal can be taken from a ruling on sovereign immunity regardless of the type of motion (plea to the jurisdiction, motion to dismiss or motion for summary judgment) through which immunity from suit is raised. Tex.Civ.Prac. & Rem.Code § 51.D14(a); Austin State Hosp. v. Graham, 347 S.W.3d 298 (Tex. 2011). Because section 51.014(a) gives appellate court's jurisdiction over interlocutory appeals from rulings on sovereign immunity from pleas to the jurisdiction, motions to dismiss and motions for summary judgment, if a valid interlocutory appeal is otherwise taken sovereign immunity can be raised for the first time on appeal.

Graham brought suit against Austin State Hospital and two of its doctors alleging medical malpractice claims. Id. at 299. Because Graham sued both the hospital and two employees, the hospital moved to dismiss the doctors pursuant to Texas Civil Practice and Remedies Code § 101.106(e). Id. The doctors also moved to dismiss under sections 101.106(a) and (e). Id. Graham then nonsuited the hospital and asserted that its motion to dismiss was thereby mooted. The trial court denied the doctors' motion and did not rule on the hospital's motion. Id. The hospital and the doctors appealed and the Court of Appeals held that it did not have jurisdiction over the doctors' appeal because section 51.041(a) of the Civil Practice and Remedies Code allowed the doctors to appeal only from a denial of a motion for summary judgment. Id. at 300.

The Supreme Court held that section 51.014 allows appeals by governmental entities

or their employees where a motion in the trial court challenged that court's jurisdiction. Id.

> "[W]e have held under section 51.014(a) that an interlocutory appeal may be taken from a refusal to dismiss for want of jurisdiction whether the jurisdictional argument is presented by plea to the jurisdiction or some other vehicle such as a motion for summary judgment. . . . if the trial court denies the governmental entity's claim of no jurisdiction, whether it has been asserted by a plea to the jurisdiction, a motion for summary judgment, or otherwise, the Legislature has provided that an interlocutory appeal may be brought. The reference to plea to the jurisdiction is not a particular vehicle but the substance of the issue raised."

Id. (internal quotations and citations omitted). The Court explained that there is no reason for limiting appeals under section 51.014(a)(5) which references "motions for summary judgment", when section 51.014(a)(8) is not so limited. Id. The Texas Supreme Court concluded, "[t]he point of section 51.014(a)(5) . . . is to allow an interlocutory appeal from rulings on certain issues, not merely rulings in certain forms. Therefore, we hold that an appeal may be taken from orders denying an assertion of immunity . . . regardless of the procedural device used." Id. at 301.

Any appeal from the ruling on a plea to the jurisdiction is conducted under a de novo standard of review. Miranda, 133 S.W.3d at 225-26; Mayhem v. Town of Sunnyvale, 964 S.W.2d 922, 928 (Tex. 1998).

While courts are not to look to the merits of a claim unless immunity from suit and liability are co-extensive under the statute at issue, the courts frequently look to the existence of a dispute regarding a contractor's performance in ruling on a plea to the jurisdiction and breach of contract cases. In reviewing rulings on pleas to the jurisdiction in breach of contract cases, the Texas Supreme Court has consistently noted and based its ruling in part on the fact that the governmental entity alleges the contract or plaintiff has breached the terms of the contract to some extent or degree. See Pelzel, 77 S.W.3d 251, 252; IT-Davy, 74 S.W.3d at 852. Then in the Pelzel case, the Supreme Court pointed out that it would not find a waiver of immunity from suit where a governmental entity reduces the contract price under the express terms of the agreement, "even if the propriety of that adjustment is disputed." Pelzel, 77 S.W.3d at 252. While the court is not supposed to weigh the merits of the case in ruling on a plea to the jurisdiction, clearly allegations that a contractor has breached the contract or failed to perform on a contract are critical to defeating any claim of waiver by conduct in a breach of contract case. A lawyer bringing a plea to the jurisdiction in a case where waiver by conduct is alleged should plead and offer evidence that the contractor has breached and/or failed to perform its contractual obligations.

E. Is sovereign immunity jurisdictional and can it be raised for the first time on appeal?

In Rusk State Hospital v. Black, the Texas Supreme Court addressed the issue of whether the defense of sovereign immunity, specifically immunity from suit, could be raised for the first time before an appellate court during an interlocutory appeal. 392 S.W.3d 88 (Tex. 2012). The Court's decision in Rusk, that immunity from suit could be raised for the first time in an appellate court during an interlocutory appeal, will have significant implications for a very limited number of cases. However, the Court's decision, including a concurring opinion filed by Justice Hecht, as well as a concurring and dissenting opinion by Justice Lehrmann, joined by Chief Justice Jefferson and Justice Medina, focus on whether immunity from suit impacts a trial court's subject-matter jurisdiction or personal jurisdiction. Id. at 94, 103-04, 107.

The Black family brought suit against the state hospital arising from the death of their son Travis Black, a psychiatric in-patient at the hospital. Black was found unconscious with a plastic bag over his head. Id. at 91-92. Efforts to resuscitate Black failed and an autopsy revealed that he died of asphyxiation. Travis's parents brought a healthcare liability suit as well as

claims under the TCA against the Rusk State Hospital as well as alleging three different bases for liability under the TCA. With respect to their claims under the TCA, the Blacks first asserted that the hospital was negligent for providing or allowing Travis Black to have access to a plastic bag. Second, the Blacks alleged that the hospital was negligent in training and supervising employees, which resulted in their son's death from assisted suicide or murder. Third, the Blacks alleged that the hospital was deliberately indifferent to their son's need by depriving him of sleep and refusing to prescribe appropriate medication. Id.

In accordance with the provisions of Chapter 74 of the Civil Practice & Remedies Code, the Medical Liability Act, the Blacks served the hospital with an expert report at the commencement of suit. Id. The hospital moved to dismiss the suit on the basis that the medical reports provided by the Blacks failed to satisfy the statutory requirements of Section 74.351 of the Tex.Civ.Prac. & Rem.Code. Id. The trial court denied the hospital's motion to dismiss and the hospital took an interlocutory appeal under Section 51.014 of the Tex.Civ.Prac. & Rem.Code. Id. at 91. Section 51.014 of the Tex.Civ.Prac. & Rem.Code authorizes an interlocutory appeal to be taken from motions that deny or grant relief regarding the adequacy and sufficiency of an expert report filed in connection with a medical liability suit. See Tex.Civ.Prac. & Rem.Code § 51.014(9). However, Section 51.014 of the Civil Practice & Remedies Code also authorizes interlocutory appeals to be taken from the granting or denying of pleas to the jurisdiction filed by a governmental unit subject to the TCA. See Tex.Civ.Prac. & Rem.Code §51.014(8).

At the court of appeals, the hospital argued that the trial court erred in denying its motion to dismiss regarding the sufficiency of the plaintiff's expert's reports but also asserted sovereign immunity as a separate basis for reversing the trial court and rendering a judgment of dismissal. Specifically, the hospital argued that the Blacks' pleadings did not allege a cause of action for which the hospital's immunity had been waived and thus, they had failed to meet their burden of establishing that the trial court had jurisdiction. The Blacks responded that the court of appeals could not consider the hospital's immunity argument because that argument was neither raised at nor addressed by the trial court. The court of appeals did not address the immunity issue because it had not been presented to nor ruled on by the trial court. The court of appeals also denied the hospital's appeal with respect to its seeking dismissal for the inadequacy of the medical expert's reports. The hospital appealed to the Texas Supreme Court, asserting that because sovereign immunity deprived the trial court of subject-matter jurisdiction it could be raised for the first time at the court of appeals in an interlocutory appeal. Id. at 91-92.

The majority began its analysis by noting that the Court had previously held that standing and ripeness could first be raised on appeal. Id. at 94. (citing Waco Independent School District v. Gibson, 22 S.W.3d 849, 851 (Tex. 2000)). The court noted that its holding in Gibson was based on its prior decision in Texas Association of Businesses v. Texas Air Control Board, 852 S.W.2d 440, 445 (Tex. 1993) holding, "that because subject-matter jurisdiction is essential to the authority of a court to decide a case it cannot be waived and may be raised for the first time on appeal." Id. The majority acknowledged that the issues in Gibson, standing and ripeness, as well as the issues raised in Texas Association of Businesses, subject-matter jurisdiction, were different than the issue first raised by Rusk State Hospital, namely sovereign immunity. Id. The court, however, found that these differences did not dictate a different outcome. Id.

The majority of the court then addressed the scope of jurisdiction for interlocutory appeals granted by Section 51.014 of the Civil Practice and Remedies Code. The supreme court noted that the court of appeals' holding found that Section 51.014 precluded a court of appeals' hearing an interlocutory appeal "from reviewing an immunity claim that was neither raised nor ruled upon in the trial court. Id. The supreme court rejected this reasoning holding that:

> The inquiry is not whether Section 51.014(a) *grants* appellate court authority to review immunity claims; rather it is whether Section 51.014(a) *divest* appellate courts of such authority. We conclude it does not.

Id.(italics in original).

The supreme court next noted that it had previously held in numerous other cases that sovereign immunity deprives courts of subject-matter jurisdiction:

> It has been suggested that while immunity *implicates* subject-matter jurisdiction, it does not necessarily equate to a lack of subject-matter jurisdiction….But regardless of whether immunity equates to a lack of subject-matter jurisdiction for all purposes, it implicates a court's subject- matter jurisdiction over pending claims. So if a governmental entity validly asserts that it is immune from a pending claim, any court decision regarding that claim is advisory to the extent it addresses issues other than immunity, and the Texas Constitution does not afford court's jurisdiction to make advisory decisions or issue advisory opinions.

Id at 95. (citing Valley Baptist Med. Ctr. v. Gonzalez, 33 S.W.3d 821, 822 (Tex. 2000)). Next the court notes that Section 51.014(a) of the Civil Practice & Remedies Code expands the jurisdiction of courts of appeals allowing a litigant to take an immediate appeal where a final judgment has not been rendered. Id. The court then points out that the court of appeals' holding would "affectively construe Section 51.014(a) to require appellate courts to address the merits of cases without regard to whether the court has jurisdiction. That construction violates constitutional principles." Id. Thus, the supreme court concludes:

> [I]f immunity is first asserted on interlocutory appeal, section 51.014(a) does not preclude the appellate court from having to consider the issue at the outset in order to determine whether it has jurisdiction to address the merits.

Id. As an additional justification for its holding, the court points out that upon remand to the trial court the governmental entity will immediately raise sovereign immunity which, "would work against the main purpose of the interlocutory appeal statute, which is to increase sufficiency of the judicial process." Id. at 96. See Dallas Metrocare Srvs v. Juarez, 420 S.W.3d 39, 41-42 (Tex. 2013); Dallas County v. Logan, 407 S.W.3d 745 (Tex. 2014);

In his concurring opinion, Justice Hecht stated that he joined in the majority opinion because, "I agree that immunity from suit 'sufficiently partakes of the nature of a jurisdictional bar' that it must be considered on interlocutory appeal, even if not raised in the trial court." Rusk State Hosp., 392 S.W.3d at 101. (Hecht concurring). Like the majority, Hecht points out that if immunity were ultimately established by the governmental entity, then any decision on the merits of hospital's appeal regarding whether the Black's medical reports were adequate under the Texas Medical Liability Act would be advisory and would be outside the court of appeals' jurisdiction as established by the Texas Constitution. Id. He also agreed with the majority that remanding a case so that jurisdiction could be considered by the trial court only to result in another interlocutory appeal would be a waste of time, judicial resources, and cost litigant more in attorney fees. Id.

Hecht then offers his opinion on whether sovereign immunity deprives a court of subject, type and matter jurisdiction. Hecht acknowledged that the Texas Supreme Court's opinion in Texas Department of Transportation v. Jones has created confusion regarding the impact that sovereign immunity has on a trial court's jurisdiction. Hecht notes that the Court stated "'the law in Texas has been that absent the state's consent to suit, a trial court lacks subject matter jurisdiction.'" Id. at 102 citing Texas Department of Transportation v. Jones, 8 S.W.3d 636, 638 (Tex.1999) (per curiam). Hecht then explains that the issue in Jones was whether immunity from suit could be asserted in a plea to the jurisdiction and not the nature of whether immunity deprives the trial court or any court of subject-matter jurisdiction. Id. Thus, Hecht concludes, "Jones cannot fairly be read to equate

immunity from suit with a lack of subject-matter jurisdiction." Id. (Hecht concurring).

Hecht points out that there are important differences between immunity from suit and lack of subject-matter jurisdiction. According to Hecht the most important difference is that a governmental entity can waive immunity from suit either for broad classes of claims or for a particular case, but no litigant can waive subject-matter jurisdiction. Id. Hecht then seeks to explain any inconsistencies in the court's prior rulings by concluding that, "Jurisdiction, it has been observed, is a word of many, too many, meanings. Not all of them have been or can be attributed to immunity from suit." Id. (Hecht concurring)(internal quotations omitted).

Justice Lehrmann, joined by Chief Justice Jefferson and Justice Medina, issued an opinion concurring in part and dissenting in part. Justice Lehrmann begins by stating that a trial court cannot exercise jurisdiction over a case unless it has both subject-matter jurisdiction and personal jurisdiction. Id. at 103. (Lehrmann concurring and dissenting). The Justice next points out that subject-matter jurisdiction involves the court's power to hear and resolve a matter and cannot be waived or granted by the parties. She further notes that all courts, trial courts as well as courts of appeals, are obligated to consider subject-matter jurisdiction *sua sponte*. Id. (Lehrmann concurring and dissenting).

Justice Lehrmann next compared the differences between subject-matter jurisdiction and personal jurisdiction.

> "In contrast, personal jurisdiction involves a court's power to bind a particular party. Unlike subject-matter jurisdiction, personal jurisdiction can be voluntarily waived by an appearance."

Id. (Lehrmann concurring and dissenting).

Lehrmann then explores the history of sovereign immunity back to the English kings and the formation of the United States. She notes that sovereign immunity was frequently referred to as impacting a court's ability to render a judgment against a king or sovereign. She also points out the sovereign immunity implicates a governmental entities "amenability" to suit. Id. at 105. (Lehrmann concurring and dissenting). "[A]menability" from suit is more properly referred to as an element of personal jurisdiction, which can be waived by a party." Id. (Lehrmann concurring and dissenting). Lehrmann then asserts that sovereign immunity cannot implicate subject-matter jurisdiction, because courts in Texas all have subject-matter jurisdiction over tort claims and breach of contract claims, which are the claims typically brought against governmental entities. Id. (Lehrmann concurring and dissenting). Lehrmann points out that if sovereign immunity implicates subject-matter jurisdiction, then a governmental entity could always attack any judgment properly rendered it against on appeal by arguing that the trial court lacked subject-matter jurisdiction. Id. at 108. (Lehrmann concurring and dissenting).

Ultimately, Lehrmann concludes that governmental entities should not be allowed to assert immunity for the first time on an appeal in the event of an interlocutory appeal. Id. (Lehrmann concurring and dissenting). She points out that one of the purposes of sovereign immunity is to reduce costs and expenses for governmental entities by allowing them to avoid unnecessary litigation through asserting immunity early in the litigation. Id. at 109. (Lehrmann concurring and dissenting). She notes that this purpose is:

> …[I]ll-served by allowing immunity to be raised post-judgment, possibly even years after the litigation has ended….When attorneys for the State fail to raise sovereign immunity in the trial court, that failure might not be based on oversight. The State's attorneys often make tactical decisions in deciding which issues they choose to raise. By not requiring the State to raise the issue of sovereign immunity in the trial court, the Court is providing it with a strategic advantage that other parties lack. Moreover, such a lenient rule penalizes

> taxpayers by dissuading conscientious attorneys for the state from developing procedures to ensure that the matter is raised timely…resulting in unnecessary and costly litigation. Second, the doctrine should not result in one law for the sovereign and another for the subject, as such a rule would look less like sovereign immunity then sovereign inequity.

Id. (Lehrmann concurring and dissenting) (internal quotations and citations omitted).

While immunity can be raised on appeal, it is important to note that it is not a basis for collateral attack on a final judgment. In Engelman Irrigation Dist. v. Shields Bros., Inc., 514 S.W.3d 746 (Tex. Mar. 17, 2017), the Court considered a governmental entity's request to void a prior judgment for breach-of-contract based on changed precedent involving governmental immunity. Id. at 748. The Court held that while judicial decisions on issues like immunity applied retroactively, it did not allow the reopening of a judgment where all appeals had been exhausted. Id. at 749. Accordingly, res judicata applied to bar a collateral attack on a sovereign immunity basis. Id. at 750.

> (1) Potential resolutions of the immunity issue when it is first raised on appeal in an interlocutory appeal.

After determining that immunity could first be raised on appeal in an interlocutory appeal, the supreme court then had to address the Hospital's assertion that the Blacks' claims were barred by immunity from suit. The court held that a plaintiff must be given fair opportunity to address jurisdictional issues by amending its pleadings or developing the record when the assertion of immunity is not raised at the trial court. The court cited its decision in Gibson as holding that safeguards are necessary to protect a plaintiff when an appellate court considers an issue of subject, type and matter jurisdiction in the first instance because the plaintiff had not had the opportunity to amend their pleadings in response to the jurisdictional challenge. Id. "Under such circumstances, appellate courts must construe the pleadings in favor of the party asserting jurisdiction, and, if necessary, review the record for evidence supporting jurisdiction." Id. at 96

The Supreme Court holds that where immunity is raised for the first time in an interlocutory appeal, the appellate will reach one of four decisions. First, the appellate court may find that the pleadings or record conclusively negate the existence of jurisdiction in which case the suit should be dismissed. Id. Second,

> if the pleadings and record neither demonstrate jurisdiction nor conclusively negate it, then in order to obtain dismissal of the plaintiff's claim, the defendant entity has the burden to show either that the plaintiff failed to show jurisdiction despite having had a full opportunity in the trial court to develop the record and amend pleadings; or, if such opportunity was not given, that the plaintiff would be unable to show the existence of jurisdiction if the cause were remanded to the trial court and such opportunity afforded. If the governmental entity meets this burden, then the appellate court should dismiss the plaintiff's case.

Id. The third and final outcome is where the pleadings and record do not conclusively negate the existence of jurisdiction and the governmental entity does not meet the burden of showing the plaintiff was afforded the opportunity to amend pleadings and develop a record, or the plaintiff would be unable to show the existence of jurisdiction if afforded the opportunity; then the case should be remanded to the trial court for further proceedings. Id.

The Supreme Court concluded that the Black case would be remanded for further

proceedings on jurisdictional issues because the hospital had not conclusively established by the record that the Blacks had had a full and fair opportunity to develop the record as to jurisdiction or amend their pleadings. Id.

(2) The Practical Effect of the Rusk State Hospital Decision.

The Supreme Court's decision in Rusk State Hospital will have a significant impact on a limited number of cases. As allowed in Rusk, in those instances where governmental entities take an interlocutory appeal, the issue of immunity can still be raised on appeal, either in the courts of appeal or the Texas Supreme Court, regardless of whether it was ever raised at the trial court or the court of appeals. Id. While this is a significant result, it will have an impact only in a limited number of instances, because there are only a limited number of cases where interlocutory appeals are authorized to be taken on an issue other than immunity. Indeed, based upon the reported decisions, the vast fast majority of interlocutory appeals are taken from the granting or denial of pleas to the jurisdiction or summary judgments based upon immunity from suit.

Interestingly, the Rusk State Hospital case may raise the question of whether immunity can be addressed by an appellate court considering a petition for writ of mandamus. A governmental entity may argue that when an appellate court chooses to grant a petition for writ of mandamus to consider a case, it should then consider the issue of immunity in resolving the mandamus application. Indeed, the Austin Court of Appeals did just that in In Re Hays County Sheriff's Department, 2012 WL 6554815 (Tex.App.—Austin December 12, 2012). In In Re Hays County Sheriff's Department, the petitioner brought an application for writ of mandamus based upon the trial court's refusal to rule on its plea to the jurisdiction. Id. The trial court judge had withheld any ruling on the plea to the jurisdiction pending discovery in the case. The petitioner argued that the trial court was obligated to rule on the plea to the jurisdiction, grant or deny, because the plea was based upon the plaintiff's live pleading. Id. Ultimately, the court of appeals addressed the merits of the plaintiff's claim and whether he could establish a waiver-by-conduct that would give rise to a breach of contract action, in deciding to conditionally grant the writ of mandamus. Id. at 4. Interestingly, in his concurring opinion, Justice Bob Pemberton pointed out that because the county's plea to the jurisdiction challenged only the sufficiency of the plaintiff's pleadings, the question of whether there was a waiver of immunity constituted a question of law for which the existence of additional facts learned through discovery would have no bearing. Id. (Pemberton concurring). Pemberton went on to point out that it was unnecessary for the majority to analyze whether the plaintiff could articulate a waiver-by-conduct breach of contract claim in resolving whether to grant the writ of mandamus. Id. at 5. (Pemberton concurring). The practical effect of this decision, is that it evidences that courts of appeals may consider immunity issues in resolving interlocutory appeals and writs of mandamus. See Id.

However, mandamus relief may be appropriate against the court of appeals itself if it abuses its discretion in granting mandamus relief for jurisdictional issues. The Supreme Court recently addressed this question in In re Lazy W District No. 1, 493 S.W.3d 538 (Tex. 2016). In In re Lazy W District No. 1, a water district filed a petition in condemnation to acquire land controlled by a municipal utility district by eminent domain, and sought the appointment of special commissioners to determine the value of a proposed easement. Id. at 540. The municipal district asserted its immunity in a plea to the jurisdiction, and successfully requested the appointment of the commissioners be vacated. Id. at 541. The water district responded by seeking mandamus relief in the court of appeals, which was granted. Id. On appeal from the grant of mandamus relief, the municipal district sought mandamus against the court of appeals. Id. The water district contended that the plea to the jurisdiction could not be heard until after the commissioners were appointed. Id. at 543. The Court disagreed, concluding that the trial court did not abuse its discretion in hearing the plea to the jurisdiction prior to the appointment of the commissioners, and accordingly the court of appeals abused its discretion in granting mandamus relief. Id. at 544.

F. Impact on Statute of Limitations Where the Court Lacks Jurisdiction.

In the event that the plea to the jurisdiction is granted, section 16.064 of the Texas Civil Practice and Remedies Code tolls the statute of limitations for cases dismissed for want of jurisdiction, provided the case is refiled in a court of proper jurisdiction within sixty days of dismissal. Tex.Civ.Prac. & Rem.Code § 16.064(a); In re United Serv. Auto. Ass'n., 307 S.W.3d at 304. However, the tolling provision does not apply to cases in which the first filing was made with "intentional disregard of proper jurisdiction." TEX. CIV. PRAC. & REM. CODE section 16.064(a); In re United Servs. Auto. Ass'n, 307 S.W.3d at 304. Once a party seeks relief asserting that a suit was filed with intentional disregard of proper jurisdiction, the non-movant bears the burden proving the filing was made in good faith. Id. at 312-13. The Supreme Court concluded that the burden of proof rests with the non-movant because he is in the better position of establishing the factors that lead to the decision as to in which court suit should be filed. Id. The standard of proof is similar to the standard of proof for setting aside a default judgment. Id. at 313. A plaintiff's mistake about the court's jurisdiction will "never" meet the test of intentional disregard. Id. As the Supreme Court observed, "[c]apable lawyers often made good faith mistakes about the jurisdiction of Texas courts." Id. (internal quotations omitted). However, a party is charged with intentional disregard when a lawyer or party makes a strategic decision to seek relief from a court without jurisdiction. Id. Dismissals resulting from an attorney's "tactical decisions" were not meant to be protected by the tolling provision of section 16.064(a). Id. (dismissal for want of jurisdiction was final and statute of limitations had run where plaintiff unquestionably sought damages in excess of the trial court's jurisdictional limits).

Governmental defendants are not required to raise lack of jurisdiction through special exceptions and/or summary judgment before seeking to have the case dismissed through a plea to the jurisdiction. Lueck, 290 S.W.3d at 884.

Because an order granting a plea to the jurisdiction may constitute a final judgment and may also bar litigation against other defendants arising from the same events, a plaintiff may want to dismiss the suit before the court rules on the plea.

While immunity from suit is properly raised through a plea to the jurisdiction, the proper procedural tool for obtaining a judgment for immunity from liability short of trial is summary judgment. See Maxwell, 880 S.W.2d at 464; Harris, 799 S.W.2d at 788. To prevail on a motion for summary judgment, the governmental entity must establish that there are no disputed issues of material fact and it is entitled to judgment as a matter of law. Id.

G. Submission of Cases to the Jury where jurisdictional issues remain unresolved.

When the issue of immunity remains unresolved because there is a fact question that precludes a determination of jurisdiction prior to trial, the plaintiff needs to make certain that she gets a jury finding on all factual disputes that affect whether the court had jurisdiction. See Creedmoor, 307 S.W.3d at 512-13; City of North Richland Hills, 340 S.W.3d 900, 906 (Tex.App. – Forth Worth 2011, no pet.). The plaintiff's failure to get jury findings sufficient to establish jurisdiction can result in the case being dismissed by the trial court or a court of appeals for lack of jurisdiction, even after a full jury trial.

Defense counsel must raise the defense of sovereign immunity and make appropriate objections to the charge. The affirmative defense of sovereign immunity from liability and the limits of liability are waived if not timely and properly raised. See also King, 2003 WL 22937252, *5. However, immunity from suit is jurisdictional and cannot be waived

H. Jury Charge in an Ordinary Premises Defect Case.

1. Dangerous Condition Premises Defect.

In an ordinary premises liability case in which the licensor/licensee standard of care is applicable and the case is being tried upon a dangerous condition theory of liability, the following fact issues exist:

> (a) Was the condition that is alleged to have caused the injury a dangerous condition?
>
> (b) Did the governmental entity have actual knowledge of the dangerous condition?
>
> (c) Was the plaintiff without knowledge of the dangerous condition?
>
> (d) Did the government fail to warn of the dangerous condition and fail to make the condition reasonably safe?
>
> (e) Was such failure negligence?
>
> (f) Was such negligence a proximate cause of the injuries?

See Adams, 888 S.W.2d at 612; Tennison, 509 S.W.2d at 561; Payne, 838 S.W.2d at 237. See also Thompson, 167 S.W.3d at 575 (constructive notice of premises defect does not give rise to duty to warn of premises defect).

Alternatively, the case could be submitted in broad form. In the case of broad form submission, the charge will ask only if the jury finds the defendant governmental entity was negligent, with accompanying instructions setting forth the defendant's duty. Specifically, the instruction should state that the governmental defendant was negligent only if:

> (a) The condition complained of posed an unreasonable risk of harm to users of the premises;
>
> (b) The governmental defendant had actual knowledge of the dangerous condition;
>
> (c) The plaintiff did not have actual knowledge of the dangerous condition;
>
> (d) The governmental defendant failed to warn of the dangerous condition; and/or
>
> (e) The governmental defendant failed to make the dangerous condition reasonably safe.

See id.; Texas Pattern Jury Charge, Volume 3, § 66.05.

The Pattern Jury Charge, however, overstates the nature of licensor's duty in the case of a dangerous condition. Subchapter 66.05 contains an instruction for a licensee case that allows the jury to find the defendant to be negligent if it failed to warn, or make the condition reasonably safe. This would obligate governmental entities to both warn and make the condition safe. A licensor, however, discharges his obligation if he either warns of the condition or makes it safe. Guerra, 858 S.W.2d at 46-47; Smith v. State, 716 S.W.2d at 179. The defendant would have been held liable in both Smith v. State and Guerra had they not been able to discharge their duty to the plaintiffs by warning of the dangerous condition. Guerra, 858 S.W.2d at 46-47; Smith v. State, 716 S.W.2d at 179.

Regardless of the form of submission, adjustments will be made to the charge depending upon the judge's interpretation of the applicable standard of liability. For example, the charge may be modified in any combination of the ways set forth below:

> (a) Dangerous condition can be defined as a condition that represents an unreasonable risk of injury to persons exercising ordinary care. Payne III, 781 S.W.2d at 321.
>
> (b) Defendant can be charged with knowledge:
>
> > (i) only if he knew that the condition represented an unreasonable risk of harm. Hastings, 532 S.W.2d at 149;

(ii) if he created the condition. Henson, 843 S.W.2d at 149; or

(iii) if from the facts known to defendant he should have discovered the dangerous condition. Cantu, 831 S.W.2d at 425.

(c) Plaintiff is charged with knowledge if she knew or in the exercise of ordinary care should have discovered the condition. Weaver, 750 S.W.2d at 26-27.

As with any litigation, the jury verdict will depend in large part upon the attorney's ability to convince the judge of the state of the law during the charge conference. In particular, defense counsel must be prepared to direct the court to Smith v. State, Guerra, and other decisions that note that, contrary to the Pattern Jury Charge, a governmental occupant's duty is to warn of the condition or make it reasonably safe, but it is not obligated to do both. Texas Pattern Jury Charge, Volume 3, § 66.05.

2. Gross Negligence Case.

In addition to the duty to warn of dangerous conditions in certain circumstances, the occupier also owes to a licensee the duty not to injure him by willful, wanton, or gross negligence. If there is evidence of gross negligence, then a licensor/licensee case may be tried on that basis with appropriate jury questions and instructions. Davenport, 780 S.W.2d at 828-30.

Gross negligence for the purpose of establishing liability of a licensor is defined as:

That entire want of care which would raise the belief that the act or omission complained of was the result of conscious indifference to the rights or welfare of the person or persons to be affected by it, or that shows maliciousness or evil intent by a policy making official of the Defendant.

Cavazos, 811 S.W.2d at 233.

I. Jury Charge in a Special Defect Case.

In case of a special defect, the fact issues are as follows:

(a) Did the occupier have actual or constructive knowledge of the [insert defined name of the special defect]?

(b) Did the [insert defined name or the special defect] pose an unreasonable risk of harm to the claimant?

(c) Did the occupier fail to exercise reasonable care to warn of the risk?[24]

(d) Did the failure to use ordinary care to warn of a special defect a proximate cause of the claimant's injuries?

[24] The actual wording of the factual question in Corbin was, "3) that Safeway did not exercise reasonable care to reduce or to eliminate the risk ...." The modification of the issue is based upon the wording of TCA § 101.022(b) which limits the government's liability for premises defects except that the limitation "... does not apply to the duty to warn of special defects...." As discussed herein, this suggests the government's duty is less than to "reduce or eliminate the risk...." The distinction may be of questionable importance, however, since a warning is the only way to reduce the risk.

Payne, 838 S.W.2d at 237; Corbin, 648 S.W.2d at 295; Adams, 888 S.W.2d at 612-13.

Again, the case can be submitted in broad form with the accompanying definition of the governmental entities' duty in the case of a special defect. The instruction should state that the governmental entity is negligent only if:

> (a) Defendant had actual knowledge or in the exercise of ordinary care should have discovered the [insert the defined name of the special defect];
>
> (b) The [insert defined name of the special defect] posed an unreasonable risk of harm to the plaintiff;
>
> (c) Defendant failed to exercise ordinary care to warn of the risk of the [insert the defined name of the special defect]; and
>
> (d) The failure to use ordinary care to warn of the [insert the defined name of the special defect] was the proximate cause of plaintiff's injuries.

J. Jury Submission in a Traffic Signal Case.

In the case of a traffic control device malfunction, the jury questions must inquire as to whether the defendant acted within a reasonable time of having actual knowledge of the malfunction or absence. Specifically, the jury should be asked:

> (a) Did the defendant fail to repair the malfunction within a reasonable time of obtaining actual knowledge that it was malfunctioning?
>
> (b) Was the defendant's failure to repair the malfunction within a reasonable time of obtaining actual knowledge of the malfunction negligence?
>
> (c) Was the defendant's failure to act within a reasonable time a proximate cause of plaintiff's injuries?

TEX. TORT CLAIMS ACT § 101.060(a) (2-3). In the event of broad form submission the applicable definition of negligence must explain that the defendant was negligent only if it failed to act within a reasonable time of learning of the malfunction.

VIII. MISCELLANEOUS

A. Municipalities' Liability for Proprietary Activities.

1. Municipalities Remain Liable For Proprietary Functions.

The TCA is applicable to a municipality only in connection with its governmental functions. Vela v. City of McAllen, 894 S.W.2d 836 (Tex.App.–Corpus Christi 1995, no writ). The TCA does not displace municipal liability in the case of proprietary functions. Likes, 962 S.W.2d at 501; Adams, 888 S.W.2d at 611-12. Thus, in the event that the City's activity constitutes a proprietary function, it has the same liability as existed at common law. Id. Therefore, with proprietary functions, the City's standard of care is established by common law, and there is no cap on total liability. Id.

The Courts have struggled with creating a clear test of what constitutes a proprietary versus a governmental activity. The state's sovereign immunity extends to municipalities to the extent their actions serve the interests of the general public, rather than just the interests of their citizens. City of Tyler v. Likes, 962 S.W.2d 489, 501 (Tex. 1997); TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(a). When a city performs functions that are assigned to it by the state or which serve the interests of all citizens, then it is performing a governmental function and enjoys full sovereign immunity, except to the extent it has been waived. Likes, 962 S.W.2d at 501. Accordingly, providing police and fire protection promotes the health, safety and general welfare of all citizens of the state and are, thus, governmental functions. City of LaPorte , 898 S.W.2d at 291 (Tex.1995). Conversely, a city acts in its proprietary capacity when, in the

exercise of its discretion, it takes actions primarily for the benefit of those within its corporate limits. Truong v. City of Houston, 99 S.W.3d 204, 209 (Tex.App.–Houston [1st Dist.] 2002, no pet.). Drawing the line between where proprietary functions begin and proprietary functions end can create liability for a city that is completely unexpected. For example, while providing police protection is a governmental function, providing insurance benefits to policemen is a governmental function. Temple v. City of Houston, 189 S.W.3d 816, 818-21 (Tex.App.–Houston [1st Dist.] 2006, no pet.). Thus, the City of Houston was performing a proprietary function and had no immunity related to its providing insurance benefits to members of its police department. Id.

Section 101.0215 of the TCA provides an incomplete list of functions that are and are not governmental municipal activities that are proprietary or governmental. TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215. However, when an activity falls outside these parameters, then the courts must determine whether the city is acting as an agency of the state for the benefit of all citizens, or is acting principally for the benefits of its own citizens in determining whether the city enjoys immunity. Additionally the construction of a pool to include modern features designed to enhance the user's experience and distinguish the Natatorium from a generic pool, did not constitute "the introduction of a proprietary element into an activity designated by the Legislature as governmental does not serve to alter its classification." Henry v. City of Angleton, No. 01–13–00976–CV, 2014 WL 5465704at *2-3 (Tex.App.—Houston [14th] Oct. 28, 2014, no pet.) (quoting City of Texarkana v. City of New Boston, 141 S.W.3d 778, 784 n.3 (Tex.App.—Texarkana 2004, pet. denied), *abrogated on other grounds* by Tooke v. City of Mexia, 197 S.W.3d 325, 338–42, n. 60 (Tex. 2006)); see City of Plano v. Homoky, 294 S.W.3d 809, 815 (Tex.App.—Dallas 2009, no pet.) (quoting City of San Antonio v. Butler, 131 S.W.3d 170, 178 (Tex.App.—San Antonio 2004, pet. denied) ("In considering whether the City was engaged in a governmental or proprietary function, a plaintiff may not 'split various aspects of [a City's] operation into discrete functions and recharacterize certain of those functions as proprietary.'"). Furthermore, a city charging an admission fee to access or use a facility does not convert the operation of the facility from a governmental function to a proprietary function. Henry, No. 01–13–00976–CV, 2014 WL 5465704, pat p. 3.

a. Counties And State Have No Proprietary Functions.

The distinction between proprietary and governmental functions developed from, and is associated only with, municipal law. It is not applicable to the state or to counties. Neither the state nor counties have proprietary functions. Adams v. Harris County, 530 S.W.2d 606 (Tex.App—Houston [14th Dist.] 1975); Atchison, Topeka, 783 S.W.2d at 646 (construction and maintenance of state highways is a governmental function). Jezek, 605 S.W.2d at 547 (counties in Texas have no proprietary functions); Daniels v. Univ. of Tex. Health Sci. Ctr., 2004 WL 2613282 (Tex.App.–Houston [1st Dist.] 2004, no pet.) (mem. op.).

2. Roadway Maintenance, However, Is Now a Governmental, Not a Proprietary, Function.

As part of the "Tort Reform" initiative in 1987, the status of street maintenance was changed; it is now a governmental function. TEX. TORT CLAIMS ACT § 101.0215(4). This means that premises liability cases involving city street maintenance now come under the TCA with its limitations and exceptions on liability. City of Galveston v. Albright, 2004 WL 2439231 (Tex.App.–Houston 2004, no pet. h.) (claim that city had duty to maintain drainage block in safe manner); Bell v. City of Dallas, 146 S.W.3d 819, 824 (Tex.App.–Dallas 2004, no pet.) (municipality activities regarding sanitary and storm sewers are governmental functions); Winkenhower, 875 S.W.2d at 390-91.

One needs to read municipal premises liability cases decided prior to "tort reform" with the understanding that the law has changed. For example, Jezek noted that the maintenance of streets in a safe condition was a proprietary function, and a city was liable for its negligence in the performance on this function.

3. Pre-1970 Design, Construction and Maintenance of Municipal Public Works May be Deemed Proprietary.

Prior to the TCA, the construction of municipal public works was considered a proprietary function. There was also some authority for the proposition that the design of public works by a city were also proprietary functions. See Hamilton, 714 S.W.2d at 374-75 (holding city liable for design of low water crossing). But see Likes, 962 S.W.2d at 501(citing earlier Texas Supreme Court decisions holding that when a city exercises its discretion regarding public works it enjoys governmental immunity).

The effective date of the TCA is January 1, 1970 and from that time forward suits against cities for the performance of governmental functions were controlled by the TCA. However, it was not until the 1987 amendments to the TCA that the Act provided that the "street construction and design, bridge construction and maintenance and street maintenance, sanitary and storm sewers, warning signals, engineering functions, maintenance of traffic signals, signs and hazards" were governmental functions. Adams, 888 S.W.2d at 611. The timing of the enactment of the TCA and whether design of public works are proprietary functions has created a morass in which cities may be found to be held liable for the design, construction and maintenance of public works based on these activities' being proprietary functions not covered by the TCA. See Likes, 962 S.W.2d at 501; Adams, 888 S.W.2d at 611.

The first case to address this problem was the Adams decision from the Fort Worth Court of Appeals. Adams complained that the design of a roadway underpass (the City's failure to provide adequate drainage and failure to provide a gauge showing the depth of flood waters) and the failure to erect barricades caused the death of a mother and her son. Adams, 888 S.W.2d at 610. The Fort Worth court pointed out that until the 1987 amendments to the TCA the design of public structures were proprietary functions. The court went on to point out that for all suits filed after September 1987, the amended version of the TCA, (that makes design, construction and maintenance governmental functions) controlled. Id. However, the court noted that the TCA has no application for acts or omissions occurring before January 1970. Id. For suits complaining of acts and omissions before the TCA's effective date, a city's liability was determined by common law. Id. Moreover, it was common law that would determine whether the acts or omissions at issue were proprietary or governmental functions of a city. See id . at 614.

Based on this reasoning, the Fort Worth court went on to hold that the plaintiff's causes of action based on failure to provide adequate drainage and a flood gauge related back to the date of construction of the underpass. Id. Since the underpass was constructed before 1970, the TCA did not apply to those claims. The court held that these causes of action could be tried under common law. Interestingly, the court did not address whether the claims related to the design of the underpass would constitute proprietary or governmental functions for the City. The court's acknowledgment that claims against cities for performance of governmental functions and the fact that the case was remanded for new trial offered some suggestion that the court concluded or at least would not rule out a finding that the design of the underpass was a proprietary function. See id.

The Fort Worth court did note plaintiff's complaints regarding the failure to erect barricades and failure to warn of the flood water on the road were acts or omissions that occurred on the date of the accident. Id. As such, the court held that these claims would have to be remanded for a new trial under the amended version of the Act. Id.

The supreme court took up this issue in the Likes case. Likes complained that the construction operation and maintenance of storm sewers caused flood waters to damage their home. Likes, 962 S.W.2d at 492-93. The culverts in question were built in 1925 and 1938 and modifications were made to the culverts after the construction was complete. Id. at 500.

The supreme court held that both the initial design of the culverts and the decision of whether or not to improve the culverts after construction were governmental functions immune from liability. Id. With respect to the initial design of the culverts the court held:

> Governmental immunity protects a city when it exercises

> discretionary powers of a public nature involving judicial or legislative functions. The City's design and planning of its culvert system are quasi-judicial functions subject to governmental immunity.

Id. at 501. Turning to the issue of liability based on the failure to improve the culverts after construction, the supreme court notes that part of the transcript includes deposition testimony from the plaintiff's expert criticizing the design of the culverts and the City's failure to make improvements to the culverts. Id. at 501. In apparent response to this evidence, the court states:

> Because a municipality's decision about whether to order public improvements is discretionary, its decision to initiate or not initiate such an undertaking is an exercise of governmental power for which it may not be held liable.

Id. This passage clearly indicates that a city cannot be held liable for failing to improve or upgrade an existing public work is a governmental function for which it cannot be held liable.

The court, following the Adams' rationale, held that the City could be liable for the construction and maintenance of the culverts because these acts occurred before the effective date of the TCA and under common law they were proprietary functions.

> However, the acts of constructing and maintaining a storm sewer are proprietary at common law, both because they are performed in a city's private capacity for the benefit of those within its corporate limits and because they are ministerial functions. The City could be liable for the negligent performance of these acts if they proximately caused Likes' damages.

Id. (citations omitted).

B. Do Contractors Working For Governmental Entities Enjoy Sovereign Immunity?

A general contractor who is in control of premises is charged with the same duty as an owner or occupier. Barham v. Turner Const. Co., 803 S.W.2d 731 (Tex.App.—Dallas 1990, writ denied). The limitation of liability for premises defects provided for in the TCA has been held to apply to a general contractor in control of government premises. Marshbank v. Austin Bridge Co., 669 S.W.2d 129, 134 (Tex. App.—Corpus Christi 1984, writ ref'd n.r.e.).

> [A]n independent contractor, who acts in creating a condition upon land on behalf of the possessor, is subject to the same liability and enjoys the same freedom from liability for physical harm caused thereby to others upon the land as though he were the possessor of the land. Any duty owed by ... [the contractor] to appellant based upon a premises liability theory would be limited to the duty owed by [the government].

Id. at 134. But see K.D.F. v. Rex, 878 S.W.2d 589, 597 (Tex. 1994) (a contractor enjoys governmental immunity to the extent he acts solely at the direction of the entity; however, a contractor who exercises discretion and is not subject to the direction and control of the entity is not entitled to sovereign immunity). Moreover, the mere fact that a company is doing work pursuant to a contract or at the request with a governmental entity does not vest it with sovereign immunity. See Critical Care Medicine Inc., v. Sheppard, No. 04-05-00676-CV, 2005 WL 3533130 (Tex.App.—San Antonio, DecemberDec. 28, 2005, no pet.)(mem. op.).

In 2003, the Legislature codified the holding in the Marshbank case for companies

who contract with the Texas Department of Transportation. For accidents occurring after September 1, 2003, a company that is building or repairing roads for the Texas Department of Transportation cannot be held liable for injury death, or property damage arising from its construction work if it is in compliance with the contract documents. TEX. CIV. PRAC. & REM. CODE § 97.002.

However, a private contractor carrying out governmental functions, such as design and contruction of roadways, is not entitled to sovereign immunity where the governmental entity deligated the entity'sentity's responsibilities to the contractor. Brown & Gay Engineering, Inc. v. Olivares, 461 S.W.3d 117 (Tex. 2015). The contractor's assumption of responsibility made it liable to plaintiff and precluded it have enjoying any form of sovereign or governmental immunity. Id. The Supreme Court recently reaffirmed Brown & Gay Engineering's holding in Fort Worth Transp. Auth. v. Rodriguez, No. 16-0542, 2018 Tex. LEXIS 370, at *22-26 (Apr. 27, 2018), where it also concluded that while the independent contractor was liable for performing an essential government function, it also enjoyed the benefit of the cap on damages under the TCA.

On the other hand, a governmental premises owner may find itself liable for a contractor's negligence if the government exercises more control than just a general right to start, stop, and inspect the work. Cf. Hoechst-Celanese Corp. v. Mendez, 967 S.W.2d 354, 355 (Tex. 1998) ("[a]n employer's duty of reasonable care is commensurate with the control it retains over the independent contractor"). In the case of a private person occupier, liability arises from the law of agency as set forth in Restatement (Second) of Torts, § 414 (1977). Redinger v. Living, Inc., 689 S.W.2d 415 (Tex. 1985). However, it may be that a governmental entity would not be liable under this theory unless such negligence involves "some condition or some use of tangible property ...." Id.

At the same time, if the danger causing the injury resulted from the performance of work the contractor was employed to do, rather than from any condition of the premises where the work was done; there is no liability on the part of the owner. Moore v. Tex. Co., 299 S.W.2d 401 (Tex. Civ. App.–El Paso 1956, pet. ref'd n.r.e.).

C. Chapter 75 of the Texas Civil Practice and Remedies Code, Regarding Landowners Who Permit Use of Property for Recreational Use and its Application to Governmental Entities.

Section 75.002 provides limited liability to landowners who permit others to use their property for recreational purposes. Under section 75.002, when the premises occupant gives permission to enter for recreational purposes, the person to whom permission is given has the status of a trespasser on the premises. See Crossland, 781 S.W.2d at 437. A premises occupant owes a lesser duty to a trespasser than to a licensee. Consequently, in the case of injuries that took place at a park, zoo, or other recreational facility, governmental defendants argued that they were obligated only to refrain from injuring the plaintiff willfully, wantonly, or through gross negligence. See Tex. Dep't of Parks & Wildlife v. Miranda, 133 S.W.3d 217 (Tex. 2004); City of Dallas v. Mitchell, 870 S.W.2d 21 (Tex. 1994).

For a period of time there was a split among the courts of appeals regarding the application of section 75.002 of the Texas Civil Practice and Remedies Code to governmental recreational facilities. Compare Mitchell, 855 S.W.2d at 741.

The supreme court appeared to have resolved the issue in City of Dallas v. Mitchell, 870 S.W.2d at 21 when it held: "Section 75.002 does not apply to governmental entities because the standard of care owed to recreational users on governmental property is specified in Section 101.022 of the Texas Tort Claims Act." Id. at 22.

In 1995, the Texas Legislature amended both Chapter 75 of the Civil Practice and Remedies Code as well as the TCA to overrule Mitchell and make 75.002 applicable to governmental entities. See Act of May 26, 1995, 74th Leg., R.S. Ch. 520, 1995 Tex. Gen. Laws 3276, 3276-77 (amending TEX. CIV. PRAC. & REM. CODE ANN. §§ 75.003, 101.058 (Vernon 1997)). Section 75.003(c) of the Texas Civil Practice and Remedies Code was amended to provide:

> Except for a governmental unit, this chapter applies only to an owner, lessee, or occupant of real property who:
>
> (1) does not charge for entry to the premises;
>
> (2) charges for entry to the premises, but whose total charges collected in the previous calendar year for all recreational use of the entire premises of the owner, lessee, or occupant are not more than twice the total amount of ad valorem taxes imposed on the premises for the previous calendar year; or
>
> (3) has liability insurance coverage in effect on an act or omission described by Section 75.004(a) and in the amounts equal to or greater than those provided by that section.
>
> (e) Except as otherwise provided, this chapter applies to a governmental unit.
>
> (f) This chapter does not waive sovereign immunity.
>
> (g) To the extent that this chapter limits the liability of a governmental unit under circumstances in which the governmental unit would be liable under Chapter 101, this chapter controls.

TEX. CIV. PRAC. & REM. CODE ANN. § 75.003 (Vernon 1997).

Section 101.058 of the TCA was amended to state:

> LANDOWNER'S LIABILITY. To the extent that Chapter 75 limits the liability of a governmental unit under circumstances in which the governmental unit would be liable under this chapter, Chapter 75 controls.

TEX. TORT CLAIMS ACT § 101.058 (West 2005).

While the Legislature's intentions may have been clear, the amendments did not make it clear how the statutes were intended to interact. The First Court of Appeals seems to have resolved the uncertainly in City of Houston v. Morua, 982 S.W.2d 126, 129 (Tex.App.—Houston [1st Dist.] 1998, no pet.). In Morua, parents brought suit on behalf of their child who was bitten by a wolf at the Houston zoo. Clearly the zoo was a recreational facility within the meaning of Chapter 75 of the Civil Practice and Remedies Code. The City argued that:

> [The amendments were] an attempt by the legislature to alter the result in Mitchell and ensure that the recreational use statute did apply to governmental entities. The City further argues that, because the recreational use statue controls in such situation, section 75.003(f) bars any liability for the City in light of that section's express language that, "This chapter does not waive sovereign immunity."

The First Court of Appeals rejected this analysis, ruling that the plain language of the statutes made it clear that governmental entities could be held liable under Chapter 75.

> The express wording of both section 101.058 of the Act and section 75.003(g) of the recreational use statute undermine the City's argument. Both sections clearly state that, to the extent the recreational use statute *limits* the liability of a governmental unit under circumstances in which the governmental unit *would be*

> *liable* under the Act, the recreational use statute, and its diminished standard of care, controls. A plain reading of both sections reveals that, once it is determined that a governmental entity is liable under the Act, the recreational use statute may then operate to limit, not abolish, that liability if the facts of a particular case support its application. ... [B]ased on the plain meaning of sections 75.003(g) and 101.058 outlined above, an analysis of a governmental unit landowner's liability does not reach the recreational use statute *unless* it is first determined that the litigant's claims fall under the waiver of immunity created by the Act. Therefore, section 75.003(f) merely emphasizes that the recreational use statute limits *preexisting* liability, and does not, in and of itself, waive sovereign immunity or abolish the waiver of liability found in the Act.

Morua, 982 S.W.2d at 129 (citations omitted, emphasis in original).

Thus, when the premises are a recreational facility within Chapter 75 of the Texas Civil Practice and Remedies Code, the duty owed is reduced from a licensor/licensee standard to the trespasser standard. Id.; City of Fort Worth v. Crockett, 142 S.W.3d 550, 552 (Tex.App.–Fort Worth 2004, pet. denied); West v. City of Crandall, 139 S.W.3d 784, 787 (Tex.App.–Dallas 2004, no pet.). As explained by the Texas Supreme Court:

> When property is open to the public for "recreation," however, the recreational use statute further limits the governmental unit's duty by classifying recreational users as trespassers and limiting liability for premises defects to claims involving gross negligence, malicious intent, or bad faith. … In doing so, the statute elevates the burden of proof necessary to invoke the Tort Claims Act's statutory waiver. …TEX. CIV. PRAC. & REM. CODE 75.003(d)-(g) (the recreational use statute neither creates liability nor waives sovereign immunity, but "limits the liability of a governmental unit under circumstances in which the governmental unit would be liable under [the Tort Claims Act]"); 101.058 (the recreational use statute controls to the extent it limits a governmental unit's liability under the Tort Claims Act).

Suarez v. City of Texas City, 465 S.W.3d 623, 632 (Tex. 2015).

The Supreme Court has determined that the scope of Chapter 75's application extends to all activities and facilities of a recreational nature. City of Bellmead v. Torres, 89 S.W.3d 611, 614-15 (Tex. 2002). Ms. Torres was injured when a swing she sat on at a park broke. Id. at 611. In 1996, at the time of Ms. Torres' injury, Chapter 75 contained an itemized list of activities that were covered by the chapter's limitations of liability. Id. at 613. In 1996, Chapter 75 did not include playgrounds and swing sets as being an enumerated recreational activity. Id. The Legislature subsequently amended Chapter 75 to include "any other activity associated with enjoying nature or the outdoors." Id. Thus, the issue before the court was whether Ms. Torres' claims should be evaluated under Chapter 75 of the Civil Practice and Remedies Code or under the Tort Claims Act. Id. The court held that swinging on a swing was the type of activity that the Legislature intended to be covered by the limitation of liability established by Chapter 75. Id. at 615. The court affirmed the trial court's granting of summary judgment because Torres did not plead that her injuries were as a result of the city's willful, wonton or gross and negligent conduct, the standard of liability under Chapter 75. Id.; see Miranda, 133 S.W.3d at 225

([t]he recreational use statute limits the Department's duty for premises defects to that which is owed a trespasser).

In Univ. of Tex. at Arlington v. Williams, the Supreme Court had to determine whetherparticipating and watching sporting events fell within the statute. Univ. of Tex. at Arlington v. Williams, 459 S.W.3d 48, Tex. 2015). The Court began by reviewing how the Legislature has changed the activities covered by the RUS over the last 50 years:

> When first enacted in 1965, the Legislature limited the statute to hunting, fishing, or camping on private property.[1]. Over the last fifty years, the Legislature has added to the recreational-activities list, but as a class these activities have generally remained consistent. For example, the list was enlarged in 1981 to include "activities such as hunting, fishing, swimming, boating, camping, picnicking, hiking, pleasure driving, nature study, water skiing and water sports." An accompanying bill analysis explained that the statute's "original purpose" had been "to keep private land open for hunting, fishing, and camping" but that "many other recreational activities [had] gained popularity" since the law's original enactment, "such as water skiing and cross-country hiking, which require wide open spaces or lakes and streams that may not be available in public parks or preserves near urban centers."[3]." The analysis concluded that expanding the list of activities "would encourage owners to open more land for such uses."[4]." . . .
>
> What UTA refers to as the "catchall" provision was added in 1997.[7]. The recreational-activities list was amended that year to include "bird watching and any other activity associated with enjoying nature or the outdoors." Bird-watching was added to subpart (I)'s nature-study provision, while the "catchall" was added at the list's end as subpart (L). See TEX. CIV. PRAC. & REM. CODEE § 75.001(3)(I), (L).See TEX. CIV. PRAC. & REM. CODEE § 75.001(3)(I), (L).

Id. at *4-5.

The Court went on to note that while playing sports is associated with outdoor activities that does not mean itsit is covered by the RUS:

> While [playing and watching sports] are more likely than not to occur outside, their association with the enjoyment of nature or the outdoors is different. .... . . Because of its association with nature, "enjoying the outdoors" cannot include every enjoyable outside activity . . . . It must also be associated with nature, or "that part of the physical world that is removed from human habitation.." In this sense, the "outdoors" is not integral to the enjoyment of competitive sports because the focus of that activity is the competition itself, not where the competition takes place. In contrast, a park playground is not so much a celebration of organized human activity as it is a respite from it—a place where children can run, play, and otherwise enjoy the outdoors. The enjoyment of nature or the outdoors is thus a significant part of playground activity, but is not integral to the enjoyment of competitive sports. Although soccer may be played in an open-air stadium, a soccer

> game, as ordinarily understood, is not associated with nature in the sense indicated by the statutory definition of "recreation." Because the outdoors and nature are not integral to the enjoyment of [playing and watching sports] and because the activity is unlike the others the statute uses to define "recreation," we conclude that subpart (L)'s so-called "catch-all" does not catch this activity. See TEX. CIV. PRAC. & REM. CODEE § 75.001(3) (listing the activities that define recreation under the statute).

Id. Thus, playing and watching sports, as well as acts of ingress and egress, do not fall within the activites covered by the RUS. Id.; Lawson v. City of Diboll, 472 S.W.3d 667 (Tex. 2015) (injuries sustained while leaving a park where the decedent had watched a youth sports event, was not covered by the RUS).

The Texas Supreme Court has repeatedly held that Chapter 75 pre-empts section 101.058 of the TCA. See Suarez v. City of Texas City, 465 S.W.3d at 632. A plaintiff cannot avoid the heightened liability standard established by the Recreational use statute by alleging liability under the TCA for the condition or use of property. Miranda, 133 S.W.3d at 233. See State of Tex. Parks & Wildlife Dep't v. Morris, 129 S.W.3d 804, 809-10 (Tex.App.–Corpus Christi 2004, no pet.) ("[t]he Tort Claims Act ... does not allow plaintiffs to circumvent the heightened standards of a premises defect claim contained in section 101.022 by recasting the same acts as a claim relating to the negligent condition or use of tangible property."). Therefore, merely alleging injuries were caused by the use of personal property or nuisance/attractive nuisance does not allow a party to get around the standard of care set forth in the recreational use statute. State v. Shumake, 131 S.W.3d 66, 81 (Tex.App.–Austin, 2003, pet. filed), aff'd 199 S.W.3d 279 (Tex. 2006). See Simpson, 500 S.W.3d at 389-90 (cannot circumvent limitations for premises liability under TCA by claims the injury was caused by personal property).

In order to prevail, the plaintiff must establish: (1) the defendant had a duty to warn or protect against the condition that caused the injury; and (2) the failure to warn constituted gross negligence, malicious intent or bad faith. Suarez, 465 S.W.3d at 632.

In order to establish a duty to warn, the plaintiff must establish that the condition was unknown to the user of the premises and was not a condition "inherent" to the nature of the recreational activity. Id. at 633. As explained by the Supreme Court:

> We have been called upon on several occasions to examine when circumstances existing in a recreational setting give rise to a duty to warn or protect. We have found such a duty when an artificial condition created a risk of harm that was latent and not so inherent in the recreational use that it could reasonably be anticipated. See Shumake, 199 S.W.3d at 281–82, 288 (recognizing a duty to warn or protect when a man-made structure—an underground culvert—interacted with the natural perils associated with river tubing to create a powerful undertow that sucked a nine-year-old girl under water and trapped her in the culvert). On the other hand, we have declined to impose a duty for premises conditions that are open and obvious, regardless of whether such conditions are artificial or naturally occurring. See Kirwan, 298 S.W.3d at 623, 626 (concluding that landowner had no duty to warn about risk of falling associated with sitting on cliff's edge even though the particular risk—the collapse of the cliff—was unexpected); Flynn, 228 S.W.3d at 655, 659–60 (finding no duty to warn or protect cyclist from visible oscillating sprinkler that

> knocked the plaintiff off her bike as she rode along a public trail). For naturally occurring conditions, our jurisprudence suggests that obvious conditions include dangers that are not necessarily visible but are inherent in the recreational use. ... Although we have not directly addressed whether a duty arises with respect to conditions that are naturally occurring but concealed and unexpected, we have said we could "envision" such a duty where a landowner knows of a hidden and dangerous natural condition that is located in an area frequented by recreational users, where the landowner is aware of deaths or injuries related to that particular condition, and where the danger is such that a reasonable recreational user would not expect to encounter it on the property.

Suarez, 465 S.W.3d at 633 (some internal citations and quotations omitted); but see City of El Paso v. Collins, 483 S.W.3d 742 (Tex. App.—El Paso 2016, no pet.) (some evidence of lack of knowledge required to shift burden to plaintiff, such as an affidavit "averring that the entity itself had not been aware of any dangerous condition on the premises" prior to the injury).

In State of Tex. v. Shumake, 199 S.W.3d 279 (Tex. 2006), the Texas Supreme Court rejected the State's argument that liability under the Recreation Use statute was limited to injuries resulting from negligent activities being conducted on the property. The case arose from the death of nine-year old Kayla Shumake at the Blanco State Park, which is owned and operated by the State Parks and Wildlife Department. Kayla and her parents were at the park when she drowned while swimming in the Blanco River. The Shumakes alleged that Kayla's drowning was caused by a strong undertow created by a man-made culvert that diverted water under a nearby park road. Id. The Shumakes offered evidence that only days before Kayla's death, three other park patrons reported to Parks and Wildlife's Austin office that they almost drowned as a result of the undertow adjacent to the culvert. Id.

The State argued that liability under Chapter 75 of the Civil Practice and Remedies Code was limited to injuries caused in connection with negligent activities being conducted on the premises. Id. In order to prevail on negligent activity claim, a plaintiff must establish that she was injured as a result of a contemporaneous activity being held on the property and not by a premises defect. Id. The State contended that under Chapter 75 land owners had no duty to warn of premises defects but only of potential danger from activities being held on the premises. Id.

The Supreme Court rejected the State's argument and held that, under the plain language of Chapter 75, land owners had the duty to warn of certain premises defects. As noted above, the Court noted that it was not requiring land owners to warn of "the inherent dangers of nature."

> A landowner has no duty to warn or protect trespassers from obvious defects or conditions. Thus, the owner may assume that the recreational user needs no warning to appreciate the dangers of natural conditions, such as a sheer cliff, a rushing river, or even a concealed rattlesnake. But a landowner can be liable for gross negligence in creating a condition that a recreational user would not reasonably expect to encounter on the property in the course of the permitted use.

Id. (citations omitted). The court also pointed out that the standard for liability was whether the governmental land owner had committed "an act or omission involving subjective awareness of an extreme degree of risk, indicating conscious indifference to the rights, safety, or welfare of others." Id.

In order to establish liability under the Recreational Use Statute, the plaintiff must prove

gross negligence or intent to injure. Stephen F. Austin Univ. v. Flynn, 228 S.W.3d 653 (Tex. 2007). Flynn failed to show the sprinklers represented an extreme risk, or that the university was consciously indifferent to the risk of the sprinklers causing serious injury. Id. The Recreational Use Statute does not require the land owner to make the premises safe for recreational purposes or to warn users of the property of defects that are open or obvious. Id.; Morris v. Tex. Parks & Wildlife Dep't, 226 S.W.3d 720 (Tex.App–Corpus Christi 2007, no pet.) (there was no duty to warn of possibility of hot ash or coals in campfire ring). Flynn could not establish jurisdiction where she and her husband both saw the sprinklers before they rode through them. Stephen F. Austin Univ. v. Flynn, 228 S.W.3d 653 (Tex. 2007). Mere general allegations of gross negligence related to running sprinklers at times of high traffic on the trail were insufficient to establish jurisdiction under the Recreational Use Statute. Id.

The Texas Supreme Court also distinguishes between the duties owed by a governmental entity, depending on the condition that caused the plaintiff's injury. See City of Waco v. Kirwan, 298 S.W.3d 618 (Tex. 2009). Kirwan arose from a death in a city park caused by the collapse of rocks on a cliff on which the decedent was sitting. Id. at 620. The city had put up a wall back from the cliff, and the wall included the warning that visitors should not go past the wall for their safety. Id. The decedent went past the wall and the warning to sit on the cliff. Id. The Supreme Court held that: "We must … apply the statute to his case in a manner that furthers that policy [of encouraging governmental and private entities to open up their land for public use]. Thus, we hold that a landowner … under the recreational use statute, does not generally owe a duty to others to protect or warn against the dangers of natural conditions on the land, and therefore may not ordinarily be held to have been grossly negligent for failing to have done so." Id. at 626.

Proving Gross negligence under the RUS, involves two components: (1) viewed objectively from the actor's standpoint, the act or omission must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (2) the actor must have actual, subjective awareness of the risk involved, but nevertheless proceeds in conscious indifference to the rights, safety, or welfare of others. Suarez, 465 S.W.3d at 634; Miranda, 133 S.W.3d at 225; Henry v. City of Angleton, No. 01–13–00976–CV, 2014 WL 5465704 *6 (Tex. App-Houston [14th Dist.] Oct. 28, 2014, no pet.). When reviewing the second subjective component, "what separates ordinary negligence from gross negligence is the defendant's state of mind; in other words, the plaintiff must show that the defendant knew about the peril, but his acts or omissions demonstrate that he did not care." Louis.-Pac. Corp. v. Andrade, 19 S.W.3d 245, 246-47 (Tex. 1999); see also City of Corsicana v. Stewart, 249 S.W.3d 412, 414–15 (Tex. 2008) (holding that "actual knowledge" element of a premises defect cause of action requires knowledge that the dangerous condition existed at the time of the accident). Additionally, the governmental entity must have the requisite knowledge "at the time of the accident." Suarez, 465 S.W.3d at 634.

Because knowledge of the dangerous condition's existence is an element of gross negligence claims, a plaintiff must plead and prove that the defendant landowner had subjective awareness of the serious risk and disregarded it at the time of the accident. Id.; Miranda, 133 S.W.3d at 225. In Henry, the plaintiff alleged that the City's failure to install elevated lifeguard stations or chairs amounted to "ignoring a known extreme risk of harm or death," but failed to allege any facts establishing that the City had actual knowledge or was aware of any risk. Henry, 2014 WL 5465704 *6. Henry alleged only that the City's failure to install different lifeguard stations or chairs amounted to "ignoring a known extreme risk," without first alleging any facts that the City knew of the alleged risk. Id. Therefore, the court of appeals held Henry failed to allege facts demonstrating that the City knew of the allegedly dangerous placement or design of the lifeguard stations or chairs before Kylie's injury, or that the City was aware of any extreme risk. Id. Consequently, Henry failed to allege facts demonstrating gross negligence with respect to her claims that were based on the lifeguard stations or chairs, which was the only premises defect Henry alleged. See Flynn, 228 S.W.3d at 659–60 ("conclusory"

allegation that appellee "knew that the use of the sprinkler .... . . posed a risk of serious injury to others" but that appellee was "grossly negligent in ignoring and creating that risk" was insufficient "to meet the standard imposed by the recreational statute"); City of El Paso v. Collins, 440 S.W.3d 879, 885 (Tex.App.—El Paso 2013, no pet.) (immunity not waived where plaintiffs alleged that City had knowledge of pool's defective condition because they did not allege that City was "aware of the extreme risk" to children); Univ. of Tex. Health Sci. Ctr. at Hous. v. Garcia, 346 S.W.3d 220, 228 (Tex.App.—Houston [14th Dist.] 2011, no pet.) (allegation that university "knew that, left unattended, the condition of the volleyball court would likely deteriorate and expose players to an unreasonable risk of injury" insufficient to "affirmatively demonstrate the trial court's jurisdiction"); Homoky, 294 S.W.3d at 817–18 (appellant's allegations, including that landowner "knew or should have known about the dangerous condition .... . . [that] created an unreasonable risk of harm," failed to satisfy pleading requirements for gross negligence); Biermeret v. Univ. of Tex. Sys., No. 02–06–240–CV, 2007 WL 2285482, at *6 (Tex.App.—Fort Worth Aug. 9, 2007, pet. denied) ("[B]ecause no pleadings or jurisdictional evidence exists that [appellee] possessed actual or constructive knowledge .... . . that on the date in question [the floor] actually had become wet and slick prior to [appellant's] fall, [appellant] has not shown that if [appellee] were a private person it would be liable to him.").

Moreover, proof of the governmental entity's subjective knowledge must establish more than knowledge or risks inherent in the activity. Suarez, 465 S.W.3d at 634. Suarez arose from the drowning of a father and two daughters in the Galveston ship channel just off a dyke owned and operated as a recreations facility by Texas City. The Supreme Court noted that the plaintiffs attempted to provide subject knowledge through an "allegation that Texas City had knowledge of latent perils at the man-made Dike rests on circumstantial evidence and inferences alleged to arise from evidence that, prior to Hurricane Ike, Texas City (1) had posted warning signs—including signs that said: "Beware. Undertow and wake, rip currents, and sink holes," "No lifeguard on duty. Swim at your own risk," and "Swim in designated area only"—but failed to replace the signs after the hurricane; (2) had previously provided a "designated swimming area" somewhere at the beach but had not established such an area after Hurricane Ike; and (3) knew an unspecified number of drowning deaths had previously occurred at unknown locations along the Dike over the course of an unspecified time period." Id. The Supreme Court rejected plaintiff's arugment holding that to "the extent this evidence raises any inference that the City knew uniquely perilous conditions existed at the beach (or the Dike generally), the evidence is equally consistent with mere knowledge of risks inherently associated with open-water swimming. As such, it is no evidence of subjective awareness of and conscious indifference to the enhanced marine hazards alleged to have caused or contributed to the drowning deaths of Hector Suarez and his daughters." Id.

Chapter 75 establishes the standard of care even when the plaintiff had to pay for admission to the recreational facility. Shumake, 131 S.W.3d at 81. Henry, 2014 WL 5465704 *6.

> The amendments to Chapter 75 of the Texas Civil Practice and Remedies Code require municipalities or counties that own, operate, or maintain recreation facilities at which hockey, in-line hockey, skating, in-line skating, roller-skating, skateboarding, and/or roller-blading are conducted must post a specified notice. TEX. CIV. PRAC. & REM. CODE ANN. § 75.002(g). However, the statute does not specify the consequence of failing to post the notice.

TEX. CIV. PRAC. & REM. CODE ANN. § 75.002(g) (Vernon Supp. 2000).

The fact that the governmental entity did not build or maintain the recreational facility does not remove it from the protection of the Recreational Use Statute. Stephen F. Austin Univ. v. Flynn, 228 S.W.3d 653 (Tex. 2007). In

Flynn, Stephen F. Austin gave an easement to the City of Nacogdoches for a part of its campus for inclusion in a hike and bike trail. Id. The trail was built and maintained by the city. While the university did not maintain the trail, it did not lose its protection under the Recreational Use Statute. Id. The purpose of the Recreational Use Statute is to encourage landowners to open their property to the public for recreational use. Id. Thus, the Supreme Court held that it would be wrong for the university to lose the protection of the act when the only reason for giving the easement was for the inclusion of a part of the campus in the city's hike and bike trail. Id.

Additionally, the plaintiff does not need express permission from the land owner to use the land in order for their claim to fall under the Recreational Use Statute. Stephen F. Austin Univ. v. Flynn, 228 S.W.3d 653(Tex. 2007). The statute does not specify how permission is to be given. Id. Permission can be implied from the landowner's knowledge of and acquiescence to the public's use of the land for recreational purposes. Id. Flynn was deemed to have the university's permission to go on the property by the fact that the university gave an easement to the city authorizing the city to include part of its campus in a hike and bike trail. Id.

In that regard various plaintiff's have argued that different standards of care should be applied under the RUS depending on whether the plaintiff was a know tresspasser. See Bernhard v. City of Aransas Pass, No. 13–13–00354–CV, 2014 WL 3541677 *6 (Tex.App.—Corpus Christi)(July 17, 2014, no pet.)(requesting the court adopt the higher standard of care for known tresspassers set forth in 336 of the Restatement (Second) of Torts). Despite numerous invitations to adopt a higher shtand of care for known tresspasser, the Supreme Court has refused to alter the standard of care:

> Whether Texas common law has, or should, distinguish between different types of trespassers does not control our decision..... . . . Neither this distinction nor any other disagreement about the common law's treatment of trespassers is controlling here because the Legislature did not purport to adopt these common law principles as its liability standard in section 75.0052(d).

Shumake, 199 S.W.3d 279, 286 (Tex. 2006).

D. Criminal Activities by Third Parties.

Under limited circumstances, liability may exist for an owner/occupier of premises when an invitee is injured by the intentional or criminal act of another. Such liability may the owner/occupier knows or has reason to know that criminal acts are likely to occur. When such activity is foreseeable, the landowner may have a duty to take steps to offer reasonable protection against attacks. Kendrick v. Allright Parking, 846 S.W.2d 453 (Tex.App.–San Antonio 1992, pet. denied).

A governmental entity may also be liable for the intentional or criminal acts of a third person. Section 101.057(2) of the TCA provides that the TCA's waiver of sovereign immunity does not extend to claims arising out of assault, battery, false imprisonment, or any other intentional tort. TEX. TORT CLAIMS ACT § 101.057(2). This section has been construed to apply only to the conduct of government employees. Delaney, 835 S.W.2d at 56. Therefore, a government premises owner/occupier may have liability for the criminal or intentional acts of a third party in the same manner as a private owner/occupier. Id. But see Univ. of Tex. El Paso v. Moreno, 172 S.W.2d 281 (Tex.App.–El Paso 2005, no pet.) (University was not liable where plaintiff was injured from criminal actions of others - tearing down goal posts at a football game - not as a result of any defect in the property at issue, that is, the goal posts).

IX. CONCLUSION

Three issues must be addressed before bringing or defending suit against a governmental entity under the TCA. The first issue that must be considered in any claim or potential claim involving a governmental entity is whether there is a waiver of immunity from suit and a waiver of immunity from liability by statute. Unless the claim is authorized by statute, the suit should be dismissed under the doctrine of sovereign immunity.

Last, considerable thought must be given to how the case should be submitted to the jury, and what objections and exceptions need to be made in order to preserve for appeal any complaints regarding the jury charge.

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EXPUNCTIONS AND NON-DISCLOSURES

BRYAN S. McWILLIAMS, *Amarillo*
City of Amarillo

State Bar of Texas
GOVERNMENT LAW 101
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San Antonio

CHAPTER 9

Bryan graduated from the University of Tulsa College of Law in 2001. He has been with the City of Amarillo since November of 2007. He was the first Public Safety Legal Advisor for the City of Amarillo advising police, the fire marshal's office, and code enforcement. He later served as the Assistant City Attorney in charge of all litigation and employment matters concerning City personnel. He was promoted to Deputy City Attorney in 2016. Before moving to the panhandle, he was in private practice in New Mexico and was the contracted City Prosecutor for all cases coming before the local municipal court. Before private practice he was the law clerk for 8 district judges of the Fifth Judicial District for the State of New Mexico.

He is licensed to practice before the State Courts of New Mexico, Oklahoma and Texas and has represented the City of Amarillo in numerous cases coming before the US District Court of the Northern District of Texas and the Fifth Circuit.

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EXPUNCTIONS AND NON-DISCLOSURES

When I think of the true nature of expunctions and non-disclosures my mind conjures up thoughts of the classic television program Fantasy Island. (yeah I know what you're thinking. . . I was forced to watch it.) For all those that don't remember or weren't born yet, the classic storyline went something like this: Tattoo would run to the top of the cupola of the large resort house and deliver the program's most famous quote "De plane, De plane!"; The plane would glide in for a landing and the passengers would disembark while Mr. Roarke (played by Ricardo Montalban) would describe the guests' troubles and reasons for coming to Fantasy Island. Sometimes a guest was ashamed of a misdeed in their life and wished to relive that moment again and perhaps "expunge" the misdeed away. Sometimes the guest's misdeed had criminal implications. Child's play for Mr. Roarke and Tattoo, who in just 49 minutes (it seemed like a lifetime for me), would help right all the wrongs and send the guests on their way with less emotional baggage (excuse the pun) than they disembarked with. While Mr Roarke and Fantasy Island are indeed a "fantasy," the Texas legislature has provided two procedural mechanisms by which documents related to a criminal misdeed or arrest can be completely erased or ordered to be non-disclosed by a criminal justice agency if certain statutory criteria are met.

Expunctions

What is an Expunction?

Texas Code of Criminal Procedure article 55.01 contains the requirements for expunction of criminal records. Tex. Code Crim. Proc. art. 55.01. The petition for an expunction is a civil proceeding. *Dean v. State* 697 S.W.2d 683, 687 (Tex. App. - Dallas 1985). A petitioner's right to an expunction is purely a matter of statutory privilege, and the petitioner bears the burden of demonstrating that each of the required statutory conditions has been met. *Tex. Dep't of Pub. Safety v. Nail,* 305 S.W.3d 673, 674 (Tex. App.-Austin 2010) (no. pet.); *Tex. Dep't of Pub. Safety v. J.H.J.,* 274 S.W.3d 803, 806 (Tex. App.-Houston [14th Dist.] 2008,

no pet.); (A person is not entitled to expunction until all of the statutory conditions are met). *State v. T.S.N*, 547 S.W.3d 617, 620 (Tex. 2018) (citing *Tex. Dep't of Pub. Safety v. J.H.J.*, 274 S.W.3d 803, 806 (Tex. App.—Houston [14th Dist.]) Thus, Article 55.01 of the Texas Code of Criminal Procedure reads like a recipe for a soufflé, albeit confusing in places, a person wishing to expunge an arrest need only follow the recipe to expunge the same. The legislature has revised Article 55.01 a number of times over the last ten years, most recently in 2017. The general tenor of all of the revisions has been to lower the barrier to expunctions for cases, especially for cases that have been dismissed. *See generally State v. N.R.J.* 453 S.W.3d 76 (Tex. App. – Fort Worth 2014), petition *for review filed, review denied* ("Legislative intent behind amendments to expunction statute was to lower the barrier to expunctions for cases that have been dismissed.")

General Discussion of Subsection (a):

Parts (1) and (2) of Subsection (a) of Article 55.01 contain the recipe of circumstances for the large majority of expunction requests.

(a) A person who has been placed under a custodial or noncustodial arrest for commission of either a felony or misdemeanor is entitled to have all records and files relating to the arrest expunged if:

(1) the person is tried for the offense for which the person was arrested and is:
(A) acquitted by the trial court, except as provided by Subsection (c); or
(B) convicted and subsequently:
(i) pardoned for a reason other than that described by Subparagraph (ii); or
(ii) pardoned or otherwise granted relief on the basis of actual innocence with respect to that offense, if the applicable pardon or court order clearly indicates on its face that the pardon or order was granted or rendered on the basis of the person's actual innocence; or

So if a person is arrested for any crime, all records of the arrest can be expunged if the person is acquitted as long as the person meets the "criminal episode test" of Subsection (c) or is pardoned as specifically referenced in Part 1. Subsection (c) of Article 55.01 states:

A court may not order the expunction of records and files relating to an arrest for an offense for which a person is subsequently acquitted, whether by the trial court, a court of appeals,

> or the court of criminal appeals, if the offense for which the person was acquitted arose out of a criminal episode, as defined by Section 3.01, Penal Code, and the person was convicted of or remains subject to prosecution for at least one other offense occurring during the criminal episode.

A criminal episode involves the commission of two or more offenses, regardless of whether the harm is directed toward or inflicted upon more than one person or item of property, that are committed pursuant to the same transaction or pursuant to two or more transactions that are connected or constitute a common scheme or plan, or are the repeated commission of the same or similar offenses. TEX. PENAL CODE ANN. § 3.01 (West 2018).

In *State v. T.S.N*., 547 S.W.3d at 618, T.S.N. was charged by information for the misdemeanor offense of theft by check in October of 2010, and a warrant had been issued for her arrest in November of the same year. However, she was not arrested until June 11, 2013. On that date, she was also arrested for the felony offense of aggravated assault with a deadly weapon that arose from a different criminal episode. During the arrest process, the officer also executed the 2010 warrant and arrested T.S.N. on the theft by check charge as well as the assault charge. The theft and assault charges were filed in different courts with different cause numbers. T.S.N. pleaded guilty to the theft charge but not guilty to the assault charge. The assault charge was tried to a jury and she was acquitted. Following the acquittal of the assault charge, T.S.N filed a petition seeking expungement of the records and files relating to the assault charge. *Id.* The State opposed T.S.N.'s petition asserting that T.S.N. was not entitled to expunction because she was convicted of the theft charge for which she was simultaneously arrested. *See T.S.N.* at 619. The trial court granted the expunction and the court of appeals affirmed holding that "the statute linked "arrest" to a single "offense," permitting expunction under the facts of this case, where the charge T.S.N. was acquitted of, and the charge she pleaded guilty to, did not relate to a single episode of criminal conduct." The Court noted that

> [H]ere an arrest is made pursuant to a charge for a single offense and the person is acquitted or convicted and then pardoned pursuant to article 55.01(a)(1)(B), then article 55.01(a)(1) entitles the person to expunction of all records and files relating to the arrest. *Harris County District Attorney's Office v. J.T.S.*, 807 S.W.2d 572, 574 (Tex. App. – Waco 1994). This is because records and files relating to "*the* offense" encompass the whole

> of the records and files relating to "*the* arrest." TEX. CODE CRIM. PROC. art. 55.01(a)(1) (emphasis added). And where an arrest is made pursuant to a charge or charges for multiple related offenses as part of a criminal episode, the statute just as clearly does *not* entitle the person to expunction of any files and records relating to the episode if the person either is convicted of one of the offenses or charges for one of the offenses remain pending. *See id.* art. 55.01; TEX. PENAL CODE § 3.01. But this case differs from either scenario. Here, a single arrest occurred for multiple unrelated offenses. *Id.* at 621.

In affirming the expungement of the records that Court cited *Texas Department of Public Safety v. G.B.E*. 459 S.W.3d 622, 629 (Tex. App. Austin 2014, pet. denied). In that case, the Austin Court of Appeals denied the request for an expunction concluding that G.B.E.'s arrest for DWI, although that charge was dismissed, did in fact result in a final conviction, albeit for reckless driving. *Id.* at 630. However, the Austin court reasoned that,

> Under the circumstances presented in this case, we need not decide whether subarticle (a)(2) as a whole is "charge-based"—that is, whether subarticle (a)(2) generally permits the expunction of records related to individual charges. For example, we need not decide whether a petitioner may expunge records related to a single charge arising from a multi-charge arrest when the charge for which expungement is sought is wholly *unrelated* to any final conviction arising from the arrest. Instead, we hold that under the circumstances presented in this case and the plain language of subarticle (a)(2), G.B.E. is not entitled to expunge any records related to his arrest.

Id. at 629 n.3. *See T.S.N*., 547 S.W.3d at 623.

The *T.S.N*. Court held that:

> Article 55.01 is neither entirely arrest-based nor offense-based. Here, we address only the expunction scheme under subsection (a)(1). The expunction scheme under subsection (a)(2) is not at issue, and we express no opinion about it. Different parts of the article, including the expunction requirements, address different factual situations: subsection (a)(1) concerns acquittals and pardons, with clear instructions provided as to multiple offense arrests under subsection (c); and subsection (a)(2) concerns dismissals and plea bargains. And although the Legislature has specifically provided for expunction under only limited, specified circumstances, that it has done so at all evidences its intent to, under certain circumstances, free persons from the permanent shadow and burden of an arrest record, even while requiring arrest records to be maintained for use in subsequent punishment proceedings and to document and deter recidivism. *Id. See Harris County District Attorney's Office v. J.T.S.*, 807 S.W.2d 572, 574 (Tex. App. – Waco 1994).

The *T.S.N*. Court recognized the difficulties that the Court's order may pose to governmental entities as it related to record keeping and/or retention requirements.

> We recognize that there are practical difficulties posed by partial expunctions and redactions. But given the Legislature's demonstrated acceptance of selective redaction and expunction of records as valid remedial actions, the arguments of the State and DPS do not convince us. And article 55.02(5) explains that when an official or agency or other governmental entity named in the expunction order is unable to practically return all of the records and files subject to the order, obliteration (i.e., redaction) is required as to those portions of the record or file that identify the individual. 547 S.W.3d at 624. art. 55.02(5).

The subsection (a)(2) states as follows:

(a) A person who has been placed under a custodial or noncustodial arrest for commission of either a felony or misdemeanor is entitled to have all records and files relating to the arrest expunged if:

****

(2) the person has been released and the charge, if any, has not resulted in a final conviction and is no longer pending and there was no court-ordered community supervision under Chapter 42A for the offense, unless the offense is a Class C misdemeanor, provided that:

(A) regardless of whether any statute of limitations exists for the offense and whether any limitations period for the offense has expired, an indictment or information charging the person with the commission of a misdemeanor offense based on the person's arrest or charging the person with the commission of any felony offense arising out of the same transaction for which the person was arrested:

(i) has not been presented against the person at any time following the arrest, and

(a) at least 180 days have elapsed from the date of arrest if the arrest for which the expunction was sought was for an offense punishable as a Class C misdemeanor and if there was no felony charge arising out of the same transaction for which the person was arrested;

(b) at least one year has elapsed from the date of arrest if the arrest for which the expunction was sought was for an offense punishable as a Class

B or A misdemeanor and if there was no felony charge arising out of the same transaction for which the person was arrested;

(c) at least three years have elapsed from the date of arrest if the arrest for which the expunction was sought was for an offense punishable as a felony or if there was a felony charge arising out of the same transaction for which the person was arrested; or

(d) the attorney representing the state certifies that the applicable arrest records and files are not needed for use in any criminal investigation or prosecution, including an investigation or prosecution of another person; or

(ii) if presented at any time following the arrest, was dismissed or quashed, and the court finds that the indictment or information was dismissed or quashed because:

(a) the person completed a veterans treatment court program created under Chapter 124, Government Code, or former law, subject to Subsection (a-3);

(b) the person completed a pretrial intervention program authorized under Section 76.011, Government

Code, other than a veterans treatment court program created under Chapter 124, Government Code, or former law;

(c) the presentment had been made because of mistake, false information, or other similar reason indicating absence of probable cause at the time of the dismissal to believe the person committed the offense; or

(d) the indictment or information was void; or

(B) prosecution of the person for the offense for which the person was arrested is no longer possible because the limitations period has expired.

(a-1) Notwithstanding any other provision of this article, a person may not expunge records and files relating to an arrest that occurs pursuant to a warrant issued under Article 42A.751(b).

(a-2) Notwithstanding any other provision of this article, a person who intentionally or knowingly absconds from the jurisdiction after being released under Chapter 17 following an arrest is not eligible under Subsection (a)(2)(A)(i)(a), (b), or (c) or Subsection (a)(2)(B) for an expunction of the records and files relating to that arrest.

(a-3) A person is eligible under Subsection (a)(2)(A)(ii)(a) for an expunction of arrest records and files only if:

(1) the person has not previously received an expunction of arrest records and files under that sub-subparagraph; and

(2) the person submits to the court an affidavit attesting to that fact.

In light of the holding in *State v. T.S.N.* and (perhaps in contrast to the same) consider the holding of *In the Matter of Hoover*, 2018 WL 2926143 at *1-3 (June 7, 2018). In *Hoover*, the Dallas Court of Appeals denied a petition for expunction pursuant to 55.01(a)(2), noting that the evidence presented showed that Hoover had pleaded guilty to a false statement to obtain a property charge related to the arrest. The Court held:

> Although three of the four indictments were dismissed, Hoover pleaded guilty to false statement to obtain property or credit. The trial court deferred adjudication and placed him on community supervision. Thus, Hoover failed to meet his burden to show he satisfied the requirements of article 55.01(a)(2) because the record shows that although three indictments were dismissed, one indictment resulted in Hoover receiving community supervision.
>
> Considering the language of article 55.01(a)(2), the Texas Supreme Court's recent opinion in *T.S.N.*, the prevailing case law from our sister courts, and keeping in mind the statute's general purpose of permitting expunction of wrongful arrests, we conclude that a person is not entitled to have any arrest records expunged under article 55.01(a)(2) when any charge resulted in court-ordered community supervision under article 42.12 of the Code of Criminal Procedure. *Id.*

The Corpus Christi Court of Appeals recently affirmed: "[F]or a petitioner to be entitled to expunction under article 55.01, *all charges* arising from the arrest must meet that article's requirements." *Ex Parte Sharyon Sue Hyde*, 2018 WL 3062480 at *2 (Tex. App. Corpus Christi-Edinburgh June 21, 2018); see also *S.J. v. State*, 438 S.W.3d 838, 845 (Tex. App.—Fort Worth 2014, no pet.). (emphasis added "[I]ndividual charges within an arrest" are not subject to expunction; an arrest can only be

expunged if every offense arising from that arrest meets the requirements of 55.01. *Id.*; *see Ex Parte Vega*, 510 S.W.3d 544, 548 (Tex. App.—Corpus Christi 2016, no pet.); *Travis County Dist. Atty. v. M.M.*, 354 S.W.3d 920, 927 (Tex. App.—Austin 2011, no pet.); *see also Ex parte M.R.L.,* No. 10-11-00275-CV, 2012 WL 763139, at *3 (Tex. App.—Waco Mar. 7, 2012, pet. denied) (mem. op.) (rejecting the party's argument that "the expunction statute should apply to each charge or offense for which a person is arrested separately"). *Ex Parte Sharyon Sue Hyde*, 2018 WL 3062480 at *2 (Tex. App. Corpus Christi-Edinburgh June 21, 2018).

In the *Hyde* case, the court stated: "It is undisputed that the possession of a controlled substance charge in the present case was dismissed and resulted in no final conviction. *Id.* However, Hyde pled guilty to the offense of attempted possession of a controlled substance, which indisputably arose out of the same arrest, and she was placed on deferred adjudication community supervision for eighteen months. *Id.* Hyde seeks to expunge records of her possession of a controlled substance charge, but the unit of expunction is the entire arrest, not the individual charges." *See S.J.*, 438 S.W.3d at 845; *Ex parte Vega*, 510 S.W.3d at 551. Because Hyde's arrest resulted in court-ordered community supervision, expunction is not available. *See Hyde*, 2018 WL 3062480 at *2.

Subsection (b) and (b-1):

(b) Except as provided by Subsection (c) and subject to Subsection (b-1), a district court, a justice court, or a municipal court of record may expunge all records and files relating to the arrest of a person under the procedure established under Article 55.02 if:

(1) the person is:

(A) tried for the offense for which the person was arrested;

(B) convicted of the offense; and

(C) acquitted by the court of criminal appeals or, if the period for granting a petition for discretionary review has expired, by a court of appeals; or

(2) an office of the attorney representing the state authorized by law to prosecute the offense for which the person was arrested recommends the expunction to the court before the person is tried for the offense, regardless of whether an indictment or information has been presented against the person in relation to the offense.

(b-1) A justice court or a municipal court of record may only expunge records and files under Subsection (b) that relate to the arrest of a person for an offense punishable by fine only.

Subsection (c):

(c) A court may not order the expunction of records and files relating to an arrest for an offense for which a person is subsequently acquitted, whether by the trial court, a court of appeals, or the court of criminal appeals, if the offense for which the person was acquitted arose out of a criminal episode, as defined by Section 3.01, Penal Code, and the person was convicted of or remains subject to prosecution for at least one other offense occurring during the criminal episode.

Subsection (d):

(d) A person is entitled to obtain the expunction of any information that identifies the person, including the person's name, address, date of birth, driver's license number, and social security number, contained in records and files relating to the person's arrest or the arrest of another person if:

(1) the expunction of identifying information is sought with respect to the arrest of the person asserting the entitlement and the person was arrested solely as a result of identifying information that was inaccurate due to a clerical error; or

(2) the expunction of identifying information is sought with respect to the arrest of a person other than the person asserting the entitlement and:

(A) the information identifying the person asserting the entitlement was falsely given by the arrested person as the arrested person's identifying information without the consent of the person asserting the entitlement; and

(B) the only reason why the identifying information of the person asserting the entitlement is contained in the applicable arrest records and files is because of the deception of the arrested person.

Subsection (d) of Article 55.01 essentially provides for a means to expunge records related to an arrest due to a mistake identity or fraud.

What are the procedures related to an Expunction?

Generally speaking, Article 55.02 of the Code of Criminal Procedure provides for the procedural method for obtaining an expunction. For your sanity and mine I will not discuss each particular procedural step in detail here, but I will offer the following observations:

Sections (1) and (1a) provide for a more expeditious method for expunction in cases involving an acquittal per Article 55.01(a)(1)(A) or pardoned or relief based upon actual innocence per Article 55.01(a)(1)(B)(ii). *See generally* Tex. Code Crim. Proc. art. 55.02(1) and (1a) (West 2018). Section (a-1) concerns expunctions related to a dismissal of a case following a person's successful completion of a veteran's treatment program under Chapter 124 of the Government Code. *See generally* Tex. Code Crim. Proc. art. 55.02(a-1) (West 2018). Section 2 provides the information requirements that must be contained in a verified petition filed by a person who is entitled to an expunction under Article 55.01(a)(1)(A), 55.01(a)(1)(B)(i), or 55.01(a)(2) or Article 55.01(b). Article 3 concerns information that must be incorporated into or attached to the expunction order and the notification requirements related to a final order. *See generally* Tex. Code Crim. Proc. art. 55.02(Sec. 3) (West 2018).

What if my agency needs to retain records subject to an expunction order?

Section 4 of Article 55.02 allows for the retention of records by a criminal justice agency needed for an investigation. *See generally* Tex. Code Crim. Proc. art. 55.02 (Sec. 4) (West 2018).

What must an official do upon receipt of an expunction order?

Section 5 states: "Except as provided by Subsections (f) and (g), on receipt of the order, each official or agency or other governmental entity named in the order shall:

(1) return all records and files that are subject to the expunction order to the court or in cases other than those described by Section 1a, if removal is impracticable, obliterate all portions of the record or file that identify the person who is the subject of the order and notify the court of its action; and

(2) delete from its public records all index references to the records and files that are subject to the expunction order. Tex. Code Crim. Proc. art.55.02 (Sec. 5) (West 2018).

Can a relative seek expunctions on behalf of a deceased person?

Yes. Pursuant to Article 55.011:

(a) In this article, "close relative of a deceased person" means the grandparent, parent, spouse, or adult brother, sister, or child of a deceased person.

(b) A close relative of a deceased person who, if not deceased, would be entitled to expunction of records and files under Article 55.01may file on behalf of the deceased person an ex parte petition for expunction under Section 2 or 2a, Article 55.02. If the court finds that the deceased person would be entitled to expunction of any record or file that is the subject of the petition, the court shall enter an order directing expunction. Tex. Code Crim. Proc. art. 55.011. (West 2018).

What is the result of a final order of expunction?

Pursuant to Article 55.03 (Effect of Expunction):

When the order of expunction is final:

(1) the release, maintenance, dissemination, or use of the expunged records and files for any purpose is prohibited;

(2) except as provided in Subdivision (3) of this article, the person arrested *may deny the occurrence of the arrest and the existence of the expunction order*; (emphasis added) and

(3) the person arrested or any other person, when questioned under oath in a criminal proceeding about an arrest for which the records have been expunged, may state only that the matter in question has been expunged. Tex. Code Crim. Proc. art. 55.03 (West 2018).

What if an official knowingly releases or disseminates records ordered expunged?

Article 55.04 (Sec. 1) states that "[a] person who acquires knowledge of an arrest while an officer or employee of the state or of any agency or other entity of the state or any political subdivision of the state and who knows of an order expunging the records and files relating to that arrest commits an offense if he knowingly releases, disseminates, or otherwise uses the records or files." Tex. Code Crim. Proc. art. 55.04 (Sec. 1) (West 2018). The offense is a Class B Misdemeanor. Tex. Code Crim. Proc. art. 55.04 (Sec. 3) (West 2018).

What about expunctions involving Juveniles and Minors?

Expunctions related to juveniles and minors involve multiple provisions in the Health and Safety Code, Alcohol Beverage Code, and the Code of Criminal Procedure depending on the nature of the offense. The Texas Municipal Courts Education Center has a chart on their website for your reading pleasure. *See* http://www.tmcec.com/files/3315/1509/5162/Expunctions_Juveniles_and_Minors_2017.pdf

Nondisclosures

What is an Order of nondisclosure?

Generally, an order of nondisclosure will "[prohibit] public entities, including courts, clerks of the court, law enforcement agencies, and prosecutorial offices, from disclosing certain criminal records." *An Overview of Orders of Nondisclosure*, 1 (2017), at http://www.txcourts.gov/media/1439434/overview-of-orders-of-nondisclosure-2017.pdf.

An order of nondisclosure benefits individuals with a criminal record because it "legally frees" them from disclosing information related to a particular criminal offense on job applications. *Id*. The order will not protect all offenses on an individual's criminal record; however, one "may obtain multiple orders of nondisclosure for multiple offenses."*Id*. The general rule is subject to exceptions. *Id*. Despite the order of nondisclosure, certain criminal justice and state agencies may still obtain information on an offense that is the subject of the order. *Id*.

What is the difference between a nondisclosure and an expunction?

An expunction clears all records relating to a certain criminal offense, and frees individuals from disclosing criminal history to any person or entity. *Prepared for the Senate Committee on State Affairs by Texas Criminal Justice Coalition*, September 12, 2014. On the other hand, a nondisclosure prohibits public entities from disclosing certain records related to a particular criminal offense and frees individuals from disclosing their criminal history on job applications. *Id*. A typical expunction occurs when an individual is acquitted at trial, or if they have been arrested and the charges have been dismissed. Fred Dahr, *Clearing Criminal Records in Texas*, 69 Tex. B.J. 258, 260 (2006). An individual is typically eligible for nondisclosure once they have successfully completed deferred adjudication probation and had their case dismissed and discharged. *Id*.

How do you determine if you're eligible for an order of nondisclosure?

You must first satisfy the basic requirements of Section 411.074, Government Code. *Texas OCA Overview of Orders of Nondisclosures*, at 3. Without the satisfaction of these requirements the court will not have legal authority to grant an order of nondisclosure to you. *Id*.

1. You are **NOT ELIGIBLE** if the offense for which the order of nondisclosure is requested, or any other offense you have ever been convicted of or placed on deferred adjudication for was one of the following:
   a) An offense requiring registration as a sex offender under Chapter 62, Code of Criminal Procedure;
   b) An offense under Texas Penal Code Section 20.04 (aggravated kidnapping), regardless of whether the offense is a reportable conviction or adjudication for purposes of Chapter 62, Code of Criminal Procedure;
   c) An offense under any of the following sections of the Texas Penal Code:
      - 19.02 (murder);
      - 19.03 (capital murder);
      - 20A.02 (trafficking of persons);
      - 20A.03 (continuous trafficking of persons);
      - 22.04 (injury to a child, elderly individual, or disabled individual);
      - 22.041 (abandoning or endangering a child);

- 25.07 (violation of court orders or conditions of bond in family violence, sexual assault or abuse, stalking or trafficking case);
- 25.072 (repeated violation of certain court orders or conditions of bond in family violence, sexual assault or abuse, stalking, or trafficking case); or
- 42.072 (stalking); or

d) Any other offense involving family violence, as defined by Section 71.004, Family Code

2. Your **are NOT ELIGIBLE** if the court made an affirmative finding that the offense for which the order of nondisclosure requested involved family violence, as defined in Section 71.004,Family Code.
3. You are **NOT ELIGIBLE** if, during the period after you were convicted or placed on probation of deferred adjudication for the offense for which the order of nondisclosure is requested, and during any applicable waiting period following completion of the sentence, probation, or deferred adjudication, you were convicted of or placed on deferred adjudication for another offense other than a traffic offense punishable by fine only.
   Id; Tex. Gov't Code Ann. § 411.074 (West).

Types of nondisclosure petitions and orders available

After meeting the basic eligibility requirements, you must then determine which section of nondisclosure is applicable to you. *Id at 2*. There are eight sections of nondisclosure petitions and orders, and "the procedures and requirements for each section are different." *Id*.

- **Section 411.072, Gov't Code**- Deferred Adjudication Community Supervision; Certain Nonviolent Misdemeanors
- **Section 411.0725, Gov't Code**- Deferred Adjudication Community Supervision; Felonies and Certain Misdemeanors
- **Section 411.0727, Gov't Code**- Procedure Following Successful Completion of Veterans Treatment Court Program
- **Section 411.0728, Gov't Code**- Procedure Following Successful Completion of Veterans Treatment Court Program
- **Section 411.073, Gov't Code**- Community Supervision Following Conviction; Certain Misdemeanors
- **Section 411.0731, Gov't Code**- Procedure for Community Supervision Following Conviction; Certain Driving While Intoxicated Convictions
- **Section 411.0735, Gov't Code**- Conviction and Confinement; Certain Misdemeanors
- **Section 411.0736, Gov't Code**- Procedure for Conviction; Certain Driving While Intoxicated

How to Select the Appropriate Section for an Order of Nondisclosure

Questions for determining the correct nondisclosure section	If the answer is YES	If the answer is NO
1. Is the offense for which the order of nondisclosure is requested an offense under any of these sections? -Section 43.02, Penal Code -Section 43.03(a)(2), Penal Code -Section 481.120 Health & Safety Code -Section 481.121, Health & Safety Code -Section 31.03, Penal Code	Review the instructions for completing the model petition for an order of nondisclosure under section 411.0728 to determine if you are eligible to file a petition under that section	Proceed to question 2
2. Is the offense for which the order of nondisclosure is requested an offense for which you successfully completed a veteran's treatment court program as defined by Chapter 124 of Title 2 of the Gov't Code or former law?	Review the instructions for completing the model petition for an order of nondisclosure under Section 411.0727	Proceed to question 3
3. Is the offense for which the order of nondisclosure is requested a Class B misdemeanor driving while intoxicated under Section 49.04, Penal Code?	-Were you placed on probation following your conviction of the offense? -"YES" → Review the instructions for completing the model petition for an order of nondisclosure under Section 411.0731 -"NO"→ Review the instructions for completing the model petition for an order of nondisclosure under Section 411.0736 (If you are not eligible under this section, you are not eligible for an order of nondisclosure for your driving while intoxicated offense)	Proceed to question 4
4. Is the offense for which the order of nondisclosure is requested a felony?	-were you placed on deferred adjudication for that offense? - "YES," → follow the procedure for section 411.0725 -If your answer is "NO," you are not eligible for an order of nondisclosure	Proceed to question 5

5. Is the offense for which the order of nondisclosure is requested a misdemeanor for which you were placed on deferred adjudication?	-Other than the offense for which the order is requested, have you ever been convicted of or placed on deferred adjudication for an offense other than a traffic offense that is punishable by fine only? -"YES"→ Follow procedure for Section 411.0725 -"NO"→ is the offense for which the order of nondisclosure is requested a misdemeanor in which the judge entered an affirmative finding that it is not in the best interest of justice for you to receive an automatic order of nondisclosure and filed a statement of this affirmative finding in the papers of your case? -"YES,"→ follow the procedure for Section 411.0725 -"NO,"→ is the offense for which the order of nondisclosure is requested a misdemeanor under Penal Code Chapters 2,21,22,25,42,43,46,or 71? -"YES,"→ follow the procedure for section 411.0725 -"NO,"→follow the procedure for Section 411.072	-Other than the offense for which the order of nondisclosure is requested, have you ever been previously convicted of or placed on deferred adjudication for an offense other than a traffic offense punishable by fine only? -"YES," → you are not eligible -"NO,"→ Is the offense for which the order of nondisclosure is requested one of the following: Alcoholic Beverage Code Sec. 106.041; Penal Code Secs. 49.04,49.05,49.06or 49.065; or Chapter 71? -"YES" → You are not eligible -"NO"→ Were you placed on probation for the offense in which the order of nondisclosure is requested, including a probation that required you to serve a term of confinement as a condition of the probation or to be placed on probation after you served a term of confinement? -"YES"→ follow the procedure for Section 411.073 -"NO,"→ follow the procedure for Section 411.0735

Texas OCA Overview of Orders of Nondisclosure, 5-8 (2017).

How do I obtain an Order of Nondisclosure?

The proper procedure for obtaining an order of nondisclosure will depend on what section you are eligible for. Instructions for completing petitions and a list of additional requirements for each Section can be found at http://www.txcourts.gov/rules-forms/orders-of-nondisclosure. When a petition is required, you should file it with the court that sentenced you or placed you on probation or deferred adjudication. *Id* at 2. There is a fee associated with the filing of a petition. *Texas OCA Instructions for Completing Petition for Order of Nondisclosure*. Typically the fee amounts to $280; however, the fee will vary depending on what county you are in, so it is important to check with the clerk of the court in which you are filing. *Id*. If you are unable to pay, you may be eligible for a Statement of Inability to Afford Payment of Court Costs; the correct form is available at http://www.txcourts.gov/media/1435953/statement-final-version.pdf. *Id*. The documents you will need to include with your petition will depend on your case. *Texas OCA Overview of Orders of Nondisclosure* at 2-3. Below is a list of possible documents:

- A copy of the judgment in your case;
- A signed order or document showing that the judge reduced your period of deferred adjudication, probation, or confinement, or granted you an early termination;
- A signed order or document showing that you completed your deferred adjudication or probation, including any term of confinement imposed and payment of all fines, costs, and restitution imposed;
- A discharge order an order or document showing that you were discharged from probation or deferred adjudication);
- A discharge and dismissal order showing the judge set aside the verdict in your case or permitted you to withdraw your plea and dismissed the accusation, complaint, information, or indictment against you in accordance with Section 42A.701, Code of Criminal Procedure
- A signed order or judgment reflecting any affirmative findings made by the judge, including any finding that it is not in the best interest of justice for you to receive an order of nondisclosure, any finding of family violence, and any finding that you have to register as a sex offender

Once your petition is complete, the clerk will send your petition to the judge. *Texas OCA Instructions for Completing Petition for Order of Nondisclosure*. Either the judge or the clerk will then send a copy to the prosecutor's office. *Id*. The prosecutor may or may not request a hearing to determine whether you are eligible to file a petition. *Id*. If no hearing is requested, the judge will review your petition. *Id*. The court must find you have met all the requirements of the law, and it is in the best interest of justice to grant your request for an order of nondisclosure. *Id*.

Disclaimer: This paper was drafted for the State Bar of Texas Government Law 101 course and is strictly for educational purposes. The drafter's intent was to give a brief introduction and overview of the laws involving expunctions and nondisclosures in the State of Texas and is not exhaustive of all sources of information related to expunctions and non disclosures and should not be relied on as such.

FIRST AMENDMENT ISSUES FOR MUNICIPALITIES

WILLIAM M. "MICK" McKAMIE, *San Antonio*
McKamie Krueger, LLP

State Bar of Texas
GOVERNMENT LAW 101
July 18, 2018
San Antonio

CHAPTER 10

WILLIAM M. "MICK" MCKAMIE
SENIOR PARTNER
MCKAMIE KRUEGER, LLP

Mick McKamie practices trial law and represents governmental entities. He is a graduate of the University of Texas with at B.A. in Government, and the Texas Tech School of Law. Mr. McKamie earned a Master's Degree in Public Administration from Texas Tech. Mr. McKamie is a former full-time Assistant City Attorney for Lubbock (1979-81) and City Attorney for Greenville (1983-87) and Amarillo (2015-18). He has also served as City Attorney for the Home Rule Cities of Boerne, Hondo, and the General Law Cities of Leon Valley, Richwood, Somerville, Ferris and Cottonwood Shores. He has served as Interim City Attorney for the City of Euless and for the City of Forney, and as General Counsel for the Laredo Housing Authority. He is currently City Attorney for Alpine. He is a frequent speaker and panelist on municipal and public law issues, focusing on Open Government, land use litigation, annexation and boundary disputes, governmental and official immunity, Fair Housing, Whistleblower Act, EEOC and employment discrimination, damages and remedies issues, and complex civil litigation. He is an Original Member of the Housing Authority Defense Attorneys Association.

Mick has over 50 reported State and Federal Appellate decisions as lead counsel.

Mr. McKamie is a Research Fellow of the Center for American and International Law, a Fellow of the College of the State Bar of Texas, and a Life Fellow of the Texas Bar Foundation. He is Board Certified in Civil Trial Law, Texas Board of Legal Specialization (1992). Mick was the first to be elected twice as Chair of the Government Law Section of the State Bar of Texas. In 2012 he received a Certificate of Merit in Municipal Law from the Texas City Attorneys Association. He has been recognized in Best Lawyers in America, Best Lawyers in Texas, Best Lawyers in San Antonio, and SuperLawyers.

Mr. McKamie is the 2011 Recipient of the Marvin J. Glink Private Practice Local Government Attorney Award, presented by the International Municipal Lawyers Association to recognize outstanding service to the public, the top award in the practice of Municipal Law.

Mr. McKamie is a member in good standing and admitted to practice in all Texas state courts, all federal district courts in Texas, the Fifth and Third Circuit Courts of Appeals, and the United States Supreme Court.

Admitted to Practice Before

Supreme Court of the United States (1992--)
United States Court of Appeals for the Fifth Circuit (1987--)
United States Court of Appeals for the Third Circuit (1997--)
United States District Court for the Northern District of Texas (1979--)
United States District Court for the Eastern District of Texas (1985--)
United States District Court for the Western District of Texas (1991--)
United States District Court for the Southern District of Texas (1991--)
Supreme Court of Texas (1978--)

Certification

Board Certified Civil Trial Law, Texas Board of Legal Specialization (1992--)
Certificate of Merit in Municipal Law from the Texas City Attorneys Association (2012)

Education

M.P.A. (City Management Track), Texas Tech University, 1981
J.D., Texas Tech University, 1978
B.A., Government, University of Texas, 1972
Overseas Study – Comparative Government--Europe, American University, 1970

Military Service

2LT, MPC, US Army 1972-75

Personal

Married to Diane (Stafford) McKamie
Children: Misty Spears, Zack, Allison Yakin
Grandchildren: Savannah, Max & Madeleine, Scarlett, Sadie
2LT, MPC, US Army 1972-75
Amateur Baseball Manager and Coach
District Chairman, Tawakoni District, Boy Scouts of America
Eagle Scout
Church of Christ

Honors

Marvin J. Glink Private Practice Local Government Attorney Award, International Municipal Lawyers Association (2011)
Certificate of Merit in Municipal Law from the Texas City Attorneys Association (2012)
Pi Alpha Alpha (Academic - Public Administration)
Outstanding Young Men of America, 1985

Dean's List, Texas Tech University, 1980-81
Chapter President, Phi Sigma Kappa (Social), University of Texas, 1971-72

Professional Memberships and Activities

American Bar Association
State Bar of Texas
Amarillo Area Bar Association
San Antonio Bar Association
Fellow, College of the State Bar of Texas
Research Fellow, Center for American and International Law
Life Fellow, Texas Bar Foundation
Chancellor's Council, University of Texas System (2010 –)
Government Law Section, State Bar of Texas (Council member, 2006-14)
Chair, 2010-11 and 2008-9
Housing Authority Defense Attorneys Association (Original Member, 2002 --)
Hunt County Tax Appraisal District Board of Directors (Secretary, 1986-87)
Texas City Attorneys Association (Board of Directors, 1984-87;
Recorder, 1986-87, Member 1983 --)

Presentations

Municipal Law Seminar, Panelist, Center for Public Service, The Graduate School, Texas Tech University, 2018
First Amendment Issues for Government Lawyers, Government Law 101 Advanced Government Law Course, State Bar of Texas, 2018
Dealing with the Media, The 15th Biennial Las Vegas CLE, Amarillo Young Lawyers Association, 2018
Property Abatement for General Law Cities, Texas Panhandle Inspectors' Association, 2017
Impact Litigation and Texas Municipal Courts, Panelist, Texas Municipal Courts Education Center Prosecutors Conference, 2017
Affordable Housing – Recent Developments, 21st Annual Land Use Planning Conference, University of Texas School of Law CLE, 2017
Immigration Issues that Affect Local Government, Advanced Government Law Course, State Bar of Texas, 2016
Open Government and Employment, TML HR Workshop for Public Officials, 2015
Recent Developments in Fair Housing, Advanced Government Law Course, State Bar of Texas, 2015
Service Animals and City Facilities, Texas City Attorneys Association Summer Conference, 2015
Legislative Update, Panelist, State Bar of Texas Annual Meeting, 2015
Why Every City Should Have a Board of Adjustment, Summit for Texas Code Enforcement Attorneys and Officials, City of Irving, 2015
Public Information and Records, Panelist, Austin Chapter, National Forum for Black Public Administrators, 2014

Open Government and Employment, TML HR Workshop for Public Officials, 2014

Open Government after *Alpine II* and *Adkisson*, University of Texas System 14th Annual Legal Conference, 2014

The Ethical Challenges of Representing Entities (Panelist and Presenter), City of San Antonio Team Building and CLE, 2014

Texas Tort Claims Act Basics (Paper only), Riley Fletcher Basic Municipal Law Seminar, Texas Municipal Center, 2014

Texas Open Meetings Act – Constitutional?, Bill of Rights, Litigating the Constitution, 7th Annual Bill of Rights Seminar, State Bar of Texas, 2013

Texas Open Meetings Act – Constitutional? City of Austin Open Government Seminar, 2013

Transparency in Government, Panelist, Leadership Summit 2013, National Forum for Black Public Administrators, 2013

Political Subdivision Liability under the Texas Tort Claims Act, Riley Fletcher Basic Municipal Law Seminar, Texas Municipal Center, 2013

Legal Q&A, Together, Finding Solutions, Texas City Management Association, 2013

Political Subdivision Liability under the Texas Tort Claims Act, Riley Fletcher Basic Municipal Law Seminar, Texas Municipal Center, 2012

Open Government Panel, Panelist, State Bar of Texas Annual Conference, 2012

Political Subdivision Liability under the Texas Tort Claims Act Presentation, Suing & Defending Governmental Entities Boot Camp, State Bar of Texas, 2012

Texas Open Meetings Act – "Constitutional?" Advanced Administrative Law Course, State Bar of Texas, 2011

Ethical Considerations in Social Networking, Best Practices in Government Law Course, State Bar of Texas 2011

Legislative Update -- Community Development, Economic Development, Code Enforcement, Texas Municipal Clerks Certification Program, 2011

Transparency in Government, Panelist, Leadership Summit 2011, National Forum for Black Public Administrators, 2011

Open Government Panel, Social Networking, State Bar of Texas Annual Meeting, 2010

Local Regulation of Sexually Oriented Businesses, American Planning Association, Texas Chapter, 2009

Open Government Panel, Public Information and the First Amendment, State Bar of Texas Annual Meeting, 2009

Course Director, Suing and Defending Governmental Entities, State Bar of Texas, 2009

Annexation, Quasi-Annexation, S.P.A.'s and Weird Boundary Things, Land Use Planning Conference, University of Texas School of Law CLE, 2008

Local Regulation of Sexually Oriented Businesses, San Antonio Christian Legal Society, 2007

Legal and Liability Issues, Colloquium, Center for Public Service, Texas Tech University, 2007

Dealing with the Media, Texas City Attorneys Association Summer Conference,

2007

Zoning and Sexually Oriented Businesses, Suing and Defending Governmental Entities, State Bar of Texas, 2007

Local Governments, Types and Powers, Advanced Real Estate Law Course, State Bar of Texas, 2007

Local Regulation of Sexually Oriented Businesses, Texas City Attorneys Association Summer Conference, 2006

Local Regulation of Sexually Oriented Businesses, Suing and Defending Governmental Entities Boot Camp, State Bar of Texas, 2006

EEOC Update, Employment Law Seminar, Texas Municipal Human Resources Association, 2006

Anatomy of a Trial, San Antonio College Law Enforcement Training, 2004

Deliberate Indifference, Institute for Law Enforcement, Center for American and International Law, 2004

Anatomy of a Trial, Institute for Law Enforcement, Center for American and International Law, 2004

The Relationship between the City Council and the City's Top Officials, Texas Municipal League Annual Conference, 2004

What Exactly is Deliberate Indifference? Suing and Defending Governmental Entities, State Bar of Texas 2002

Deliberate Indifference, Conscious Indifference and Reckless Disregard, Texas Municipal League Intergovernmental Risk Pool Workshop for Attorneys, 2002

Local Regulation of Sexually Oriented Businesses, Texas City Attorneys Association, 2002

Recent Cases of Interest to Cities, Texas Municipal League Intergovernmental Risk Pool Workshop for Attorneys, 2000; 2001

Recent State Law Enforcement Cases, Texas Department of Public Safety Management Training, 2001

Recent Federal Law Enforcement Cases, Texas Department of Public Safety Management Training, 2001

Texas Whistleblower Act, Employment Law 101, Texas Municipal League, 2000; 2001; 2002; 2003

Public Official Liability, Texas Municipal League Seminar for Public Officials, 2000

Privacy Rights in Public Employment, Public Sector Employment Law Update, Council on Education in Management, 1998

Handling Regulatory Taking and Due Process Claims, Litigating the Land Use Case, Municipal Legal Studies Center, Southwestern Legal Foundation, 1997

General Nuisance, Texas Municipal League Intergovernmental Risk Pool Attorney Workshop, 1997

Damages: Is Mental Anguish a Part of Property Damage?, Texas Municipal League Intergovernmental Risk Pool Attorney Workshop, 1996

Discovery, Sanctions and Other Potential Pitfalls under the Federal Rules, Federal Civil Litigation, 1996; 1997

Damages: Is Mental Anguish a Part of Property Damage?, Suing and Defending

Governmental Entities, State Bar of Texas, 1996

Discovery, Sanctions and Other Potential Pitfalls under the Federal Rules, Federal Civil Litigation, 1995

Protecting the Investigation in Civil Litigation, Texas Association of Licensed Investigators, 1995

Discovery and Cities, Texas Municipal League Intergovernmental Risk Pool Workshop for Attorneys, 1993

Special Challenges Facing Public Sector Employers, Personnel Law Update 1993, Council on Education in Management

Texas State and Fifth Circuit Legal Developments, Personnel Law Update 1993, Council on Education in Management

Bidding on Public Contracts, Texas City Attorneys Association, 1992

Legal Question & Answer Clinic, Institute for Mayors and Council Members 1990; 1991

Legal Q & A: General Law Cities; Legal Q & A: Home Rule Cities, Association of Mayors, Councilmembers and Commissioners 26th Annual Institute; 1992

Privilege of Self-Critical Analysis, Texas City Attorneys Association, 1992

Open Meetings and Records Acts, Panelist, Texas City Attorneys Association, 1991; 1992; 1994

Open Meetings and Open Records Acts, Mayors and Council Members, Texas Municipal League Annual Conference, 1988

City Council Relations with City Attorney, Institute for Mayors and Council Members, 1987

Pros & Cons-Drug Testing of Police Officers, Southwestern Law Enforcement Institute, 1987

Immigration Law and Its Impact on Cities, Institute for Mayors and Council Members, 1986

Recent Case Developments in Municipal Law, Texas City Attorneys Association, 1984; 1995

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FIRST AMENDMENT ISSUES FOR MUNICIPALITIES

The First Amendment

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."
> *U.S.C.A. Const.Amend. 1*

I. REGULATION OF PEDDLING, SOLICITING, AND CANVASSING

Peddlers. Cities generally have broad authority to regulate peddlers to help prevent fraud and protect residents' privacy. *See Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 165 (2002). Express statutory authority for most general law cities to "license, tax, suppress, prevent, or otherwise regulate" peddlers is found in Section 215.031 of the Local Government Code. Home rule cities are not expressly forbidden from regulating peddlers, and thus may do so pursuant to their broad powers of self-government. *See also* TEX. LOC. GOV'T CODE §§ 51.035, 51.051; *Ex parte Faulkner*, 158 S.W.2d 525, 526 (Tex. Crim. App. 1942).

Canvassers. Canvassers are not immune from regulation under the state's police power, whether the purpose of regulation is to protect from danger or to protect the peaceful enjoyment of the home. *Hynes v. Mayor of Oradell*, 425 U.S. 610, 619-20 (1976). On the other hand, it is very difficult for cities to regulate canvassers who promote political or religious ideas through handbills or other means because of First Amendment concerns. Watchtower, 536 U.S. at 165-66. When regulating canvassers, a city must give due respect to the protected right to distribute and receive literature. *Martin v. Struthers, Ohio*, 319 U.S. 141, 146-47, 148-49 (1943). Free speech concerns may likely limit canvasser regulation to a minimum.

Solicitors. Solicitors fall in the middle. A city may generally regulate solicitors to prevent against fraud and protect privacy. Watchtower, 536 U.S. at 165; Hynes, 425 U.S. at 619-20. However, charitable solicitations have been found to be protected speech, even though the speech is in the form of a solicitation to pay or contribute money. *Village of Schaumburg v. Citizens of a Better Environment*, 444 U.S. 620, 633 (1980). Solicitation is subject to reasonable regulation with due regard for a solicitor's protected speech. Id. at 632. Any regulations that do not adequately balance the city's interests with free speech concerns will often lead to litigation.

General Law cities have authority to regulate peddlers and solicitors, but not the authority to completely prohibit them on both public and private property. TEX. LOC. GOV'T CODE § 215.031; *Faulkner*¸ 158 S.W.2d at 527. Cities have authority to prohibit peddlers and solicitors from conducting business in public places. *Faulkner*¸ 158 S.W.2d at 526; *Ex parte Hogg*, 156 S.W. 931, 932 (Tex. Crim. App. 1913). Although there is no direct case law, it is likely that a city may similarly regulate canvassers on public property. However, free speech concerns may likely limit any canvasser regulation to a minimum.

Regulations on private property are different. Cities arguably do not have the authority to completely bar peddlers or solicitors on private property. *Faulkner*¸ 158 S.W.2d at 527; *Hynes*, 425 U.S. at 619-20; *Schaumburg*, 444 U.S. at 633; Op. Tex. Att'y Gen. No. JC-0145 (1999). Cities clearly may not prohibit canvassers from private property. *Watchtower*, 536 U.S. at 165- 66; *Martin*, 319 U.S. at 149.

The main issue in regulating peddlers is unlawful discrimination. All vendors who are selling similar goods must be treated the same. *See Faulkner*, 158 S.W.2d at 527. An ordinance regulating peddlers must comport with the equal protection provisions of the Texas and United States Constitutions. A city may classify peddlers according to their business and may apply different rules to different kinds of businesses, so long as the differences are reasonably related to the city's permissible purposes in its regulations. In *City of New Orleans v. Dukes*, the ordinance in question only allowed food vendors who had been in the city for a certain amount of time, and prohibited all new food vendors. 427 U.S. 297, 298-99 (1976) (per curiam). The Supreme Court validated the ordinance's distinction between new food vendors and established food vendors because the city's purpose in promoting the appearance and culture of the French Quarter was permissible, and the distinction within the ordinance could reasonably achieve the city's permissible purpose. *Id.* at 304; *See also Hixon v. State*, 523 S.W.2d 711 (Tex. Crim. App. 1975). However, in *City of Houston*, Houston's ordinance prohibiting the sale of newspapers on city streets, while allowing the sale of ice cream and flowers, was struck down partly because the distinction was unlawfully discriminatory. *Houston Chronicle Pub1'g Co. v. City of Houston*, 620 S.W.2d 833, 838 (Tex. Civ. App.—Houston [14th Dist.] 1981). The city claimed that the purpose of the regulation was to promote traffic safety. *Id.* However, the court struck down the ordinance because prohibiting the sale of newspapers, an activity that implicates freedom of the press, while allowing the purely commercial activity of selling ice cream and flowers, is not a reasonable distinction. *Id.* Also, the city did not provide a sufficient reason to justify the limitation of the fundamental right of freedom of the press. *Id.*

The regulation of certain peddlers also invokes fundamental personal rights, such as freedom of speech, freedom of the press, and equal protection. If an ordinance restricts these rights, the city must show that the regulation is necessary to promote a compelling city interest, and that there is no less restrictive means of achieving the city's regulatory purpose. *See Houston Chronicle Publ'g Co. v. City of League City*, 488 F.3d 613, 622 (5th Cir. (Tex.) 2007); *Houston Chronicle Pub1'g Co. v. City of Houston*, 620 S.W.2d 833, 838 (Tex. Civ. App.—Houston [14th Dist.] 1981).

Ordinances typically provide for the granting and issuing of licenses, direct how the licenses are issued and registered, and set the fees to be paid for licenses for commercial peddlers and noncommercial solicitors who ask for donations.

For example, the *Watchtower* case indicates that a license or permit application can request information that would allow a city to verify whether a potential peddler gives correct information and whether the peddler poses a threat of fraud or crime. 536 U.S. at 169. Ordinance provisions that require names, addresses, business names, and photo identification are arguably permissible, and perhaps even necessary for a valid ordinance that provides for the issuance of a permit or license. *See id.* (holding that the ordinance's permit requirement was not permissible partially because the ordinance did not require the city to verify the peddlers' identities).

City ordinances usually provide for the expiration of licenses or permits, the duration of which varies from one day to one year. Under statute, most general law cities may not issue a license for a period of more than one year, and a license may not be assigned except as permitted by the governing body of the city. TEX. LOC. GOV'T CODE §215.033. The licensing fees also vary according to duration, ranging from five dollars for a daily license, to over one hundred dollars for a yearly license. By statute, most general law cities may charge an amount reasonably necessary to cover their administrative and regulatory costs or costs reasonably related to a legitimate licensing objective. TEX. LOC. GOV'T CODE § 215.033; *See;* Op. Tex. Att'y Gen. No. JC-0145 (1999). Cities can deny or revoke a license based on their investigation or other factors. However, for most general law cities, the license can be suspended or revoked only through the municipal court based on ordinance violations. TEX. LOC. GOV'T CODE § 215.034. A city cannot require a license or license fee for a peddler who is already licensed by the state, such as an insurance salesman. *Combined Am. Ins. Co. v. City of Hillsboro*, 421 S.W.2d 488 (Tex. Civ. App.—Waco 1967). A city may not levy an occupation tax on street vendors or peddlers, since the state has not chosen to levy such a tax. *See* TEX. CONST. art. VIII, § l(f).

Limited time, place, and manner regulations are often permissible. Ordinances frequently require reasonable hours during which a peddler may approach private residences or work in city streets or public areas (for example, from sunrise to sunset). *See City of League City*, 488 F.3d at 622. However, a city may not completely prohibit peddlers from approaching private residences. *Faulkner*, 158 S.W.2d at 526; Op. Tex. Atty. Gen. No. JC-0145 (1999). An ordinance may also regulate which public property and city streets that peddlers, solicitors, and canvassers may or may not use for their business, so long as there are adequate alternate places for solicitation. *See id.*; Op. Tex. Atty. Gen. No. JC-0145 (1999). A city may also provide peddlers with a "no solicitations" resident list, similar to the Do Not Call Registry. The peddlers and solicitors can also be required to comply with "no solicitor" signs, and if licensed, could have their license revoked if they fail to comply. *See Watchtower,* 36 U.S. at 168; *Schaumburg*, 444 U.S. at 639.

Courts have held that **panhandling** is protected speech under the First Amendment. *See Gresham v. Peterson*, 225 F.3d 899, 904 (7th Cir. 2000); see also *Smith v. City of Fort Lauderdale*, 177 F.3d 954, 956 (11th Cir. 1999); *Loper v. New York City Police Dep't*, 999 F.2d 699, 704 (2d Cir. 1993). This means that any such restriction should be a time, place, or manner restriction on these activities that is narrowly tailored to meet the governmental interest. One court of appeals upheld a city ordinance that prohibited panhandling at night, near public transportation facilities, at parked or stopped vehicles, at sidewalk cafes, and near banks. *Gresham*, 225 F.3d at 906. The court held that this was narrowly tailored to meet the city's interest in protecting its citizens and still left many avenues open for panhandling, including the ability to panhandle during the day. Another court allowed an ordinance prohibiting panhandling on a five mile stretch of beach because individuals could panhandle in other places and the ordinance was narrowly tailored to meet the city's purposes. *Smith*, 177 F.3d at 956. But a law prohibiting begging in all public places was held to be unconstitutional. *Loper*, 999 F.2d at 705-06.

Thus, a city can arguably pass a panhandling ordinance, but it must be narrowly tailored to meet the city's purposes and cannot completely restrict panhandling.

II. FIRST AMENDMENT RIGHTS DURING SPECIAL EVENTS

Traditional public forums include streets, sidewalks, parks and town squares. *Perry Educ. Ass'n v. Perry Local Educ. Ass'n*., 460 U.S. 37, 44 (1983). In a traditional public forum, the government may regulate the time, place, and manner of expressive activity, so long as such restrictions are content neutral,

are narrowly tailored to serve a significant governmental interest, and leave open ample alternatives for communication. *Burson v. Freeman*, 504 U.S. 191, 197 (1992).

A number of courts have held that when a municipality issues a permit to an organization to hold a special event on a street or at a park, the streets and parks remain traditional public fora during the permitted events, and restrictions on speech during such events will be highly scrutinized.

> *Bays v. City of Fairborn*, 668 F.3d 814 (6th Cir. 2012) (where arts club and Lions Club entered into a facility use agreement with city to hold Sweet Corn Festival, the park remained a traditional public forum during the festival; the court noted that the park remained open to the public and the city supported the festival by raising and lowering festival banners, providing picnic tables and bleachers and supplying general labor at set cost; First Amendment rights of plaintiff walking through festival wearing sandwich board that read "Jesus is the Way, the Truth and the Life" and "Are you born again of the Holy Spirit" were violated by city's enforcement of festival organizer's solicitation policy that prohibited sales or soliciting outside of booth spaces because policy was not narrowly tailored to a governmental interest).
>
> *Parks v. City of Columbus*, 395 F.3d 643 (6th Cir. 2005) (where city issued a block permit to a private arts council to hold a festival on a public street in the city, street remained a traditional public forum during the festival; court stated: "The City cannot, however, claim that one's constitutionally protected rights disappear because a private party is hosting an event that remained free and open to the public;" therefore, city violated First Amendment rights of plaintiff wearing a sign bearing a religious message and distributing religious literature when off-duty police officer hired to provide security for the event approached the plaintiff, told him that the event sponsor wanted him to leave, and instructed him to move beyond the barricades or he would be arrested).
>
> *Irish Subcommittee of the Rhode Island Heritage Comm'n v. Rhode Island Heritage Comm'n*, 646 F. Supp. 347 (D. R. I. 1986) (finding that Heritage Day festival booths are a public forum and that regulation prohibiting display or distribution of political paraphernalia at state-sponsored event violated First Amendment rights of organization who was not allowed to participate in the event because it planned to distribute literature on the political situation in Northern Ireland).
>
> But *see, e.g., Rundus v. City of Dallas*, 634 F.3d 309 (5th Cir. 2011) (private non-profit corporation that ran state fair under contract with city on parcel of land it rented from city and over which it had primary control during fair season was not a state actor for purposes of Section 1983 action challenging fair's policy not to allow individual to distribute free Bibles) and *Price v. City of Fayetteville*, 2013 WL 1751391 (E.D.N.C. 2013).

Where a person's First Amendment activities interfere with a permitted event, that person may be lawfully excluded from the event.

> *Startzell v. City of Philadelphia*, 533 F.3d 183 (3rd Cir. 2008) (police could exclude counter-protesters from Philly Pride event where counter-protestors expressed their message with bullhorns next to main stage where musical performances were held, directly confronted a transgendered individual with derogatory terms, and blocked access to vendors; court stated: "We have already made it clear that Appellants possess a First Amendment right to communicate their message in a public forum. Yet, their rights are not superior to the First Amendment rights of Philly Pride, as permit-holder, to effectively convey the message of its event – 'that we're out and proud of who we are,' – and of the audience's ability to receive that message and experience the entire event").

In contrast, where speech does not interfere with the event, a number of courts have held people engaging in First Amendment speech cannot be excluded from a permitted event.

> *World Wide Street Preachers' Fellowship v. Reed*, 430 F.Supp.2d 411 (M.D. Penn. 2006) (in case involving a gay pride festival in a city park, city violated First Amendment rights of street preachers preaching about homosexuality at the entrance of the festival when police officers told them they must go

across the street to engage in First Amendment activities; court found that that the street preachers' presence at the festival entrance did not interfere with the festival and that a location across the street was not an ample alternative channel of communication when the preachers could have been standing in the park).

Gathright v. City of Portland, 439 F.3d 573 (9th Cir. 2006) (Christian evangelist who preached his message at privately-sponsored, city-permitted events challenged an ordinance allowing the city to evict people espousing messages contrary to what the permit holder wanted as part of its event; court found that the city's policy of allowing permittees unfettered discretion to exclude private citizens on any (or no) basis was not narrowly tailored to that legitimate interest; court further found that there was no risk that the evangelist's message, which included calling women "whores," "sluts," and "Jezebels" and wearing a t-shirt reading "Got AIDS Yet?" at an event celebrating tolerance of homosexuality, could be mistaken by anybody as part of the message of the events he protested).

Dietrich v. John Ascuaga's Nugget, 548 F.3d 892 (9th Cir. 2008) (private business received a permit from the city to hold a chili cook-off in the Town square and a volunteer gathering signatures for a political petition at the event was ordered by police to leave the permitted area and move to a public sidewalk outside the event area; the court held that the city's actions were not narrowly tailored to a government interest noting that the permitted event was open to the public and there was little chance that the public would have viewed the volunteer's petitioning activities as endorsed by the chili cook- off).

In deciding whether permit holders may exclude certain speakers from their events, some courts have focused on whether the permit holder is a public or private entity.

Reinhart v. City of Brookings, 84 F.3d 1071 (8th Cir. 1996) (city was not liable for actions of private festival committee in banning political candidate distributing business cards from festival; court dismissed the suit, explaining the fact that the city permitted the committee to adopt rules and enforce them did not convert the private action of the committee into state action; in reaching its decision, the court found important the fact that the festival committee was a private group that did not receive any funding from the city).

III. CRIMINAL ENFORCEMENT OF FLAG DESECRATION

Forty-seven states have statutes criminalizing flag desecration. Even in the aftermath of U.S. Supreme Court decisions invalidating flag desecration statues, *e.g. U.S. v. Eichman*, 496 U.S. 310 (1990), only one state legislatively repealed its statutory prohibition of flag desecration. *See also Texas v. Johnson*, 491 U.S. 397 (1989)(Any action taken with respect to American flag is not automatically expressive; rather, in characterizing such action for First Amendment purposes, Supreme Court considers context in which conduct occurred.) According to the First Amendment Freedom Forum, 49 states legislatures have passed resolutions supporting congressional efforts to amend the U.S. Constitution to allow laws protecting against flag desecration. freedomforum.org.

IV. RELIGION IN THE MUNICIPAL WORKPLACE

The four-part *Pickering* test generally applies to a public employee's speech:

> First, we must determine whether the employee's speech involves a matter of public concern. If so, we then balance the employee's interest in commenting upon matters of public concern against the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. Third, if the balance tips in favor of the employee, the employee then must show that the speech was a substantial factor or a motivating factor in the detrimental employment decision. Fourth, if the plaintiff establishes that speech was such a factor, the employer may demonstrate that it would have taken the same action against the employee even in the absence of the protected speech. *Finn v. New Mexico*, 249 F.3d 1241, 1247 (10th Cir. 2001).

Government must balance the burdens imposed by the Establishment Clause and the Free Exercise and Free Speech Clauses.

Government must distinguish between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion,

which the Free Speech and Free Exercise Clauses protect. *Rosenberg v. Rector & Visitors of the Univ. of Va*., 515 U.S. 819 (1995).

At times, the state's interest in avoiding an Establishment Clause violation may provide justification for infringing upon free speech or free exercise rights otherwise protected by the First Amendment. *Good News Club v. Milford Cent. Sch*., 533 U.S. 98, 112-113 (2001).

Courts have applied these principles with differing results.

> *Tucker v. Calif. Dept. of Educ*., 97 F.3d 1204 (9th Cir. 1996) (computer analyst for state department placed the phrase "Servant of the Lord Jesus Christ" and acronym "SOTLJC" after his name on label of software program he was working on; the software program was distributed within the department; as a result, the department banned written or oral religious advocacy by employees; applying the Pickering test, the court found that "the speech is religious expression and it is obviously of public concern" and the government failed to show that the broad ban on religious advocacy disrupted the workplace; court also rejected the state's Establishment Clause argument finding that what a computer analyst discusses in his cubicle or in the hallway would not appear to any reasonable person to represent the view of the state).
>
> *Draper v. Logan County Public Library*, 403 F. Supp. 2d 608 (W.D. Ken.. 2006) (public library employee who wore cross necklace was fired for violating library's dress code that provided: "No clothing or ornament depicting religious, political, or potentially offensive decoration is permitted;" court found that employee's wearing of cross involved expressive speech touching on a matter of public concern in that "it is an expression of her personal religious convictions and viewpoint, which is a matter of social and community concern entitled to the full protection of the First Amendment;" wearing of cross was not disruptive nor controversial and did not interfere with the library's purpose and would not be interpreted by a reasonable observer as a governmental endorsement of religion thus employee's termination violated First Amendment rights; the court acknowledged that: "A different conclusion might be justified if, for example, the library allowed employees to actively proselytize or if it permitted religious banners or slogans to be hung from the rafters").
>
> *Daniels v. City of Arlington, Texas*, 246 F.3d 500 (5th Cir. 2001) (police officer who wore small, gold cross pin on uniform was fired for violating department's "no-pins policy;" court found that wearing the cross was intensely personal in nature did not involve public concern speech and that the authority symbolized by the police uniform runs the risk that the city may appear to endorse Daniels religious message; therefore, the no-pins policy did not violated the First Amendment).

V. REGULATION OF SEXUALLY ORIENTED BUSINESSES

What exactly is a Sexually Oriented Business (SOB)? Adult businesses in America continuously change their nature and character in an effort to stay a step ahead of governmental regulation. This game of cat and mouse means that cities must periodically review their regulatory schemes so that they are not addressing these issues with antiquated tools.

Precisely because of this chameleon-like quality, one of more difficult tasks cites are faced with is defining an SOB. Unfortunately for cities, they do not have the luxury of knowing SOBs when they see them. Defined too narrowly and unregulated venues fall through the cracks. Defined too broadly and cities run the risk of having their ordinance declared unconstitutionally vague. So what type of establishment constitutes a sexually oriented business?

The Supreme Court has upheld definitions that manage to balance First Amendment combat harmful secondary effects with time, place and manner regulations. A regulation must not be vague so as to require people of (at least) normal intelligence to guess at its meaning, *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); however, the vagueness prohibition "does not invalidate every statute which a reviewing court believes could have been drafted with greater precision. *Rose v. Locke*, 423 U.S. 87, 94 (1975).

For example, in *Young v. American Mini-Theatres*, the City of Detroit defined in "adult motion picture theater as:

> An enclosed building with a capacity of fifty or more persons used for presenting material distinguished or characterized by their emphasis on matter depicting, describing or relating to "specified sexual activities or "specified anatomical areas, (as defined

> below), for observation by patrons therein. *Young*, 427 U.S. 50, at 53, n. 5 (1976).

The plaintiff challenged this definition as vague, claiming that adult motion picture theatre operators would have to guess at when a film would cross the threshold amount of sexual activity to require the theatre showing it to be licensed. The Supreme Court held that the plaintiff adult businesses fell clearly within the definition since they regularly offered adult films.

The definition of "nudity" in *City of Erie v. Pap's* A.M.:

> "Nudity" means the showing of the human male or female genital, pubic area or buttocks with less than a fully opaque covering; the showing of the female breasts with less than a fully opaque covering of any part of the nipple; the exposure of any device, costume, or covering which gives the appearance of or simulates the genitals, pubic hair, natal cleft, perineum anal region or pubic hair region; or the exposure of any device worn as a cover over the nipples and/or areola of the female breasts, which device simulates and gives the realistic appearance of nipples and/or areola. *Pap's* A.M., 529 U.S. 277, at 289.

This definition has repeatedly been upheld and is used widely in licensing and zoning ordinances across the country as a threshold inquiry for determining whether a business is an SOB. Typically, SOB ordinances are crafted to include establishments like gentlemen's clubs, cabarets, some massage parlors, escort services, nude or partially nude modeling studios, adult video stores with on and off-site viewing capabilities, peep show parlors, totally nude dancing establishments, and so forth.

Why Regulate SOBs? Sexually oriented businesses have expanded and grown significantly in the last decade. In 1996, the portion of the entertainment industry that focuses on adult and sexually oriented entertainment grossed approximately $8,000,000.00. Alan C. Weinstein, Licensing Ordinances as an Adjunct to Zoning Regulation of Sexually Oriented Businesses (Part I), *22 Zoning and Plan. L. Rep. 2* (1999). As these businesses have expanded, cities have attempted to keep pace by imposing locational restrictions and operational standards that prohibit physical contact between performers and customers and impose distance restrictions, and prohibit direct tipping of performers. SOB owners and operators have been aggressive in challenging many of these regulations as unconstitutional prior restraint of free speech.

A variety of substantial governmental interests are arguably advanced by the licensing and regulation of SOBs. For example, communities seeking to avoid criminal activity in an adult business have an interest in ensuring that the persons operating the establishment have not recently been convicted of crimes. Licensing of owners and employees serves to identify participants in the enterprise and helps to prevent the employment of minors. Well-defined interior configuration and lighting standards and prohibitions on certain conduct can help to prevent illicit sexual activity and discourage employees and patrons from prohibited contact. Further, the Supreme Court has recognized that a city's broad police power to prevent the negative secondary effects includes creating special regulations that aim to curb the transmission of sexually transmitted diseases.

Cities may rely on a number of cases that have found that prostitution, indecent exposure, masturbation and other elicit sexual activity frequently occurs on the premises (and in the vicinity) of sexually oriented businesses. *Nobby Lobby, Inc. v. City of Dallas*, 970 F.2d 82 (5th Cir. 1992). Courts have upheld regulations that require booths to either be visible by persons adjacent to the booth ("line of sight" regulations), or an employee who is required to monitor booth activity via closed circuit television, in spite of privacy and equal protection challenges. These regulations discourage prostitution and unprotected anonymous sex associated with adult theaters, for example. *Bamon Corp. v. City of Dayton*, 923 F.2d 470 (6th Cir. 1991).

Types of Local Regulation. Regulation of sexually oriented businesses has evolved into the following general categories: Zoning (locational regulations), licensing (qualification standards), and operational (protective safeguards).

While completely nude dancing in adult entertainment establishments can be prohibited, complete nudity may not be prohibited in other entertainment venues such as artistic performances in theatres. Therefore a prohibition against "any person appearing in a state of nudity in any place where the general public is invited, is void on its face for over breadth. Note, however, that most current regulations require performers to wear pasties and a G-string. *Pap's A.M. v. City of Erie*, 529 U.S. 277 (2000). In *Pap's A.M.*, the Supreme Court held that an ordinance prohibiting public nudity did not infringe unnecessarily on the constitutional rights of nude dancers by requiring them to wear pasties and G-strings during their performances. As Justice Rehnquist famously noted, requiring pasties and a G-string "does not deprive the dance of whatever erotic message it conveys. *Pap's A.M.* at 571.

General Constitutional Principles. As a constitutional matter, the value of freedom of expression prevails over other democratic values, such as combating negative secondary effects of SOBs. Therefore, if the ordinance in question is not narrowly drawn and content neutral, it will be struck down no matter how noble its aim or how negative the secondary

effect it seeks to ameliorate. Unlike other legislative acts where courts defer to the legislative body, ordinances purporting to regulate the time, place and manner of erotic speech are not presumed to be constitutional, and the burden of proving constitutionality of its regulations shifts to the government. It is especially important that a record be developed prior to the adoption of the ordinance or regulation, even if the record is composed only of studies conducted in similar jurisdictions.

Regulations that are not facially content neutral are subject to strict scrutiny, and the governmental body must demonstrate a compelling interest to support such regulations. The First Amendment requires that regulations must be "no greater than necessary" to protect the "substantial" governmental interest sought to be advanced. Federal court decisions on whether there is an adequate fit between the purpose and the means of the regulations are generally case specific, so each community and its regulations must be carefully crafted. The local government attorney has a great burden in this area of the law to closely examine court opinions and look for principles and results that may apply to a particular regulation.

* *The Narrow Specificity Principle* - This principle applies to the commercial speech doctrine and stands for the proposition that a regulation must be no more extensive than is necessary to advance the legitimate governmental interest at stake and must allow ample opportunity for an expressive message to be conveyed.
* *The Content Neutrality Principle* - The government may not proscribe any expression because of its content, and an otherwise valid regulation violates the First Amendment if it discriminates among different types of expression based upon its content. Under the viewpoint neutrality aspect of the principle, the government cannot regulate expression in such a way as to favor one view over another. Under the category neutrality aspect, the government generally cannot regulate in such a way as to discriminate between different categories of expression. There are two exceptions to this principle, both of which are applicable to land use regulation by local governments. First, in order to deal with undesirable secondary effects resulting from concentration of adult entertainment establishments in a particular area, the government can enact zoning regulations specifically applicable to those establishments. For example, cities may limit (but not wholly exclude) the placement of SOBs to a particular zoning classification, and prohibit them from locating within a certain distance of another SOB, neighborhood, church, school, etc. Second, the governmental body may require licenses for SOB employees, which would otherwise be considered an unconstitutional prior restraint.

The Supreme Court has dealt with governmental licensing of expression by imposing very specific requirements on such licensing.

* *The Prior Restraint Doctrine* - A prior restraint directly interferes with the ability of the public to receive information and has a freezing effect on expression. Therefore a prior restraint is presumptively unconstitutional and imposes on the government a heavy burden for justification. In *Freedman v. Maryland*, 380 U.S. 51 (1965), the Supreme Court held that "any system of prior restraint" bears a "heavy presumption against its Constitutional validity." In order for prior restraint to be upheld, the following safeguards must be met: (1) the decision to issue or deny a license must be made within a brief, specified and reasonably prompt period of time; (2) the licensing scheme must provide for prompt judicial review; and (3) the burden of initiating review must be on the government, not on the challenger.
* *The Commercial Speech Doctrine* - The constitutionality of governmental regulation of commercial speech requires application of a four-part analysis.

    1. The commercial speech must concern lawful activity and must not be misleading
    2. The government must have a substantial interest to justify the regulation
    3. The regulation must directly advance the asserted governmental interest
    4. The regulation may not be more extensive than is necessary to serve the asserted interest.

The government will not be given the benefit of the doubt about the constitutionality of a land use regulation, and the burden of sustaining the regulation against a constitutional challenge falls on the local government. The regulation must be carefully tailored to achieve its legitimate, narrowly stated public purpose. Land use permitting requirements must provide for a specific and speedy decision by the licensing body to avoid being held an invalid "prior restraint" on speech.

The First Amendment imposes substantial restrictions on the types of land use regulation available to local governments. Clear standards must be provided to guide the discretion of the local official, the time frame for a decision to issue or deny a permit must be brief and specific, the status quo must be preserved during the review period, and the regulation must state and express a prompt judicial review procedure in a case

of a denial. Another important effect of the prior restraint doctrine is to discourage conditional use permits in favor of permits issued as a matter of right. This is so because a conditional use permit necessarily requires the application of discretion from the local government agency. It is, therefore, subject to criticism as being vague and over broad.

Courts have routinely invalidated SOB regulations because administrative and judicial review is not sufficiently prompt. Since 1998, this has been one of the most frequent avenues of challenge to local ordinances. *Baby Tam and Company v. Las Vegas*, 154 F.3d 1097 (9th Cir. 1998) (Baby Tam I); *Baby Tam and Company v. Las Vegas*, 199 F.3d 111 (9th Cir. 1999) (Baby Tam II); *Baby Tam and Company v. Las Vegas*, 247 F.3d 1003 (9th Cir. 2001) (Baby Tam III) but see the discussion at 3.D. infra. Also, an alleged failure to leave open reasonable alternatives is another common basis of attack; therefore, most local governments must be sure that land use regulations do not effectively "zone out" SOBs. *City of Renton v. Play Time Theatres Inc*., 475 U.S. 41 (1986).

Sexually oriented businesses in a small community - Case law has established that non-obscene adult entertainment is a protected First Amendment activity for which local governments must make sites reasonably available. Arguably, however, the Supreme Court has held open the possibility that not every small jurisdiction must allow a sexually oriented business. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981). For example, in *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, n. 2 (11th Cir. 1999), the court determined that the relevant real estate market contained available sites for adult entertainment, including those as far as one and a quarter miles south of the city limits. Previously the same court had noted that the Supreme Court had not decided that "every unit of local government entrusted with zoning responsibilities must provide a commercial zone in which protected activities permitted. *Digital Properties, Inc. v. City of Plantation*, 121 F.3d 586, n. 2 (11th Cir. 1997). Nevertheless, if it is possible at all to essentially "zone out" SOBs, this would apply only to the smallest of communities, and the local government must be prepared to engage in a protracted court fight with a likely well-funded foe.

Is the speech or conduct protected? - In order for First Amendment speech protections to apply, there must be some type of speech or expression involved. Questions arise as to whether nudity or nude dancing is a type of protected speech or expression. The U.S. Supreme Court has stated that speech is not limited to the spoken or written word. *Pap's A.M. v. City of Erie*, 529 U.S. 277 (2000). First Amendment speech protection can extend to conduct, as long as the conduct is accompanied with some type of expression. *Texas v. Johnson*, 491 U.S. 397, 404 (1989). To be considered speech, the conduct also must demonstrate a sufficient amount of expression. Conduct signifying only a small amount of the expression will not be protected under the First Amendment. *Spence v. Washington*, 418 U.S. 405 (1974). In that case, the Supreme Court held that conduct is protected by the First Amendment when: (1) an intent to convey a particularized message was present; and (2) the likelihood was great that the message would be understood by those who viewed it.

Not all adult businesses are entitled to First Amendment protection. Many sexually oriented business ordinances lump together businesses like sexual encounter clubs, escort services, massage parlors, movie theatres, video stores, and cabaret or dance clubs. There is a difference in the type of protection to which such businesses are entitled. In *FW/PBS*, the Supreme Court unequivocally held that adult businesses that do not "purvey sexually explicit speech, such as escort agencies and sexual encounters centers are not protected by the First Amendment. *FW/PBS Inc. vs. City of Dallas*, 493 U.S. 215. In *Pap's A.M.*, Justice O'Connor stated that "being in a state of nudity is not an inherently expressive condition. *Pap's A.M.* at 289. The Court has implied that certain types of expression, such as offensive or indecent speech, is less deserving of full protection than more traditional types of speech. The Court has decided that this type of "lower value" speech can be regulated more heavily than "higher value" speech. *Young v. American Mini Theatres*, 427 U.S. 50 (1976). But, the Supreme Court has never held precisely which adult businesses are entitled to heightened constitutional scrutiny.

Even though the Supreme Court has never made this delineation, in *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997) the Supreme Court did intimate that the internet is now the principal channel through which most Americans can receive sexually explicit communication. The Court identified the widespread availability of sexually explicit material, including hard core pornography. *Reno*, at 2336. Therefore, as access to the internet expands, local governments may be able to make the argument in the future that additional locational restrictions and permit requirements as they pertain to adult theaters and bookstores are permissible because reasonable alternative avenues to obtain the same material are readily available.

Evidence of Harmful Secondary Effects. The plurality of the Supreme Court in the *Pap's A.M.* decision stated that "as long as the evidence relied upon is reasonably believed to be relevant to the problem that the City addresses," then the City does not have to produce its own evidence, but may rely on evidence of harmful secondary effects. *Pap's A.M.*, 529 U.S. at 296. In an important 2002 decision, *City of Los Angeles v.*

Alameda Books, 535 U.S. 435 (2002), the Supreme Court reaffirmed its holding in *City of Renton* and addressed the relationship between the local government and the evidence upon which it relies for its regulations. The first issue the court addressed was the fact that the study was 25 years old at the time of the decision and had been several years old at the time the city relied on it. The Court stated:

> A municipality may rely on any evidence that is reasonably believed to be relevant for demonstrating a connection between speech and a substantial, independent government interest. This is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

Alameda reaffirms the proposition that a local government retains discretion to make findings from the studies before it and may draw reasonable conclusions about what regulatory techniques will be beneficial in addressing the findings. Also, the municipality should be able to rely on evidence of negative secondary effects from other cities. If the Plaintiff is successful in casting any doubts upon the evidence relied upon by the city, the city should be able to provide additional evidence at trial that renews support for a theory that justifies its ordinance. In 2003, the Fifth Circuit decided *N.W. Enterprises, Inc. v. City of Houston*, 352 F.3d 162, 173 (5th Cir. 2003). It held that in determining content-neutrality, the proper inquiry is whether the "predominant concern of the ordinance is addressing secondary effects, versus banning content. It went on to state that a local government can justify the ordinance based on evidence developed prior to the ordinance's enactment, and also that adduced at trial. The *N.W Enterprises* case supports the analysis in *Alameda* by allowing the local government discretion to draw reasonable conclusions based on the evidence before it prior to enacting the ordinance. *N.W. Enterprises* also supports the notion that a city should be allowed to provide additional evidence at trial of negative secondary effects should plaintiff succeed in its burden of casting doubt on the city's rational for enacting the ordinance. See *Encore* article.

Even though it is not clear how much evidence of secondary effects a government must show to justify its need for the law, it is clear that there must be a reasonable nexus between the regulations and the evidence/studies upon which they are based. *See Encore Video, Inc. v. City of San Antonio,* 330 F.3d 288 (5th Cir. 2003). In *Encore*, the plaintiff successfully argued that the City's reliance on studies that did not differentiate between on-premise businesses, and strictly off-premise take home rental stores was no reasonable. While that case may no longer be good law in light of the holding of *N.W. Enterprises,* SOBs will undoubtedly rely on its reasoning to argue that the local government's regulations are not reasonable conclusions based on the evidence of negative secondary effects.

Zoning - Major Cases. *United States v. O'Brien*, 391 U.S. 367 (1968) - is the landmark political speech case establishing the framework for evaluating content neutral regulations of conduct that have incidental impacts on expression. Under *O'Brien,* a regulation is valid if it: 1) is within the constitutional power of the government; 2) is designed to service substantial governmental interest that is unrelated to the suppression of free expression; 3) is narrowly tailored to serve the interest; and 4) leaves open reasonable alternative avenues of communication. Many challenges against zoning ordinances center around the requirement that reasonable alternative avenues of communication be provided.

In *Young v. American Mini-Theatres, Inc.*, 427 U.S. 50 (1976) the operators of two adult theatres in Detroit challenged the City's ordinances that required adult theatres (defined or referring to the content of films shown) to be licensed and to be located at least 1,000 feet away from any two other regulated uses (adult theatres, taverns, pool halls, etc.). Based upon the substantial justifications given for the ordinance by Detroit's common counsel, the district court granted summary judgment for the City. The Sixth Circuit reversed, holding that the ordinances were content based prior restraints on speech and were not justified by merely establishing that they were designed to serve a compelling public interest. The U.S. Supreme Court reversed in a 5-4 decision with Justice Stephens writing the majority opinion. The court held that the ordinance was not vague for failure to specify exactly how much of a film must be sexual in nature before the film could say to be characterized by an emphasis on sex, because the theatres regularly featured erotic films and there was no question of the applicability of the ordinance to those activities.

The Plaintiffs were held not to have standing to assert the First Amendment rights of third parties because they did not show that the threat of the

ordinance being applied improperly was real and substantial and because any ambiguity could be corrected through a narrowing construction by the state courts.

The licensing and zoning ordinances in question were determined to be valid means to protect the quality of life and neighborhoods and did not constitute a prior restraint on speech. In this case the Supreme Court broadly sustained the power of local governments to utilize land use regulations in order to protect the quality of life of their citizens. The court recognized that the governmental interest to prevent the adverse effects of adult businesses is important and substantial, and that the governmental interest in stable neighborhoods was unrelated to the suppression of any message. The Supreme Court also held that the impact of the regulations upon erotic expression was incidental, and was no more than necessary to achieve the government's interest in protecting neighborhoods.

City of Renton v. Playtime Theatres, 475 U.S. 41 (1986) was decided ten years after *Young*. The City of Renton adult theatre zoning ordinance was analyzed as a content neutral regulation, with the stated purpose to prevent the secondary effects of sexually oriented businesses upon neighborhoods. The court found that the ordinance served a substantial governmental interest despite the fact that the City of Renton failed to conduct a local study or to demonstrate that the impacts of adult theatres in Renton nullified the claim of substantial governmental interest. The court explicitly held:

> "The First Amendment does not require a city, before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence the city relies upon is reasonable believed to be relevant to the problem that the city addresses." *Renton*, 475 U.S. 41, 51-52 (1986).

The City of Renton relied heavily upon the study and experiences of Seattle and the court held that was sufficient, despite the fact that the zoning regulations that Seattle used were different from those used in Renton. Importantly, the court also addressed the issue of whether the zoning regulations allowed for "reasonable alternatives of communication." The court held that Renton's ordinance met the standard because more than 5% of the land mass in Renton was opened to adult theatres. The plaintiffs had claimed that practically none of the land was for sale or lease, so that none of the available space was commercially viable. The court held that these factual circumstances, even if true, would not demonstrate a defect in the city's regulation, finding that the adult theatres "must fend for themselves in the real estate market on an equal footing with other prospective purchasers and lessees." *Renton,* at 54.

In *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 435 (2002), two adult establishments challenged a city ordinance that prohibited more than one adult business from occupying the same building. In analyzing the ordinance, the majority again relied on *Renton* in determining that the ordinance was "content neutral" because it was aimed at the secondary effects of the adult businesses rather than at the expression.

Improper interpretation of ordinance terms by regulatory officials can also lead to invalidation of the regulations. In *Tollis v. San Bernardino County*, 827 F.2d 1329 (9th Cir. 1987), a county official interpreted the county's adult use ordinance to apply to mainstream theaters even if the theater showed pornographic films only on one occasion. The district court agreed with the plaintiff that the ordinance was unconstitutionally over broad as applied. The Ninth Circuit affirmed but instead of finding that the ordinance was over broad, concluded that the ordinance was not narrowly tailored to serve a substantial governmental interest because the county presented no evidence that a single showing of an adult movie would have any harmful secondary effects on the community. It is clear that definitions must be interpreted to apply only to a category of establishments that are associated with negative secondary effects, and a one-time use of a building for sale or presentation of sexually explicit fare does not bring it within that category.

Local governments are urged to use the term "regularly" in the definitions of adult theatre, adult cabaret, adult performance or adult performance center to eliminate the possibility of a “single use interpretation like the one that lead to the invalidation of the ordinance in *Tollis*. As Justice Scalia wrote in his concurring opinion in *FW/PBS, Inc. v. City of Dallas*, "regularly features" means "a continuous presentation of the sexual material as one of the very objectives of the commercial enterprise." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 260 (1990).

The ordinance that was upheld in *Young* defined an adult book store as an establishment "having as a substantial or significant portion of its stock in trade distinguished or characterized by their emphasis on matter depicting, describing are related to "specified anatomical areas," (as defined below, or an establishment with a segment or section devoted to the sale or display of such material." *Young, at* 53, n. 5. The court rejected a vagueness argument against the phrase "characterized by an emphasis." The courts have rejected the argument that "substantial or significant portion" is unconstitutionally vague. *ILQ Invs. Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir. 1994); *Mom N Pop's, Inc. v. City of Charlotte*, 1998 U.S. App. Lexis 20272 (4th Cir. 1998). Further, the phrases "major

businesses" *SDJ, Inc. v. City of Houston,* 636 F.Supp.1359, 1376 (S.D. Texas 1986) and "principle business purpose," *Dumas v. City of Dallas,* 648 F. Supp. 1061, 1079 (N.D. Texas 1986), affirmed 837 F.2d 1298 (5th Cir. 1988), reversed on other grounds, *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990), have also been upheld.

Cities commonly seek to avoid ambiguity by using percentages of floor space, gross receipts, or other factors to define adult uses. Many of these efforts have failed, due in large part to the fact that these factors frequently require some degree of self-reporting. Further, some of these factors have led to successful challenges for unconstitutional vagueness. *City of New York v. Les Hommes*, 724 NE 2d 368 (NY 1999); *Christy v. City of Ann Arbor,* 824 F.2d 489 (6th Cir. 1987); *World Wide Video v. City of Tukwila*, 816 P.2d 18 (Wash. 1991)

Reasonable alternative avenues of communication - generally a city may not use a zoning ordinance to effectively preclude adult businesses from locating within the city. The Supreme Court has not, however, required every tiny city or village to provide its own "red light" district. For example, if areas immediately surrounding a small city are available for adult businesses, that may provide reasonable alternative avenues for communication. Clearly though, this is a very fact specific inquiry, and small local governments should not assume that they can zone out adult businesses just by virtue of the fact that they are lightly populated.

For example, in *Schad v. Borough of Mt. Ephrain*, 452 U.S. 61 (1981) the Supreme Court invalidated a zoning ordinance that prohibited all live entertainment. The Borough suggested that the ordinance was not unconstitutional because live entertainment in the form of nude dancing was available nearby although not within the corporate limits of the city. The court stated "this may very well be true, but the Borough cannot avail itself of that argument in this case. There is no county wide zoning in Camden County, and Mt. Ephrain is free under state law to impose its own zoning restrictions, within constitutional limits." *Schad at 76.*

The question whether every community, regardless of size or proximity to other available venues, must provide a zone for adult businesses is undecided. In *Keego Harbor Company v. City of Keego Harbor*, the Sixth Circuit cited the Schad decision and did not find that all municipalities must provide an area for adult entertainment. Still, the ordinance in question passed by a city of only 3000 was invalidated because it had the effect of totally prohibiting adult uses in the city. *Keego Harbor Company v. City of Keego Harbor,* 657 F.2d 94 (6th Cir. 1981).

On the other hand, the New Jersey Supreme Court upheld a state statute that prohibited SOBs from locating within a 1,000 feet of another SOB or other defined land uses, despite the fact that the effect of the statute was to prohibit adult businesses from locating within the township of Saddlebrook. The court concluded that the available sites for adult businesses existed within the surrounding vicinity. *Township of Saddlebrook v. AB Family Ctr.*, 722 A.2d 530 (NJ 1999). Furthermore, certain Texas cities (Plano, Texas, for example) have even more stringent locational restrictions (3,000 feet) that have yet to be challenged. These legislative decisions ultimately depend on the standards that a particular community wishes to govern by. Local governments that wish to push the regulation envelope must be cognizant of the possibility that these decisions can lead to litigation, and should plan accordingly before embarking on robust changes to their ordinances.

Other Venues for Communicating Message. Generally, zoning regulations do not impact the other venues available for dissemination of protected erotic speech. For instance, such messages are widely available in magazines such as Hustler and Penthouse, cable television, telephone services and free internet sites. Ideally, well-crafted zoning regulations prohibit, or at least inhibit, illegal expression of constitutionally unprotected sexual contact including peep show booths, lap dances and couch dances on the grounds of limiting negative secondary effects. Nevertheless, the availability of sexually oriented expression and even pornographic expression in other accessible venues will not justify the preclusion of adult businesses from a particular community.

The most common form of zoning regulation is the dispersal method approved by the Supreme Court in *Young*. This method requires adult businesses to be separated by a distance from each other and from specified land uses, such as churches, schools and residential neighbors, and from each other. Provided the regulation allows for reasonable alternative sites for such businesses, a court will usually uphold such limitations as a valid exercise of a zoning power. If you have a concern about the standards currently applied in your community, refer to the following cases: *Woodall v. City of El Paso,* 49 F.3d 1120 (5th Cir. 1995); 955 F.2d 1305 (5th Cir. 1992); 950 F.2d 255 (5th Cir. 1995) - a series of cases. *Topanga Press, Inc. v. City of Los Angeles,* 989 F.2d 1524 (9th Cir. 1993), cert. denied 511 U.S. 1030 (1994); *Lim v. City of Long Beach*, 217 F.3d 1050 (9th Cir. 2000) cert denied 121 S. Ct. 1189 (2001); *Diamond vs. City of Taft*, 215 F.3d 1052 (9th Cir. 2000). Local governments should recall that their zoning ordinance need not provide "commercially available" areas for SOBs to locate, but merely the opportunity to locate in specified areas based upon reasonable time, place and manner restrictions. *City of Renton v. Playtime Theatres*, 475 U.S. 41 (1986).

Amortization of Non-Conforming Adult Uses. Numerous cases stand for the proposition that the Constitution does not require indefinite "grandfathering" of SOBs that become nonconforming uses if a new ordinance provides for a reasonable amortization period that provides for recovery of investment. *SDJ v. City of Houston*, 636 F. Supp. 1359, 1370 (SD Tex. 1996), affirmed, 837 F.2d 1268, 1278 (5th Cir. 1988); *Dumas v. City of Dallas*, 648 F. Supp. 1061, 1171 (ND Tex. 1986), affirmed 837 F.2d 1298 (5th Cir. 1988); Rathkopf, *The Law of Zoning and Planning*, Chapter 17B (Clark Boardman Callaghan). In *23 West Washington Street, Inc. v. City of Hagerstown*, 1992 US App Lexis 18014 (4th Cir. 1992), the City did not provide for grandfathering or provide special exceptions for existing uses when a new zoning ordinance was passed that affected SOBs. Nevertheless, the court upheld the ordinance because it contained amortization provisions that allowed investors with vested rights to recoup their investment.

Note that the challenges to ordinances that do not contain amortization provisions, or contain amortization provisions with short time periods are often challenged as constituting a taking. Challenges to well-crafted amortization schemes often fail because amortization of a nonconforming use does not generally render the property completely worthless under the federal constitutional analysis. *Ranchhouse, Inc. v. Amerson*, 238 F.3d 1273 (11th Cir. 2001); *NW Enters. v. City of Houston*, 27 F. Supp. 2d 754, 865 (SD Tex. 1998). Nearly all court opinions talk about the reasonableness of the amortization period in determining whether the amortization clause should be upheld. To determine the appropriate length of an amortization period in a particular community, the City must balance the substantial governmental interests advanced by the ordinance with the need to provide a business a fair amount of time to recoup its investment. *Northend Cinema, Inc. v. City of Seattle*, 585 P.2nd 1153 (1978), *cert. denied* 441 U.S. 946 (1979). Note that the courts require an SOB to exhaust all administrative remedies before seeking relief in state or federal court. S*ee Stringfellows of New York Ltd. v. City of New York*, 694 NE 2d 407, 420 (NY 1998).

Typically conditional use ordinances operate as licensing schemes and allow the denial of a use permit based on the zoning board's finding that the proposed use will have adverse effects upon adjacent and surrounding uses. Since the negative secondary effects of adult businesses constitute the very reason for regulating them more stringently than other land uses, some courts have invalidated conditional use permitting schemes as applying to adult businesses. *Landover Books, Inc. v. Prince George's County*, 566 A.2d 792 (Maryland App. 1989); *Smith v. County of Los Angeles*, 29 Cal. Rptr. 2nd 680 (Cal. Crt. App. 1994); *Dease v. City of Anaheim*, 826 F.Supp. 336 (C.D. Cal. 1993). These cases do not stand for the proposition that the cities may never place special requirements on adult uses, but when they do, objective standards and guidelines for the zoning board to follow must be expressly established. *801 Conklin Street Ltd. v. Town of Babylon*, 38 F.Supp.2d 228, 244 (E.D.N.Y. 1999).

Licensing. The term "prior restraint" is used "to describe administrative and judicial orders forbidding certain communications when issued in advance of the time that such communications are to occur." *Alexander v. United States*, 509 U.S. 544, 550 (1993). The purpose of the prior restraint doctrine is to prevent government censorship. *O'Connor v. City and County of Denver*, 894 F.2d 1210, 1220 (10th Cir. 1990). Prior restraint must take place "under procedural safeguards designed to obviate the dangers of a censorship system." *Southeastern Promotions Ltd. v. Conrad*, 420 U.S. 546 (1975). *Freedman v. Maryland*, 380 U.S. 51 (1965) illustrates the classic example of unconstitutional prior restraint censorship. In *Freedman*, the state passed a statute stating that it was unlawful to sell, lend, lease or exhibit a motion picture or film unless the film had been submitted to the state board of censors, who would examine the film for objectionable content including obscenity. In a unanimous decision, the Supreme Court found the statute unconstitutional.

While *Freedman* might be an easy call, especially with 40 years of hindsight, local governments today are faced with a much more pervasive adult industry than that which the *Freedman* court faced. In *FW/PBS Inc. v. City of Dallas*, 493 U.S. 215 (1990), the Supreme Court gave cities some guidance regarding what to avoid in licensing ordinances. While prior restraints are not unconstitutional per se, any scheme that focuses on subjective discretion versus objective, clearly defined criteria will be unconstitutional. Further, any licensing ordinance absolutely must provide strict administrative time limits on the decision making process, and it must provide for the possibility of prompt judicial review in the event a license is erroneously denied. See *City of Littleton v. Z.J. Gifts D-4, L.L.C.*, 541 U.S. 774, 781 (2004).

Not only must the administrative requirements be sufficiently well defined, but the Constitution requires any substantive hurdles to be defined by narrow, definite, and objective criteria in order to avoid prior restraint problems. *City of Lakewood v. Plain Dealer Publ'g Company*, 486 U.S. 750 (1988). Unbridled discretion in the hands of a government official to deny a license constitutes censorship. The ordinance must be specific in spelling out what sexual acts, exposed parts of the human body, or what criminal convictions constitute the basis for denial of a permit. If drafted with sufficient care, the ordinance can be upheld under the constitutional challenge because it has been recognized

by the Courts that a "modicum of judgment" must be exercised by the regulators. *Baby Tam and Company, Inc. v. City of Las Vegas*, 247 F.3d 1003 (9th Cir. 2001) (Baby Tam III).

Unfortunately, because permitting requirements are some of the most technical and easily challenged SOB regulations, some cities have abandoned permitting and licensing schemes altogether and allow SOBs to open as a matter of right (as a permitted use). These criteria often include the distance restriction and basic operational standards such as building code requirements. One problem with this approach is that the license or permit suspension and revocation process is no longer available as an enforcement tool. Instead, local governments are typically left only with the option of civil and/or criminal proceedings if an SOB violates its ordinances.

This can be problematic. For example, in a nuisance abatement proceeding under Chapter 125 of the Civil Practice and Remedies Code, a local government may seek an injunction against a person who "knowingly maintains a place to which persons habitually go" for various purposes, including prostitution, drug crimes, and the commercial exhibition of obscene material. Civ. Prac. Rem. Code §125.0015. From a practical standpoint, proving that an SOB proprietor or employee "knowingly" allows a premises to be "habitually used" for an illegal purpose can be very difficult. It probably requires numerous criminal convictions for the specified crimes at the location in question, which can be difficult to obtain, and also often requires local governments (such as city attorneys and district attorneys) to work together.

On the other hand, Chapter 243 of the Local Government Code provides that municipalities and counties may adopt regulations regarding SOBs, including a requirement that owners and employees obtain licenses or permits. Loc. Govt. Code § 243.007. Local governments may sue in the district court for an injunction to prohibit the violation of a regulation adopted under this chapter, and an offense under a regulation adopted pursuant to the chapter is a Class A misdemeanor. Note that there is no requirement that a local government prove that the regulation is knowingly violated, or that the premises is habitually used for an illegal purpose in order to obtain an injunction. Further, a local government may inspect an SOB to ensure compliance, and it may impose fees on applicants, which are based on the cost of processing applications and investigating applicants.

Prompt Judicial Review. Prior to the Supreme Court decision of *City of Littleton v. Z. J. Gifts D-4, L.L.C.*, 541 U.S. 774 (U.S. 2004), the fourth, sixth and ninth circuits held that when a city denies a sexually oriented business license, the ordinance must guarantee a prompt judicial decision on the merits of a challenge to the denial within a brief, specified period of time. *Baltimore Boulevard, Inc. v. Prince George's County*, 58 F.3d 988 (4th Cir. 1995); *Lounge Management, Inc. v. City of Paducah*, 202 F.3d 884 (6th Cir. 2000); *Baby Tam & Company, Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998) (Baby Tam 1). The first, fifth, sixth and eleventh circuits held that the prompt judicial review requirement is met if the ordinance allows for prompt access to the courts. *See Jews for Jesus v. Massachusetts Bay Transp. Auth.*, 984 F.2d 1319 (1st Cir. 1993); *T.K.'s Video, Inc. v. Denton County*, 24 F.3d 705 (5th Cir. 1994); *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993) (en banc); *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251 (11th Cir. 1999).

Obviously, cities lack the authority to make courts issue decisions within a specific period of time. Under *FW/PBS*, it appeared that if a city could not guarantee a prompt judicial decision, the enforcement of its license denial would be stayed until a court upheld the denial. The problem with this approach is that the SOB has no incentive to aggressively pursue an appeal of the denial as it would have the benefit of the permit for an indefinite period until a judicial decision is rendered. There was a split in the circuits over this issue based on Justice O'Connor's rationale in *FW/PBS*: the city should not have to bear the true burden of either not going to court or not enforcing its ordinance. In 2004, however, the Supreme Court decided *City of Littleton v. Z. J. Gifts D-4, L.L.C.*, 541 U.S. 774, 782 (U.S. 2004), which modified *FW/PBS* by holding that the ordinary procedures of the courts are adequate to satisfy the Constitutional requirements for prompt judicial review. Therefore, so long as prompt access to the courts is required by an ordinance, the license denial can be enforced in the interim while a decision is pending.

In an effort to address this issue, some states have passed legislation mandating short time periods for state courts to resolve administrative appeals. Such efforts have been successful in Nevada, California and Tennessee. This does not appear to be required, though, as the Supreme Court in *Littleton* expressed confidence that state courts understood the constitutional need to avoid undue delay, which would result in the unconstitutional suppression of free speech.

Renewal Suspension and Revocation. The power to license necessarily includes the power to revoke a license and the power not to renew a license. Decisions to revoke or deny renewal should also be analyzed under the content neutral steps provided in *O'Brien, FW/PBS* and the other major Supreme Court announcements in this area. In other words revocations and suspensions must include strictly enforced definite time limits, the decision to revoke or suspend must not be based on overly subjective criteria, and an appeals process with prompt access to the courts must be part of the scheme.

License Fees. License fees charged to adult entertainment businesses must be reasonable and in general must be "revenue neutral". *Schultz v. City of Cumberland*, 228 F.3d 831 (7th Cir. 2000). In other words, the fees must be intended only to defray the costs of administering the ordinance. In general, the burden of proving that a license fee is unreasonable is on the applicant for the license. *Worldwide Video, Inc. v. City of Tukwila*, 816 P.2d 18 (Washington 1991); *Adult Entm't Ctr., Inc. v. Pierce County*, 788 P.2d 1102 (1990). Chapter 243 of the Texas Local Government Code provides that municipalities and counties may impose license fees, and that the cost "must be based on the cost of processing the applications and investigating the applicants." Price gouging in this context would be akin to the poll taxes of yesteryear, and would likewise be held as unconstitutional.

Cities should also avoid requiring a bond or license fee that is intended to remunerate victims or the community for expenses for expected prosecutions associated with the operation of the business. Such exactions have been held to excessively burden constitutional rights. *Wendling v. City of Duluth*, 495 F. Supp. 1380 (D. Minn. 1980); *Am. Target Adver., Inc. v. Giani*, 199 F.3d 1241 (10th Cir. 2000).

Regulating Persons Involved in the Sexually Oriented Businesses. An application for license to operate a sexually oriented business should require the applicants to disclose information that is reasonably necessary to identify and communicate with the applicant and to determine whether a disqualification in the ordinance applies to the particular applicant. Under the identification factor, courts have upheld requirements forcing applicants to provide their names, addresses, official documents proving identity and official documents that substantiate age. *T.K.'s Video, Inc. v. Denton County*, 24 F.3d 705 (5th Cir. 1994). Complete identification of SOB managers and employees is essential to preventing prostitution and other elicit sexual activity. *KEV, Inc. v. Kitsap County*, 793 F.2d 1053 (9th Cir. 1986).

Under the disqualification function, courts will uphold the required disclosure of prior criminal conduct if it deems that such conduct is a valid basis for a disqualifying applicant. *Schultz v. City of Cumberland*, 228 F.3d 831 (7th Cir. 2000). In other words, a blanket disqualification of anyone ever convicted of a felony, regardless of its nature, is arguably over broad. Disqualification criteria must still be reasonable time, place and manner restrictions. *Dream Palace v. County of Maricopa*, 384 F.3d 990 (9th Cir. 2004).

Regulating the Interior Premises - Stage and Booth Requirements. Cities have been held to have a substantial interest in regulating the interior configurations of strip bars and dance clubs. The Supreme Court has recognized that such establishments have repeated problems with prostitution and other illegal activities. *Erie v. Pap's A.M.*, 526 U.S. 277 (2000); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991). Some cities have enacted ordinances that establish buffer zones or specified distances that must be maintained between entertainers and customers. These have generally been upheld as valid restrictions on the presentation of a striptease. *City of Colorado Springs v. 2,3,5,4, Inc.*, 896 P.2d 272; *Colacurcio v. City of Kent*, 163 F.3d 545 (9th Cir. 1998).

To ensure compliance with configuration standards and other requirements, inspection provisions are often included in SOB ordinances. These have been challenged as violative of the Fourth Amendment's prohibition on unreasonable searches and seizures. Most courts have included there is an obvious need for inspections and that a local government's goal of preventing negative secondary effects could be seriously compromised without the ability to monitor compliance. *New York v. Burger*, 482 U.S. 691; *Allno Enterprises, Inc. v. Baltimore County*, 2001 U.S. App. Lexis 11522 (4th Cir. 2001).

Local governments should also not forget about tried and true building code regulations, which can be an excellent method of combating negative secondary effects. These include minimum lighting standards, no-smoking ordinances, prohibitions against multiple people in video booths, requiring interior signage that the premises are under surveillance, and public health warnings regarding the spread of sexually transmitted diseases. These kinds of regulations can be effective deterrents against many of the negative secondary effects that local governments have the power to combat.

Vicarious Liability of Business Operators. Ordinances often impose liability, either in the form of civil license revocation or criminal sanctions, on SOBs for the unlawful acts of employees and customers. In *United States v. Park*, 421 U.S. 658 (1975). The Supreme Court ruled that imposing criminal liability for the acts of another does not necessarily require proof that the responsible party knowingly permitted the illegal conduct. The court has not decided what level of knowledge (actual, constructive, or none) is a constitutional requirement before imprisonment as a penalty could be imposed. *Staples v. United States*, 511 U.S. 600 (1994). It appears, however that there is no constitutional obstacle to imposing a fine upon a business operator for the acts of another on the premises. *Lady J Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999). That court held that *respondeat superior* could be applied to hold business operators responsible for employees under their scope of authority because the regulations involved are meant to deter activity that poses a special risk to public health or safety, and is not a traditional crime.

Nevertheless, local governments should be wary of imposing strict liability on SOBs for the acts of patrons. The better practice would be to require showing at least of negligence before imputing liability to a business owner for the conduct of others not under the owner or operator's control at the business. *Broadway Books, Inc. v. Roberts*, 642 F. Supp. 486 (E.D. Tenn. 1986).

Other Types of Regulation. Moratoria - Moratoria, as applied to speech related businesses, constitute a clear restraint on expressive activity and are greatly disfavored. *Homberg v. City of Ramsey*, 12 F.3d 140 (8th Cir. 1994). Moratoria should be avoided for this reason. The better practice is to simply follow normal procedures for granting a zoning permit and to pass a more restrictive ordinance as soon as possible to meet a growing trend in the community. This type of approach generally will not invalidate an otherwise good ordinance. *Threesome Entertainment v. Strittmather*, 4 F. Supp. 2d 710 (N.D. Ohio 1998); *DG Restaurant Corp. v. City of Myrtle Beach*, 953 F.2d 140 (4th Cir. 1991).

Some cities have adopted ordinances that restrict advertisement of tobacco products and alcoholic beverages on billboards in areas where children congregate. *Anheuser Busch, Inc. v. Schmoke*, and *Penn Advertising v. Mayor and City Counsel of Baltimore*, 101 F.3d 325 (4th Cir. 1996) cert. denied, 520 U.S. 1204 (1997). Arguably, then, similar restrictions on outdoor advertising of SOBs could be justified. See *Zone D'Erotica v. Nixon*, 2006 U.S. Dist. Lexis 15041 (D. Mo. 2006) (here, a Missouri district court found that a prohibition on outdoor advertising of SOBs within one mile of state highways was narrowly tailored because it did not prohibit all SOB outdoor advertising).

Hours of Operation. One of the simplest and most effective ways to regulate and abate the negative secondary effects of SOBs is through the restriction on hours of operation. The United States Supreme Court has not specifically ruled on hours of operation limitations as applied to these businesses but some courts of appeals have upheld them. *Star Satellite, Inc. v. City of Beluxi*, 779 F.2d 1074 (5th Cir. 1986); *Lady Lingerie*, 176 F.3d at 1358. The significant case in this area is *Mitchell v. Commission*, 10 F.3d 123 (3rd Cir. 1993). The court analyzed the Delaware statute regulating hours of operation of adult businesses. The Third Circuit's analysis in this case applied the *O'Brien* and *Renton* tests and upheld the hours of operations restriction, which prohibited opening of such businesses between 10:00 a.m. and 10:00 p.m. Monday through Saturday. Since the case was decided, five courts of appeals have adopted the third circuit's approach and have generally upheld the restrictions. *Nat'l Amusements v. Town of Dedham*, 43 F.3d 731 (1st Cir. 1995); *Richland Book Mart, Inc. v. Nichols*, 137 F.3d 435 (6th Cir. 1998); *DiMa Corp. v. Town of Hallie*, 185 F.3d 823 (7th Cir. 1999); *Lady Lingerie v. City of Jacksonville*, 176 F.3d 1358 (11th Cir. 1999).

VI. SIGNS

A. Commercial Speech Standard of Review: *Central Hudson* Test

Stricter standards are applied to governmental regulation of noncommercial speech than to commercial speech. *Christ's Bride Ministries v. Southeastern Pennsylvania Transportation Authority*, 148 F. 3d 242 (3rd Cir. 1998). In general, Cities cannot impose content-based regulation on noncommercial speech, but these rules do not necessarily apply in the context of commercial speech. Regulations that may be unconstitutional with respect to noncommercial speech may be valid when applied to commercial speech. *National Advertising Co. v. Orange*, 861 F.2d 246, 248 (9th Cir. 1988). A threshold determination, then, is whether the relevant speech is commercial or noncommercial when evaluating the appropriateness of regulations.

While the distinction between what is commercial speech versus noncommercial speech often will be clear, this is not always the case. Indeed, there are times that speech may contain both commercial and noncommercial aspects such as messages about boycotting certain businesses such as Sea World (for concerns over treatment of orcas) or Nike (for concerns over child labor). The courts have articulated three general characteristics to provide guidance in determining whether speech will be deemed commercial in nature: (1) it is an advertisement of some form; (2) it refers to a specific product; and (3) the speaker has an economic motivation for the speech. *Bolger v. Youngs Drug Prods. Corp*., 463 U.S. 60 (1983). If the relevant speech is deemed commercial in nature, the appropriate standard of review, is often referred to as "**intermediate scrutiny**." The seminal case on commercial speech is *Central Hudson Gas & Electric Corp. v. Public Service Commission*,[26] 447 U.S. 557, 562-63 (1980) where the Supreme Court adopted a four- part test to determine the validity of government restrictions on commercial speech:

(1) The First Amendment protects commercial speech only if that speech concerns lawful activity and is not misleading. A restriction on otherwise protected speech is valid only if it
(2) seeks to implement a substantial government interest,
(3) directly advances that interest, and
(4) reaches no further than is necessary to accomplish the given objective.

B. *Reed v. Town of Gilbert*

Reed v. Town of Gilbert, 576 U.S. (2015). The Town of Gilbert, Arizona, enacted a sign ordinance that defined various types of signs and restricted the different types of signs in different ways. For example, the ordinance included definitions for temporary directional signs, ideological signs, and political signs. Based on the type of sign, it then limited how long the sign could be posted. For example, temporary directional signs could be posted no sooner than 12 hours before an event and for one hour after the event, but ideological or political signs could be posted for much longer.

A church in the town regularly changed the location of its services. Each week, the church used temporary directional signs to guide parishioners to the appropriate location. The signs were in place longer than allowed by the town's ordinance, and the town cited the church for the violations.

The church sued the town, arguing that the shortened time frame for temporary directional signs versus the longer time frame for ideological and other signs was a "content-based" restriction on speech that is prohibited by the First Amendment to the U.S. Constitution. The town countered that the shorter time frame for temporary directional signs was not content-based because anyone's temporary directional sign had to follow the same restrictions, not just churches.

The Court held that the ordinance's varying durations for posting based on the type of sign was based on the content of the sign because a city employee had to read the sign to enforce the ordinance. When a restriction on speech is content-based (as opposed to a reasonable time, place, or manner restriction,) it will be upheld only if a city can show that the restriction is "narrowly-tailored to meet a compelling governmental interest." That test is referred to by the courts as "strict scrutiny." A law or ordinance that is subject to strict scrutiny rarely survives a first amendment analysis.

The Court invalidated the ordinance because the town did not prove that the content-based distinction was narrowly tailored to achieve the town's interests of aesthetics and traffic safety. As support for its position, the court noted that the ordinance allowed a great number of signs to be placed for long periods of time. That fact refuted the town's stated interests of aesthetics and traffic safety. Moreover, the court concluded that the various exceptions in the ordinance for certain signs made the restriction of other signs insupportable.

The result of the opinion is that any provision in a sign ordinance requiring a city employee to read a sign before deciding whether it is in compliance subjects the ordinance to strict scrutiny review. That heightened review affects every city's ability to restrict political signs and could even affect a city's ability to restrict offsite signs, like billboards, differently than onsite signs. Further, restrictions based on the commercial versus non-commercial messages on a sign could be affected.

An ordinance can likely still prohibit all signs on city property, including city rights-of-way, and can limit the size, building materials, and other aesthetic aspects of a sign. For example, a city could still ban all billboard-sized signs, but it would have a harder time allowing some billboards and not others if a differentiation is based on the content of the billboard.

> **BILLBOARD REGULATIONS.** BILLBOARDS ARE A POPULAR MEANS OF ADVERTISING, GENERALLY PLACED ALONG HIGHWAYS OR MAJOR TRAFFIC ARTERIALS TO GARNER THE GREATEST AMOUNT OF ATTENTION FOR A SPECIFIC PRODUCT. HIGH IMPACT GRAPHICS AND BRIGHT COLORS ARE COMMON. BILLBOARDS AND OTHER SIGNS ARE PROTECTED BY THE FIRST AMENDMENT. *PRIME MEDIA, INC. V. CITY OF BRENTWOOD*, 398 F.3D 814 (6TH CIR. 2005). BILLBOARDS MAY BE REGULATED AND EVEN BANNED BY MUNICIPALITIES PURSUANT TO THEIR POLICE POWER. CITIES ARE ABLE TO IMPLEMENT REASONABLE ZONING ORDINANCES IN THE INTEREST OF PUBLIC HEALTH, SAFETY, AESTHETICS AND MAINTENANCE OF PROPERTY VALUES. AS ARTICULATED BY THE SUPREME COURT IN *METROMEDIA, INC. V. CITY OF SAN DIEGO*, 453 U.S. 490 (1981) MUNICIPALITIES MAY PROHIBIT ALL OFF-SITE BILLBOARDS FOR AESTHETIC AND SAFETY REASONS, SO LONG AS THE CITY'S ORDINANCE COMPLIES WITH THE FIRST AMENDMENT. CITIES CONSTANTLY GRAPPLE TO MAINTAIN A FINE BALANCE BETWEEN THE LEGITIMATE EXERCISE OF THEIR POLICE POWER AND THE FIRST AMENDMENT.

In *Metromedia*, the Supreme Court applied the *Central Hudson* test and held that San Diego could impose a complete ban on billboards so long as the ban is content neutral. Under the fourth prong of *Central Hudson*, the Supreme Court found that the ordinance was no broader than necessary because "[i]f the city has a sufficient basis for believing that billboards are traffic hazards and unattractive, then obviously the

most direct and perhaps the only effective approach to solving the problems they create is to prohibit them." The Supreme Court further held that commercial billboards could be banned off-site even if they were permitted on-site.

However, San Diego's regulations also impacted noncommercial speech which the Supreme Court found invalid. Specifically, San Diego's ordinance permitted on-site commercial advertising but banned on-site noncommercial advertising and offered no explanation why one was permitted while the other was not. San Diego did not offer any indication that noncommercial billboards would be more distracting to drivers or would have an adverse impact on the aesthetics of the city. The Supreme Court further held that the city could not conclude that commercial messages are of a greater value than noncommercial messages. Moreover, with respect to noncommercial speech, San Diego could not choose the appropriate subjects for public discourse. San Diego did not ban all billboards and accordingly the Supreme Court rejected San Diego's argument that the ordinance was a reasonable time, place and manner restriction.

Metromedia supports a city's ability to adopt regulations prohibiting off-site commercial signs. The case also highlights the importance of evaluating commercial speech regulations in the context of the entire regulatory framework to ensure that commercial speech is not being favored over noncommercial speech in the public forum or on private property (although as noted earlier such favoritism is allowed in a non-public/limited forum). Because challenges to billboard ordinances usually lead to expensive federal litigation, it is wise for municipalities to include extensive findings and specific references to case law in support of their regulations. A city's findings should state the governmental interest to be served through the regulation, and provide enough information about the need within the city to show there is a strong correlation between that interest and the regulation.

POLITICAL SIGNS ON PUBLIC PROPERTY. AS THE RULES GOVERNING A PUBLIC FORUM ARE DIFFERENT FROM THOSE GOVERNING A NON-PUBLIC OR LIMITED PUBLIC FORUM, IT IS NECESSARY FOR ANY CITY TO DETERMINE THE RELEVANT FORUM IN WHICH POLITICAL SIGNAGE IS BEING REGULATED. IN *MEMBERS OF THE CITY COUNCIL V. TAXPAYERS FOR VINCENT*, 466 U.S. 789 (1984) THE SUPREME COURT UPHELD A LOS ANGELES ORDINANCE PROHIBITING THE POSTING OF SIGNS ON PUBLIC PROPERTY. THE ORDINANCE WAS CHALLENGED BY A CITY COUNCIL CANDIDATE WHO POSTED CAMPAIGN SIGNS ON UTILITY POLES WHICH WERE SUBSEQUENTLY REMOVED BY CITY WORKERS. "TAXPAYERS FOR VINCENT" ARGUED THE UTILITY POLES WERE A PUBLIC FORUM OR SHOULD BE TREATED AS A PUBLIC FORUM BECAUSE THEY WERE LOCATED ON PUBLIC SIDEWALKS. THE COURT CONCLUDED THAT UTILITY POLES ARE A NON- PUBLIC FORUM, AND THAT THE GOVERNMENT COULD PROHIBIT THE POSTING OF SIGNS TO PRESERVE PHYSICAL AND AESTHETIC VALUES. THE COURT REJECTED THE CLAIM THAT THE PUBLIC PROPERTY WAS A PUBLIC FORUM BECAUSE OF THE ABSENCE OF "A TRADITIONAL RIGHT OF ACCESS RESPECTING SUCH ITEMS AS UTILITY POLES FOR PURPOSES OF THEIR COMMUNICATION COMPARABLE TO THAT RECOGNIZED FOR PUBLIC STREETS AND PARKS" AND SIMPLY BECAUSE PROPERTY IS OWNED BY THE GOVERNMENT DOES NOT MEAN THAT ALL ACCESS SHALL BE GRANTED TO WHOEVER WISHES TO EXPRESS THEIR OPINIONS. COURTS HAVE FREQUENTLY HELD THAT DURATIONAL LIMITS ON POLITICAL CAMPAIGN SIGNS TO BE CONTENT-BASED AND TO BE UNCONSTITUTIONAL BECAUSE THE LOCAL GOVERNMENT HAS FAILED TO SHOW A COMPELLING INTEREST TO JUSTIFY THE DURATIONAL LIMITS. THE COURTS HAVE DISTINGUISHED BETWEEN PRE-ELECTION DURATIONAL LIMITS AND POST-ELECTION DURATIONAL LIMITS.

SIGNAGE ON PUBLIC TRANSIT VEHICLES. MANY JURISDICTIONS ALLOW ADVERTISING ON PUBLIC OWNED TRANSIT VEHICLES. THE CASES ANALYZING THE REGULATIONS OF SIGNAGE IN THIS FORUM PROVIDE A USEFUL ILLUSTRATION OF HOW THE COURTS APPLY FORUM CLASSIFICATION IN PRACTICE AND OFFER USEFUL GUIDELINES FOR CITIES WISHING TO ENSURE A FORUM IS CLASSIFIED AS A

LIMITED PUBLIC FORUM SO AS TO RETAIN MORE CONTROL OVER THE TYPE OF SIGNAGE ALLOWED IN THE FORUM. THE SUPREME COURT HAS RULED THAT ADVERTISING SPACE ON PUBLIC TRANSIT VEHICLES IS NOT A PUBLIC FORUM, *LEHMAN V. CITY OF SHAKER HEIGHTS* 418 U.S. 298 (1974), BUT WHETHER THE SPACE WILL BE CONSIDERED A DESIGNATED PUBLIC FORUM OR A LIMITED PUBLIC FORUM IS A VERY FACT SPECIFIC INQUIRY. *CHILDREN OF THE ROSARY* V. CITY OF PHOENIX, 154 F.3D AT 972 (9TH CIR. 1998). THE CASES INDICATE THAT LIMITING THE ADVERTISING TO COMMERCIAL MESSAGES TO MAINTAIN THE NONPUBLIC FORUM STATUS OF THE FORUM WILL BE UPHELD SO LONG AS THE RESTRICTIONS ARE REASONABLE AND VIEWPOINT NEUTRAL. BY CONTRAST, THE GOVERNMENT MAY NOT FAVOR COMMERCIAL SPEECH OVER NONCOMMERCIAL SPEECH IN A PUBLIC FORUM.

VII. SPEAKING AT PUBLIC MEETINGS

WHILE THE FIRST AMENDMENT CLEARLY STATES THERE CAN BE NO LAW THAT ABRIDGES FREEDOM OF SPEECH, IT DOES NOT CREATE A RIGHT TO COMMUNICATE A PERSON'S VIEWS AT ALL TIMES OR IN ANY MANNER THAT PERSON DESIRES. *HEFFRON V. INT'L SOCIETY FOR KRISHNA CONSCIOUSNESS, INC.,* 452 U.S. 640, 647, 101 S.CT. 2559 (1981). FURTHER, FEDERAL COURTS HAVE HELD THERE IS A SIGNIFICANT GOVERNMENTAL INTEREST IN CONDUCTING ORDERLY, EFFICIENT MEETINGS OF PUBLIC BODIES. *JONES V. HEYMAN*, 888 F.2D. 1328, 1332 (11TH CIR. 1989**).** A CITY MAY PLACE LIMITATIONS ON THE TIME, PLACE AND MANNER OF SPEECH AS LONG AS THE RESTRICTIONS ARE CONTENT NEUTRAL AND NARROWLY TAILORED TO SERVE A SIGNIFICANT GOVERNMENTAL INTEREST AND LEAVE OPEN AMPLE ALTERNATIVES FOR COMMUNICATION. *BURSON V. FREEMAN,* 504 U.S. 191 (1992).

A CITY COUNCIL HAS A SIGNIFICANT GOVERNMENTAL INTEREST IN ENSURING ORDER AT ITS COUNCIL MEETING AND A SPEAKER CANNOT USE THE FIRST AMENDMENT TO DISRUPT A COUNCIL MEETING, OR ENGAGE IN CONDUCT THAT WOULD IMPAIR THE RIGHTS OF OTHER WOULD-BE PARTICIPANTS. A CITY MAY PLACE REASONABLE LIMITATIONS ON THE *TIME, PLACE AND MANNE*R OF SPEECH AS LONG AS THE RESTRICTIONS ARE CONTENT NEUTRAL AND NARROWLY TAILORED TO SERVE A SIGNIFICANT GOVERNMENTAL INTEREST AND LEAVE OPEN AMPLE ALTERNATIVES FOR COMMUNICATION. *PERRY EDUC. ASS'N V. PERRY LOCAL EDUCATORS' ASSN.*, 460 U.S. 37, 46, 103 S.CT. 948, 955 (1983).

BY CREATING A "PUBLIC COMMENT" ITEM ON AN AGENDA, THE CITY HAS CREATED A "PUBLIC FORUM" WHICH IS ENTITLED TO FIRST AMENDMENT PROTECTION. CONTENT-RELATED REGULATION IS PERMISSIBLE SO LONG AS THE CONTENT IS TIED TO THE LIMITATIONS THAT FRAME THE SCOPE OF THE "PUBLIC FORUM" AND AS LONG AS THE REGULATION IS NEUTRAL AS TO VIEWPOINT WITHIN THE SUBJECT MATTER OF THE CONTENT. *CITY OF MADISON, JOINT SCHOOL DIST. V. WISCONSIN EMPLOYMENT RELATIONS COMM'N*, 429 U.S. 167, 174 (1976)

A "PERSONAL ATTACK" RULE IS VALID IF IT DEFINES A PERSONAL ATTACK TO INCLUDE THE CONDUCT OF THE PERSON BEING ATTACKED THAT IS TOTALLY UNRELATED TO THE MANNER IN WHICH HE OR SHE PERFORMS HIS OR HER DUTIES. THE AUSTIN COURT OF APPEALS HAS HELD THAT IF A PERSON'S APPEARANCES BEFORE A ZONING BOARD "CANNOT BE FAIRLY CHARACTERIZED AS CONSTITUTING SPEECH ON A MATTER OF PUBLIC CONCERN, IT IS UNNECESSARY FOR THE COURT TO SCRUTINIZE THE REASONS FOR THAT PERSON'S REMOVAL." *PRICE V CITY OF SAN MARCOS*, 744 S.W.2D 349, 353 (TEX.

APP.—AUSTIN 1988, WRIT DENIED) CERT. DENIED 488 U.S. 961, 109 S.CT. 485 (1988).

"FIGHTING WORDS" ARE WORDS WHICH WOULD LIKELY CAUSE AN AVERAGE ADDRESSEE TO FIGHT. AN "AVERAGE ADDRESSEE" IS NOT SOMEONE EITHER OVERLY SENSITIVE OR OVERLY INURED TO THE SPEECH IN QUESTION." A CITY COUNCIL MEETING IS IN A PUBLIC ARENA AND CARRIES AN EXPECTATION OF DECORUM AND CIVILITY. *ESTES V. STATE*, 660 S.W.2D 873 (TEX. APP.—FORT WORTH 1983, PET. REF'D).

EMPLOYEE SPEECH. AN EMPLOYEE'S FIRST AMENDMENT RIGHTS, WHILE COMMENTING AS A CITIZEN ON A MATTER OF PUBLIC CONCERN, DOES NOT GIVE THE EMPLOYEE THE RIGHT TO BE DISRUPTIVE, ABUSIVE, PROFANE OR ACT IN A DISORDERLY MANNER AT A PUBLIC MEETING. • AN EMPLOYEE WHO WISHES TO COMMENT AS A CITIZEN ON A MATTER OVER WHICH THE CITY COUNCIL AND CITY HAS NO JURISDICTION ARGUABLY SHOULD BE ABLE TO SPEAK ON THAT MATTER DURING PUBLIC COMMENT. IF THE EMPLOYEE WISHES TO SPEAK ON A MATTER OVER WHICH THE CITY HAS JURISDICTION, THEN THE CITY SHOULD BE ABLE TO DETERMINE FAR ENOUGH IN ADVANCE THE CONTENT OF THE EMPLOYEES SPEECH AND POST AN APPROPRIATE NOTICE ON THE AGENDA PRIOR TO RECEIVING SUCH COMMENT. THE AUSTIN COURT OF APPEALS HAS STATED "WE SEE NO RESTRICTION OF THE RIGHT OF FREE SPEECH BY THE NECESSITY OF A PUBLIC OFFICIAL'S COMPLIANCE WITH THE OPEN MEETINGS ACT WHEN THE OFFICIAL SEEKS TO EXERCISE THAT RIGHT AT A MEETING OF THE PUBLIC BODY OF WHICH HE IS A MEMBER." *HAYS COUNTY WATER PLANNING PARTNERSHIP V. HAYS COUNTY,* 41 S.W.3D 174, 180 (TEX. APP.—AUSTIN 2001).

SOCIAL MEDIA ISSUES FOR THE GOVERNMENT EMPLOYER

Presented by:
ALAN BOJORQUEZ, *Austin*
Bojorquez Law Firm, PC

HEATHER M. LOCKHART, *Austin*
City of Austin Law Department

JENNIFER RICHIE, *Waco*
Waco City Attorney's Office

Written by:
HEATHER M. LOCKHART

State Bar of Texas
GOVERNMENT LAW 101
July 18, 2018
San Antonio

CHAPTER 11

ALAN BOJORQUEZ, ATTORNEY AT LAW, BOJORQUEZ LAW FIRM

Through his firm, Alan serves as *City Attorney or Special Counsel* to cities across Texas. He frequently teaches on the subjects of Ethics and Open Government. Alan has *Merit Certification in Municipal Law* from the Texas City Attorneys Association. He previously served as a staff attorney for the Texas Municipal League. He graduated from Texas Tech University with his Bachelor of Arts in English, Master of Public Administration, and Doctor of Jurisprudence. Alan founded and serves as the Chairperson for the Texas Center for Municipal Ethics (a 501(c)3 nonprofit corporation). He is a TCAA Board Member, IMLA State Chair of Texas, and he received IMLA's *Glick Award* in 2017 (for Outstanding Local Government Lawyer in Private Practice). Alan authors the Texas Municipal Law & Procedure Manual (6th ED.).

Heather M. Lockhart

Heather M. Lockhart is an Assistant City Attorney for the City of Austin in the Open Government, Ethics, & Compliance Division. Prior to joining the City of Austin, she served as Assistant General Counsel at the Texas Municipal League. She has presented on open government, social media, and ethics issues before city officials and attorneys across the state.

She graduated *cum laude* with a Bachelor's Degree from The University of Florida, and she holds a J.D with honors from The University of Texas School of Law. In her free time, she judges women's gymnastics and contributes to a sports podcast.

Jennifer Richie was appointed City Attorney for the City of Waco on July 17, 2012.

Prior to leading the Waco City Attorney's Office, Richie was a senior assistant city attorney for the City of Irving and an executive assistant city attorney for the City of Dallas. She also has practiced law at a large, private law firm in Dallas and clerked for the Hon. F.A. Little, Jr., U.S. District Court, W.D. Louisiana.

In 2008 Richie was named a "Rising Star" in the Texas Super Lawyer's issue of Texas Monthly magazine. Richie is on the board of directors of the Texas City Attorney's Association and a member of the Waco-McLennan County Bar Association, the Judge Abner V. McCall American Inn of Court, and the International Municipal Lawyer's Association. She also is a Sustaining Life Fellow of the DAYL Foundation, a Fellow of the Dallas Bar Foundation, and a past Chair of the Dallas Bar Association's Government Law Section.

Richie currently is the chair of the Atmos Cities Steering Committee, a coalition of 165 cities served by Atmos Energy Mid-Tex Division and a Board Alternate for the Commercial Consumer Segment of the Electric Reliability Council of Texas's (ERCOT) Board of Directors.

Richie serves on the board of the Waco Symphony and is a member of the Waco Rotary Club.

She graduated magna cum laude from Randolph-Macon Woman's College with honors in Art History and from the Paul M. Hebert Law Center, Louisiana State University where she was managing editor of the Louisiana Law Review. Richie is licensed to practice law in Texas and Louisiana and is admitted to practice law in the United States District Courts in the Northern and Southern Districts of Texas.

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SOCIAL MEDIA ISSUES FOR THE GOVERNMENT EMPLOYER

I. WHAT IS SOCIAL MEDIA?

"Social media" is defined as a form of "electronic communication through which users create online communities to share information, ideas, personal messages, and other content." MERRIAM-WEBSTER (2018). Social media has revolutionized how individuals interact with each other. These networks have also revolutionized how elected officials interact with constituents. Many cities in Texas are using social media as a tool to communicate with citizens. Rather than waiting until a monthly council meeting to hear from citizens in the "public comment" section of the agenda, governmental entities are able to constantly interact with citizens through their Facebook page, Twitter account, or YouTube channel. To understand the proliferation of social media (and appreciate that ignoring usage by cities and their officials and staff is not an option), it is helpful to look at user statistics. In 2005, a mere 7% of American adults used social networking sites. Now, 68% of American adults are Facebook users. PEW RESEARCH CENTER, http://www.pewinternet.org/2018/03/01/social-media-use-in-2018/ (last visited May 15, 2018). While young adults (ages 18 to 29) are the most likely to use social media – 88% do – use among those 65 and older has increased exponentially since 2010. Today, 37% of those 65 and older report using social media, compared with just 2% in 2005. *Id*. Although this new technology can be a tool for cities to increase outreach and efficiency, social media use can create challenges for cities.

II. CITIZEN SOCIAL MEDIA POSTS

The starting point for determining whether a social media post can be deleted from a governmental entity's social media page is understanding what type of forum is created by the page. First Amendment protection is not just limited to physical forums. *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995). Courts recognize three types of government forums: the traditional public forum, the government designated or limited public forum, and the nonpublic forum. Traditional public forums are public areas, like streets or parks, that have "immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939). A designated public forum[1] is a forum, like a city council chamber, that has been created or opened for use by the public as a place for expressive activity. *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 46 (1983). The Supreme Court has stated that it will look at the policy or practice of a governmental entity to determine if the entity intended to designate a place not traditionally open to assembly as a public forum. *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.*, 473 U.S. 788, 802 (1985). A nonpublic forum is public property that is not by tradition or designation a forum for public communication, like a jail or airport terminal.

Courts have not yet definitively placed government social media pages in a particular forum category. The nature of social media sites as a means of sharing information or ideas makes it safe to rule out its characterization as a nonpublic forum. However, whether a social media page is a designated public forum or a public forum is an open question. The social media cases that courts have analyzed are helpful in deciding whether to treat a governmental entity's social media page as a designated public forum or public forum.

A. Hawaii Defense Foundation v. City and County of Honolulu, Hawaii

The first lawsuit involving the deletion of a Facebook comment and associated First Amendment issues was filed in 2012, in Hawaii. *Haw. Def. Found. v. City & Cty. of Honolulu*, No. CV12-00469 JMS-RLP, 2012 WL 3642832 **(**D. Haw. 2012). The lawsuit claimed the Honolulu Police Department violated a citizen's First Amendment free speech rights by deleting his Facebook comment from the department's page. The plaintiff argued that because the city created and designated this Facebook page as the police department's "official" Facebook page, the page is a "traditional public forum." As such, deleting comments is unconstitutional censorship. The court did not have the opportunity to rule on these arguments. Instead, after the Hawaii Police Department and City and County of Honolulu changed their policies and procedures with regard to administration of their Facebook pages, the parties agreed to a dismissal of the case. *Haw. Def. Found. v. City & Cty. of Honolulu*, No. 12-00469 JMS-RLP, 2014 WL 2804445 (D. Haw. 2014.)

B. Quick v. City of Beech Grove

Two individuals who were blocked from the City of Beech Grove Police Department's

Facebook page sued the City for injunctive relief. Complaint for Injunctive and Declaratory Relief, *Quick et al. v. City of Beech Grove*, No. 1:16-cv-1709 (S.D.

[1] For the purposes of this paper, I will use "designated" and "limited" public forums interchangeably. The author understands that courts have created some confusion in their First Amendment forum analysis in regards to this in-between type of forum.

Ind. 2016). Kymberly Quick and Deborah Mays-Miller are residents of Beech Grove and both were active in the community's crime watch program. They both followed the Beech Grove PD Facebook page and commented on what they viewed as inaccurate reporting of crime statistics. On multiple occasions, these comments were removed. Additionally, plaintiffs were also blocked from posting future comments. Before the district court could hear the case, the American Civil Liberties Union of Indiana and the City reached an agreement in the case. Plaintiffs received $7,412.50 in costs and attorneys' fees and were able to post on the PD and City's pages again. "Beech Grove, ACLU reach settlement in Facebook case," https://www.indystar.com/story/news/2016/08/04/beech-grove-aclu-reach-settlement-facebook-case/88075666/ (Aug. 4, 2016). Additionally, the City agreed to change its policy on deleting comments and blocking users. Its policy now requires the City to issue warnings if its Facebook policy is being violated. After three warnings, the city's attorney will block the user. Though the settlement does not provide clarity on the forum categorization, because the policy was agreed to by the ACLU, it can be viewed as a model for acceptable moderating.

C. Packingham v. North Carolina

In *Packingham v. North Carolina*, the Supreme Court looked at a North Carolina law that made it a felony for a registered sex offender to access a social networking site where the sex offender knows that the site permits minor children to become members. 137 S.Ct. 1730 (2017). Lester Packingham was a registered sex offender barred under this law from joining a site like Facebook. In 2010, Packingham received a traffic ticket that a court dismissed. Afterward, he logged onto a Facebook profile as "J.R. Gerrard" and posted a message thanking God for his ticket being dismissed. At the time, Durham, NC police were investigating sex offenders thought to be violating the "social media law." By checking court records, the police department determined that a traffic citation for Packingham had been dismissed around the time of the post. Evidence obtained by search warrant confirmed Packingham was using the profile name "J.R. Gerrard," and Packingham was indicted by a grand jury. Packingham appealed. Ultimately, the North Carolina Supreme Court upheld the social media restriction on sex offenders. The Supreme Court granted certiorari.

In an opinion written by Justice Kennedy[2], the Court explored the widespread use of social media and the purpose of social media. ("On Facebook, for example, users can debate religion and politics with their friends and neighbors or share vacation photos.") The opinion concluded that the North Carolina law barred access to "the principal sources for knowing current events, checking ads for employment, **speaking and listening in the modern public square**, and otherwise exploring the vast realms of human though and knowledge." Going even further, the opinion stated:

> These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to 'become a town crier with a voice that resonates farther than it could from any soapbox.'
>
> (quoting *Reno v. American Civil Liberties Union*, 521 U.S. 844, 870 (1997)).

While Justice Kennedy did not explicitly state "Facebook is a public forum" in the opinion, it can be inferred from the language he used that he would likely characterize Facebook as a traditional public forum. This language did not sit well with three justices. Justices Roberts and Thomas joined in a concurring opinion written by Justice Alito. In the concurrence, Alito announced: "I cannot join the opinion of the Court, however, because of its undisciplined dicta. The Court is unable to resist musings that seem to equate the entirety of the internet with public streets and parks." *Packingham*, at 1738.

The *Packingham* decision was an 8-0 decision with Justice Neil Gorsuch not taking part. When predicting the outcome of a Supreme Court decision on the question of categorizing a social media platform, it is easy to envision a 5-4 decision classifying a social media platform as a traditional public forum. However, a change in the court's composition could easily change that outcome.

D. PETA v. Young

People for the Ethical Treatment of Animals (PETA) recently filed suit against the President of Texas A&M University (TAMU) for violating PETA's First Amendment rights. Complaint for Declaratory and Injunctive Relief, *PETA v. Michael Young*, No. 4:18-cv-01547 (S.D. Tex. 2018). PETA alleges that content they attempted to post on TAMU's Facebook page failed to appear on the page where it had in the past. PETA's Complaint also details PETA Staff utilizing different accounts with different combinations of words to see

[2] "Given his entire body of decisions regarding the freedom of speech over his quarter century on the Court, no Justice on the modern Court has been more consistently protective of the First Amendment freedom of speech than Justice Kennedy." Charles D. Kelso & R. Randall Kelso, *The Constitutional Jurisprudence of Justice Kennedy on Speech*, 49 San Diego L. Rev. 693, 723 (2012)

which posts would show up on TAMU's page. They found that posts containing words like "PETA," "cruel," "cruelty," "abuse," and "torture" were automatically hidden from public view. PETA alleges that TAMU is using an automatic Facebook filter to exclude visitor posts that contain certain words. TAMU's response to the lawsuit acknowledged that it had

> taken reasonable steps to manage the University Facebook account in light of online attacks on our platform organized and encouraged by PETA. We have taken these steps only after these attacks of PETA and its supporters became so extreme that they significantly interfered with University business, the ability of our communications employees to perform their duties and the ability of other members of the Texas A&M community to have meaningful access to our Facebook platform.
>
> *Texas A&M Sued for Social Media Censorship*, https://www.texasmonthly.com/politics/peta-sues-texas-am-for-social-media-censorship/ (May 17, 2018).

A decision in *PETA v. Young* will help provide clarity for Texas cities in how to treat social media accounts. It is a case that cities struggling with how to treat social media accounts should monitor closely.

Where do these cases leave us as attorneys advising our governmental clients eager to engage with citizens on social media? Without a clear answer. Until the Supreme Court definitively provides guidance, the most conservative approach is to consider a governmental entity's social media page a public forum and enact rules regarding comment moderation with this classification in mind.

Another option is to operate a social media account as a designated public forum. An entity will want to include a disclaimer and acknowledgement on the social media account that the page is a "designated public forum." Additionally, the entity will want to include guidelines for citizen comments from the entity's social media policy on the social media platform. Staff with access to the accounts should be trained on consistently and uniformly moderating social media accounts in line with approved policies.

III. GOVERNMENT OFFICIALS' SOCIAL MEDIA ACCOUNTS

Government officials regularly use their social media accounts to engage with citizens. With this increased engagement, though, has come increased scrutiny. Not only should officials be aware of the public outrage and political repercussions involved with social media posts but also their legal obligations and restrictions when using social media. *See, e.g.*, Claire Ballor and Valerie Wigglesworth, Plano councilman apologizes for anti-islam post that prompted mayor to call him "unfit to represent us," DALLAS NEWS, https://www.dallasnews.com/news/plano/2018/02/14/plano-councilmans-facebook-post-suggests-trump-banislam-schools (Feb. 14, 2018). Recent litigation has focused on whether moderating comments or banning users from a government official's social media account is a violation of an individual's First Amendment rights.

A. Knight First Amendment Institute v. Donald Trump

Seven individuals were blocked from seeing tweets from the @realDonaldTrump account after tweeting critical messages of the President or his policies in reply to tweets from the account. The Knight First Amendment Institute, a 501(c)(3) organization that works to defend and strengthen the freedoms of speech and the press in the digital age, together with the seven individuals filed suit in July 2017 seeking declaratory and injunctive relief and naming the President, the White House Social Media Director and Assistant to the President, the White House Press Secretary, and the White House Communications Director as defendants. The district court in the Southern District of New York heard oral argument on both plaintiffs' and defendants' summary judgment motions on March 8, 2018. On May 23, 2018, the Court issued an order granting in part and denying in part both motions. *Knight First Amendment Inst. At Columbia University, et al. v. Donald J. Trump, et al.*, No. 1:17-cv-05205, 2018 WL 2327290 (S.D.N.Y. May 23, 2018).

The question for the Court to resolve was whether a public official may, consistent with the First Amendment, "block" a person from his Twitter account in response to the political views that person has expressed. The Court looked at a number of factors in analyzing this question. These factors should serve as guidance when advising government officials on social media use. This particular opinion was limited to the Twitter platform, but its application would likely apply equally across social media platforms.

The Court limited its forum analysis to the @realDonaldTrump account; it did not analyze Twitter as a platform. The @realDonaldTrump twitter account was established in March 2009, before the President's inauguration. Though past history or characterization of a forum is relevant, the court instructed that does not mean the present characterization of a forum should be disregarded. The Court found the present use weighs far more heavily in the analysis than the origin of the account as the creation of private citizen Donald Trump. The Court looked at these factors to determine that the account is governmental in nature, and thus, subject to the First Amendment:

- The account is used as a channel for communicating and interacting with the public about his administration;
- The Twitter bio page identifies him as 45th President of the United States of America;
- The account is a public account;
- The account is used to announce, describe, and defend his policies; to promote the Administration's legislative agenda; to announce official decisions; to engage with foreign political leaders; to publicize state visits; to challenge media organizations whose coverage of his Administration he believes to be unfair;
- Sometimes the account is used to announce matters related to official government business before those matters are announced to the public through other official channels (i.e. that he intended to nominate Christopher Wray for the position of FBI director).

The Court also looked at whether the account is under governmental *control*. Though Twitter is a private company, the Court found that the following aspects showed that the government did, in fact, exercised control over the account:

- The account is registered to "Donald J. Trump, 45th President of the United States of America;"
- Tweets are considered presidential records that are retained by the government;
- The account has been used in the course of the appointment of officers, removal of officers, and the conduct of foreign policy;
- The President and Staff control the content of the tweets that are sent from the account; and
- The President and Staff prevent other Twitter users, through blocking, from accessing the @realDonaldTrump timeline and from participating in the interactive space associated with the tweets sent by the account.

While the content of the President's tweets is considered government speech (not susceptible to forum analysis), the **access to the interactive space** is not government speech. "When a user is blocked, the most significant impediment is the ability to directly interact with a tweet sent by the blocking user." Having concluded that the forum analysis should be applied to the interactive space, the Court characterized the space as a designated public forum because: (1) access was generally acceptable to the public at large without regard to political affiliation or any other limiting criteria (not a private account), (2) members of the Administration regarded the account as a means through which the President communicates directly with the American people; and (3) the Twitter platform is designed to allow users to interact with other users.

The Court then looked at the question of whether a government official may block users in a designated public forum. Regulation of a designated forum is subject to the same limitations as a traditional public forum: the restriction is permissible only if narrowly drawn to achieve a compelling state interest. The Court notes that shortly after the individual plaintiffs posted tweets that criticized the President or his policies, the President blocked each of the plaintiffs. This exclusion of plaintiffs based on their viewpoint is impermissible under the First Amendment.

The Court did point out that nothing in the First Amendment requires government policymakers to listen or respond to communications on public issues. The opinion then points out the differences between the Twitter functions of "blocking" and "muting." Muting allows a user to remove an account's tweets from the user's timeline without unfollowing or blocking an account. Muting allows a user to ensure that tweets from the muted account do not show up on a user's timeline while the muted account is still able to reply directly to the muting account. Blocking goes further, though. Blocking precludes a blocked user from seeing or replying to the blocking user's tweets and is impermissible under the First Amendment. The Court declined to provide injunctive relief but offered a declaratory judgment and stated they assume that the President and his staff will remedy the blocking held to be unconstitutional.

Of note, the opinion stated "No one can seriously contend that a public official's blocking of a constituent from her purely personal account – one that she does not impress with the trappings of her office and does not use to exercise the authority of her position – would implicate forum analysis, but those are hardly the facts of this case." This statement certainly suggests that a government official can have a purely personal account not subject to First Amendment restrictions.

B. Davison v. Loudon County Board of Supervisors

Brian Davison is a local watchdog and activist. He attended a town hall discussion held by the Loudoun County Board of Supervisors and Loudoun County School Board. During the panel discussion, Davison asked the chair Phyllis Randall a question on her campaign proposal on ethics. Randall later posted about the panel discussion on her Facebook page. Davison then commented on the post. Randall took issue with Davison's post and deleted her original post then blocked Davison from her Facebook page. Davison brought suit against the Loudoun County Board of Supervisors for the actions taken by Chair Phyllis Randall in violating his free speech rights. *Davison v. Loudon County Board of Supervisors*, 267 F.Supp.3d

702 (E.D. Vir. 2017), *appeal docketed*, No. 17-2002 (4th Cir. Aug. 29, 2017).

In determining whether Randall's Facebook page was a government page, the court looked at these factors:

- The title of the page includes Randall's official title ("Chair");
- The page is categorized as that of a government official;
- The page lists as contact information Randall's official county email address and the telephone number of her county office;
- The page includes the web address of the official county website;
- Many of the posts are expressly addressed to "Loudoun," Randall's constituents;
- Randall has submitted posts on behalf of the Loudoun County Board of Supervisors as a whole;
- Randall asked her constituents to use the page as a channel for "back and forth constituent conversations; and
- The information posted has a "strong tendency toward matters related to" Randall's Office.

Interestingly, the Court quoted the *Packingham* decision in noting that "When one creates a Facebook page, one generally open a digital space for the exchange of ideas and information." However, the Court refrained from declaring the page a public forum. Instead, because the Court found that banning Davison from the Facebook page consisted of viewpoint discrimination and viewpoint discrimination is prohibited in all forums, the Court determined it was not necessary to provide a forum analysis.

In its opinion, the Court did not find the fact that Randall occasionally posted regarding more personal matters changed the character of the page from governmental to personal. However, the Court did acknowledge that Randall had adopted no policy limiting the types of contents permitted. This seems to indicate a policy statement on what types of posts would be deleted and which speakers would be banned might change the Court's analysis. Ultimately, the Court concluded that banning Davison violated his First Amendment rights and entered a declaratory judgment. The Court indicated that moderation was "necessary to preserve social media websites as useful forums for the exchange of ideas" and suggested this could be achieved through neutral and comprehensive social media policies.

C. Karin Leuthy v. Governor Paul LePage

Plaintiffs Karin Leuthy and Kelli Whitlock Burton filed suit against Maine Governor Paul LePage for deleting comments they posted and banning them from the Governor's Facebook page. Complaint Declaratory and Injunctive Relief Requested, *Leuthy et al. v. LePage*, No. 1:17-cv-00296 (D. Me. Aug. 8, 2017). Plaintiffs argue that the Governor's operation of the Facebook page constitutes a limited forum under the First Amendment, and the Governor's actions constitute unlawful, viewpoint-based exclusion. In Governor Page's Motion to Dismiss, he argues that the Facebook page is personal to LePage and was created nearly a year before he became Governor. Defendant's Motion to Dismiss, *Leuthy et al. v. LePage*, No. 1:17-cv-00296, 2017 WL 8890800 (D. Me. Oct. 13, 2017). Thus, LePage is not acting "under the color of the law" when deleting comments. Alternatively, the Motion argues that the moderation of comments constitutes government speech. Following the *Knight* decision (discussed above), the Plaintiffs filed notice of the Fourth Circuit Court of Appeals' decision. Plaintiffs' Notice of Supplemental Authority, *Leuthy et al. v. LePage*, No. 1:17-cv-00296 (D. Me. May 23, 2018). The Court has not yet set a hearing on the motion, so this is a case to continue monitoring.

The decisions in *Knight* and *Davison* should guide government attorneys in advising officials on whether or not their social media accounts are considered to be limited forums subject to First Amendment protections. If an official intends to have a private account, where the member can control all of the content posted, then the account:

- Should be set to "private," not public;
- Should contain a statement that the account is private and identifying what type of content is disallowed;
- Bio page should not use an official title or identify the account as belonging to a city council member;
- Should not be categorized as any type of government account;
- Should not be used to announce or describe policies; to promote a legislative agenda; or to announce matters related to official city business;
- Should provide personal contact information, not an official's city email address or phone number; and
- Should not be used to solicit constituent feedback.

If government officials intend to have official public accounts, then it is important the officials understand that they are prohibited from blocking users except under limited circumstances. A limited forum allows a government to restrict the scope of the topic or use reasonable time, manner, and place restrictions. Blocking a user for disagreeing with a government official would be considered viewpoint discrimination. Whereas, blocking a user for:

- Sending obscene or pornographic material;
- Threatening the official (or another person);
- A response unrelated to the purpose and scope of the account;
- Using profanity or abusive language; or
- Advertising a commercial entity, product, or service

would all likely be permitted restrictions with the caveat that the official must be *consistent* in restricting access. My conservative advice is to err on the side of not blocking a user except under extreme and egregious circumstances in violation of one of the restrictions mentioned above.

IV. OTHER CONSIDERATIONS

Though these topics are beyond the scope of this particular paper and presentation, it is important to be aware of social media issues surrounding these areas of municipal law:

a. Texas Open Meetings Act: Social media creates a new, exciting opportunity for council and board members to violate the Texas Open Meetings Act. TEX. GOV'T CODE ch. 551. Walking quorums may be created via Twitter replies, Facebook posts, and Instagram comments. It is important to remind government officials who enjoy engaging on social media that a "meeting" can occur through a social media exchange. Consider creating an Online Message Board to allow governmental body members to safely exchange ideas through an internet platform. *See* Tex. Gov't Code § 551.006.[3]

b. Texas Public Information Act: Section 552.002(a-2) of the Government Code clarifies that the definition of "public information" includes "any electronic communication created, transmitted, received, or maintained on any device if the communication is in connection with the transaction of official business." The Act also provides that general forms where media containing public information exist include email, Internet posting, text message, instant message, and other electronic communication. TEX. GOV'T CODE § 552.002(c).

Clearly, tweets or posts from a governmental entity's account are subject to the PIA. But, what about a government official's tweet? If the tweet is in connection with the transaction of official business, it is subject to disclosure under the Texas Public Information Act. Information is in connection with the transaction of official business if it pertains to official business of the entity, and it is created by, transmitted to, received by, or maintained by an officer or employee of an entity in the officer's or employee's official capacity or as a person performing official business on behalf of the entity. TEX. GOV'T CODE § 552.002(a-1). "Official business" under the Act means any matter over which a governing body has any authority, administrative duties, or advisory duties. TEX. GOV'T CODE § 552.002(2-a).

The difficult part, of course, is obtaining these social media posts from officials. The good news is that at least one court has concluded that the PIA provides no real "teeth" to force an official to turn over public information. The Austin Court of Appeals addressed this question in *El Paso v. Abbott*. 444 S.W.3d 315 (Tex. App. 2014), review denied (June 12, 2015). The case is essentially about a city councilmember refusing to give the city emails from a private account, and the court concludes that:

- the PIA does not authorize a requestor to file suit for a writ of mandamus compelling a governmental body to make information available when the city has made reasonable efforts (i.e., is not refusing or unwilling) to comply with the PIA;
- other than requiring that information be produced promptly for inspection, duplication, or both, the PIA provides no guidance regarding the efforts a governmental body must take to locate, secure, or make available to the public information requested; and
- a city does not have to resort to suing an individual in district court under the Local Government Records Act when it is believed that the person holds, but has not provided, a responsive document.

A governmental entity can and should have a policy outlining how the entity intends to obtain records from officials. However, at this time, all an entity can and is required to do is to ask an official to turn over responsive documents from his or her private accounts.

c. Record Retention: Local government records include records in an electronic medium. TEX. LOC. GOV'T CODE § 201.003(8). Thus, a governmental entity's social media post is considered a government record subject to the Local Government Records Act. Many times,

[3] The City of Austin has an active Online Message Board available at http://austincouncilforum.org. I am happy to discuss how the City uses this technology.

though, social media content is **not** required to be maintained because the information contained is duplicated or exists in a different format. A government is not required to retain duplicated or identical copies of information. TEX. LOC. GOV'T CODE § 201.003(8)(A). Additionally, information shared that is cursory and minimal with no lasting importance or need beyond its initial purpose of informing do not require capture and retention. 13 Tex. Admin. Code § 6.91(8) (2000). An example of a transitory social media post is a Facebook post advertising an upcoming event. The content shared is of short-term value, especially once the event is over.

When deciding whether a social media post is a record that should be maintained in accordance with the records retention schedule, there are four important questions to ask:

- Does this document government business or provide evidence of an important action?
- Is this a unique record?
- Does the information exist elsewhere in a different record or format?
- Does it fit into my government's definition of a social media record?

Megan Carey, *FAQ: When is Social Media a Record*, Texas State Library & Archives Commission Blog (Mar. 17, 2016), https://www.tsl.texas.gov/slrm/blog/2016/03/faq-when-is-social-media-a-record/

d. Political Advertising: The Election Code prohibits an officer or employee of a political subdivision from knowingly spending, or authorizing, the spending of public funds for political advertising. TEX. ELEC. CODE § 253.003. Violating this provision is a Class A misdemeanor with a maximum punishment of confinement in jail for a year or a $4,000 fine. To date, there have not been instances of Texas government officials or employees being prosecuted for this based on social media posts, but it is a provision to be aware of, especially in the context of a ballot proposition that the entity may "support." Governmental entities are prohibited from using public funds to support a measure on a ballot, meaning there should be NO mention of support or opposition of a proposition on a city's social media platforms. Individual city officials or employees are able to use their personal social media accounts to support or oppose a proposition. However, it should be clear in the entity's social media policy that the individuals are prohibited from doing so on a government-issued device or while on the clock.

e. Social Media and Employees: A recent Fourth Circuit Court of Appeals case looked at disciplinary action taken by a city employer for off-duty social media activity. *Liverman v. City of Petersburg*, 844 F.3d 400 (4th Cir. 2016). Plaintiffs Herbert Liverman and Vance Richards challenged disciplinary action taken by the City of Petersburg Police Department based on the Department's social networking policy. The policy prohibited the dissemination of any information "that would tend to discredit or reflect unfavorably upon the [Department] or any other City of Petersburg Department or its employees." The Fourth Circuit Court of Appeals concluded that the City's policy was overbroad unconstitutional. The City failed to establish a "reasonable apprehension that plaintiffs' social media comments would meaningfully impair the efficiency of the workplace." (Other cases to look at: *Gresham v. Atlanta*, 2011 WL 4601020; and *Bland v. Roberts*, 730 F.3d 368 (4th Cir. 2013))

In Texas, a former executive assistant for Texas Court of Criminal Appeals Judge Kevin Leary is suing the Texas Court of Criminal Appeals and Judge Leary for terminating her because posts she made to her personal social media accounts were critical of Republican state leaders and supportive of Democratic candidates. Plaintiff's Original Complaint, *Zuniga v. Texas Court of Criminal Appeals*, 1:18-cv-434 (filed May 22, 2018).

V. CONCLUSION

Social media platforms can be both a blessing and a curse to governmental entities. The bottom line, though, is that social media usage will continue to increase and entities must utilize social media tools to meaningfully engage with citizens. The most important thing we, as government law practitioners, can do is to have social media policies in place and to revisit these policies on a regular basis to ensure that our entity's policies are keeping up with emerging technologies. After ensuring these policies are in place, it is important to continue educating our officials and staff to comply with and apply with policies consistently.

City of Waco

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A. Purpose

To address the fast-changing landscape of the Internet and the way residents communicate and obtain information online, City of Waco departments may consider using social media tools to reach a broader audience. The City encourages the use of social media to further the goals of the City and the missions of its departments, where appropriate.

The City of Waco has an overriding interest and expectation in deciding what is "spoken" on behalf of the City on social media sites. This policy establishes guidelines for the use of City Social Media Sites.

B. Scope

This policy applies to all civil service, full-time regular, part-time, temporary and seasonal employees as defined in City of Waco Policy CMP-1.

C. Definitions

1. SOCIAL MEDIA SITES – Third party websites which allow for the creation of content and dialogue around a specific issue or area of interest, including Facebook, Twitter, and Instagram.

2. CITY SOCIAL MEDIA SITES – Those pages, sections, or posting locations in Social Media that are established or maintained by an employee of the City who is authorized to do so as part of the employee's job and that are used to conduct City business, communicate with office holders, or city staff, and/or communicate with or gather feedback from residents and other interested persons.

3. CITY SOCIAL MEDIA CONTENT – Information, images, or photographs posted or provided to a City Social Media Site by a City employee or authorized representative when such activity is a part of the employee's job duties.

4. SOCIAL MEDIA CONTENT -- Information, images, or photographs posted or provided to a Social Media Site.

D. Policy

1. CREATION AND MAINTENANCE OF CITY SOCIAL MEDIA SITE
   City Social Media Sites may contain information that represents, or may create the appearance of representing, the City's position on policy issues and/or the positions of its leadership. No employee may create or maintain a Social Media Site that purports or appears to be a City Social Media Site without the permission of that employee's department director and the Municipal Information Office. Before any employee or department representative creates a City Social Media Site, approval must be sought

City of Waco

from the Municipal Information Office. The request must state the business necessity for the City Social Media Site. For any City Social Media Sites currently in existence, the department must submit a request within 30 days of the effective date of this policy.

Once a City Social Media Site is approved by the Municipal Information Office, the following information must be shared with the Municipal Information Office:

a. All City Social Media Site login and password information (in the case of Facebook, you may make the Municipal Information Office an administrator of the site instead of providing the password);
b. Any changes to the login and password; and
c. The names of any employees who are authorized to maintain the City Social Media Site or to post City Social Media Content ("Administrators").

The Municipal Information Office may disable a City Social Media Site and prohibit posting of any City Social Media Content to a site any time and for any reason, including any violation of this policy, unprofessional use of this resources, lack of use or disinterest by the public, or a department's failure to maintain the site.

2. PUBLIC RECORDS
City Social Media Sites create city records that are subject to the Texas Public Information Act and document retention rules of the state of Texas. Each departmental records administrator shall ensure that such records are retained and archived in conformance with Texas law.

3. POSTING ON CITY SOCIAL MEDIA SITES
Employees creating, maintaining, or posting Social Media Content on the City Social Media Site:

a. Must at all times conduct themselves as representatives of the City of Waco and in accord with all the City of Waco Employee Policies and Procedures and other departmental or management rules or directives;

b. Will follow these guiding principles:
    i. Unless the employee is posting or responding as the City Social Media Site Administrator, the employee should maintain transparency by using his/her given name and job title and clearly stating the employee's role regarding the subject;
    ii. Use correct grammar and spelling;
    iii. Avoid jargon;
    iv. Write and post only about the employee's area of expertise;
    v. Keep postings factual and accurate;

City of Waco

vi. Reply to comments in a timely manner, when a response is appropriate. When disagreeing with others' opinions or providing comments, do so in a meaningful, respectful, and relevant manner;
vii. Understand that postings are widely accessible, not retractable, and retained or referenced for a long period of time; all content should be carefully considered;
viii. Ensure that Social Media Content does not violate another person's privacy interests;
ix. Refrain from posting Social Media Content that is proprietary, copy-righted, attorney-client privileged, subject to state or federal privacy laws, and information not subject to the Texas Public Information Act;
x. Never comment on anything related to legal matters, litigation or any parties with whom the City may be in litigation without the approval of the City Attorney or the City Manager;
xi. Refrain from the expression of personal opinions or positions regarding:
(a) programs or practices of other public agencies, political organizations, private companies, or non-profit groups;
(b) political campaigns; or
(c) Religion.

4. DESIGN AND CONTENT OF CITY SOCIAL MEDIA SITES
Membership by the public in a City Social Media Site should not be required in order for the public to post on the site. If this is not possible on a particular City Social Media Site, then a City e-mail contact must be posted as an alternative for posting comments.

City Social Media Sites should be focused and limited in scope and topic. Sites that are limited in scope and topic are "limited forum" sites. Sites that do not limit the topic of discussion are "open forum" sites.

a. The following should be clearly posted on any City Social Media Site:
i. A clear statement of the intent, purpose, and subject matter of the site;
ii. City contact information; and
iii. The link to the City of Waco website.

b. In addition, City Social Media Sites that permit interactivity with the public, comments, or postings should post clear statements of the following:
i. All content and postings are subject to public disclosure;
ii. Disclaimer that postings do not necessarily reflect the views or position of the City;

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iii. The site is not monitored 24 hours a day and that in case of an emergency the public should call 911;
iv. The City reserves the right to delete completely or hide, when necessary and as soon as is feasible, any posting that involves:
(a) Advertisements or content that is commercial in nature;
(b) Obscenity or profanity;
(c) Content that promotes, perpetuates, or fosters discrimination on the basis of age, gender, race, religion, color, national origin, physical or mental disability, sexual orientation, marital status, and/or gender identity;
(d) Sexual content;
(e) Content that implies, promotes, or encourages illegal activity;
(f) Content that is contrary to the safety of City employees or the public;
(g) Content that opposes or supports political candidates or propositions;
(h) Content unrelated to a particular posting by the City; or
(i) Content that violates the legal ownership of another party.

c. In addition, for City Social Media Sites that are limited forum sites and permit interactivity with the public, comments, or postings, the following statement should be clearly posted:

The City reserves the right to delete completely or hide, when necessary and as soon as is feasible, any posting unrelated to the purpose and topical scope of the page.

Each posting on a City Social Media Site shall contain a clear statement of the discussion topic introduced for public comment so that the public is aware of the limited nature of the discussion.

Links placed on City Social Media Sites should only be to a resource on the City's website, a city-owned website, a state, federal or local government site, an educational website, or an organization with an official partnership or supportive business relationship with the City. Exceptions to this rule will be at the discretion of the Municipal Information Office.

5. EMPLOYEE TIME SPENT MAINTAINING OR CREATING CITY SOCIAL MEDIA SITES
Non-exempt employees who serve as City Social Media Site Administrators shall work on the City Social Media Site (monitoring, creating, maintaining, or posting) only during normal office hours unless specifically pre-approved in writing by the employee's supervisor. Any time spent in excess of a 40-hour work week by a City Social Media Site Administrator monitoring, creating,

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maintaining or posting on a City Social Media Site will be paid overtime in compliance with federal law and City policy.

6. USE BY BOARDS OR COMMISSIONS
   Due to open meetings requirements, individual members of a city board or commission are prohibited from participating in postings or discussion threads on City Social Media Sites created and maintained by the department or group of which they advise.

   With permission of the City Attorney or the City Manager, a department may set up an online message board or similar Internet application that complies with Texas Government Code Section 551.006. If such an online message board or similar Internet application is created and after training of that board and commission on use of the site, members of that board or commission may post on that site in compliance with Texas Government Code Section 551.006.

Failure to comply with any aspect of this policy may result in disciplinary action up to and including discharge from employment.

E. Responsibilities

1. Department Heads are responsible for:
   a. Ensuring that employees are aware of this policy for creating and maintaining City Social Media Sites;
   b. Deciding who is authorized to serve as a City Social Media Site Administrator and designating appropriate access levels;
   c. Ensuring that content that is inappropriate or violates this Policy is not posted on the City Social Media Site established and maintained by the Department; and
   d. Ensuring that approval is sought from the Municipal Information Office prior to the creation of a City Social Media Site.

2. Employees are responsible for:
   a. Ensuring that all contributions to City Social Media Sites adhere to this policy.

F. Procedures

Procedures located in the policy section above.

G. Revision History

New Policy

City of Waco Facebook Rules

Goes under About – Page Info

Sample for the Waco Parks and Recreation Department

The Waco Parks and Recreation Department's Facebook page was created to facilitate the exchange of information with the general public. The Waco Parks and Recreation Department welcomes comments and postings related to City of Waco parks, recreational programs, community events, and classes for the residents of the City of Waco, Texas, and surrounding communities.

The Waco Parks and Recreation Department reserves the right to regulate the content of this page. While city personnel will not edit comments by visitors to this page, the Department reserves the right to delete completely, when necessary and as soon as is feasible, any posting that involves:

- Content unrelated to the purpose and topical scope of the page;
- Content unrelated to a particular posting by the Waco Parks and Recreation Department;
- Advertisements or content that is commercial in nature;
- Obscenity or profanity;
- Content that promotes, perpetuates, or fosters discrimination on the basis of age, gender, race, religion, color, national origin, physical or mental disability, sexual orientation, marital status, and/or gender identity;
- Sexual content;
- Content that implies, promotes, or encourages illegal activity;
- Content that is contrary to the safety of City employees or the public;
- Content that opposes or supports political candidates or propositions; or
- Content that violates the legal ownership of another party.

The City of Waco, Texas, and the Waco Parks and Recreation Department are not responsible for and do not endorse comments placed on this page by visitors to this page. Commenters are personally responsible for their own comments, username, and/or any information placed on this page by the commenter.

All content posted to this site is subject to the public disclosure laws.

Please do not report emergencies or ask for assistance on this page. For emergency service, please call 911. For further assistance regarding the Waco Parks and Recreation Department, please _____.

ADMINISTERING THE CITY'S SOCIAL MEDIA ACCOUNTS

Jennifer Richie, City Attorney, Waco
Advanced Government Law 2018

WACO'S SOCIAL MEDIA PRESENCE

- 1 City Facebook page
- 18 City Department Facebook Pages
  - Police
  - Health District
  - Waco Mammoth Site
- 8 Twitter accounts
- 5 Instagram accounts
- 19 different employees administering these accounts

ADMINISTERING THE CITY'S FACEBOOK PAGES

PAGE	LIKES
City of Waco Public Information	13,017
Parks and Recreation	8,549
Waco City Cable Channel (WCCC.TV)	724
Waco-McLennan County Library	2,273
Waco-McLennan County Public Health District	658
Cottonwood Creek Golf Course	1,102
Waco Police Department Neighborhood Services	17,256
Waco Mammoth National Monument	9,225
Cameron Park Zoo	41,533
Waco Crime Stoppers (Waco's Most Wanted)	415
Waco Transit	1,412
Brazos Nights Concert Series	17,698
Waco Police Department	46,926
Waco-McLennan County Office of Emergency Management	1,902
Waco & the Heart of Texas (CVB)	32,467
Waco Convention Center	10,865

ADMINISTERING THE CITY'S TWITTER ACCOUNTS

ACCOUNT	FOLLOWERS
@cityofwaco	17,400
@WacoLibrary	767
@wacomclennanOEM	1,041
@CamParkZooWaco	3,554
@WacoandtheHOT	1,944
@WacoConventionC	1,157
@wacotransit	1,449
@wacopolice	22,600

ADMINISTERING THE CITY'S SOCIAL MEDIA

- The law is developing.
- In 2010, the City of Redondo Beach, California, deleted its Facebook page based on a presentation from the City Attorney to the City Council on legal concerns.
- City of Redondo Beach now has a Facebook page.

FIRST AMENDMENT

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

FIRST AMENDMENT

- **Government Speech**
- **Public Forum**
  - **Traditional**
  - **Designated**
    - **Limited**
- **Non-public**

GOVERNMENT SPEECH

- Expanding area of the law

- *John Walker, III, Chairman, Texas Department of Motor Vehicles Board, et al. v. Texas Division, Sons of Confederate Veterans, Inc., et al.*, 576 U.S. ___, 135 S.Ct. 2239 (2015) (holding that Texas license plates are government speech and thus, denial of a Confederate license plate does not violate free speech rights).

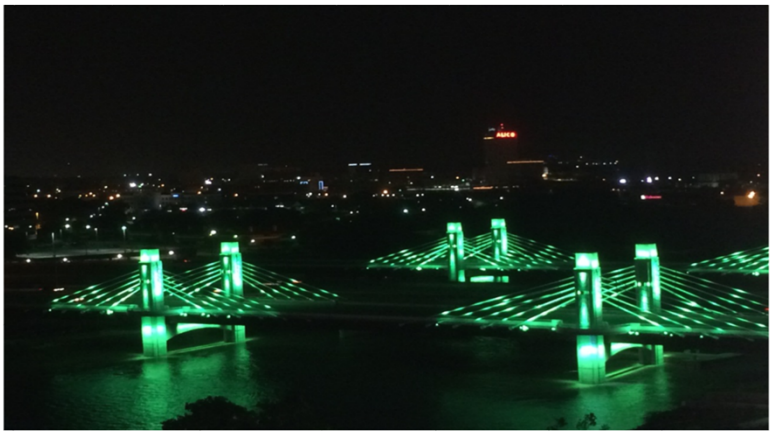
GOVERNMENT SPEECH

- *Pleasant Grove City, Utah v. Summum*, 555 U.S. 460, 129 S.Ct. 1125 (2009) (finding that city did not violate the 1st amendment when it refused to place the Seven Aphorisms of Summum statue in its park, a park that contained a statue of the Ten Commandments).
  - Court stated that there are limits to government speech, like the establishment clause (at 1132).
- See establishment clause cases: *Van Orden v. Perry*, 545 U.S. 677, 125 S.Ct. 2854 (2005); *Stone v. Graham*, 449 U.S. 39, 101 S.Ct. 192 (1980).

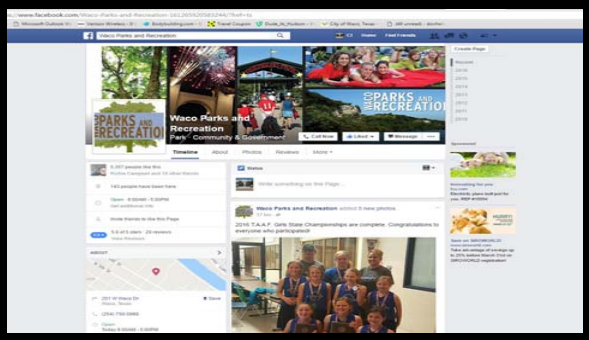
GOVERNMENT SPEECH

- "The point of the new 'government speech doctrine' … is to allow government to express its own view point and reject alternative viewpoints."
  - Mary Jean Dolan, Government Identity Speech and Religion: Establishment Clause Limits After Summum, 19 Wm & Mary Bill Rts. J. 1(2010).

GOVERNMENT SPEECH



SOCIAL MEDIA: GOVERNMENT SPEECH



- Non-interactive forums, like our web page, would be government speech
- *Sutliffe v. Epping School District*, 584 F.3d 314 (1st Cir. 2009) (holding that town's refusal to place a link to an organization on its website was government speech, and the website was not a public forum)
- Twitter?
- Facebook pages not government speech

PUBLIC FORUM DOCTRINE

- **Public Forum**
  - **Traditional**
  - **Designated**
    - **Limited**
- **Non-public**

Perry Education Association v. Perry Local Educators Association, 460 U.S. 37, 103 S.Ct. 938 (1983).

PUBLIC FORUM DOCTRINE

- Designated
  - Public property that the state has opened for expressive content
  - If open it to all, you go through same legal analysis as traditional, i.e. narrowly drawn to compelling government interest

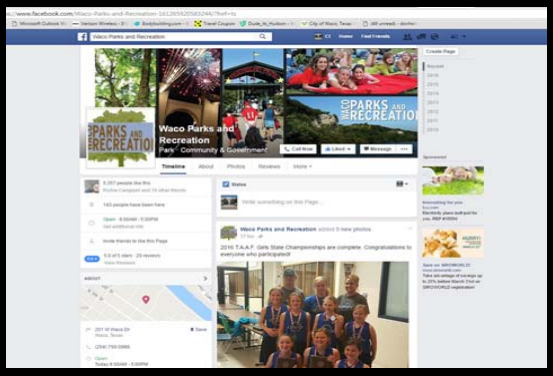
Perry Education Association v. Perry Local Educators Association, 460 U.S. 37, 103 S.Ct. 938 (1983).

PUBLIC FORUM DOCTRINE

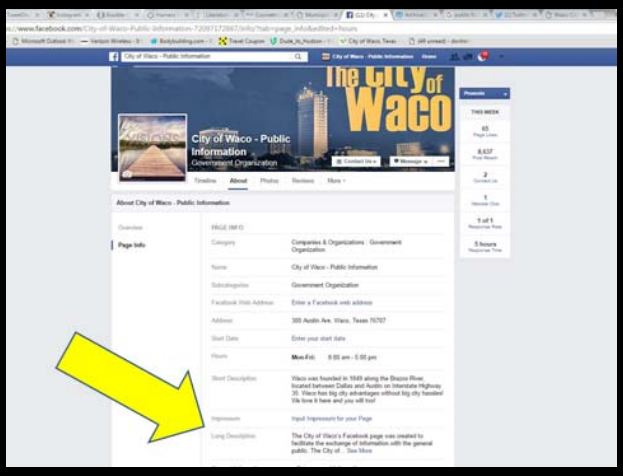
- Limited Public Forum
  - Opened only to a certain group of people or certain subject
  - Must be reasonable and viewpoint neutral
- Example: Council meeting

FACEBOOK AS A LIMITED PUBLIC FORUM

- Arguably, interactive social media sites can be limited public forums if they are focused and limited in scope and topic.
- Need rules to limit your scope



FACEBOOK AS A LIMITED PUBLIC FORUM



- Can post rules for City's Facebook under About -- Page Info – Long Description
- Like council meeting rules, you are attempting to limit the subjects open for discussion on your Facebook page.
- Restrictions have to be reasonable and viewpoint neutral.

POLICY

- Create a policy for administration of City Social Media sites
- Limit creation of social media sites
  - City does not want to be held legally or politically responsible for sites it did not approve
  - What is the business purpose of the site?
  - Need to know how many sites you need to archive

POLICY

- Make sure you have all passwords
- Clearly state that City can disable the site
- May want to require certain language posted on each site, especially if you are taking the position that the site is a limited public forum
- Address FLSA issues for site administrators

POLICY

- Create standards and rules for your employees' speech on City Social Media Sites
  - Require correct grammar and spelling
  - Only may post about area of expertise
  - Prohibit comments about legal matters without approval
  - Do you want your employees speaking on behalf of the City about political campaigns, religion, or other governmental agencies?

EMPLOYEE TRAINING

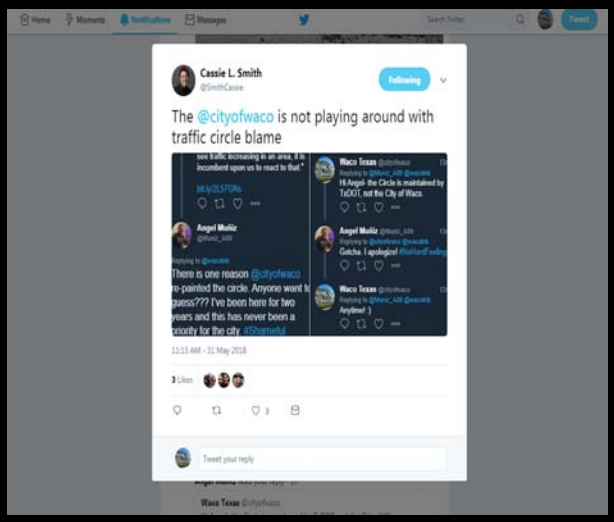
- Designate employees who can administer Social Media for the City **AND TRAIN THEM!**
- Best practice is to put social media administration in employee's job description

EMPLOYEE TRAINING

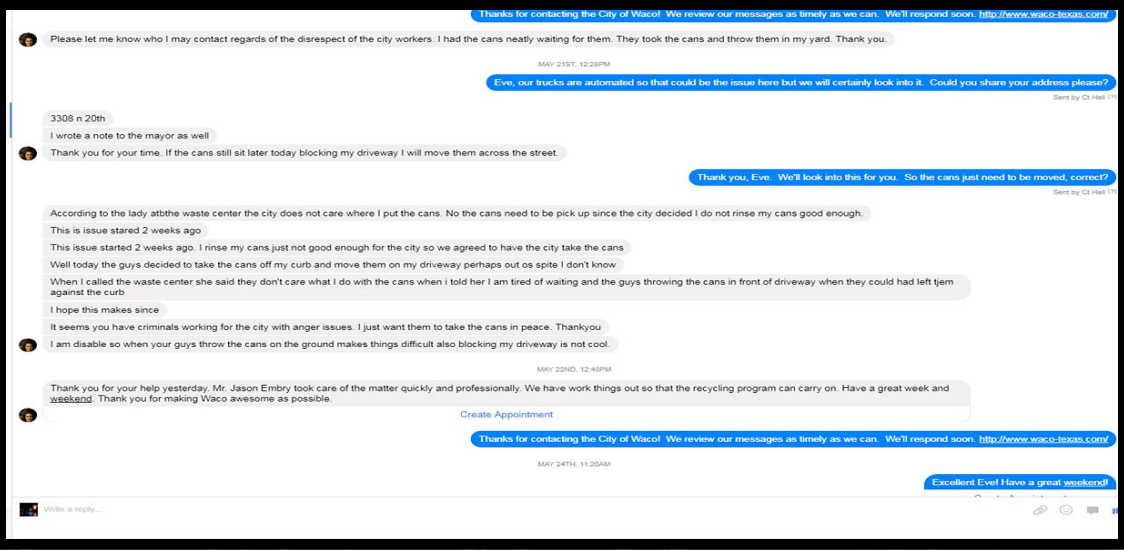
- Train staff that:
  - If the post is on topic, but is negative, then the post remains
  - Presumption that the post remains
  - The broader the subject of your Facebook page, the less you can delete

EMPLOYEE TRAINING

- Staffing is crucial
- Deciding whether to respond to angry posts is a skill
  - Responding to negative posts can neutralize them
  - Solving the issue can result in a glowing post the next day



EMPLOYEE TRAINING



OTHER ISSUES TO CONSIDER

- Open Meetings
  - Online Message Board (TEX. GOV'T CODE § 551.006)
- Disability Access to Social Media
- Privacy
- HIPAA
- Texas Election Code Section 255.003: Unlawful use of public funds for political advertising
- FLSA
  - Consider using exempt employees to administer social media.

OTHER ISSUES TO CONSIDER: OPEN RECORDS

- Social Media posts are considered public information and are subject to records retention requirements
- Need to archive your social media pages
- Archiving Service may not be able to archive closed group Facebook pages
  - Waco stopped its 2 internal Facebook pages because we could not archive them