

AVOIDING INDIVIDUAL LIABILITY:

**BE RIGHT ON THE LAW, RIGHT ON THE ETHICS,
AND AVOID EVEN THE APPEARANCE OF IMPROPRIETY**

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I. Introduction¹

Every day across Texas, civil suits are filed against local public servants (elected or appointed) by dissatisfied vendors, citizens or employees. In addition to the civil remedies sought, these suits may result from political motivation and may have serious political or employment implications for the public servant. These civil suits may be brought against the public servants in their official capacities, their individual capacities, or both – and will generally seek liability findings, monetary damages, and special relief in order to void prior governmental action because of alleged misconduct.

Also, criminal prosecutors across Texas routinely review, investigate, and charge public servants with criminal offenses. These criminal suits can also be the result of political motivation and have obvious political or employment implications for the local public servant.

When a civil or criminal suit is filed against a local public servant, many members of the public will be reluctant to view the accusation as untrue or benign. Today, many people are skeptical about the role and abilities of government in these highly adversarial, fast access to information, quick to judge times regarding public affairs. Two things are certain when such a case is filed and the initial media reports are issued: the public servant will deny the charge; but many will doubt the validity of that denial – ascribing to the old adage of “where there’s smoke, there’s fire.”

Therefore, to be successful today as a public servant, you must acknowledge the current environment in which you serve – and try hard every day to succeed at some seemingly simple but often complex principles: to be right on the law; to be right on the ethics; and to avoid even the appearance of an impropriety.

This paper is designed to help you succeed. It focuses on certain issues relating to: (a) a civil suit brought against a public servant regarding official and individual liability; (b) the basic criminal misconduct issues that can arise in the context of your public service; and (c) the civil reporting requirements regarding conflict of interest scenarios, and the criminal misconduct issues that can arise from those scenarios.

II. Civil Misconduct Issues

A. Absolute and Qualified Immunity

In general, civil suits brought against public servants in their official capacity are considered suits against the governmental entity. Normally, a governmental entity performing governmental functions is immune from suit unless its immunity has been waived by statute or

¹ As used in this paper, the following terms have the following meanings unless otherwise designated: “public servant” means any person elected, appointed, or employed by a unit of government; and “local government” means a county, city, town, school district, special purpose district, and any other political subdivision of the state. This paper and the accompanying seminar presentation are not intended to be regarded as legal advice and should not be used, construed, or acted upon by the reader or seminar attendee as legal advice.

unless there is a common-law exception.² Public officials and employees of local governmental entities, when acting in their official capacities, are protected by official, governmental immunity.³ The immunity applies unless the acts performed are clearly outside the individual's official functions.

Several types of immunity status are available to public servants who have been sued in their individual (non-official) capacity. These immunities fall into two categories: absolute immunity; and qualified immunity.

Absolute immunity is a complete bar to suit. Therefore, the court has no jurisdiction to hear or adjudicate the suit if absolute immunity status is conferred on the public servant. Conversely, qualified immunity is an affirmative defense that protects public servants from liability "who act in good faith, in their individual capacities, related to the performance of discretionary duties within the scope of [their] authority."⁴ The defense of qualified immunity must therefore be pled by the public servant in the suit as an affirmative defense or it is waived.

Public servants performing judicial and legislative functions within local governments are generally protected by the doctrine of absolute immunity. An official's conduct is "legislative" whether it is undertaken as part of a traditional legislative process, or is legislative in substance, for instance when it reflects discretionary policymaking with prospective implications.⁵

Legislative immunity extends not only to members of the Texas Legislature, but also to local governmental officials.⁶ Position or title is not determinative of immune status. Rather, it is the function performed by the public servant that determines whether immune status exists. An important factor to consider in determining the existence of immune status is whether the act of the public servant establishes a policy, or whether the act merely enforces or administers policy.⁷ An act that merely enforces policy does not confer immune status under the doctrine of legislative immunity; however, conduct that establishes policy does confer that status. Legislative immunity is not waived, and is applicable, in spite of the presence of bad faith or malice on the part of public servant.⁸

Judicial immunity applies to acts committed by a public servant in the following circumstances:

² *White v. Eastland County*, 12 S.W.3d 97, 99-100 (Tex. App.–Eastland 1999, no pet.)

³ *Medina County Commissioners Court v. Integrity Group, Inc.*, 944 S.W.2d 6, 9 (Tex. App.–San Antonio 1996, no writ); *see also Smith v. Davis*, 999 S.W.2d 409, 412-413 (Tex. App.- Dallas, no pet.).

⁴ *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994).

⁵ *Bogan v. Scott-Harris*, 118 S.Ct. 966, 971-72 (1988).

⁶ *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1193 (5th Cir. 1981); *see also Bartlett v. Cinemark USA, Inc.*, 908 S.W.2d 229, 234-235 (Tex. App.- Dallas 1995, no writ).

⁷ *Hughes v. Tarrant County, Texas*, 948 F.2d 918, 920 (5th Cir. 1991); *Crymes v. DeKalb County*, 923 F.2d 1482, 1485 (11th Cir. 1991).

⁸ *Clear Lake City Water Authority v. Salazar*, 781 S.W.2d 347, 350 (Tex. App.- Houston [14th Dist.] 1989, no writ).

- (a) if the act is one normally performed by a judge, with subject matter jurisdiction regarding the topic of controversy;
- (b) when the act occurs in a courtroom or in an appropriate adjunct facility, such as the judge's chambers;
- (c) an act that centers on a case pending before the judge; and
- (d) an act that arises from an appearance before the judge in his official capacity.⁹

A judicial act is within the subject matter jurisdiction of the court if the judge had the jurisdiction necessary to perform an act in that type of case. The concept of judicial immunity applies irrespective of the magnitude of the error or bad faith of the judicial act.¹⁰ Judicial immunity status applies to all judges, including municipal court judges.¹¹ The judicial immunity protections also apply in a derivative sense to non-judge court staff who act as an arm of the court, including clerks, bailiffs, constables, and court-appointed receivers and trustees.¹²

Additionally, the concept of judicial immunity can be applied to certain quasi-judicial proceedings, in which the following factors are present;

- (a) a proceeding in which a power to exercise discretion exists; and
- (b) a proceeding in which the judge or tribunal has the power to hear and determine facts, to make binding orders, to affect property rights, to compel the attendance of witnesses, or to enforce decisions and impose penalties.¹³

Qualified immunity is the term used for a public servant's immunity defense when a suit is brought in federal court. A similar defense is available in state suits, and is known as official immunity. The Texas Supreme Court has found these two terms interchangeable.¹⁴

The qualified immunity doctrine was developed to permit governmental officials and employees to perform discretionary duties without fear of personal liability for negligent or improper performance.¹⁵ If the act of the public servant involves personal deliberation, decision and judgment, it is discretionary; if the act is required and the person has no choice, the act is considered ministerial.¹⁶ For immune status to apply to the public servant, the act must have

⁹ *Bradt v. West*, 892 S.W.2d 56, 66-67 (Tex. App.- Houston [1st Dist.] 1994, writ denied).

¹⁰ *Kubosh v. City of Houston*, 2 S.W.3d 463, 469 (Tex. App.- Houston [1st Dist.] 1999, pet. denied).

¹¹ *City of Houston v. Swindall*, 960 S.W.2d 413, 417 (Tex. App.- Houston [1st Dist.] 1998, no pet.).

¹² *Id.*

¹³ *Gallegos v. Escalon*, 993 S.W.2d 422, 425 (Tex. App.- Corpus Christi 1999, no pet.).

¹⁴ *City of Houston v. Kilburn*, 849 S.W.2d 810, 812 n.1 (Tex. 1993).

¹⁵ *Chapman v. Gonzales*, 824 S.W.2d 685, 687 (Tex. App.-Houston 1992, writ denied).

¹⁶ *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994).

been committed within the course and scope of employment.¹⁷ Actions that are outside the course of a person's employment are not protected.¹⁸

Qualified or official immunity protects public servants "from civil damages liability as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated."¹⁹ Unlike sovereign immunity, qualified immunity shields the party from individual liability in the suit.²⁰ For qualified immunity to apply, the public servant must show that a reasonably prudent official or public employee would have believed that the action taken was appropriate, given all of the attendant circumstances.²¹ To succeed, a plaintiff must show that no reasonable person in that position could have believed that the circumstances justified the act of the public servant. Unlike legislative or judicial immunity, official immunity is not applicable if the public servant acted with malice or bad faith.²²

B. Civil Damage Awards and Reimbursement for Legal Expenses

Public servants enjoy substantial immunity protections from suits arising from their actions within the course and scope of their employment. To the extent that the Legislature has provided a limited waiver of that immunity, public servants may be entitled to indemnification for certain losses or damage and reimbursement for legal expenses imposed on them by the courts.

For example in the area of tort claims, the Texas Civil Practice & Remedies Code provides for indemnification and reimbursement of legal expenses incurred by public servants from civil claims arising from alleged acts, omissions, or negligence of officials from actions within the course and scope of their office. Section 102.002 of the Texas Civil Practice and Remedies Code provides the following:

- (a) A local government may pay actual damages awarded against an employee of the local government if the damages: (1) result from an act or omission made by the employee in the course and scope of employment; and (2) arise from a cause of action alleged for negligence;
- (b) A local government may pay the court costs and attorneys' fees awarded against an employee for whom the local government may pay damages, as described above; and
- (c) A local government may not pay damages awarded against an employee: (1) that arise from a cause of action for official misconduct; (2) that arise from a cause of

¹⁷ *Id.*

¹⁸ *Thomas v. White*, 102 S.W.3d 318, 321 (Tex. App.—Beaumont 2003, no pet.).

¹⁹ *Fraire v. City of Arlington*, 957 F.2d 1268, 1273 (5th Cir. 1992).

²⁰ *McCartney v. May*, 50 S.W.3d 599, 605 (Tex. App.—Amarillo 2001, no pet.).

²¹ *Scott v. Britton*, 16 S.W.3d 173, 179 (Tex. App.—Houston [1st Dist.] 2000, no pet.).

²² *Kassen v. Hatley*, 887 S.W.2d 4, 12 (Tex. 1994)

action involving a wilful or wrongful act or omission constituting gross negligence; or (c) to the extent the damages are recoverable under an insurance contract or self-insurance plan authorized by statute.

Section 102.004 of the Texas Civil Practice and Remedies Code states that a local government may provide legal counsel to represent a defendant for whom the local government may pay damages. The legal counsel employed by the local government in this regard may settle the portion of the suit that may result in the payment of damages by the local government.

Section 102.003 of the Texas Civil Practice and Remedies Code provides that damage payments for tort claims may not exceed: (a) \$100,000.00 to any one person or \$300,000.00 for any single occurrence in the case of personal injury or death; or (b) \$10,000.00 for a single occurrence of property damage, unless the local government is liable as a guardian under certain provisions of the Texas Probate Code, and does not give a bond, in which event the damage payments may not exceed the actual amount of property damages.

Because public servants may enjoy qualified immunity status regarding certain types of suits, this does not prevent other types of suits from being filed. The Attorney General and the courts have recognized that in many instances suits are brought against public servants in their individual capacity “when they are really designed to obstruct or control the legitimate performance of official duties.”²³ Public servants may be entitled to have their legal expenses paid in certain suits brought against them personally for other actions arising from their office, if a majority of the disinterested members of a governing body make a good faith determination that a defense of the action is in the public interest. Many local governments have purchased insurance providing coverage for employees in this regard.

Public service also brings with it a set of duties and responsibilities that are unique to public servants and which pose some potential exposure to criminal prosecution. The local government is not required to do so, but may expend public funds to reimburse a public servant for legal expenses incurred in connection with a successful defense against an unjustified criminal prosecution in certain instances where the prosecution is related to the scope of the public servant’s work.

For a number of years, the Attorney General applied the civil standard described above to situations in which a public servant requested reimbursement of legal expenses for defending himself in a criminal prosecution. A reimbursement was historically permitted by the local government if the governing body found that payment of attorney’s fees served a public interest and not just the individual’s private interest, and if the governing body also found that the officer or employee committed the alleged act or omission in good faith and within the scope of official duties.²⁴ This obligation to pay for the representation could be undertaken as the prosecution was initiated, and was not dependent on whether the public official was ultimately exonerated in the case.

²³ Op. Tex. Att’y Gen. No. LA-24 (1973), p. 2.

²⁴ Op. Tex. Att’y Gen. No. DM-488 (1998).

The Attorney General modified that rule in 2000. Now the governing body of a local government must wait to authorize reimbursement until it knows that the public official prevailed in his defense of the criminal prosecution.²⁵ The local government is prohibited from paying the expenses of a public servant found guilty of a crime.²⁶ An important condition to stress in this instance is that the determination must be made by those members *disinterested* in the outcome of the prosecution. This determination may be problematic in a criminal prosecution that is being pursued against all or a majority of the members of the governing body.

III. Criminal Misconduct Issues

A. Criminal Abuse of Office

Chapter 39 of the Texas Penal Code, entitled Abuse of Office, contains the primary statutory scheme designed to prosecute the elected public servant who violates the concepts of fairness and open government in the performance of his or her office. The primary criminal offenses contained within this chapter include: Abuse of Official Capacity; Official Oppression; Violation of the Civil Rights of a Prisoner in Custody; and Misuse of Official Information. TEX. PEN. CODE §§ 39.02, 39.03, 39.04, 39.06. The following represents a summary of the elements of these offenses.

Abuse of Official Capacity

A public servant commits an offense under this statute if, with intent to obtain a benefit or with intent to harm or defraud another, he intentionally or knowingly:

- (a) violates a law relating to the public servant's office or employment; or
- (b) misuses government property, services, personnel, or any other thing of value belonging to the government that has come into his custody or possession by virtue of the office or employment.

An offense under subpart (a) above is a Class A misdemeanor. An offense under subpart (b) above is a value related offense, with the punishment on conviction being dependent on the value of the item misused, and a State Jail felony level offense is designated in circumstances wherein the value is \$1,500.00 or more but less than \$20,000.00.

The term "law relating to a public servant's office or employment" means a law that specifically applies to a person acting in the capacity of a public servant and that directly or indirectly: imposes a duty on the public servant; or governs the conduct of the public servant.

²⁵ Op. Tex. Att'y Gen. No. JC-0294 (2000).

²⁶ While the Legislature has authorized reimbursing certain public officials in state agencies in defending a criminal prosecution in certain circumstances (*see* TEX. CIV. PRAC. & REM. CODE § 104.0035), similar legislation authorizing local governments to do likewise has not been enacted.

The term “misuse” means to deal with property contrary to: an agreement under which the public servant holds the property; a contract of employment or oath of office of a public servant; a law that prescribes the manner of custody or disposition of the property; or a limited purpose for which the property is delivered or received.²⁷

Travel discounts or awards, including frequent flier miles, are not recognized by the statute as being things of value belonging to the government, due to the administrative difficulty and cost involved in recapturing the discount or award for the governmental entity.

Since the 1920's, the constitution and laws of Texas sought to protect “any money, property, or other thing of value belonging to the government.” *Talamantez v. State*, 829 S.W.2d 174, 184 (Tex. Crim. App. 1992). Consequently, the criminal statutes were enacted and enforced in a manner consistent with the broad concept of a “thing of value belonging to the government.” The “thing of value” concept regarding the statute has been analyzed in a variety of contexts, including:

(a) The use of county equipment to clear brush and make a tank dam on the property of the accused was concluded to be a criminal act. *Talamantez*, 829 S.W.2d at 176:

(b) The use of government office stationery, secretary, and a typewriter to prepare a letter of application for appointment to an office outside state government, with intent to obtain an economic benefit, was concluded to be improper. However, if the application was for an office inside state government, no violation was recognized. Op. Tex. Ethics Comm’n No. 1984-20 (1984);

(c) The use of government computer equipment to file campaign finance reports for an officeholder, with the intent to obtain an economic benefit, was concluded to be improper. Op. Tex. Ethics Comm’n No. 386 (1997);

(d) A county employee’s use of an official county vehicle was concluded not to be improper, when the county employee was the wife of the authorized county driver of the vehicle, and the wife was merely commuting to work with her husband, in a fact scenario in which the additional cost to the government was *de minimus* and merely incidental to the authorized use county equipment. Tex. Att’y Gen. LO-97-083 (1997);

(e) The use of government equipment for personal telephone calls, e-mail service, or internet service was concluded not to be improper, so long as: the activities did not result in any additional charges to the government; the activities did not result in any damage to the government; the activities were not used for private, commercial purposes; only incidental amounts of employee time were involved; and the activities did not hinder the day-to-day operation of government. Op. Tex. Ethics Comm’n Nos. 395 (1998), 372 (1997), 134 (1993), 9 (1992);

²⁷ TEX. PEN. CODE § 39.01.

(f) The use of members of a legislative staff by a legislator to gather information for use at a campaign fund-raiser was concluded to be improper. Op. Tex. Ethics Comm'n No. 431 (2000). This ethics opinion held that the "lawful advantages of incumbency do not, however, extend to the use of the work time of government employees or other government resources to gather or otherwise prepare information for campaign purposes." *Id.*; and

(g) A criminal violation of the statute was found to exist in certain "mixed use" scenarios. See *State ex rel. Hightower v. Smith*, 671 S.W.2d 32, 35 (Tex. 1984); *Margraves v. State*, 34 S.W.3d 912, 916 (Tex. Crim. App. 2000). A "mixed use" scenario can occur when a public servant misapplies government property even when it is used partially for official purposes. In *Hightower*, an improper use of county fuel and vehicles was found to exist when the sheriff was given a rent-free apartment (not used as his residence), and he subsequently authorized deputies to make frequent patrols of the apartment complex using county vehicles. In *Margraves*, an improper use of a state-owned airplane was found to exist during a trip to Louisiana to see a son graduate from college, even though the actor did some official business during the trip. In the "mixed use" scenario, the burden is on the state to show that: an additional expense has been incurred by the government due to the personal use of government property or service; and that a private gain is earned through the use of the government property or service.

Official Oppression

A public servant acting under color of his office or employment commits an offense under this statute if he:

(a) intentionally subjects another to mistreatment or to arrest, detention, search, seizure, dispossession, assessment, or lien that he knows is unlawful;

(b) intentionally denies or impedes another in the exercise or enjoyment of any right, privilege, power, or immunity, knowing his conduct is unlawful; or

(c) intentionally subjects another to sexual harassment.

The statute defines "sexual harassment" as unwelcome sexual advances, requests for sexual favors, or other verbal or physical conduct of a sexual nature, submission to which is made a term or condition of a person's exercise or enjoyment of any right, privilege, power, or immunity, either explicitly or implicitly. This offense is designated as a Class A misdemeanor.²⁸

Misuse of Official Information

A public servant commits an offense under this statute if, in reliance on information acquired by virtue of his office or employment, and that has not been made public, he:

²⁸ TEX. PEN. CODE § 39.03.

- (a) acquires or aids another to acquire a pecuniary interest in any property, transaction, or enterprise that may be affected by the information;
- (b) speculates or aids another to speculate on the basis of the information; or
- (c) as a public servant, including the principal of a school, coerces another into suppressing or failing to report that information to a law enforcement agency.

An offense under subparts (a) and (b) of the statute is a Third Degree felony. An offense under subpart (c) is a Class C misdemeanor.²⁹

Also, under the statute a public servant commits an offense if, with intent to obtain a benefit or with intent to defraud or harm another, he discloses or uses information for a non-governmental purpose that:

- (a) he has access to by means of his office or employment; and
- (b) has not been made public.

An offense under this version of the statute is a third degree felony. TEX. PEN. CODE § 39.06(a). The statute defines “information that has not been made public” as any information to which the public does not generally have access, and that is prohibited from disclosure under the Texas Open Records Act.³⁰

B. Other Criminal Offenses

Other parts of the Texas Penal Code contain related offenses designed for the same governmental purposes, and include: Theft, TEX. PEN. CODE § 31.03; Bribery, TEX. PEN. CODE § 36.02; Acceptance of an Honorarium, TEX. PEN. CODE § 36.07; Gift to Public Servant by Person Subject to His Jurisdiction, TEX. PEN. CODE § 36.08; and Tampering with a Governmental Record, TEX. PEN. CODE § 37.10. The following represents a summary of the primary elements of these offenses.

Theft

The theft statute provides that a person commits an offense if he unlawfully appropriates property, by acquiring or otherwise exercising control over property, other than real property, with intent to deprive the owner of the property, without the owner’s effective consent. Theft is usually a value related offense, with the punishment on conviction being dependent on the value of the item stolen.³¹

²⁹ TEX. PEN. CODE § 39.06(a).

³⁰ TEX. PEN. CODE § 39.06(d).

³¹ TEX. PEN. CODE § 31.03.

A State Jail felony level offense is designated in circumstances wherein the value is \$1,500.00 or more but less than \$20,000.00. However, if it is shown on the trial of the theft offense:

(a) that the actor was a public servant at the time of the commission of the offense; and

(b) that the property stolen came into the possession or control of the actor by virtue of his status as a public servant; then

(c) the level of offense is increased to the next higher category of offense for classification of punishment.

Bribery

A person commits an offense under this statute if he intentionally or knowingly offers, confers, or agrees to confer on another, or solicits, accepts, or agrees to accept from another:

(a) any benefit as consideration for the recipient's decision, opinion, recommendation, vote, or other exercise of discretion as a public servant, party official, or voter;

(b) any benefit as consideration for the recipient's decision, vote, recommendation, or other exercise of official discretion in a judicial or administrative proceeding;

(c) any benefit as consideration for a violation of a duty imposed by law on a public servant or party official; or

(d) any benefit that is a political contribution, as defined by Title 15 of the Texas Election Code, or that is an expenditure made and reported in accordance with Chapter 305 of the Texas Government Code, if the benefit was offered, conferred, solicited, accepted, or agreed to pursuant to an express agreement to take or withhold a specific exercise of official discretion, if such exercise of official discretion would not have been taken or withheld but for the benefit.

The statute provides that it is no defense to prosecution that:

(a) a person whom the actor sought to influence was not qualified to act because he had not yet assumed office or lacked jurisdiction or for any other reason; or

(b) the benefit is not offered or conferred, or that the benefit is not solicited or accepted until after the decision vote, or other exercise of discretion has occurred, or after the public servant ceases to be a public servant.³²

The term "benefit" means anything reasonable regarded as pecuniary gain or pecuniary

³² TEX. PEN. CODE § 36.02.

advantage, including benefit to any other person in whose welfare the beneficiary has a direct and substantial interest.³³ An offense under this statute is a second degree felony.

Acceptance of Honorarium

A public servant commits an offense under this statute if he solicits, accepts, or agrees to accept an honorarium in consideration for services that he would not have been requested to provide but for the public servant's official position or duties. The statute does not prohibit a public servant from accepting transportation and lodging expenses in connection with a conference or similar event in which the public servant renders services, such as addressing an audience or engaging in a seminar, to the extent that those services are more than merely perfunctory, or from accepting meals in connection with such an event.³⁴ This offense is designated as a Class A misdemeanor.

Analysis of this statute has centered on the requirement that the request for the public servant's services be independent of his status as a public servant, as shown below:

(a) A public servant may receive consideration for services provided outside of regular job duties, so long as the public servant was asked to participate because of having a special expertise in the subject matter of the event, and not merely because of his status as a public servant. Op. Tex. Ethics Comm'n Nos. 405 (1998), 305 (1996), 312 (1996), 294 (1995), 273 (1995).

(b) A sponsoring group may pay the transportation, meals, and lodging expense of a public servant who speaks at a conference or similar event hosted by the group, provided that the participation or services provided by the public servant is more than "merely perfunctory." Op. Tex. Ethics Comm'n No. 18 (1992);

(c) A public servant may not accept a free membership in an organization as consideration for making a speech. Op. Tex. Ethics Comm'n No. 57 (1992);

(d) A public servant may not accept an engraved clock in appreciation for a speech, if the public servant would not have been asked to give the speech but for his official position. Op. Tex. Ethics Comm'n No. 97 (1992). The receipt of a plaque has been construed not to constitute a benefit; however, a clock does not become a plaque simply because a name is engraved on it

Gift to Public Servant by Person Subject to His Jurisdiction

A public servant can commit an offense in a variety of factual contexts relating to the receipt of a benefit or gift, as shown below:

(a) If the public servant is performing regulatory functions, inspections, or

³³ TEX. PEN. CODE § 36.01.

³⁴ TEX. PEN. CODE § 36.07.

investigations, an offense is committed if he solicits, accepts, or agrees to accept any benefit from a person he knows to be subject to the regulation, inspection, or investigation;

(b) If the public servant is in an agency having custody of prisoners, an offense is committed if he solicits, accepts, or agrees to accept any benefit from a person he knows to be in the custody of his agency;

(c) If the public servant is in an agency carrying on civil or criminal litigation on behalf of government, an offense is committed if he solicits, accepts, or agrees to accept any benefit from a person against whom the public servant knows litigation is pending or contemplated by his agency;

(d) If the public servant exercises discretion in connection with contracts, purchases, payments, claims, or other pecuniary transactions, an offense is committed if he solicits, accepts, or agrees to accept any benefit from a person he knows is interested in or likely to become interested in any such matter involving the exercise of his discretion;

(e) If the public servant exercises judicial or administrative authority, an offense is committed if he solicits, accepts, or agrees to accept any benefit from a person he knows is interested in or likely to become interested in any matter before the public servant or his tribunal.

An offense under this statute is a Class A misdemeanor.³⁵ A public servant who receives an unsolicited benefit that he is prohibited from accepting under this statute, may donate the benefit to: a governmental entity that has authority to accept the gift; or to a recognized tax-exempt charitable organization formed for educational, religious, or scientific purposes.

Tampering with Governmental Record

A statute widely used by Texas prosecutors to prosecute misconduct by public officials is the Tampering with Governmental Record statute. The reason it is used so frequently is that the concepts of proof and enforcement are very simple – when a false governmental record is knowingly used by the actor, the offense is complete. The level of offense is generally dependent on the type of governmental record used, and the level of intent of the actor.³⁶

A person commits an offense under this statute if he makes, presents, or uses a governmental record with knowledge of its falsity. The term “governmental record” is defined by the statute to include: anything belonging to, received by, or kept by government for information, including a court record; anything required by law to be kept by others for information of government; and certain special records, including but not limited to a license, certificate, permit, seal, letter of patent or title issued by government, a standard proof of motor vehicle liability insurance form, and an official ballot or election record.³⁷ The term

³⁵ TEX. PEN. CODE § 36.08.

³⁶ TEX. PEN. CODE § 37.10.

³⁷ TEX. PEN. CODE § 37.01.

“governmental record” is broadly construed and can be applied to a variety of document types, as shown below:

(a) the records of the Office of the Governor of the State of Texas. Op. Tex. Att’y Gen. No. JM-1013 (1989);

(b) a voter registration record, and an election petition. *Morales v. State*, 11 S.W.3d 460, 462-463 (Tex. App.- El Paso 2000, pet. ref’d); Op. Tex. Att’y Gen. No. JM-611 (1986);

(c) a bank deposit document. *Plunk v. State*, 730 S.W.2d 836, 837-838 (Tex. App.- Tyler 1987, no writ);

(d) the language in an arrest warrant. *Lewis v. State*, 773 S.W.2d 689, 690 (Tex. App.- Corpus Christi 1989, writ ref’d);

(e) expense vouchers and gasoline receipts. *Mills v. State*, 941 S.W.2d 204, 207 (Tex. App.- Corpus Christi 1996, pet. ref’d);

(f) a temporary, cardboard license plate or buyer’s tag on a newly purchased motor vehicle. *Martinez v. State*, 6 S.W.3d 674, 678-679 (Tex. App.- Corpus Christi 1999, no pet.);

(g) documents submitted to determine eligibility for government assistance. *McMillan v. State*, 696 S.W.2d 584, 585 (Tex. App.- Dallas 1984, no writ); and

(h) insurance documents or certificates. *Elliot v. State*, 976 S.W.2d 355, 356 (Tex. App.- Austin 1998, pet. ref’d).

This offense is usually designated as a Class A misdemeanor; however, if the intent of the actor is to defraud or harm another, then the offense is designated as a State Jail felony. More serious felony punishment designations exist in the statute for offenses involving special governmental records or repeated conduct by the actor.

Coercion of Police Officer or Fire Fighter in Connection with Political Campaign

Another, often forgotten statute establishes a misdemeanor offense if an individual coerces a police officer or fire fighter to participate, or to refrain from participating, in a political campaign.³⁸ The punishment for this offense is designated as a fine of not less than \$500.00 or more than \$2,000.00, by jail confinement for not more than two years, or by both such fine and confinement.

IV. Conflict of Interest – Reporting and Criminal Misconduct Issues

A. Chapter 176 Disclosure Statement

³⁸ TEX. LOC. GOV’T CODE § 180.001.

A set of conflict disclosure requirements exists for local government officials and the vendors who contract with local governments. These requirements are contained in Chapter 176 of the Texas Local Government Code.³⁹ Chapter 176 was recently amended by the Texas Legislature, effective May 25, 2007. A copy of the new legislation, same being House Bill 1491, is attached a part of the appendix.

The local government official must also identify certain gifts that the official or the official's family member⁴⁰ have received from a vendor during the preceding twelve months, other than gifts of food, lodging, transportation or entertainment accepted as a guest, that have an aggregate value of not more than \$250, as described below. Vendors are subject to their own set of disclosure requirements. The term "local government officer" includes both members of the governing body of a local governmental entity, and the director, administrator or other person designated as the executive officer of the local governmental entity.⁴¹

The local governmental entity may choose to extend the statute's reporting requirements to other employees of the local governmental entity. Each local government must also have a "records administrator" who will be responsible for receiving and maintaining the conflicts disclosure statements for public viewing and copying. If the entity maintains an internet website, the site must provide access to the filings required by Chapter 176.

Required Disclosure by Government Official – Criminal Penalty

The local government official must file a conflicts disclosure statement with respect to a vendor doing business with the local government if the following circumstances are present: (a) the vendor has actually contracted with the local government or the local government is considering doing business with the vendor; and (b) the vendor has an employment or other "business relationship" with the local government officer, or the officer's family member that results in the officer or family member receiving taxable income, other than "investment income," that exceeds \$2,500.00 during the 12 months preceding the date the officer becomes aware of contract consideration or execution; or (c) the vendor has given to the officer or officer's family member one or more gifts that have an aggregate value of more than \$250 (not food, lodging, transportation or entertainment received as guest) in the 12 months preceding the date the officer becomes aware of contract consideration or execution.

The new amendments to Chapter 176 define "business relationship" as a connection between two or more parties based on commercial activity – but does not include: (a) a transaction subject to rate or fee regulation by government; (b) a transaction conducted at a price and subject to terms available to the public; or (c) a purchase or lease of goods or services from a person who is chartered by a state or federal agency and that is subject to regular examination by, and reporting to, that agency. Those new amendments also define "investment income" as

³⁹ TEX. LOC. GOV'T CODE §§ 176.001-176.012.

⁴⁰ "Family member" means a person related to another person within the first degree by consanguinity or affinity. *Id.* at 176.001(2).

⁴¹ *Id.* at § 176.001(4).

dividends, capital gains, or interest income generated from a personal or business checking or savings account, a share draft or similar share account, a personal or business investment, or a personal or business loan.⁴²

The disclosure statement must be filed not later than 5 p.m. on the 7th business day after the date that the officer becomes aware of facts that require the filing of the statement. A copy of the most recent form approved by the Commission is attached as part of the appendix.

An officer commits a Class C misdemeanor if the officer knowingly violates the disclosure requirements. It is an exception to the offense if the officer filed the statement not later than 7 business days after the date the person received notice of the violation from the local governmental entity.

The local government officer is not required to file a conflict disclosure statement under Chapter 176 in relation to a gift accepted by the officer of a family member of the officer, if the gift constitutes: (a) a gift given by a family member of the person accepting the gift; (b) a political contribution as defined by Title 15 of the Texas Election Code; or (c) food, lodging, transportation, or entertainment accepted as a guest. The local government may extend the Chapter 176 disclosure requirements to any employee who has the authority to approve contracts for the entity. A local government may reprimand, suspend, or terminate the employment of any employee who knowingly fails to comply with a requirement adopted under Chapter 176.

Required Disclosure by Vendor – Criminal Penalty

Vendors are also required to make disclosure statements under Chapter 176. The vendor disclosure requirements apply to any person who: (a) contracts or seeks to contract with a local governmental entity, or is an agent of a person contracting with or seeking to contract with the entity; (b) the person has a “business relationship” with the entity; and (c) the person has an employment or other “business relationship” with an officer of the entity, or a family member of the officer – or has given that officer or family member one or more gifts with an aggregate value of more than \$250 (not food, lodging, transportation or entertainment received as a guest) in the 12 months preceding the date awareness of contract consideration or execution.

Governmental entities (i.e., the state, political subdivisions of the state, the federal government, or a foreign government) and their employees are not subject to the disclosure requirements. The Texas Ethics Commission promulgates a form to be used for the vendor disclosures. A copy of the most recent form approved by the Commission (on June 29, 2007) is attached as part of the appendix.

⁴² TEX. LOC. GOV'T CODE § 176.001 (eff. May 25, 2007).

A vendor must file a completed conflict of interest questionnaire with the records administrator no later than the 7th day after the later of: (a) the date the person begins contract discussions with the entity or submits an application, bid, or other writing related to a potential contract with the entity; or (b) the date the person becomes aware of an employment or other business relationship with an officer of the entity, or of a family member of said officer – or becomes aware that the person has given one or more gifts previously identified by the statute.

A subsequent disclosure statement must be filed no later than September 1 of each year in which business is done with the local government – and no later than the 7th business day after the date of an event that would make a statement in a previously filed questionnaire incomplete or inaccurate. A person is not required to file an updated questionnaire in a year if the person has filed a questionnaire on or after June 1, but before September 1 of that year.

A vendor commits a Class C misdemeanor if he knowingly violates the disclosure requirements. It is an exception to the offense if the vendor filed the statement not later than 7 business days after the date the person received notice of the violation from the local governmental entity.

B. Chapter 171 Disclosure Affidavit and Abstention from Voting

The affidavit and abstention requirements of Chapter 171 of the Texas Local Government Code are different – dramatically different than Chapter 176 disclosures – and you should begin to appreciate the distinction.⁴³ This statute is designed to prevent conflict of interest scenarios from actually affecting the voting conduct and business decisions of the local government – and Chapter 171 provides more substantial criminal penalties for conduct that violates the statute.

Definitions

Chapter 176 applies to any member of a governing body or another officer, whether elected, appointed, paid, or unpaid, of any district, county, municipality, precinct, central appraisal district, transit authority, or other local governmental entity who exercises responsibilities beyond those that are advisory in nature. “Business entity” is defined by the statute to include any business entity recognized by law.

A person is recognized by Chapter 171 as having a “substantial interest in a business entity” if:

(a) the person owns 10% or more of the voting stock or shares of the business entity – or owns either 10% or more, or \$15,000.00 or more, of the fair market value of the business entity; or

(b) funds received by the person from the business entity exceed 10% of the person’s gross income for the previous year.

⁴³ TEX. LOC. GOV’T CODE §§ 171.001-171.010.

A person is deemed by Chapter 171 to have a substantial interest in real property if the interest is an equitable or legal ownership in the property with a fair market value of \$2,500 or more. Also, local public official is considered to have a substantial interest if a person related to the official, in the first degree by consanguinity or affinity, as determined by Chapter 573 of the Texas Government Code, has a substantial interest under Chapter 171.

Affidavit and Abstention – Criminal Penalty

If a local public official has a substantial interest in real property or a business entity – as defined by Chapter 171 – prior to any vote or decision on any matter involving the business entity or real property, the official must file a disclosure affidavit stating the nature and extent of the interest – and must abstain from further participation in the matter if:

(a) action on the matter will have a special economic effect on the business entity that is distinguishable from the effect on the public; or

(b) it is reasonably foreseeable that an action on the matter will have a special economic effect on the value of the real property which is distinguishable from its effect on the public.

A knowing violation of Chapter 171 constitutes a Class A misdemeanor – with a range of punishment being a fine not to exceed \$4,000, confinement in jail not to exceed one year, or both such fine and confinement.

Special Circumstances

If a local public official files an affidavit under Chapter 171, no abstention is required if a majority of the other members of the entity is composed of persons who are likewise required to file, and who do file, affidavits of similar interests on the same official action. Regarding the budget of the governmental entity, a separate vote is required on any budget item specifically dedicated to a contract with a business entity in which a member of the governing body has a substantial interest – and except as provided above, the affected member may not participate in that separate vote. However, the affected member may vote on the final budget if: (a) the member has fully complied with Chapter 171; and (b) the matter in which the member is concerned has been resolved.

Should a court find that a violation of Chapter 171 occurred, that violation does not void the action of the governing body – unless that action would not have passed without the vote of the person who violated Chapter 171.

APPENDIX