

OFFICEHOLDER DUTIES AND IMMUNITY
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I. Officeholder Immunities

From time to time, public officials are sued by unhappy vendors, citizens or employees. These suits may be brought against individuals in their official or individual capacities, or both. In general, suits brought against public servants in their official capacity are considered suits against the governmental entity. Normally governmental entities “performing governmental functions are immune from suit unless their immunity has been waived by statute or unless there is a common-law exception.”¹ Public officials and employees of local governmental entities, when acting in their official capacities, are protected by official immunity.² The immunity applies unless the acts performed are clearly outside the individual’s official functions. There are several types of immunities available to public servants who have been sued in their individual capacity. These immunities fall into two categories—“absolute” and “qualified.” Absolute immunity is a bar to suit—that is, the court has no jurisdiction to process the lawsuit. Qualified immunity is an affirmative defense which protects individuals from liability “who act in good faith, in their individual capacities, related to the performance of discretionary duties within the scope of [their] authority.”³

Individuals performing judicial, prosecutorial and legislative functions are protected by absolute immunity. An official’s conduct is “legislative” whether it is undertaken as part of a traditional legislative process, or is legislative in substance—i.e. “it reflects discretionary policymaking with prospective implications.”⁴ Legislative immunity extends to local governmental officials, precluding questioning about performance of legislative functions.⁵ Position or title is not determinative of the immunity question. Rather, it is the function performed which determines whether immunity protections are to be afforded. Factors to be considered include: whether the act establishes a policy, act or law, or merely enforces or administers one or just applies one.⁶

For day-to-day activities and decisions, qualified or official immunity protects individuals. Qualified immunity is the term used for a public servant’s defense when a suit is brought in federal court. A similar defense is available in state lawsuits that is known as official immunity. The Texas

¹ *White v. Eastland County*, 12 S.W.3d 97, 99-100 (Tex. App.—Eastland 1999, no pet.)

² *Medina County Commissioners Court v. Integrity Group, Inc.*, 944 S.W.2d 6, 9 (Tex. App.—San Antonio 1996, no writ).

³ *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994).

⁴ *Bogan v. Scott-Harris*, 118 S.Ct. 966, 971-72 (1988).

⁵ *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1193 (5th Cir. 1981).

⁶ *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).

Supreme Court has found the terms interchangeable.⁷ The doctrine was developed to permit governmental officials and employees to perform discretionary duties without fear of personal liability for negligent or improper performance.⁸ If an act involves personal deliberation, decision and judgment, it is discretionary; if an act is required and the person has no choice, the act is considered ministerial.⁹ The action must have been committed within the course and scope of the individual's employment.¹⁰ Of course, actions that are outside the course of a person's employment are not protected.¹¹

Qualified/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."¹² "Unlike sovereign immunity, qualified immunity shields the party from individual liability in the law suit."¹³ Basically, the public servant must show that a reasonably prudent official or public employee might have believed that the action taken was appropriate, not that it would have been unreasonable to take different action or that all reasonably prudent persons would have acted the same way.¹⁴ To succeed, a plaintiff must show that no reasonable person in that position could have thought that the facts justified such action. If an act involves personal deliberation, decision and judgment, it is discretionary; if an act is required and the person has no choice, the act is considered ministerial.¹⁵ The action must have been committed within the course and scope of the individual's employment.¹⁶

II. Reimbursement For Individual Legal Expenses

Public servants enjoy substantial immunity 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

⁷ *City of Houston v. Kilburn*, 849 S.W.2d 810, 812 n.1 (Tex. 1993).

⁸ *Champan v. Gonzales*, 824 S.W.2d 685, 687 (Tex. App.–Houston 1992, writ denied).

⁹ *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994).

¹⁰ *Id.*

¹¹ *Thomas v. White*, 102 S.W.3d 318, 321 (Tex. App.–Beaumont 2003,

¹² *Fraire v. City of Arlington*, 957 F.2d 1268, 1273 (5th Cir. 1992).

¹³ *McCartney v. May*, 50 S.W.3d 599, 605 (Tex. App.–Amarillo 2001, no pet.)

¹⁴ *Scott v. Britton*, 16 S.W.3d 173, 179 (Tex. App.–Houston 2000, no pet.)

¹⁵ *City of Lancaster v. Chambers*, 883 S.W.2d 650, 653 (Tex. 1994).

¹⁶ *Id.*

damage and reimbursement for legal expenses imposed on them by the courts. For example in the area of tort claims, Texas Civil Practice & Remedies Code Chapter 102 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.

Just because public servants may enjoy qualified immunity from other types of suits, this does not prevent suits from being filed. The Attorney General and the courts have recognized that in many instances suits are brought against public officials in their individual capacity “when they are really designed to obstruct or control the legitimate performance of official duties.”¹⁷ Public servants may be entitled to have their legal expenses paid for in certain suits brought against them personally for other actions arising from their office; e.g., if a majority of the disinterested members of a board of trustees of a district make a good faith determination that a defense of the action is in the public interest. Many political subdivisions 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 political subdivision is not required to do so, but may expend public funds to reimburse a public official 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 official’s work.

For a number of years, the Attorney General applied the same standard described above for civil lawsuits to situations where a public official was asking for reimbursement of legal expenses for defending himself from a criminal prosecution. That is, a reimbursement was permitted by the political subdivision if the governing board of the political subdivision found that paying of attorney’s fees served a public interest and not just the individual’s private interest, and if the board also found that the officer or employee committed the alleged act or omission in good faith and within the scope of their official duties.¹⁸ 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.

The Attorney General subsequently modified that rule, so that it now requires a political subdivision to wait to make the decision to reimburse until it knows that the public official prevailed in his defense of the criminal prosecution.¹⁹ The political subdivision is prohibited from paying the expenses of a public official found guilty.²⁰ An important condition to stress in this instance is that

¹⁷ Op. Tex. Att’y Gen. No. LA-24 (1973), p. 2.

¹⁸ Op. Tex. Att’y Gen. No. DM-488 (1998).

¹⁹ Op. Tex. Att’y Gen. No. JC-0294 (2000).

²⁰ While the Legislature has authorized reimbursing certain public officials in state agencies in defending a criminal prosecution, TEX. CIV. PRAC. & REM. CODE § 104.0035 in certain circumstances, similar legislation authorizing local governments to do likewise has not been enacted.

the determination must be made by those members disinterested in the outcome of the prosecution. This may be problematic in instances where the cause of action is being raised against all or a majority of the members of the governing board.

III. Officeholder Duties and Obligations

Public servants, both officeholders and administrators, are considered professionals. That is, persons who are expected to adhere to a certain standard of conduct. Scholars of the field suggest that professionals are persons whose value system as professionals represents the societal value system. The role of public servant goes beyond treating everyone with respect and dignity; it goes beyond maintaining appropriate confidentiality, and it goes beyond complying with the statutes. One definition of a profession concludes that, among other things, a profession generally involves a commitment to public service for the benefit of the protection of society. And that looks beyond the mere earning of a livelihood. Actually, this commitment can be thought of as some notion of social responsibility. Social responsibility is non-specific in nature. It is a commitment to the protection of society, a looking beyond the mere earning of a livelihood and considering the effect on society of how we perform our work. It is the product of individual talent and individual conscience.

It is essential that public servants have an integrated philosophy by which they order their activity and that philosophy must include some notion of social responsibility. It must also include some notion of the John Adams definition of virtue – a “positive passion for the public good.” In the current environment, that philosophy must also include some notion of ethics and integrity. We used to think of integrity as an individual value. While that is still true, public servants, as well as corporate executives, must now think of integrity as an organizational value. We all know that there are environments where corruption exists. An article in the Houston Chronicle on June 1, 2004 poses the riddle “How is the Texas public school system like Enron?”²¹ The article discusses a chapter of a book that will be published later this year. Linda M. McNeil, head of Rice University’s Center for Education, describes in her book how both Enron and Texas schools structured a system of rewards and punishment for executives and staff based on “a single indicator of success.” Enron made the price of stock so important that the pressure to boost stock prices led to bad deals, exaggerating the prospects of new operations, establishing off-the-books entities and doing bad deals. McNeil argues that for Texas schools the only measure that counts—first the TAAS and now the TAKS tests. We have read in various communities that school employees have exempted poorly achieving students from taking the tests, classifying them as special ed and have falsified results of the tests by not counting certain scores. If it is possible that professionals can create an environment that leads to sacrificing fundamental values to achieve a goal, surely it is possible that we can create an environment that nurtures the fundamental values of our society. Stratford Sherman argues that the bad behavior we are experiencing is the result of a “combination of factors, including increased reliance on rules, imprecise use of language, and a general coarsening of attitudes about ethics.”²²

²¹ Rick Casey, *Texas Schools are like Enron*, Houston Chronicle, Local & State section, June 2, 2004, p.

²² Stratford Sherman, *Rethinking Integrity*, Leader to Leader, Spring 2003, p. 44.

But he suggests that “the best of us create environments that nourish the integrity of others.”²³ To create such an environment, he says we need to “start by acknowledging that personal integrity may not always produce behavior that others can easily accept...” [and then] we need to systematically uproot the habits of insincerity by promoting authenticity.²⁴

The Institute for Local Self Government, a nonprofit research arm of the League of California Cities, published a Handbook for the New Mayors Conference in April 2004. One of the sections examined two common types of ethical dilemmas and suggested some approaches for solving them.²⁵ One of them is the situation where doing the right thing comes at a significant personal cost to you or your public agency—the Institute says, “The bottom line is that being ethical means doing the right thing for the entire community regardless of personal costs.” The article then discusses the situation where there are “two conflicting sets of ‘right’ values,” and suggests some questions that may help in determining the ethical course of action: (a) Which ethical values are in conflict (for example, trustworthiness, compassion, loyalty, responsibility, fairness, or respect)?; (b) What are the facts? What are the benefits to be achieved or the harm to be avoided by a particular decision? Is there a decision that does more good than harm?; (c) What are your options? Is there a course of action that would be consistent with both sets of values?; (d) Is one course of action more consistent with a value that is particularly important to your (for example, promise-keeping or trustworthiness)?; (e) What decision best reflects your responsibility as an officeholder to serve the interests of the community as a whole?; (f) What decision will best promote public confidence in the agency and your leadership?

How then to exert the moral leadership—set the ethical tone? James O’Toole says “simply adhere to a few common sense principles such as: obey the law; tell the truth; show respect for people; stick to the golden rule; *primum non nocere* (above all, do no harm); practice participation, not paternalism; always act when you bear responsibility (that is to say, take action when you have the capacity or resources to act, or when those nearby are in need and you are the only one who can help).”²⁶

When corporations do not meet the expectation of the public, society imposes greater social control—regulatory, judicial and legislative. When governments do not meet the expectations of the public, society imposes reform through judicial and legislative avenues. As professionals, on whatever level, our task goes beyond accomplishing a smooth running, efficient, effective organization. It includes making an adequate contribution to society. It includes being socially responsible.

²³ Stratford Sherman, *Rethinking Integrity, Leader to Leader*, Spring 2003, p. 39.

²⁴ Stratford Sherman, *Rethinking Integrity, Leader to Leader*, Spring 2003, p. 44.

²⁵ *Establishing A Public Service Ethic*, Public Confidence Project, Institute for Local Self Government, www.ilsg.org.

²⁶ *Moral Courage, Best of Business*, December 1985.

