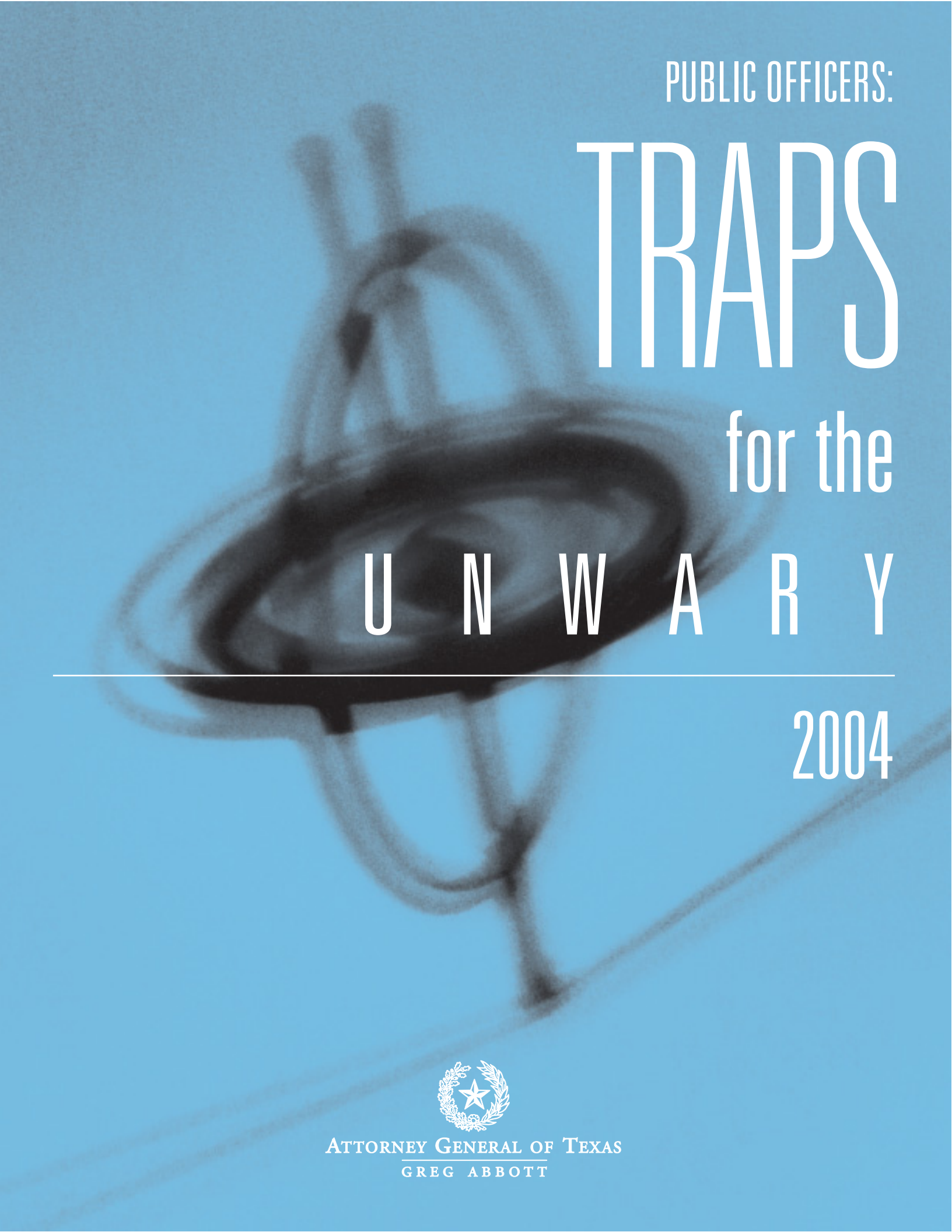

PUBLIC OFFICERS:

TRAPS for the UNWARY

2004

ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

ATTORNEY GENERAL OF TEXAS

GREG ABBOTT

Dear State and Local Officials:

While it is a privilege to serve, public officers often encounter legal and ethical pitfalls, land mines and traps while doing their job. These may include everything from conflicts of interest and nepotism to the state Whistleblower Act.

As your Attorney General, I want to provide public officials in Texas with the best possible legal advice and support. As part of that, we have prepared *Public Officers: Traps for the Unwary 2004*, an updated handbook that incorporates legislative changes, recent case law and Attorney General opinions issued since the handbook was last published in 2002.

This handbook is not a substitute for legal advice, but can provide guidance about various legal constraints that may affect you in the performance of your official duties. Our goal is to help you avoid common mistakes and "traps for the unwary."

I urge you to become familiar with the contents of the handbook (also available on the Internet at www.oag.state.tx.us). Well-informed state and local government officials are important to a responsible, ethical and accountable government.

Sincerely,

Greg Abbott

GREG ABBOTT
Attorney General of Texas

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APPENDIX

I. Introduction

Public officers and employees, as well as the attorneys who advise them, need to be well-informed about the five topics addressed in this handbook — conflict of interest, nepotism, dual office holding, sequential office holding and the Whistleblower Act. These laws help ensure that the public officer works for the benefit of the public that he or she was elected or appointed to serve.

Conflict of interest laws, for example, address the personal interests that can undermine one's loyalty to his or her public duties, while nepotism laws prevent a public officer from serving his or her personal interest by providing employment for relatives instead of serving the public interest by hiring the best qualified employees. The common-law rule of incompatibility of office — an aspect of dual office holding — prevents one person from holding two offices with conflicting duties. "Resign to run" provisions and similar restrictions are designed to keep the officer's attention on the office he or she holds, rather than the next one to which he or she aspires. Finally, a public employee who reports violations of law by other agency personnel is protected from reprisal by the Whistleblower Act.

Although these areas of law are related in purpose, they have different histories, use different terminology and operate differently. This handbook discusses each one in enough detail to make the differences clear.

The discussions of conflict of interest, nepotism, dual office holding and, to a lesser extent, sequential office holding rely heavily on attorney general opinions. There are relatively few judicial decisions in these areas, and much of the law has been developed in advisory opinions issued by this office. The discussion of the Whistleblower Act, in contrast, relies on the numerous judicial decisions that construe and apply it.

This handbook describes and summarizes each area of law. Readers who wish to apply one of these laws to a particular set of facts should not rely on the handbook as a source of law but should read the relevant statutes, judicial decisions and attorney general opinions and update their research with any more recent authorities. Seeking local legal counsel is also advised.

II. Conflict of Interest

A. Overview

Conflict of interest rules are directed at preventing public officials from using their authority for personal economic benefit rather than for the benefit of the public.[1] This area of the law has traditionally focused on public contracts in which a member of the contracting body has a personal economic interest. Contracts in which a contracting officer is interested have been held invalid by the courts[2] on the basis of public policy and civil and criminal statutes.[3]

In recent years the legislature has adopted statutes codifying or changing the common-law prohibitions against conflicts of interests in public contracting. It has also addressed other kinds of outside interests, such as interests that might interfere with a public officer's impartial performance of regulatory duties. *See* Tex. Att'y Gen. Op. No. JC-0067 (1999) (discussing statute barring officer, employee, or paid consultant of trade association in the field of fire protection from serving on Texas Commission on Fire Protection). Some of the statutes punish the wrongdoer,[4] while others attempt to prevent conflicts from arising by disqualifying from public service those whose particular interests might interfere with their relevant public duties.[5]

B. Common-Law Conflict of Interest

The judicial decisions on common-law conflict of interest rules involve city and county officers, but attorney general opinions have also applied these rules to officers of school districts, other types of political subdivisions, state agencies and institutions of higher education.[6] Chapter 171 of the Local Government Code has changed the common-law conflict of interest rule for local officers,[7] but this doctrine is still relevant to conflicts of interest involving state officers.

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[1] *Int'l Bank of Commerce of Laredo v. Union Nat'l Bank of Laredo*, 653 S.W.2d 539, 548 (Tex. App.–San Antonio 1983, writ ref'd n.r.e.).

[2] *Meyers v. Walker*, 276 S.W. 305, 307 (Tex. Civ. App.–Eastland 1925, no writ).

[3] "It has long been the public policy of this state to prohibit officers of a city from having a personal pecuniary interest in contracts with the city and this policy is specifically expressed in both the penal and civil statutes." *City of Edinburg v. Ellis*, 59 S.W.2d 99 (Tex. Comm'n App. 1933, holding approved) (citing former article 373 of the Penal Code and former article 988 of the Revised Civil Statutes (1925)).

[4] *See* TEX. PEN. CODE ANN. ch. 39 (Vernon 2003) (abuse of office).

[5] *See* TEX. FIN. CODE ANN. § 11.1021 (Vernon Supp. 2004) (disqualification from service on finance commission of persons with certain connections with Texas trade association in industry regulated by finance agency and of registered lobbyists whose lobbying activities bear a certain relationship to a finance agency).

[6] *See* Tex. Att'y Gen. LO-97-072 (member of Board of Criminal Justice may not bid on work for Department of Criminal Justice); Tex. Att'y Gen. Op. Nos. JM-884 (1988) (Commission for the Deaf), JM-817 (1987) (state university board of regents), MW-179 (1980) (Board of Health), H-916 (1976) (school district board of trustees), V-640 (1948) (state college board of regents).

[7] *See* section C.1. for a discussion of chapter 171of the Local Government Code.

The court in *Meyers v. Walker*[8] stated why public officers may not have a financial interest in contracts they enter into on behalf of a governmental body:

> **If a public official directly or indirectly has a pecuniary interest in a contract, no matter how honest he may be, and although he may not be influenced by the interest, such a contract so made is violative of the spirit and letter of our law, and is against public policy.**[9]

A contract made in violation of this policy is illegal and void,[10] because of the possibility that the public officer's personal interests would be adverse to the faithful discharge of public duty.[11] The fact that the officer acted "with sincerest purpose and no intention of wrong"[12] and that he or she exercised no influence does not keep the contract from violating conflict of interest laws.[13]

A public official's indirect interest is sufficient to invalidate a public contract. In *Bexar County v. Wentworth*,[14] Bexar County's purchase of voting machines was invalid because the Bexar County commissioner who cast the deciding vote to let the contract held an exclusive sales contract with the company that supplied the voting machines.[15] The commissioner was entitled to compensation for every voting machine he sold in Texas, except in Bexar County. Nonetheless, the court found that he still could have an indirect interest in the contract with Bexar County because the sale of voting machines there could promote the sales elsewhere.[16] Similarly, an attorney general opinion concluded that a school district could not contract with a company that employed a member of the district's board of trustees.[17] Even though the trustee derived no direct financial benefit from the contract, he still had an interest in the success of his employer.[18]

The court in *Bexar County v. Wentworth* also relied on former article 2340, Revised Civil Statutes, the predecessor statute to section 81.002 of the Local Government Code. It described this statute, which required each commissioner to swear that he would not be directly or indirectly interested in

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[8]276 S.W. 305 (Tex. Civ. App.–Eastland 1925, no writ).

[9]*Id.* at 307.

[10]*Id.*

[11]*Delta Elec. Constr. Co. v. City of San Antonio,* 437 S.W.2d 602, 609 (Tex. Civ. App.–San Antonio 1969, writ ref'd n.r.e.).

[12]*Meyers,* 276 S.W. at 307.

[13]*Delta Elec. Constr. Co.*, 437 S.W.2d at 608-09.

[14]378 S.W.2d 126 (Tex. Civ. App.–San Antonio 1964, writ ref'd n.r.e.).

[15]*Id.*

[16]*Id.* at 129.

[17]Tex. Att'y Gen. Op. No. H-916 (1976).

[18]*But see Crystal City v. Del Monte Corp.*, 463 F.2d 976, 980 (5th Cir. 1972) (city council member did not have personal pecuniary interest as a matter of law in city ordinance exempting his employer from annexation for seven years; whether or not he had an interest was question of law).

any contract or claim against the county, except for warrants issued as fees of office, as incorporating the common-law rule. The legislature has adopted other statutes codifying the common-law rule with respect to particular kinds of contracts.[19]

The conflict of interest rule stated in *Meyers v. Walker* has most commonly been applied to contracts in which public officers were pecuniarily interested. In *Hager v. State*,[20] however, the court relied on this rule and the rule on judicial disqualification to determine that a city councilman could not vote on appealing a judicial decision that ordered the city to call an election on recalling him from office.[21]

C. Legislative Changes to Common-Law Conflict of Interest Rules

For many years, the common-law conflict of interest doctrine barred governmental bodies from entering into particular contracts.[22] The common-law rule in some cases seemed unnecessarily strict, such as when an officer's minimal interest in an entity barred a contract,[23] or when a governmental entity was prevented from securing a necessary service.[24] On the other hand, the common-law rule did not necessarily reach a pecuniary interest in a public contract held by a public officer's family member.[25] In 1983, the legislature addressed some of these problems by adopting former article 988b, Revised Civil Statutes,[26] which modified the common-law rule previously applicable to local public officials. Former article 988b is now codified as Local Government Code chapter 171.

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[19]*See* TEX. CIV. PRAC. & REM. CODE ANN. § 34.048 (Vernon 1997) (if officer or deputy conducting an execution sale directly or indirectly buys property, sale is void); TEX. LOC. GOV'T CODE ANN. § 351.101 (Vernon Supp. 2004) (commissioners court may not contract with private detention facility in which member of court or peace officer who serves in the county has financial interest or in which employee or commissioner of Commission on Jail Standards has a financial interest).

[20]446 S.W.2d 43 (Tex. Civ. App.–Beaumont 1969, writ ref'd n.r.e.).

[21]*See also* Tex. Att'y Gen. Op. No. JM-1004 (1989).

[22]*See* Tex. Att'y Gen. Op. Nos. MW-124 (1980) (county contract for road materials in which county commissioner has indirect interest); MW-34 (1979) (county may not pay former county judge for services rendered while judge was still in office); H-79 (1973) (State Board of Education may not adopt textbooks upon which state will realize pro-rata royalties from publishers); M-1236 (1972), WW-1362 (1962), O-878 (1939) (school district may not purchase from company in which trustee has pecuniary interest).

[23]*See* Tex. Att'y Gen. Op. No. H-624 (1975) (commissioners court not allowed to purchase supplies from farmer's cooperative in which commissioner owned small share).

[24]*See* Tex. Att'y Gen. Op. No. H-734 (1975) (school district should not contract with one of its trustees to furnish garbage pickup, even though trustee operated only garbage pickup service in area).

[25]*See* Tex. Att'y Gen. Op. No. H-354 (1974) (county may purchase gasoline from corporation owned by brother of county commissioner). *See generally* Tex. Att'y Gen. Op. Nos. WW-1406 (1962), WW-957 (1960) (effect of marital property rights on public contract where officer's spouse has pecuniary interest in contract).

[26]Act of May 30, 1983, 68th Leg., R.S., ch. 640, 1983 Tex. Gen. Laws 4079.

1. Local Government Code, Chapter 171

Chapter 171 of the Local Government Code[27] prohibits a local public official from participating in a vote on a matter involving a business entity or real property in which the official has a substantial interest if it is reasonably foreseeable that an action on the matter would confer an economic benefit on the business entity or real property.[28] This enactment preempts common-law conflicts of interest rules as applied to local public officials and is cumulative of municipal charter provisions and ordinances defining and prohibiting conflicts of interest.[29] A violation of chapter 171 does not render an action of the governing body voidable unless the measure would not have been approved without the vote of the person who violated its provisions,[30] but the person who knowingly violates its requirements commits an offense punishable as a Class A misdemeanor.[31]

A local public official within chapter 171 is:

> **a member of the governing body or another officer, whether elected, appointed, paid, or unpaid, of any district (including a school district), county, municipality, precinct, central appraisal district, transit authority or district, or other local governmental entity who exercises responsibilities beyond those that are advisory in nature.**[32]

A person has a substantial interest in a business entity if:

> **(1) the person owns 10 percent or more of the voting stock or shares of the business entity or owns either 10 percent or more or $15,000 or more of the fair market value of the business entity; or**
>
> **(2) funds received by the person from the business entity exceed 10 percent of the person's gross income for the previous year.**[33]

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[27]The full text of this statute is found in the Appendix to these materials.

[28]TEX. LOC. GOV'T CODE ANN. § 171.004 (Vernon 1999). Chapter 171 of the Local Government Code does not apply to a local officer's interest in his or her compensation from the local government because this is not an interest in a business entity or in real estate. Tex. Att'y Gen. LO-98-097, at 3.

[29]TEX. LOC. GOV'T CODE ANN. § 171.007 (Vernon 1999).

[30]*Id.* § 171.006.

[31]*Id.* § 171.003(a); *see Walk v. State*, 841 S.W.2d 430 (Tex. App.–Corpus Christi 1992, writ ref'd) (discussing "knowing" violation as well as other issues involved in criminal prosecution under chapter 171 of Local Government Code).

[32]TEX. LOC. GOV'T CODE ANN. § 171.001(1) (Vernon 1999); *see also id.* § 171.0025 (application of chapter 171 to member of higher education authority); Tex. Att'y Gen. Op. No. DM-309 (1994) (member of City of Dallas Planning and Zoning Commission is a "local public official" within chapter 171 of Local Government Code).

[33]TEX. LOC. GOV'T CODE ANN. § 171.002(a)(1) (Vernon 1999); *see also id.* § 171.002(a)(2) (substantial interest in real property). The earnings of a public official's minor or dependent child are part of the child's gross income, not the public official's gross income. Tex. Att'y Gen. Op. No. JC-0063 (1999).

A local public official is also considered to have a substantial interest under the statute if a person related to the official in the first degree by consanguinity or affinity has such an interest.[34]

The definition of "business entity" is found in section 171.001(2) of the Local Government Code. An individual may be a business entity under this provision.[35] Neither a city nor a state university is a business entity within chapter 171 of the Local Government Code.[36]

The definition of "substantial interest" makes no distinction between funds received directly from the business entity and funds received indirectly, but a court has addressed this issue. In *Dallas County Flood Control District No. 1 v. Cross*,[37] the court stated as follows:

> **Limiting this provision [the definition of "substantial interest"] to funds directly received from the business entity would seriously undermine its effectiveness in deterring self-dealing among our public officials. On the other hand, the indiscriminate inclusion of all funds indirectly received from a business entity — no matter how remote — would far exceed the scope of the statute.**[38]

The court concluded that "substantial interest" would encompass funds indirectly received from a business entity if the business entity participated in causing the intervening party to engage in the transaction with the public official.[39] Whether a particular interest is a substantial interest for purposes of chapter 171 is a question of fact.[40]

If a local public official has a substantial interest in a business entity or in real property and if action on a matter will have a special economic effect on the business entity or on the value of the property that is distinguishable from its effect on the public, the official must file an affidavit stating the nature and extent of the interest before a vote or decision on any matter involving the business entity or real property,[41] and then abstain from further participation.[42] When a local public officer has a substantial interest in a proposed action of a local governmental entity, the officer, rather than the

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[34]TEX. LOC. GOV'T CODE ANN. § 171.002(c) (Vernon 1999); s*ee* Tex. Att'y Gen. LO-97-028 (local public official does not have "substantial interest" by virtue of kinship in law firm in which his brother is shareholder).

[35]*Dallas County Flood Control Dist. No. 1 v. Cross*, 815 S.W.2d 271, 278 (Tex. App.–Dallas 1991, writ denied); *see* Tex. Att'y Gen. LO-94-055 (individual's law practice is business entity within chapter 171 of Local Government Code).

[36]Tex. Att'y Gen. Op. Nos. DM-267 (1993), JM-852 (1988).

[37]773 S.W.2d 49 (Tex. App.–Dallas 1989, no writ).

[38]*Dallas County Flood Control Dist. No. 1 v. Cross*, 773 S.W.2d 49, 55 (Tex. App.–Dallas 1989, no writ).

[39]*Id.*; *see also Dallas County Flood Control Dist. No. 1*, 815 S.W.2d at 279 (applying test on second appeal of case).

[40]*Dallas County Flood Control Dist. No. 1*, 773 S.W.2d at 55 (considering summary judgment evidence); Tex. Att'y Gen. Op. No. JM-1187 (1990).

[41]TEX. LOC. GOV'T CODE ANN. § 171.004(a) (Vernon 1999). The affidavit is to be filed with the official records keeper of the governmental entity. *Id.* § 171.004(b).

[42]*Id*. § 171.004(a).

governmental body, should decide in the first instance whether the proposed action will have a special economic effect on him or her.[43] "Participation" in the vote or decision for purposes of chapter 171 includes deliberating about a matter with the other members of the governing body; voting is not essential.[44]

Section 171.010 relates to a county judge or county commissioner engaged in the private practice of law who intends to practice in the courts of the county where the officer serves.[45] The county judge or commissioner has a substantial interest in a business entity if he or she has entered a court appearance or signed court pleadings in a matter relating to the business entity.[46] Upon compliance with chapter 171, the official may practice law in the courts of the county that he or she serves.[47]

However, a judge of a constitutional county court may not enter a court appearance or sign court pleadings as an attorney in any matter before the court over which the judge presides or any court of the state over which the judge's court exercises appellate jurisdiction.[48]

Chapter 171 of the Local Government Code impliedly repeals section 81.002 of the Local Government Code – the oath requirement for the county judge and county commissioners – to the extent of inconsistencies between the two statutes.[49] Section 84.007(b) of the Local Government Code, which requires a county auditor to take an oath that he will not be personally interested in a contract with the county, is also impliedly repealed by chapter 171 to the extent of conflict.[50]

The legislature has expressly incorporated the requirements of chapter 171 of the Local Government Code into other statutes.[51] For example, officers and members of the governing body of an open-enrollment charter school are considered to be local public officials for purposes of chapter 171 of

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[43]Tex. Att'y Gen. LO-98-052.

[44]Tex. Att'y Gen. Op. No. JM-379 (1985).

[45]TEX. LOC. GOV. CODE ANN. § 171.010 (Vernon Supp. 2004). Attorney General Opinions JC-0033 (1999) and JC-574 (2002) address the conflicts that arise when a county judge or county commissioner wishes to practice law in the courts of the county that he or she serves.

[46]*Id.* § 171.010(b).

[47]*Id.* § 171.010(d).

[48]*Id.* § 171.110(c).

[49]Tex. Att'y Gen. Op. Nos. JC-0121 (1999) at 7 (chapter 171 of the Local Government Code does not apply to approval of bail bonds and does not provide exception to section 81.002(a) of the Local Government Code); DM-279 (1993).

[50]Tex. Att'y Gen. Op. No. DM-303 (1994).

[51]*See, e.g.*, TEX. HEALTH & SAFETY CODE ANN. § 534.0065(g)(1) (Vernon 2003) (member of board of trustees of community mental health/mental retardation center); TEX. TRANSP. CODE ANN. § 452.505 (Vernon 1999) (members of executive committee and officers of regional transportation authority).

the Local Government Code.[52] It has also adopted specialized conflict of interest provisions for particular entities.[53] When researching a possible conflict of interest involving a local official, it is necessary to consult the statutes applicable to the particular official as well as chapter 171 of the Local Government Code.

2. Depository Statutes

Before 1967, the strict common-law conflict of interest rule applied to contracts between governmental entities and banks, preventing a state agency or political subdivision from contracting with a bank if a member of its governing body was an officer, director or shareholder of the bank.[54] A statute adopted in 1967 changed the common-law rule applicable to contracts with depository banks, providing that a bank would not be disqualified from becoming the depository for any agency or political subdivision of the state even though an officer or employee of the agency or political subdivision had certain pecuniary interests in the bank.[55] This enactment is now codified as section 404.0211 of the Government Code, applicable to state agencies, and as section 131.903 of the Local Government Code, applicable to political subdivisions. Section 404.0211 of the Government Code provides that a bank is not disqualified from serving as a depository for funds of a state agency if:

> **(1) an officer or employee of the agency who does not have the duty to select the agency's depository is an officer, director, or shareholder of the bank; or**
>
> **(2) one or more officers or employees of the agency who have the duty to select the agency's depository are officers or directors of the bank or own or have a beneficial interest, individually or collectively, in 10 percent or less of the outstanding capital stock or the bank, if:**
>
> > **(A) a majority of the members of the board, commission, or other body of the agency vote to select the bank as a depository; and**
> >
> > **(B) the interested officer or employee does not vote or take part in the proceedings.**

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[52]TEX. EDUC. CODE ANN. § 12.1054 (Vernon Supp. 2004).

[53]*See* TEX. TAX CODE ANN. § 6.036 (Vernon 2001) (appraisal district may not enter into contract with member of its board of directors or with business entity in which member has substantial interest).

[54]Tex. Att'y Gen. Op. Nos. WW-957 (1960) (wife of stockholder in bank that serves as depository for school district has pecuniary interest in school district's contract with bank); V-640 (1948) (where member of state college board of regents is officer of bank, contract between bank and board of regents is invalid).

[55]Act of Apr. 26, 1967, 60th Leg., R.S., ch. 179, 1967 Tex. Gen. Laws 370.

Section 131.903 of the Local Government Code establishes the same requirements for officers and employees of a political subdivision.[56] Conflicting provisions in the charter of a home-rule municipality are not changed by section 131.903.[57] With respect to conflicts of interest in the selection of depositories, section 131.903 prevails over the general conflict of interest provision found in chapter 171 of the Local Government Code.[58]

3. Contracts Between Institutions of Higher Education and Corporations

A common-law rule known as "dual agency" prevents one person from representing both parties in a transaction. This rule previously limited contracting and other transactions between institutions of higher education and nonprofit corporations whose directors included officers of the institution,[59] but the legislature has modified this limit by adopting section 51.923 of the Education Code. This provision authorizes the governing board of an institution of higher education to contract with a nonprofit corporation even though one or more members of the governing board also serves as a member or director of the nonprofit corporation.

Section 51.923 also provides an exception to the common-law rule invalidating contracts in which a member of the governing board of an institution of higher education is pecuniarily interested.[60] The governing board of an institution of higher education may enter into a contract or another transaction with a for-profit corporation even though one or more members of the institution's governing board also serves as a stockholder or director of the corporation,

> **provided that no member of the governing board owns or has a beneficial interest in more than five percent of the corporation's outstanding capital stock and further provided that the contract or transaction is:**
>
> **(1) an affiliation, licensing, or sponsored research agreement; or**
>
> **(2) awarded by competitive bidding or competitive sealed proposals.**[61]

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[56]*See also* TEX. LOC. GOV'T CODE ANN. § 116.024(d) (Vernon 1999) (conflict of interest provision of section 131.903 applies to selection of county depositories); *id.* § 117.023(c) (conflict of interest provision of section 131.903 applies to county's selection of depository for trust funds held by county and district clerks).

[57]*Id.* § 131.903(b); *see Int'l Bank of Commerce of Laredo*, 653 S.W.2d at 547-48 (bank disqualified from serving as city depository where president and owner of 20 percent of stock was chairman of city waterworks); *see also* TEX. EDUC. CODE ANN. § 45.204 (Vernon 1996) (member of board of trustees of school district who is stockholder, officer, director, or employee of bank may not vote on awarding depository contract to bank).

[58]Tex. Att'y Gen. LO-97-093; *see also* Tex. Att'y Gen. Op. Nos. JM-1082 (1989), JM-583 (1986) (conflict of interest provision applicable to selection of school district depositories prevails over chapter 171 of the Local Government Code).

[59]*See* Tex. Att'y Gen. Op. No. H-1309 (1978). A state agency authorized by statute to accept money from a private donor or for which a private organization exists to further the agency's purposes is required by statute to adopt rules governing the relationship between the donor or organization and the agency and its employees. *See* TEX. GOV'T CODE ANN. § 2255.001 (Vernon 2000).

[60]*See* Tex. Att'y Gen. Op. No. JM-817 (1987).

[61]TEX. EDUC. CODE ANN. § 51.923(c) (Vernon 1996).

A board member with an interest in the contract or transaction must disclose that interest in a public meeting and refrain from voting on the contract or transaction.[62]

D. Statutes Applicable to State Agency Officers and Employees

1. Government Code, Chapter 572, Subchapter C Standards of Conduct and Conflict of Interest Provisions

Section 572.001 of the Government Code provides in part:

> **(a) It is the policy of this state that a state officer or state employee may not have a direct or indirect interest, including financial and other interests, or engage in a business transaction or professional activity, or incur any obligation of any nature that is in substantial conflict with the proper discharge of the officer's or employee's duties in the public interest.**[63]

Chapter 572 provides standards of conduct and disclosure requirements for state officers and employees, which serve "not only as a guide for official conduct but also as a basis for discipline of those who refuse to abide by its terms."[64] The Texas Ethics Commission issues written opinions on chapter 572, which may be requested by a person subject to its provisions.[65]

Subchapter C of chapter 572 sets out standards of conduct and conflict of interest provisions for state officers and employees. Of the provisions found in subchapter C, section 572.051 applies to the broadest category of persons. Section 572.051 provides that a state officer or employee should not:

> **(1) accept or solicit any gift, favor, or service that might reasonably tend to influence the officer or employee in the discharge of official duties or that the officer or employee knows or should know is being offered with the intent to influence the officer's or employee's official conduct;**
>
> **(2) accept other employment or engage in a business or professional activity that the officer or employee might reasonably expect would require or induce the officer or employee to disclose confidential information acquired by reason of the official position;**

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[62] *Id.* § 51.923(d).

[63] TEX. GOV'T CODE ANN. § 572.001(a) (Vernon 1994).

[64] *Id.* § 572.001(b), (c).

[65] *Id.* § 571.091 (Vernon Supp. 2004) (Commission's authority to prepare written opinions on chapters 302, 303, 305, 572, and 2004 of Government Code, title 15 of Election Code, and chapters 36 and 39 of Penal Code).

(3) accept other employment or compensation that could reasonably be expected to impair the officer's or employee's independence of judgment in the performance of the officer's or employee's official duties;

(4) make personal investments that could reasonably be expected to create a substantial conflict between the officer's or employee's private interest and the public interest; or

(5) intentionally or knowingly solicit, accept, or agree to accept any benefit for having exercised the officer's or employee's official powers or performed the officer's or employee's official duties in favor of another.[66]

Section 572.051 prohibits officers and employees of a state agency from having various kinds of interests that would conflict with their loyalty to the agency. Determining whether this provision has been violated involves the resolution of fact questions, so that questions arising under this provision ordinarily cannot be resolved as a matter of law in an attorney general opinion.[67] Whether a state employee has violated this provision should be determined by the employing agency.

Other provisions of subchapter C apply to other conflicts of interest affecting specific classes of state officers and employees. Section 572.056 prohibits a state officer from soliciting or accepting compensation from a governmental entity for soliciting the award of a contract to a governmental body, except where the contract is awarded by competitive bids or is a court appointment. Section 572.057 prohibits a member of the legislature, an executive or judicial officer elected in a statewide election, or a business entity in which the legislator or officer has a substantial interest from leasing any office space or other real property to the state, its executive or legislative agencies, or the Supreme Court of Texas, the Court of Criminal Appeals, or a state judicial agency. Section 572.058 provides that certain elected or appointed officers having policy direction over a state agency shall not vote or participate in a measure, proposal or decision in which the officer has a personal or private interest. Other provisions of subchapter C apply to legislators,[68] former officers and employees of a regulatory agency,[69] and an association or organization of employees of a regulatory agency.[70] Persons interested in any of these provisions should consult its language and any opinions by the courts, the Attorney General or the Texas Ethics Commission that construe it.

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[66]*Id.* § 572.051 (Vernon 1994).

[67]Tex. Att'y Gen. Op. Nos. JC-0020 (1999) at 2; JM-745 (1987); H-688 (1975).

[68]TEX. GOV'T CODE ANN. §§ 572.052 (Vernon Supp. 2004) (restricting legislator's representation of another person before state agency for compensation), .053 (Vernon 1994) (barring legislator from voting on certain measures or bills benefitting business entity in which legislator has controlling interest).

[69]*Id.* § 572.054 (Vernon 1994) (restricting representation before officer or employee of agency by former officer or employee).

[70]*Id.* § 572.055 (prohibiting certain solicitations of regulated business entities by association or organization of employees).

2. Disqualification of Interested Persons from High-Level Positions: Sunset Advisory Commission Across-the-Board Recommendations

The across-the-board recommendations of the Sunset Advisory Commission[71] include provisions relating to conflicts of interest, and these have been added to many of the statutes governing state agencies. These provisions, unlike the common-law rule, operate by disqualifying a person with certain interests from serving as an officer or high-level employee of the agency rather than by invalidating contracts in which a member of the governing body has a personal pecuniary interest.

One such provision disqualifies a person from being appointed to a board if the person has certain economic interests that conflict with the board's interest. This across-the-board provision reads as follows:

> **(b) A person is not eligible for appointment as a member of the board if the person or the person's spouse:**
>
> **(1) is employed by or participates in the management of a business entity or other organization receiving funds from the authority;**
>
> **(2) owns or controls, directly or indirectly, more than a 10 percent interest in a business entity or other organization receiving funds from the authority; or**
>
> **(3) uses or receives a substantial amount of tangible goods, services, or funds from the authority, other than compensation or reimbursement authorized by law for board membership, attendance, or expenses.[72]**

Another across-the-board provision addresses the conflicts that can result if an agency has close ties with a trade association or board members or the general counsel are involved in lobbying. An example of this provision, from the statute governing the Credit Union Commission,[73] reads as follows:

> **(b) A commission member may not be:**
>
> **(1) an officer, employee, or paid consultant of a trade association representing or affiliated with a financial institution group or an entity affiliated with financial institutions;**

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[71] At each regular legislative session, the Sunset Advisory Commission reports to the Governor and the legislature on state agencies scheduled to be abolished. *See* TEX. GOV'T CODE ANN. § 325.010 (Vernon 1998). Among other things, its report recommends legislation. *Id.* The "across-the-board" recommendations are general standards that address common agency problems, and the commission includes these in any legislation that continues an agency. *See* SUNSET ADVISORY COMMISSION, GUIDE TO THE TEXAS SUNSET PROCESS 7 (2003), *available at* http://www.sunset.state.tx.us/guide.pdf.

[72] TEX. GOV'T CODE ANN. § 1232.052(b) (Vernon Supp. 2004) (Texas Public Finance Authority).

[73] TEX. FIN. CODE ANN. ch. 15 (Vernon 1998 & Supp. 2004).

(2) a spouse of an officer, manager, or paid consultant of a trade association representing or affiliated with a financial institution group or an entity affiliated with financial institutions; or

(3) a person who is required to register as a lobbyist under Chapter 305, Government Code, because of the person's activities for compensation on behalf of a profession related to the operation of the commission.[74]

The following across-the-board provision also applies to the Credit Union Commission:

> **A person may not be an employee of the department who is exempt from the state's position classification plan or is compensated at or above the amount prescribed by the General Appropriations Act for step 1, salary group 17, of the position classification salary schedule, if the person is:**
>
> **(1) an officer, employee, or paid consultant of a trade association representing or affiliated with a financial institution group or an entity affiliated with financial institutions; or**
>
> **(2) a spouse of an officer, manager, or paid consultant of a trade association representing or affiliated with a financial institution group or an entity affiliated with financial institutions.**[75]

Violations of the above provisions are grounds for removal from the board.[76]

The across-the-board provisions may be tailored to the particular agency's functions and modified in other ways during the legislative process. The statute applicable to a particular state agency must be consulted for the text of any across-the-board provisions included in it as well as for other conflict of interest provisions relevant to its officers and employees.

E. Penal Code Section 39.02(a)(2): Misuse of Government Property

Section 39.02 of the Penal Code provides that:

> **(a) A public servant commits an offense if, with intent to obtain a benefit or with intent to harm or defraud another, he intentionally or knowingly:**
>
> **. . . .**

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[74]*Id.* § 15.202(b) (Vernon Supp. 2004); *see* Tex. Att'y Gen. Op. No. DM-0151 (1992) (member of firm that employs lobbyists is not disqualified from serving as commissioner of General Services Commission).

[75]TEX. FIN. CODE. ANN. § 15.311 (Vernon Supp. 2004).

[76]*Id.* § 15.206.

(2) misuses government property, services, personnel, or any other thing of value belonging to the government that has come into the public servant's custody or possession by virtue of the public servant's office or employment.[77]

The penalty for violating subsection (a)(2) ranges from a Class C misdemeanor to a first degree felony, depending on "the value of the use of the thing misused."[78] "Misuse" means to deal with property contrary to:

(A) an agreement under which the public servant holds the property;

(B) a contract of employment or oath of office of a public servant;

(C) a law, including provisions of the General Appropriations Act specifically relating to government property, that prescribes the manner of custody or disposition of the property; or

(D) a limited purpose for which the property is delivered or received.[79]

This statute addresses a serious violation of the public trust – a public servant's misuse of government property, services, personnel or any other thing of value belonging to the government that is in that person's custody or possession because of his or her public position. Judicial decisions arising out of prosecutions under Penal Code section 39.02(a)(2) illustrate various kinds of property uses that may violate it. For example, a county commissioner was convicted of official misconduct for using county equipment to clear property belonging to his family, and the indictment for this offense was reviewed and upheld in *Talamantez v. State*.[80] The court in *Megason v. State*[81] affirmed the conviction of a former county clerk for misuse of county funds and personnel in violation of Penal Code section 39.02(a)(2). As clerk, she had submitted invoices to the county in the name of a moving company owned by her two children for services in moving old record books. County employees and work-release inmates had in fact done most of the work, the two children performed no work, and the majority of the county's payment went into the clerk's personal account.[82]

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[77]TEX. PEN. CODE ANN. § 39.02(a)(2) (Vernon 2003).

[78]*See id.* § 39.02(c).

[79]*Id.* § 39.01(2).

[80]829 S.W.2d 174 (Tex. Crim. App. 1992).

[81]19 S.W.3d 883 (Tex. App.–Texarkana 2000, pet. ref'd).

[82]*See also Margraves v. State*, 34 S.W.3d 912 (Tex. Crim. App. 2000) (affirming conviction of former university regent of official misconduct for using a university airplane for personal travel while serving as regent); *State v. Goldsberry*, 14 S.W.3d 770 (Tex. App.–Houston [1st Dist.] 2000, pet. ref'd) (upholding indictment charging a city employee with misusing the city's computer system and computer services).

F. Conflict of Interest Provisions in the Texas Constitution

1. Legislators

Article III, section 18 of the Texas Constitution provides in part:

> **nor shall any member of the Legislature be interested, either directly or indirectly, in any contract with the State, or any county thereof, authorized by any law passed during the term for which he was elected.**

This prohibition applies to current members of the legislature; it does not bar former members of the legislature from entering into a contract based on law adopted during a term served by the former legislator.[83] It prohibits contracts between the state and companies owned, controlled and operated by a member of the legislature, if the contract is authorized by a general statute or appropriations act passed during the legislator's term of office.[84] Contracts entered in violation of this provision are void.[85] However, an attorney's representation of an indigent defendant is not a "contract" between the attorney and the state or county, even though the attorney may receive the incidental benefit of reasonable attorney's fees for representing the defendant.[86]

Article III, section 22 of the constitution provides that a member of the legislature:

> **who has a personal or private interest in any measure or bill, proposed, or pending before the Legislature, shall disclose the fact to the House, of which he is a member, and shall not vote thereon.**

Section 572.058 of the Government Code, which provides that certain elected or appointed officers having policy direction over a state agency shall not vote or participate in a measure, proposal or decision in which the officer has a personal or private interest, states that "personal or private interest" has the same meaning as is given to it under article III, section 22 of the Texas Constitution.

2. Governor

Article IV, section 6 of the Texas Constitution places a strict restriction on the Governor's outside activities while in that office, barring him from holding any other civil, military or corporate office and from practicing any profession and receiving compensation therefore. "[N]or [shall he] receive any salary, reward or compensation or the promise thereof from any person or corporation, for any service rendered or performed during the time he is Governor, or to be thereafter rendered or performed."

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[83] *Damon v. Cornett*, 781 S.W.2d 597 (Tex. 1989).

[84] Tex. Att'y Gen. Op. No. JM-62 (1984).

[85] *Lillard v. Freestone County*, 57 S.W. 338 (Tex. Civ. App. 1900, no writ); Tex. Att'y Gen. Op. No. JM -162 (1984).

[86] *Washington v. Walker County*, 708 S.W.2d 493 (Tex. App.–Houston [1st Dist.] 1986, writ ref'd n.r.e.).

3. Judges

Article V, section 11 of the Texas Constitution provides in part that:

> **No judge shall sit in any case wherein the judge may be interested, or where either of the parties may be connected with the judge, either by affinity or consanguinity, within such a degree as may be prescribed by law, or when the judge shall have been counsel in the case.**

An interest within this provision is a direct personal or pecuniary interest in the case.[87] For example, a stockholder in a corporation is disqualified to sit as judge in a trial wherein the corporation is a party.[88]

III. Nepotism

A. Overview

A public officer's compliance with chapter 171 of the Local Government Code does not insulate a nepotistic appointment from the reach of chapter 573 of the Government Code, Texas' primary anti-nepotism law.[89] Conflict of interest laws regulate a public officer's or employee's financial interests, while anti-nepotism laws regulate a public officer's relational interests.[90] For example, while a public officer may have abstained from participating in a vote to promote the officer's spouse, purportedly in accordance with the conflict of interest statute, chapter 171 of the Local Government Code, the governing body of which the officer is a member may not promote the spouse except in accordance with chapter 573.[91]

Under chapter 573, a public official, acting alone or as a member of a multi-member governing board, generally may not appoint a close relative to a paid position, regardless of the relative's merit.[92] "Nepotism is a legitimate concern in many . . . areas of state and local government and the

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[87]*See City of Oak Cliff v. State*, 79 S.W. 1068, 1069 (Tex. 1904); Tex. Att'y Gen. Op. No. DM-109 (1992).

[88]*See Pahl v. Whitt*, 304 S.W.2d 250, 252 (Tex. Civ. App.–El Paso 1957, no writ). *See also Templeton v. Giddings*, 12 S.W. 851 (Tex. 1889) (judge disqualified to render judgment upon a note assigned as collateral to secure a debt owned by a firm of which he was a member).

[89]*See* Tex. Att'y Gen. Op. No. JC-0184 (2000) at 3.

[90]*See id*.

[91]*Id*.

[92]*See infra* section III.D.2. (detailing exception for specific, listed positions and for continuous employment).

courts have usually upheld its implementation when it was correctly applied. . . . The Texas legislature has . . . recognized the need for nepotism regulations and restrictions and has codified that policy into" chapter 573.[93] In fact, Texas was the first state in the nation to adopt an anti-nepotism statute; it first did so in 1907.[94]

This section of the handbook uses the term "appoint" to include confirming the appointment of, voting to appoint or confirm, and employing.[95] The term "close relative"describes a relative within the third degree by consanguinity or within the second degree by affinity[96] — the "prohibited degrees" of relationship under chapter 573. Finally, this section uses the term "governing board" to include a sole officeholder, who is statutorily authorized to appoint positions, such as a sheriff.

Although this discussion will focus on chapter 573, a particular governmental body may be subject to other nepotism provisions. A state agency, for example, may be governed by a specific statute that may be similar to[97] or different from[98] chapter 573. A state agency may also adopt a nepotism policy that is more restrictive than state law.[99] The attorney general has not yet considered whether a county may adopt an anti-nepotism policy that differs from state law.[100] A home-rule municipality may adopt a nepotism policy that is more restrictive than state law.[101] Likewise, a municipal civil-service commission may adopt a stricter policy. Some civil-service commissions, for example, have adopted nepotism regulations that prohibit the employment of an existing employee's relative.[102] Consequently, chapter 573 may not provide the final answer with respect to a particular nepotism question.

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[93]*Collier v. Firemen's & Policemen's Civil Serv. Comm'n of Wichita Falls*, 817 S.W.2d 404, 408 (Tex. App.–Fort Worth 1991, writ denied).

[94]*See* Richard D. White Jr., *Consanguinity by Degrees: Inconsistent Efforts to Restrict Nepotism in State Government*, 32 ST. & LOC. GOV'T REV. 108, 109 (Spring 2000).

[95]*See* TEX. GOV'T CODE ANN. § 573.041 (Vernon 1994).

[96]*See infra* section III.B.2.

[97]*See, e.g.*, TEX. GOV'T CODE ANN. § 465.013(h) (Vernon 1998) (National Research Laboratory Commission); TEX. HEALTH & SAFETY CODE ANN. §§ 534.0065(e)(5), .0115 (Vernon 2003) (community center board); TEX. TRANSP. CODE ANN. § 68.038(c) (Vernon 1999) (Brazoria County Board of Pilot Commissioners).

[98]*See, e.g.*, TEX. TAX CODE ANN. § 6.05(g) (Vernon 2001) (chief appraiser of appraisal district may not employ or contract with individual or spouse of individual related to chief appraiser within first degree by consanguinity or affinity); TEX. WATER CODE ANN. § 49.059(a)(1) (Vernon 2000) (general-law water district may not appoint individual to serve as tax assessor and collector if individual is related within third degree by consanguinity or affinity to board member, general manger, district engineer, or district attorney); *id*. § 57.262 (Vernon 2004) (county commissioners court may not appoint as commissioner of appraisement freeholder related to any commissioner within fourth degree by consanguinity or affinity).

[99]*See* Tex. Att'y Gen. Op. No. MW-540 (1982) at 2.

[100]*But cf.* Tex. Att'y Gen. Op. No. JM-521 (1986) at 2-3 (determining that county commissioners court may enact policy prohibiting employees from becoming candidate in partisan election "where this condition is reasonably necessary to the conduct of county business," but court may not enforce policy against other elected officers' employees).

[101]*See* Tex. Att'y Gen. LO-93-030, at 2.

[102]*See Collier*, 817 S.W.2d at 405; *see also Turner v. City of Carrollton Civil Serv. Comm'n*, 884 S.W.2d 889, 894-95 (Tex. App.–Amarillo 1994, no writ); *cf*. Tex. Att'y Gen. Op. No. JC-0143 (1999) at 2-3 (consistently with *Collier*, civil-service commission may promulgate qualifications for beginning fire fighters).

B. Prohibition

Section 573.041 generally prohibits a public official from appointing a close relative of the official to a paid position:

> **A public official may not appoint, confirm the appointment of, or vote for the appointment or confirmation of the appointment of an individual to a position that is to be directly or indirectly compensated from public funds or fees of office if . . . the individual is related to the public official within a degree described by Section 573.002.**[103]

This provision raises some questions: First, who is a "public official" who may not appoint, confirm, or vote to appoint or confirm the appointment of a relative? Second, what entities are encompassed within the term "individual"? Third, which relatives are close enough to be "within a degree described by [s]ection 573.002"? And fourth, which positions are "directly or indirectly compensated from public funds or fees of office"?

1. Public Official

For purposes of chapter 573, a "public official" is:[104]

- A state officer or board member
- A political subdivision officer or board member
- A judge[105]

The anti-nepotism statutes apply only to officers, including sole officeholders,[106] who are vested by statute with authority to appoint a position.[107] Officers include those who have resigned from office but who are holding over, in accordance with article XVI, section 17 of the Texas Constitution, pending the appointment and qualification of a successor.[108] The anti-nepotism statute does not apply to employees.

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[103]TEX. GOV'T CODE ANN. § 573.041(1) (Vernon 1994).

[104]*See id.* § 573.001(3).

[105]*See also* CODE OF JUDICIAL CONDUCT, Canon 3, pt. C(4) (requiring judge to avoid nepotism), *reprinted in* TEX. GOV'T CODE ANN. tit. 2, subtit. G app. B (Vernon Supp. 2004).

[106]*See Cain v. State*, 855 S.W.2d 714, 718 (Tex. Crim. App. 1993) (en banc).

[107]*See* TEX. GOV'T CODE ANN. § 573.041 (Vernon 1994); *see also Aldine Indep. Sch. Dist. v. Standley*, 280 S.W.2d 578, 583 (Tex. 1955) (stating that officer is individual upon whom law confers sovereign function of government, to be exercised largely independently of others' control); *Pena v. Rio Grande City Consol. Indep. Sch. Dist.*, 616 S.W.2d 658, 660 (Tex. Civ. App.–Eastland 1981, no writ) (same); *infra* section IV.B.1.a ("The Concept of an Office").

[108]*See* Tex. Att'y Gen. Op. No. JM-636 (1987) at 2 (and sources cited therein).

A governing body or an official with statutory authority to appoint a position is one who "*may* exercise control over hiring decisions."[109] To ascertain where hiring authority lies with respect to a particular governmental entity, we generally examine the entity's enabling law to "determine whom the legislature empowered with hiring authority."[110] Thus, this office has concluded that the Stephen F. Austin State University Board of Regents may employ the university president's spouse, assuming the spouse was not related to any regent: "Because the legislature has vested hiring authority exclusively in the . . . board, its members are public officials subject to the nepotism statute."[111] The university president, on the other hand, has no statutory authority to hire employees or contract for the services of independent contractors.[112]

A governing body or an official that is subject to the anti-nepotism law may not abdicate statutory hiring authority by delegating hiring duties to an employee, unless the body or official is statutorily authorized to delegate final authority to hire.[113] This office has concluded, for example, that a school board that has exercised its statutory authority to delegate to the district superintendent "final authority" to select personnel is no longer the public official for purposes of the nepotism laws.[114] Rather, in that case, the superintendent is the public official for purposes of the anti-nepotism statute.[115] Similarly, a city council may delegate final authority to hire personnel to a police chief in a collective bargaining agreement entered under Local Government Code chapters 143 and 174.[116] A police chief who has such authority under a collective bargaining agreement may not hire a relative.[117]

The governing body of a home-rule municipality that has delegated appointing authority by charter, not by ordinance, is not the appointing official for purposes of chapter 573.[118] Attorney General Opinion DM-2 concludes that a delegation, by city ordinance, of hiring authority to the city administrator does not relieve the members of the governing board of the burdens of the nepotism law.[119] By contrast, Attorney General Opinion O-5274 concludes that the anti-nepotism statutes does not preclude a city from hiring a governing board member's relative although the city charter

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[109]Tex. Att'y Gen. Op. No. DM-2 (1991) at 1.

[110]Tex. Att'y Gen. Op. No. GA-0073 (2003) at 2.

[111]*Id*. at 3.

[112]*See id*.; *see also* Tex. Att'y Gen. Op. No. DM-163 (1992) at 2 (finding, after examining Local Government Code chapter 392, which creates municipal housing authorities, that authority's executive director has no statutory authority to appoint personnel and is not, therefore, subject to the anti-nepotism statute).

[113]*See Pena*, 616 S.W.2d at 659; Tex. Att'y Gen. Op. No. GA-0123 (2003) at 4.

[114]*See* Tex. Att'y Gen. Op. No. GA-0123 (2003) at 4; *see also* TEX. EDUC. CODE ANN. § 11.163(a)(1) (Vernon 1996) (authorizing a school board to delegate to the superintendent "final authority" for decisions regarding the selection of all personnel).

[115]*See id*. at 3.

[116]*See* Tex. Att'y Gen. Op. Nos. JC-0336 (2001) at 3, JC-0193 (2000) at 3; *see also* TEX. LOC. GOV'T CODE ANN. § 143.306(a) (Vernon 1999) (providing that a collective bargaining agreement is "binding" on the public employer if the municipal governing body and the association has ratified it); *id*. § 174.023 (providing certain fire fighters and police officers the right to organize and bargain collectively with their public employer regarding employment conditions).

[117]*See* Tex. Att'y Gen. Op. No. JC-0336 (2001) at 3.

[118]*See* Tex. Att'y Gen. Op. No. DM-2 (1991) at 1.

[119]*See id*. at 1-2.

prohibited board members from participating in hiring decisions.[120] Attorney General Opinion DM-2 explains the distinction: "The governing body of a home-rule city may not, by ordinance, override a provision of the city charter. . . . [But where] the grant of authority to the city administrator was made by ordinance, . . . the city council has the power to repeal [it]."[121]

Special provision relating to a district judge. A district judge may not appoint "as official stenographer of the judge's district an individual related to the judge or to the district attorney of the district within the third degree."[122] The statute does not specify whether "the third degree" refers to the third degree by consanguinity, or by affinity, or by either. Attorney General Opinion O-6307 suggests that the relation may be limited to the third degree by consanguinity, but this opinion is based upon an outdated version of the anti-nepotism law.[123] A district judge also is subject to the Code of Judicial Conduct, which, among other things, requires a judge to avoid nepotism.[124]

Special provisions pertaining to a candidate for office. Although a candidate for office who is not an incumbent does not hold office, the candidate must comply with certain statutory anti-nepotism requirements: In any matter specially affecting the appointment of a candidate's close relative, the candidate may not attempt to influence an employee of the office that the candidate seeks or, if the candidate seeks an office in a multi-member governing board, an employee or an officer of that governing board.[125] This prohibition does not affect a candidate's actions taken with respect to a bona fide class or category of employees or prospective employees.[126]

A candidate for an elective state office will receive from the Secretary of State a summary of the state nepotism prohibitions and the kinds of relatives that are within the prohibited degrees of relationship.[127] In the application for a place on the ballot, the candidate must affirm that he or she is aware of the state nepotism law.[128] For example, in the application for a place on an independent school district general election ballot, the candidate must affirm that "I am aware of the nepotism law, Chapter 573, Government Code."[129]

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[120]*See* Tex. Att'y Gen. Op. No. O-5274 (1943) at 9.

[121]Tex. Att'y Gen. Op. No. DM-2 (1991) at 1-2.

[122]TEX. GOV'T CODE ANN. § 573.043 (Vernon 1994).

[123]*See* Tex. Att'y Gen. Op. No. O-6307 (1945) at 2.

[124]*See* CODE OF JUDICIAL CONDUCT, Canon 3, pt. C(4), *reprinted in* TEX. GOV'T CODE ANN. tit. 2, subtit. G app. B (Vernon Supp. 2004).

[125]TEX. GOV'T CODE ANN. § 573.042(a) (Vernon 1994).

[126]*See id.* § 573.042(b) (Vernon 1994); *infra* at section III.D.2., at p. 28-29 (distinguishes between decision that specially relates to close relative's employment and decision that affects bona fide class of employees which includes close relative).

[127]*See* TEX. ELEC. CODE ANN. § 31.0021(a) (Vernon 2003).

[128]*See id*. § 141.031(4)(L).

[129]Application forms for a place on the ballot can be found on the Secretary of State's web page, http://www.sos.state.tx.us/elections/forms/a2-17.pdf (updated Jan. 20, 2004).

2. Individuals

Chapter 573 applies to the appointment and employment of natural persons only, including independent contractors.[130] "[T]he nepotism law applies to the hiring of *natural persons*. . . . Thus, the nepotism law applies whenever a governmental body hires a *natural person*, whether as an employee or as an independent contractor. If the independent contractor is related to a member of the governing body within a prohibited degree, the nepotism law would prohibit the hiring."[131]

The anti-nepotism statute does not apply to the appointment of a corporation, unless the corporation is the alter ego of an individual who is closely related to an appointing official.[132] A corporation normally is not a "natural person."[133] Consequently, absent evidence that a law firm is an alter ego of the brother of a board member of the Guadalupe-Blanco River Authority, the River Authority may retain the law firm on an annual basis as local counsel.[134] Similarly, a school district may contract to provide a speech pathologist on an as-needed basis with a corporation for which one of the school-district trustee's spouse works as a speech pathologist.[135] The corporation is the entity "that is responsible for the appointment, supervision, and payment of the individual pathologists."[136]

3. Related Within a Prohibited Degree

Two individuals are related "within a degree described by [s]ection 573.002" if the relationship is "within the third degree by consanguinity or within the second degree by affinity,"[137] as computed by the civil-law method.[138]

Relationships by consanguinity. "Consanguinity" denotes a blood relationship: one individual is descended from the other or two individuals share a common ancestor.[139] "An individual's relatives within the third degree by consanguinity" (computed by the civil-law method) are:

(1) first degree: the individual's parent or child;[140]

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[130]*See* Tex. Att'y Gen. Op. No. DM-76 (1992) at 3. Attorney General Opinion DM-76 overruled Attorney General Opinion JM-492 (1986) to the extent JM-492 suggests that the adoption of chapter 171 of the Local Government Code, the conflict of interest provisions, affected the scope of the anti-nepotism statute. *See id*. at 2. "To determine whether the nepotism law applied, Attorney General Opinion JM-492 should have considered whether the independent contractor was a 'person' within the nepotism statute, since the nepotism law applies to the hiring of natural persons." *Id.*

[131]Tex. Att'y Gen. Op. No. DM-76 (1992) at 2-3 (emphasis added).

[132]*See* Tex. Att'y Gen. LO-88-044, at 3.

[133]*See* Tex. Att'y Gen. LO-97-028, at 2; *see also* Tex. Att'y Gen. Op. No. DM-76 (1992) at 2 (stating that nepotism law applies to hiring of "natural persons").

[134]*See* Tex. Att'y Gen. LO-98-028, at 1-3.

[135]*See* Tex. Att'y Gen. LO-95-080, at 1.

[136]*Id.* at 3.

[137]TEX. GOV'T CODE ANN. § 573.002 (Vernon 1994).

[138]*Id.* § 573.021.

[139]*See id.* § 573.022(a).

[140]*See* Tex. Att'y Gen. LO-94-039, at 2.

(2) second degree: the individual's brother, sister, grandparent, or grandchild; and

(3) third degree: the individual's great-grandparent, great-grandchild, aunt who is the sister of a parent, uncle who is a brother of a parent, nephew who is a child of a brother or sister, or niece who is a child of a brother or sister.[141]

Under the nepotism statutes, the term "child" includes an independent, adult child. Consanguine relationships include those by half blood[142] and legal adoption.[143] The degree of a relationship by half blood or by adoption is computed just as though the individuals are related by full blood. Accordingly, a school district trustee is related in the second degree by consanguinity to the daughter of the trustee's half-sister (equivalent to a full-blood niece).[144] On the other hand, a relationship between step-relatives is not consanguine. Thus, a governing board may appoint a board member's step-brother unless the board member was also related to the step-brother by affinity.[145]

Relationships by affinity. "Affinity" refers to a relationship created by marriage. Two individuals are related by affinity if they are married to each other[146] or if one individual's spouse is a blood relative of the other individual.[147] An individual's relatives within the second degree by affinity are:

(1) anyone related by consanguinity to the individual's spouse within the first or second degrees; or

(2) the spouse of anyone related to the individual by consanguinity within the first or second degrees.[148]

A relationship by affinity extends only to blood relatives of an individual's spouse. It does not include a relative-in-law of the individual's spouse. Accordingly, a public official is related within a prohibited degree to the official's spouse, but is not related at all (unless there is some other relationship) to the spouse's sibling's spouse.

For the purpose of determining the existence of a relationship by affinity, a marriage that has ended in divorce or the death of a spouse generally is considered to continue so long as a child of that marriage lives.[149] In the case of an officer or a trustee of a school district, a relationship by affinity created by a marriage that has ended through divorce or death terminates when the youngest child

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[141]*See also* "Degrees of Relationship Chart," app. at 89.

[142]*See* Tex. Att'y Gen. LO-90-030, at 1.

[143]*See* TEX. GOV'T CODE ANN. § 573.022(b) (Vernon 1994).

[144]*See* Tex. Att'y Gen. Op. No. O-791 (1939) at 2.

[145]*See* Tex. Att'y Gen. Op. No. V-765 (1949) at 1.

[146]*See also* Tex. Att'y Gen. Op. No. V-785 (1949) (reasons that spouse is included within nepotism prohibition).

[147]*See* TEX. GOV'T CODE ANN. § 573.024(a) (Vernon Supp. 2004).

[148]*Id.* § 573.025(b) (Vernon 1994).

[149]*See id*. § 573.024(b) (Vernon Supp. 20004.

of that marriage reaches the age of twenty-one years.[150] Accordingly, except in the case of a school district officer or trustee, a governing board may not appoint a board member's ex-spouse or ex-close relative of a board member while a child of that marriage lives.

Self-appointment. The anti-nepotism statute does not preclude an official from appointing him- or herself to a second position.[151] An individual is not related to him- or herself. The common-law doctrine of incompatibility forbids an officer from appointing him- or herself, however.[152]

4. Paid Position[153]

Chapter 573 applies only to positions that are "directly or indirectly compensated from public funds or fees of office."[154] The phrase "public funds or fees of office" encompasses all monies belonging to the governmental body, from any source, as well as fees of office. For example, a court has found that all of the assets of a water improvement district "are public funds within the contemplation of the nepotism law."[155] All county funds, including monies from a county's road and bridge fund, are public funds.[156] "[M]onies raised from a bond issue" are also public funds for the purpose of the anti-nepotism statute.[157]

On the other hand, a position that is not paid from public funds is not subject to chapter 573. Accordingly, a prosecutor may appoint his or her spouse to fill a victim coordinator position in the prosecutor's office when the position is unpaid.[158] An unpaid position includes one that, by statute, may only be reimbursed for expenses incurred.[159]

C. Prohibition Applies to All Members of Governing Board

Section 573.041 also prohibits a multi-member board from appointing the close relative of any of the board members:

> **A public official may not appoint, confirm the appointment of, or vote for the appointment or confirmation of the appointment of an individual to a position that is to be directly or indirectly compensated from public funds or fees of office if . . . the public official holds the appointment or confirmation authority as a member of**

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[150]*Id.* § 573.024(c).

[151]*See* Tex. Att'y Gen. Op. No. DM-259 (1993) at 4.

[152]*See Ehlinger v. Clark*, 8 S.W.2d 666, 673-74 (Tex. 1928); Tex. Att'y Gen. Op. No. JM-934 (1988) at 3-4.

[153]*See* TEX. GOV'T CODE ANN. § 573.041 (Vernon 1994).

[154]*Id.* § 573.041(1).

[155]*Fairless v. Cameron County Water Imp. Dist. No. 1*, 25 S.W.2d 651, 652 (Tex. Civ. App.–San Antonio 1930, writ ref'd).

[156]*See* Tex. Att'y Gen. Op. Nos. O-2925 (1940) at 2, O-718 (1939) at 2.

[157]Tex. Att'y Gen. Op. No. O-784 (1939) at 2.

[158]*See* Tex. Att'y Gen. LO-98-098, at 3.

[159]Tex. Att'y Gen. Op. No. JM-195 (1984) at 2.

a state or local board, the legislature, or a court and the individual is related to another member of that board, legislature, or court within a degree described by Section 573.002.[160]

We have already discussed, in Part B, the public officials who are subject to the nepotism statute;[161] the individuals who are related to a board member within a degree described by section 573.002;[162] and the kind of position that may be directly or indirectly compensated from public funds or fees of office.[163] These principles apply as well to the following discussion of how the nepotism law affects members of a multi-member governing body.

When an individual is ineligible for an appointment because the individual is a close relative of a member of the governing body, *no member* of the governing body may appoint or vote for the individual. To illustrate, the anti-nepotism statute forbade a municipal utility district's board of directors to vote to appoint a director's husband to a paid position as utility superintendent.[164] Because the board member who was married to the superintendent candidate did not vote on her husband's appointment, she herself did not violate chapter 573.[165] Her fellow board members, who voted to employ her husband, violated section 573.041, however, and may be subject to actions for removal and official misconduct.[166]

On the other hand, a governing body that lacks authority to appoint a position does not violate the nepotism statute by setting the salary for the position, even if the person who holds the position is a close relative of a member of the governing body.[167] A county commissioners court may, for instance, approve a salary increase for the position of county attorney's investigator, even though the individual currently holding that position is a close relative of a commissioner.[168] The commissioners court has no control over the county attorney with respect to whom the county attorney appoints to a position in the county attorney's office.[169]

Public officials may not *trade* nepotistic appointments.[170] In other words, a public official may not appoint an individual who is closely related to another public official and, partly or wholly in return, the other public official would appoint a close relative of the first public official.[171] A public official may appoint another official's close relative if no trading occurs: "If the employment of the [first

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[160]TEX. GOV'T CODE ANN. § 573.041(2) (Vernon 1994).

[161]*See supra* section III.B.1.

[162]*See id*. III.B.2.

[163]*See id*. III.B.3.

[164]*See* Tex. Att'y Gen. Op. No. JC-0184 (2000) at 2.

[165]*See id*.; *see also* TEX. GOV'T CODE ANN. 573.041(1) (Vernon 1994).

[166]Tex. Att'y Gen. Op. No. JC-0184 (2000) at 2.

[167]*See* Tex. Att'y Gen. Op. Nos. JM-254 (1984) at 2, H-1210 (1978) at 2.

[168]*See* Tex. Att'y Gen. Op. No. JM-254 (1984) at 2.

[169]*See id*. at 1-2.

[170]*See* TEX. GOV'T CODE ANN. § 573.044 (Vernon 1994).

[171]*See id*.

public official's relative] by the [second public official] is not the result of an agreement, express or implied, between [the two public officials] to employ [the relative], or if in fact there is no subterfuge to do indirectly what cannot be done directly," chapter 573 is not violated.[172] Whether trading has occurred in any particular situation is a question of fact.[173]

D. Exceptions

Two types of persons are excepted from the anti-nepotism statutes. First, the anti-nepotism statutes do not apply to persons holding specific, listed positions. Second, the anti-nepotism statutes do not apply to an appointee who has been continuously employed by the governing board for a certain period of time.

1. Specific Positions

Section 573.061 of the Government Code excepts certain specific positions from the anti-nepotism statutes:

> **(1) an appointment to the office of a notary public or to the confirmation of that appointment;**
>
> **(2) an appointment of a page, secretary, attendant, or other employee by the legislature for attendance on any member of the legislature who, because of physical infirmities, is required to have a personal attendant;**
>
> **(3) a confirmation of the appointment of an appointee appointed to a first term on a date when no individual related to the appointee within a degree described by Section 573.002 was a member of or a candidate for the legislature, or confirmation on reappointment of the appointee to any subsequent consecutive term;**
>
> **(4) an appointment or employment of a bus driver by a school district if:**
>
> > **(A) the district is located wholly in a county with a population of less than 35,000; or**
> >
> > **(B) the district is located in more than one county and the county in which the largest part of the district is located has a population of less than 35,000.**

[172]Tex. Att'y Gen. Op. No. O-2010 (1940) at 3.

[173]*See* Tex. Att'y Gen. LO-98-098, at 3.

(5) an appointment or employment of a personal attendant by an officer of the state or a political subdivision of the state for attendance on the officer who, because of physical infirmities, is required to have a personal attendant;

(6) an appointment or employment of a substitute teacher by a school district; or

(7) an appointment or employment of a person by a municipality that has a population of less than 200.[174]

Subsection (6), which excepts the "appointment or employment of a substitute teacher by a school district," does not apply to a school district's appointment of a certified teacher employed by a contract or to promoting a substitute teacher to a certified, contract teaching position.[175]

The legislature added the final exception, subsection (7), in 1999.[176] The exception recognizes that "[p]ublic officials in small incorporated municipalities" may have "difficulty hiring employees" who are not related to the officials.[177]

2. General Exception for Continuous Employment

Section 573.062 permits a governing board to reappoint, promote, dismiss or give a raise to a board member's close relative if the appointee has been *continuously employed* for a certain period of time:

(a) A nepotism prohibition prescribed by Section 573.041 or by a municipal charter or ordinance does not apply to an appointment, confirmation of an appointment, or vote for an appointment or confirmation of an appointment of an individual to a position if:

(1) the individual is employed in the position immediately before the election or appointment of the public official to whom the individual is related in a prohibited degree; and

(2) that prior employment of the individual is continuous for at least:

(A) 30 days, if the public official is appointed;

(B) six months, if the public official is elected at an election other than the general election for state and county officers; or

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[174]*See* TEX. GOV'T CODE ANN. § 573.061 (Vernon Supp. 2004).

[175]*See* Tex. Att'y Gen. Op. No. JC-0185 (2000) at 2-3.

[176]*See* Act of May 26, 1999, 76th Leg., R.S., ch. 1026, § 1, 1999 Tex. Gen. Laws 3814, 3814-15.

[177]HOUSE COMM. ON URBAN AFFAIRS, BILL ANALYSIS, Tex. H.B. 2930, 76th Leg., R.S. (1999).

(C) one year, if the public official is elected at the general election for state and county officers.[178]

These time periods are not linked to the types of offices, but to the manner by which an individual assumes office.[179] For example, if an individual is appointed to fill a vacancy in an office that is normally elected, the thirty-day period appropriate to an appointment is applicable. Indeed, the legislature intended the continuous-employment periods to correspond roughly to the length of time a candidate's or incoming appointee's relatives would know about the potential conflict.[180] Candidacies for state and county offices elected at the general election, which are partisan, are generally public knowledge for at least a year.[181] By contrast, candidacies for nonpartisan offices elected at an election other than the general election, such as school board trustee, generally are known only a few months prior to the election.[182] Finally, because an appointment can occur at any time, the legislature believed that appointive offices should not require as long a period of prior employment as an elective office.[183]

The continuous-employment exception raises two questions: First, what is "continuous employment"? Second, what if the appointee has not been continuously employed for the requisite period of time?

a. Continuous Employment

In determining whether an appointee satisfies the continuous-employment requirement, the critical date is the date the public official related to the appointee assumes office.[184] Consequently, with respect to an employee who becomes related to a board member by marriage during the board member's term, prior continuous service is the time served before the board member assumed office following the most recent election, *not the time served before the marriage*.[185] "The prior continuous employment exception is . . . available [only] if the employee has completed the applicable period of prior continuous service during a time when the relative was not an employer with the power to hire or fire the employee."[186] Consequently, an individual who had been employed in the county sheriff's office during a previous term, long enough to have satisfied the continuous-employment exception when the sheriff was reelected, could retain her job after she and the sheriff married during the subsequent term.[187]

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[178]TEX. GOV'T CODE ANN. § 573.062(a) (Vernon 1994).

[179]Tex. Att'y Gen. Op. No. DM-2 (1991) at 3.

[180]*See* HOUSE RESEARCH ORG., BILL ANALYSIS, Tex. S.B. 933, 70th Leg., R.S. (1987).

[181]*See id*.

[182]*See id*.

[183]*See id*.

[184]*See Bean v. State*, 691 S.W.2d 773, 775 (Tex. App.–El Paso 1985, writ ref'd).

[185]*See* Tex. Att'y Gen. Op. Nos. GA-0121 (2003) at 4, DM-132 (1992) at 4; Tex. Att'y Gen. LO-95-070, at 3.

[186]Tex. Att'y Gen. LO-95-070, at 3.

[187]*See* Tex. Att'y Gen. Op. No. GA-0121 (2003) at 4.

"Continuous" indicates that the term of employment prior to the event that triggers the anti-nepotism statute's application is uninterrupted. "[S]ection 573.062 focuses on the continuing nature of the employment relationship."[188] An at-will employee may be continuously employed for the purpose of the anti-nepotism statute if the employee's service to the employer is uninterrupted.[189] By the same token, an employee with successive term contracts may be continuously employed for the purpose of the anti-nepotism statute if there have been no breaks in service.[190] For instance, an appointee whose contract with a governing board has been repeatedly renewed, leaving no periods of time when the appointee was not under contract with the governing board, has been continuously employed.[191] An uncertified teacher who serves as a "permanent substitute" for a particular school district — in essence, an at-will employee — may satisfy the continuous-employment exception.[192]

In *Bean v. State*[193] the court held that a judge's uncle who had been repeatedly appointed to represent different indigent clients in different cases over a six-year period had not been continuously employed.[194] "Each appointment," the court said, "represents a separate employment."[195] Similarly, a teacher who has been listed as a substitute with and periodically substituted for a school district for six months prior to her husband's election to the school board has not accumulated sufficient continuous employment to satisfy the statute.[196] A teacher who taught for twenty-five years with a school district, but then worked in another school district for a year, during which time the teacher's spouse was elected to the school board of the first district, cannot be reemployed by the first district while the spouse remains on the school board.[197]

Under section 573.062(b), an appointee who satisfies the continuous-employment requirement may be reappointed, reemployed, promoted or dismissed during a relative's tenure with a governing board, but the related public official must abstain from deliberating or voting on an action that will specially affect the appointee, which would necessarily require the related official to exercise subjective judgment.[198] Consequently, a city commissioner may neither deliberate nor vote on a merit salary raise for his sibling, whom the city has continuously employed for the requisite time

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[188]Tex. Att'y Gen. Op. No. JC-0185 (2000) at 4.

[189]*See id*.

[190]*See id*.

[191]*See* Tex. Att'y Gen. Op. No. JM-45 (1983) at 3.

[192]*See* Tex. Att'y Gen. Op. JC-0185 (2000) at 4.

[193]691 S.W.2d 773 (Tex. App.–El Paso 1985, writ ref'd).

[194]*See id*. at 775.

[195]*Id*.

[196]*See* Tex. Att'y Gen. Op. No. JM-861 (1988) at 2-3.

[197]*See* Tex. Att'y Gen. LO-98-046, at 3; *see also* Tex. Att'y Gen. LO-96-015, at 2-3 (school district may not reemploy close relative of school board member who had been continuously employed by the school district when school board member was elected, but who had resigned employment subsequent to election).

[198]*See* Tex. Att'y Gen. Op. No. DM-46 (1991) at 4.

period.[199] The city commissioner's participation in such a deliberation violates section 573.062(b).[200] The other commissioners are not criminally liable, however, for voting on the merit salary raise after having deliberated the matter with the fellow city commissioner unless they had the requisite criminal intent.[201]

On the other hand, section 573.062(b) specifically permits a public official to deliberate and vote on an action that will affect the official's close relative, but only because the relative is a member of "a bona fide class or category" of appointees (*e.g.*, all teachers, all primary school teachers, or all teachers of the fine arts).[202] Thus, a board member may participate in a decision to give cost-of-living raises to all employees even though the board member's close relative is an employee.[203]

Sole officeholders. An official with sole authority to appoint positions, *e.g.*, a sheriff, may not take any action that will specially affect a related appointee, even if the appointee has been continuously employed by the official for the requisite period.[204] Thus, the superintendent of a Texas Department of Mental Health and Mental Retardation school, who has statutory authority to fix employees' salaries, may not give his wife, an employee, a merit salary increase.[205] Similarly, a chief of police who, under the applicable collective-bargaining agreement, had final authority to approve interdepartmental transfers, could not approve the lateral transfers of the chief's son and nephew if the approval process allowed the chief to exercise any discretion.[206] Although the interdepartmental transfers at issue were not promotions and did not involve salary changes, section 573.062 of the Government Code prohibits any "change in status" of the related employee.[207] "[T]he phrase 'change in status' includes a reassignment within an organization, whether or not a change in salary level accompanies the reassignment."[208]

b. Insufficient Employment

An appointee must have been continuously employed in his or her present position to retain the position. An appointee who has been continuously employed for the requisite period when the nepotism problem arises, but who has not been continuously employed for the requisite period in his or her current position, may not retain the current position. If, for instance, an employee who has been continuously employed by the county commissioners court for several years is promoted to a new position six weeks before a close relative assumed a seat on the commissioners court, the

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[199]*See* Tex. Att'y Gen. Op. No. JC-0558 (2002) at 3.

[200]*See id*.

[201]*See id*. at 5.

[202]*See* TEX. GOV'T CODE ANN. § 573.062(b) (Vernon 1994).

[203]*See* Tex. Att'y Gen. Op. No. DM-46 (1991) at 4.

[204]*See Cain v. State*, 855 S.W.2d 714, 718 (Tex. Crim. App. 1993) (en banc).

[205]*See* Tex. Att'y Gen. Op. No. DM-46 (1991) at 4.

[206]*See* Tex. Att'y Gen. Op. No. JC-0193 (2000) at 4.

[207]*See id*. at 3; *see also* TEX. GOV'T CODE ANN. § 573.062(b) (Vernon 1994).

[208]Tex. Att'y Gen. Op. No. JC-0193 (2000) at 3.

employee may not retain the new position.[209] The employee may be reinstated to his or her former, lower-level position, however, because with respect to that position, the continuous-employment requirement is satisfied.[210]

The anti-nepotism prohibition pertains only to the situation existing at the time of the appointment.[211] When, at the time of appointment, the appointee is not related to any member of the governing board with statutory authority to appoint him or her, the statutes are satisfied.[212] If an appointee has not been continuously employed by the governing board for the requisite period when his or her close relative assumes office, the governing board need not discharge the appointee until the appointee completes his or her contract.[213] In the absence of a valid contract for a specific term of employment, as in an at-will employment situation, a governing board may retain the employee only through the end of the pay period during which the close relative assumes office.[214] Regardless of the existence of a valid contract, the governing board may not reappoint the appointee or renew the contract.[215]

E. Penalties for Violations

An official who is convicted of violating chapter 573 (except section 573.083, "Withholding Payment of Compensation") must be immediately and summarily removed from office.[216] If the official is not summarily removed within thirty days after the conviction becomes final, a quo warranto proceeding will be brought to remove the official.[217]

In addition to removal, an official who violates the anti-nepotism statutes commits an offense involving official misconduct, a misdemeanor punishable by a fine between $100 and $1,000.[218]

Thus, members of the board of directors of a municipal utility district who voted to appoint the spouse of one of the directors to a paid position with the district, and who thereby violated section 573.041, were subject to removal from office.[219] The members were also subject to a conviction for official misconduct and a fine of between $100 and $1,000.[220]

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[209]*See* Tex. Att'y Gen. Op. No. DM-132 (1992) at 2.

[210]*See* Tex. Att'y Gen. Op. No. JM-371 (1985) at 3.

[211]Tex. Att'y Gen. Op. No. O-667 (1939) at 1.

[212]*See id* at 2.

[213]*See* Tex. Att'y Gen. Op. Nos. DM-132 (1992) at 6-7, JM-636 (1987) at 2, V-785 (1949) at 5, O-6330 (1945) at 2, O-667 (1939) at 1; Tex. Att'y Gen. LO-89-053, at 1; *see also* TEX. GOV'T CODE ANN. § 573.084 (Vernon 1994) (prescribing penalty for paying appointee who is ineligible under nepotism prohibition).

[214]*See* Tex. Att'y Gen. Op. No. DM-132 (1992) at 6-7, JM-91 (1983) at 3; Tex. Att'y Gen. LO-89-053, at 2.

[215]*See* Tex. Att'y Gen. Op. Nos. JM-636 (1987) at 2, O-6330 (1945) at 2.

[216]*See* TEX. GOV'T CODE ANN. § 573.081 (Vernon 1994).

[217]*See id*. §§ 573.081, .082.

[218]*See id*. § 573.084.

[219]*See* Tex. Att'y Gen. Op. No. JC-0184 (2000) at 2 (citing TEX. GOV'T CODE ANN. § 573.081 (Vernon 1994)).

[220]*See id.* (citing TEX. GOV'T CODE ANN. § 573.084 (Vernon 1994)).

An individual appointed to a position in violation of chapter 573 may not be compensated.[221] Under section 573.083, a public official who knows that an individual's appointment violates chapter 573 may not approve an account or draw or authorize the drawing of a warrant or order to pay. Moreover, a county auditor has a discretionary duty to determine whether approving a particular claim for payment would violate the anti-nepotism statute.[222] An official who contravenes section 573.083 commits a misdemeanor offense involving official misconduct, punishable by a fine of between $100 and $1,000.[223] Consequently, a county commissioners court may not approve salary payments to the county's rabies control officer, whose wife was an aunt to one of the commissioners.[224] Additionally, a member of the board of directors of a municipal utility district, the board of which approves her husband's (a paid employee of the district) paychecks, may be subject to official misconduct charges under section 573.083 of the Government Code.[225]

Appointing a board member's relative may not be completely without effect, however. In *City of Robstown v. Verastegui*[226] the Texas Court of Appeals concluded that a nepotistic appointment constitutes an "'action' inconsistent with" an incumbent's retention of office.[227] *City of Robstown* was an action by a former municipal court judge who sought to be reinstated as municipal court judge.[228] Under state law, "'[a] municipal court judge who is not reappointed by the 91st day following the expiration of a term of office shall, *absent action by the appointing authority*, continue to serve another term of office . . . ."[229] The term expired May 5, 1998, and within ninety days the Robstown City Council voted to appoint the sister of one of the city council members to the municipal judgeship.[230] Because the appointment violated the statutory anti-nepotism prohibitions, the council's appointee never took office as municipal judge.[231] Even so, the court held that the appointment was an action sufficient to prevent holding the office of municipal judge for another term.[232]

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[221]*See Fairless*, 25 S.W.2d at 652 (water improvement district employee who had been hired for one year but who had been discharged mid-year could not recover wages for remainder of year because original appointment violated nepotism prohibition).

[222]*See Crider v. Cox*, 960 S.W.2d 703, 707 (Tex. App.–Tyler 1997, writ denied).

[223]*See* TEX. GOV'T CODE ANN. § 573.084 (Vernon 1994).

[224]*See* Tex. Att'y Gen. Op. No. O-6406 (1945) at 4.

[225]Tex. Att'y Gen. Op. No. JC-0184 (2000) at 3.

[226]995 S.W.2d 315 (Tex. App.–Corpus Christi 1999, no writ).

[227]*Id*. at 316.

[228]*See id*.

[229]*Id*. (quoting TEX. GOV'T CODE ANN. § 29.005 (Vernon Supp. 2004)) (emphasis added).

[230]*See id*.

[231]*See id*. (citing TEX. GOV'T CODE ANN. § 573.041 (Vernon 1994)).

[232]*See id*.

IV. Dual Office Holding

A. Overview

The concept of dual office holding embraces the idea of one individual holding two or more positions at the same time. The concept involves two major and distinct aspects: constitutional prohibitions, primarily article XVI, section 40, of the Texas Constitution; and the common-law doctrine of incompatibility. A few statutes address dual office holding, but they relate almost exclusively to particular offices rather than to the doctrine as a whole.[233]

The Office of the Attorney General has played a large role in the development of the doctrine of dual office holding, especially in the past thirty years. Relatively few judicial decisions have addressed the various issues involved. The three most significant decisions were rendered, respectively, in 1955,[234] 1928,[235] and 1927.[236] By contrast, the Office of the Attorney General has issued more than sixty dual office holding opinions since the beginning of 1991.

B. Constitutional Provisions

1. Article XVI, Section 40

Article XVI, section 40, of the Texas Constitution is by far the most important constitutional provision dealing with dual office holding. Its first clause reads:

> **No person shall hold or exercise at the same time, more than one civil office of emolument . . . .**

This provision seems simple and straightforward, but within it lurk ambiguities and pitfalls. The two questions it presents are: 1) what is an "office"? and 2) what is an "emolument"?

a. The Concept of an Office

In the 1970s, the attorney general drew a distinction between a "civil office" and a "public office" and concluded that a "civil office" is something more than an "employment" but less than a "public office."[237] A veterans county service officer, for example, was said to hold a "civil office" but not a "public office."[238] Needless to say, this distinction has no support in article XVI, section 40, nor in any judicial decision, nor had it been recognized by any previous attorney general. Historically,

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[233]Chapter 574 of the Government Code is the exception.

[234]*Aldine Indep. Sch. Dist.*, 280 S.W.2d 578.

[235]*Ehlinger v. Clark*, 8 S.W.2d 666 (Tex. 1928).

[236]*Thomas v. Abernathy County Line Indep. Sch. Dist.*, 290 S.W. 152 (Tex. Comm'n App. 1927, judgm't adopted).

[237]*See, e.g.*, Tex. Att'y Gen. LA-137 (1977), LA-61 (1973).

[238]Tex. Att'y Gen. LA-61 (1973).

the term "civil office" was used to distinguish it from a "military office."[239] What's important, however, is that the "civil office/public office" dichotomy has long since been abandoned.[240] There are only two categories: "public officer" and "public employee."

The generally accepted definition of "officer" derives from the Texas Supreme Court's opinion in *Aldine Independent School District v. Standley*.[241] There the court, quoting *Dunbar v. Brazoria County*,[242] held that:

> **the determining factor which distinguishes a public officer from an employee is whether any sovereign function of the government is conferred upon the individual to be exercised by him for the benefit of the public largely independent of the control of others.**[243]

Under this definition, who is an "officer"? One obvious group is that of elected officials. If a person holds an elective position, he is clearly an officer, since he exercises a "sovereign function of the government . . . largely independent of the control of others."[244]

In Attorney General Opinion JM-1266 (1990), the attorney general said that a person is not ordinarily an officer if his actions are subject to control by a superior body, for in such instance, he cannot be said to exercise his authority "largely independent of the control of others." Under this formulation, neither an assistant district attorney,[245] a jailer,[246] a court reporter,[247] a chief deputy of a county tax assessor-collector,[248] a county law librarian,[249] a county emergency medical services administrator,[250] nor a volunteer fireman[251] holds an office. Neither does an at-will city attorney who serves under the direction of the city council.[252] The chief appraiser of a county appraisal district, although an "officer" for purposes of the nepotism statutes, is not an officer under article XVI, section 40. He exercises his appraisal functions subject to review and correction by the appraisal review board and

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[239]*See* BLACK'S LAW DICTIONARY 224 (5th ed. 1979) (defining "civil office" to mean "non-military public office," one which pertains to exercise of powers or authority of government).

[240]*See, e.g.*, Tex. Att'y Gen. Op. No. JM-480 (1986).

[241]280 S.W.2d 578 (Tex. 1955).

[242]224 S.W.2d 738, 740 (Tex. Civ. App.–Galveston 1949, writ ref'd).

[243]*Aldine*, 280 S.W.2d at 583.

[244]*See* Tex. Att'y Gen. Op. No. GA-0032 (2003) (members of board of trustees of junior college district and members of board of municipal utility district, as elected officials, are "officers" within article XVI, section 40 of the Texas Constitution).

[245]Tex. Att'y Gen. LO-96-148, LO-89-082, LO-88-019.

[246]Tex. Att'y Gen. Op. Nos. JM-1047 (1989), JM-485 (1986).

[247]Tex. Att'y Gen. Op. Nos. JM-1083 (1989), JM-163 (1984).

[248]Tex. Att'y Gen. Op. No. JM-1083 (1989).

[249]Tex. Att'y Gen. LO-90-010.

[250]Tex. Att'y Gen. LO-94-046, LO-88-085.

[251]Tex. Att'y Gen. Op. Nos. JC-0385 (2001), H-665 (1975); Tex. Att'y Gen. LO-93-054; Tex. Att'y Gen. LA-154 (1978).

[252]Tex. Att'y Gen. Op. No. JC-0054 (1999).

serves at its pleasure.[253] Thus, his duties are not exercised "largely independent of the control of others." On the other hand, a member of the board of managers of a county hospital holds an office, since his actions are not subject to the control of another body.[254] And a member of a city planning and zoning commission has been determined to hold an office.[255]

In order to constitute an office under article XVI, section 40, a position must be public. Thus, a person holding a position with a private, nonprofit housing corporation does not hold an "office."[256] Members of the governing board of a health maintenance organization are not public officers because their authority and duties are not created and conferred by law.[257] And a board member of an industrial development corporation created by a city does not hold a public office.[258] An office under article XVI, section 40, must be a genuine "office under the state." No dual office holding issue arises when an elected board member takes an oath of allegiance as an officer in the so-called "Republic of Texas."[259] Furthermore, persons who serve in a merely advisory capacity are not "officers."[260]

A mere additional duty does not create a second office. For example, where an independent school district is a component of a community college district, a school board member does not thereby hold a second office.[261] Likewise, where a statute confers upon a mayor the duties of a magistrate, the mayor does not as a result occupy a second office.[262]

A merely temporary position does not constitute an office under article XVI, section 40. An "officer" has duties that are continuing in nature rather than intermittent.[263] Thus, a special commissioner in a condemnation proceeding, who is appointed for one case only, lacks the elements of permanency and continuity essential to an "office."[264] Likewise, an election judge for a single municipal election does not hold an office.[265] And one recent case has held that a mayor pro tem did not automatically relinquish his office by temporarily assuming the duties of mayor.[266] On the other hand, a former district judge sitting by assignment does hold an office. The appointment is not

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[253]Tex. Att'y Gen. Op. No. JM-499 (1986).

[254]Tex. Att'y Gen. LO-97-100.

[255]Tex. Att'y Gen. Op. No. JC-0339 (2001).

[256]Tex. Att'y Gen. Op. No. DM-303 (1994).

[257]Tex. Att'y Gen. Op. No. JC-0407 (2001) at 5.

[258]Tex. Att'y Gen. Op. No. JC-0547 (2002) at 3.

[259]Tex. Att'y Gen. LO-96-066.

[260]Tex. Att'y Gen. LO-94-021.

[261]Tex. Att'y Gen. Op. No. DM-55 (1991).

[262]Tex. Att'y Gen. LO-88-022; *see also* Tex. Att'y Gen. Op. No. H-739 (1975) (where legislature vests control of School for the Blind in board composed of five members of State Board of Education, no second office is created).

[263]Tex. Att'y Gen. LO-96-081.

[264]Tex. Att'y Gen. Op. No. JM-847 (1988).

[265]Tex. Att'y Gen. LO-96-081.

[266]*De Alejandro v. Hunter*, 951 S.W.2d 102 (Tex. App.–Corpus Christi 1997, no writ).

intermittent; it is for a specific "term" rather than for one case only. While sitting on assignment, the former judge has all the powers of a regular judge. His functions extend beyond the courtroom to numerous administrative duties. He is compensated as a "judge," and to be eligible for assignment, he must certify a willingness not to appear or plead as an attorney for a period of two years.[267]

One category warrants special mention. Prior to 1993, every attorney general had concluded, on the basis of *Irwin v. State*,[268] that every person designated a "peace officer" was an officer for purposes of article XVI, section 40. Under that formulation, not only every deputy constable and deputy sheriff, but every municipal police officer, was barred by the constitution from holding, for example, the position of school trustee.[269] In Attorney General Opinion DM-212 (1993), the attorney general said that merely because one is designated a "peace officer," he should not be deemed *ipso facto* an officer under article XVI, section 40. The opinion declared that whether any particular peace officer holds a civil office is a question of fact. But the implication was clear, and the attorney general has since held that, under ordinary circumstances, a peace officer does not hold an office under article XVI, section 40.[270]

b. The Concept of an Emolument

An emolument has been described by a court as "a pecuniary profit, gain, or advantage."[271] In addition to "salary" and "compensation," it includes an amount received as a fixed per diem allowance,[272] a flat payment per meeting,[273] or payment of hospitalization insurance.[274] Reimbursement of "actual and necessary expenses" does not constitute an emolument,[275] but any amount received in excess of actual expenses is an emolument.[276] Any reimbursement must correspond to actual expenses if it is not to be considered an emolument.[277]

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[267]Tex. Att'y Gen. LO-96-145.

[268]177 S.W.2d 970 (1944).

[269]*See, e.g.*, Tex. Att'y Gen. Op. No. JM-588 (1986) (officer of Department of Public Safety may not serve on governing bodies of cities, counties or school districts); Tex. Att'y Gen. LO-92-036 (individual may not hold the position of peace officer in two jurisdictions, LO-89-042 (individual may not hold positions of deputy constable and deputy sheriff).

[270]Tex. Att'y Gen. LO-95-048, LO-93-027.

[271]*Irwin*, 177 S.W.2d 970; Tex. Att'y Gen. Op. Nos. GA-0032 (2003) at 2, JC-0490 (2002) at 1.

[272]Tex. Att'y Gen. Op. No. JM-594 (1986) ($10.00 per day); Tex. Att'y Gen. LO-98-055 (per diem in addition to reimbursement of expenses).

[273]*Willis v. Potts*, 377 S.W.2d 622 (Tex. 1964); Tex. Att'y Gen. Op. No. JM-704 (1987) ($5.00 per meeting); Tex. Att'y Gen. LO-93-033.

[274]Tex. Att'y Gen. LO-97-100.

[275]Tex. Att'y Gen. Op. No. MW-21 (1979); Tex. Att'y Gen. LA-113 (1975).

[276]Tex. Att'y Gen. Op. Nos. GA-0032 (2003) at 2, JC-0490 (2002) at 21, JM-1266 (1990); Tex. Att'y Gen. LO-95-001.

[277]Tex. Att'y Gen. Op. No. JM-1266 (1990); Tex. Att'y Gen. LO-93-033.

An office is one "of emolument" if its emoluments are fixed by statute or by a governmental body.[278] In such case, the compensation attaches to, and is inseparable from, the office.[279] Failure to pay the emoluments attached to an office does not remove it from the category of "office of emolument."

c. Exemptions

Justices of the peace, county commissioners, notaries public, and officers and directors of soil and water conservation districts are exempt from the prohibitions of article XVI, section 40. Such persons are not prohibited *by that constitutional provision* from holding more than one office of emolument. Thus, since county commissioners are excepted, nothing in article XVI, section 40, would prevent a county commissioner from simultaneously serving as a reserve deputy sheriff[280] or a member of the state Sesquicentennial Commission.[281] But a county judge, while he sits as a member of the commissioners court, does not thereby fall within the exception in article XVI, section 40, for county commissioners.[282] Furthermore, article XVI, section 40, does not affirmatively authorize a justice of the peace or a county commissioner to hold a second office; it merely states that *nothing in that constitutional provision* prevents their doing so.[283]

The exemption for officers and directors of a "soil and water conservation district" is a narrow one. It applies only to those districts created pursuant to former article 165a-4 of the Revised Civil Statutes (1925), now chapter 201 of the Agriculture Code.[284] Neither a river authority[285] nor a drainage district[286] is a "soil and water conservation district" for purposes of article XVI, section 40.

d. The "State Employee" Proviso

A proviso to article XVI, section 40, states:

> **(b) State employees or other individuals who receive all or part of their compensation either directly or indirectly from funds of the State of Texas and who are not State officers, shall not be barred from serving as members of the governing bodies of school districts, cities, towns, or other local governmental districts. Such State employees or other individuals may not receive a salary for serving as members of such governing bodies, except that:**

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[278]Tex. Att'y Gen. Op. No. JM-333 (1985).

[279]Tex. Att'y Gen. Op. No. JM-704 (1987).

[280]Tex. Att'y Gen. LO-97-081.

[281]Tex. Att'y Gen. Op. No. JM-141 (1984).

[282]Tex. Att'y Gen. Op. No. JM-594 (1986).

[283]Tex. Att'y Gen. LO-96-064.

[284]Tex. Att'y Gen. Op. No. JC-0095 (1999); Tex. Att'y Gen. LA-150 (1978).

[285]Tex. Att'y Gen. Op. No. JM-172 (1984).

[286]Tex. Att'y Gen. LA-150 (1978).

(1) a schoolteacher, retired schoolteacher, or retired school administrator may receive compensation for serving as a member of a governing body of a school district, city, town, or local governmental district, including a water district created under Section 59, Article XVI, or Section 52, Article III; and

(2) a faculty member or retired faculty member of a public institution of higher education may receive compensation for serving as a member of a governing body of a water district created under Section 59 of this article or under Section 52, Article III, of this constitution.

Section (b)(1) was added in 1972 and is decidedly odd, although there are historical reasons for its adoption.[287] It is the only portion of article XVI, section 40 that specifically addresses itself to persons who are *not* "officers." Under the terms of the proviso, a state employee or a person who receives compensation from the state[288] may serve as a member of the governing body of a "local governmental district,"[289] such as a city council or a school district board of trustees,[290] *only* if he receives no "salary" for the latter position.[291] However, a state employee or other person who receives compensation from the state may receive a salary for serving on a commissioners court, because a county is not a "local governmental district."[292] For purposes of the proviso, "salary" is identical to "emolument."[293] In other words, a state employee serving on a local governing board may receive no compensation other than reimbursement of actual expenses.[294]

Most persons, other than state employees, fall within the proviso if they receive any part of their compensation from state funds. Thus, non-teaching employees of an independent school district, employees of a district attorney,[295] and employees of a junior college district[296] may serve on a local governing board only if they renounce any compensation attached to such service. In 2001, however, the voters adopted an amendment to article XVI, section 40 which provides that "a schoolteacher, retired schoolteacher, or retired school administrator may receive compensation for serving as a member of a governing body of a school district, city, town, or local governmental district, including a water district created under Section 59, Article XVI, or Section 52, Article III." Attorney General

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[287]*See Boyett v. Calvert*, 467 S.W.2d 205 (Tex. Civ. App.–Austin 1971, writ ref'd n.r.e.), *appeal dism'd sub nom. Anderson v. Calvert*, 405 U.S. 1035 (1972).

[288]A school teacher is an example of a state employee.

[289]A "local governmental district" is one that is restricted to a specific geographical area. Tex. Att'y Gen. LO-95-001.

[290]The proviso is not applicable unless one of the positions involves service on a *local governmental body*. Thus, it does not apply to one holding the positions of county attorney and professor at a state university because a county attorney is not a member of a local governing body.

[291]Tex. Att'y Gen. LO-93-033.

[292]*County of Maverick v. Ruiz*, 897 S.W.2d 843 (Tex. App.–San Antonio 1995, no writ); Tex. Att'y Gen. Op. No. JC-0074 (1999) (overrules Tex. Att'y Gen. Op. No. H-6 (1973)).

[293]Tex. Att'y Gen. LO-94-072.

[294]Tex. Att'y Gen. LO-95-001, LO-93-033.

[295]Tex. Att'y Gen. LO-94-045.

[296]Tex. Att'y Gen. LO-90-106.

Opinion JC-0577 (2002) declared, however, that the term "schoolteacher" does not include an instructor or professor employed by a state university.[297] We note that on September 13, 2003, voters approved section (b)(2) as a constitutional amendment to article XVI, section 40, which allows a current or retired faculty member of a public college or university to receive compensation for service on the governing body of a water district.

The state employee proviso, like the exemption for county commissioners and justices of the peace, is not a guarantee of dual employment. It means merely that article XVI, section 40 may not be used to defeat such dual service.[298]

e. The "Benefit" Proviso

Another proviso of article XVI, section 40, states:

> **It is further provided that a nonelective State officer may hold other nonelective offices under the State or the United States, if the other office is of benefit to the State of Texas or is required by the State or Federal law, and there is no conflict with the original office for which he receives salary or compensation.**

Although this provision has been little construed, a 1996 attorney general opinion held that, with respect to a particular person occupying particular offices, the "benefit" issue requires a judicial determination.[299] But with regard to the *general* matter of whether an individual may hold multiple municipal judgeships, the opinion concluded that the legislature was the appropriate body to make the determination.[300] Subsequently, the Seventy-fifth Legislature enacted Senate Bill 1173,[301] which provided that "[a] person may hold the office of municipal judge for more than one municipality at the same time if each office is filled by appointment," and that "[t]he holding of these offices at the same time is of benefit to this state."[302] In 1999, the attorney general held that the finding of a "benefit" under this provision requires a legislative or other appropriate determination.[303]

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[297]Tex. Att'y Gen. Op. No. JC-0577 (2002).

[298]Tex. Att'y Gen. Op. No. JC-0074 (1999); Tex. Att'y Gen. LO-96-109.

[299]Tex. Att'y Gen. Op. No. DM-428 (1996); *accord* Tex. Att'y Gen. LA-78 (1974). Furthermore, a river authority is not an appropriate body to determine that one of its members may hold the office of assistant municipal judge. Tex. Att'y Gen. LO-97-027.

[300]Tex. Att'y Gen. Op. No. DM-428 (1996).

[301]Act of Apr. 22, 1997, 75th Leg., R.S., ch. 37, 1997 Tex. Gen. Laws 104, 105 (codified at TEX. GOV'T CODE ANN. § 574.001(b)).

[302]*Id.*

[303]Tex. Att'y Gen. Op. No. JC-0095 (1999).

f. Legislators and "Position of Profit"

The final sentence of article XVI, section 40, provides:

> **No member of the Legislature of this State may hold any other office or position of profit under this State, or the United States, except as a notary public if qualified by law.**

A "position of profit" is "a salaried nontemporary employment."[304] Thus, a legislator is prohibited not only from holding any other "office of emolument," but any public employment to which compensation attaches. Therefore, since an employee of an independent school district holds a "position of profit," a legislator may not be employed by such district.[305] Neither may a legislator be employed as an assistant county attorney who is compensated from county funds.[306]

Furthermore, the attorney general has held that "a person's occupation of a position which assures him of a salaried status at a definite future date constitutes a position of profit."[307] Accordingly, a legislator may not assume leave-without-pay status while serving in the legislature.[308] On the other hand, an independent contractor does not hold a "position of profit," and thus, article XVI, section 40 does not prevent a legislator from simultaneously serving as an independent contractor for a governmental body.[309]

2. Article II, Section 1

Article II, section 1 of the Texas Constitution, the "separation of powers" provision, states:

> **The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.**

In the 1970s, the separation of powers doctrine was construed by the attorney general as a dual office holding prohibition. A city council member, for example, being "of" the legislative branch, was

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[304]Tex. Att'y Gen. Op. Nos. JC-0430 (2001), H-1304 (1978).

[305]Tex. Att'y Gen. LO-93-031, LO-88-072.

[306]Tex. Att'y Gen. Op. No. JC-0430 (2001).

[307]Tex. Att'y Gen. LA-153 (1978).

[308]Tex. Att'y Gen. LO-90-055.

[309]Tex. Att'y Gen. Op. No. H-1304 (1978); Tex. Att'y Gen. LO-95-022, LO-93-031.

barred by article II, section 1 from serving as a deputy sheriff, who was "of" the judicial branch. Likewise, a teacher was "of" the executive branch, and so precluded from holding the office of justice of the peace.[310]

These prior interpretations of article II, section 1 have been abandoned, particularly on the local level.[311] It is now clear that, in the usual circumstance, the separation of powers doctrine poses no bar to dual office holding.[312]

3. Article XVI, Section 12

Article XVI, section 12 of the Texas Constitution, provides:

> **No member of Congress, nor person holding or exercising any office of profit or trust, under the United States, or either of them, or under any foreign power, shall be eligible as a member of the Legislature, or hold or exercise any office of profit or trust under this State.**

The primary significance of this provision is that it bars a state officer from simultaneously holding a federal position. In Attorney General Opinion DM-49 (1991), the attorney general held that a justice of the Texas Supreme Court was precluded from serving on the Board of Directors of the State Justice Institute, since the latter was an "office of trust under the United States." A person holds such an office of trust if he has been delegated "some of the sovereign functions of the United States Government."[313] Likewise, membership on a local Selective Service Board was found in 1981 to be an "office of profit or trust" because members exercise a portion of the federal sovereignty.[314] Even though federal law states that a member of a particular board is not to be considered an officer or employee of the United States, such a pronouncement is not dispositive for purposes of article XVI, section 12.[315]

In the case of service on a selective service board, however, Attorney General Opinion GA-0057 has modified the law. This opinion considered whether a city council member may serve on a Selective Service Local Board. Local boards are still in operation, and they continue to perform certain functions with regard to record keeping. Because there is at present no draft, however, members do

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[310]Tex. Att'y Gen. LA-106 (1975).

[311]*See Turner v. Trinity Indep. Sch. Dist.*, 700 S.W.2d 1 (Tex. App.–Houston [14th Dist.] 1983, no writ) (school board trustee could also serve as justice of peace); Tex. Att'y Gen. Op. No. JM-519 (1986); Tex. Att'y Gen. LO-92-004, LO-88-019.

[312]Tex. Att'y Gen. Op. No. JC-0216 (2000).

[313]Tex. Att'y Gen. Op. No. DM-49 (1991).

[314]Tex. Att'y Gen. Op. No. MW-360 (1981).

[315]Tex. Att'y Gen. Op. No. DM-49 (1991).

not exercise any "sovereign function of government." As a result, a city council member is not barred by article XVI, section 12 from simultaneously serving as a member of a Selective Service Local Board.[316]

C. Common-Law Incompatibility

1. Introduction

The common-law doctrine of incompatibility is the other major aspect of dual office holding. Incompatibility is distinguishable from "conflict of interest." A conflict of interest is created when an individual's private pecuniary interest conflicts with his public duty. Incompatibility occurs when there are two inconsistent public duties.[317] The doctrine prohibits a person from holding two positions where one position might impose its policies on the other or subject it to control in some other way.[318]

Neither article XVI, section 40 nor chapter 171 of the Local Government Code has repealed common-law incompatibility.[319] Even though a dual office holding situation is permitted under the constitution, it may yet run afoul of incompatibility.[320] When a statute explicitly permits a member of the board of directors of a water control and improvement district to serve as the district's general manager, the doctrine of common-law incompatibility is still in effect for positions other than that of general manager.[321]

Incompatibility does not arise where one of the positions is not a public office or employment.[322] Furthermore, the doctrine does not directly address the issue of outside employment. A public body's outside employment policy does not implicate the doctrine of incompatibility.[323] Neither employee time constraints nor scheduling conflicts raise the issue.[324] And the attorney general has declared that the codification of title 5 of the Government Code "has now removed all doubt that any general statute imposes limitations upon dual state employment."[325]

Nor does incompatibility embrace a situation in which the potential conflict is not inherent in one's dual employment status. Thus, the mere possibility that a police officer of one municipality might arrest an offender in a neighboring municipality in which he sits as magistrate does not give rise to

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[316]Tex. Att'y Gen. Op. No. GA-0057 (2003).

[317]Tex. Att'y Gen. Op. No. JM-172 (1984).

[318]*Thomas*, 290 S.W. 152; Tex. Att'y Gen. Op. No. JM-129 (1984).

[319]Tex. Att'y Gen. Op. No. GA-0015 (2003) at 3.

[320]Tex. Att'y Gen. Op. Nos. JC-0270 (2000), JM-203 (1984); Tex. Att'y Gen. LO-96-004.

[321]Tex. Att'y Gen. Op. No. GA-0077 (2003).

[322]Tex. Att'y Gen. Op. Nos. DM-303 (1994), DM-194 (1992).

[323]Tex. Att'y Gen. LO-96-109; *see also* Tex. Att'y Gen. Op. No. JM-93 (1983).

[324]Tex. Att'y Gen. Op. No. JM-1083 (1989); Tex. Att'y Gen. LA-137 (1977).

[325]Tex. Att'y Gen. LO-94-080.

incompatibility,[326] although the likelihood of potential conflict plays a significant role.[327] Likewise, a teacher is not barred from serving on the State Board of Education merely because of the possibility that she might have to prepare an examination that she is required to take as a teacher.[328] On the other hand, ethical considerations might restrict certain kinds of employment that do not rise to the level of incompatibility.[329] For example, while there is no legal incompatibility in a justice of the peace serving as a juvenile law master, conflict might arise in practice.[330]

Three aspects of common-law incompatibility have been recognized by the courts and the attorney general: 1) self-appointment; 2) self-employment; and 3) conflicting loyalties.[331]

2. Self-Appointment

In *Ehlinger v. Clark*,[332] the Texas Supreme Court declared:

> **It is because of the obvious incompatibility of being both a member of a body making the appointment and an appointee of that body that the courts have with great unanimity throughout the country declared that all officers who have the appointing power are disqualified for appointment to the offices to which they may appoint.**[333]

In accordance with this principle, the attorney general has held, *inter alia*, that members of a school district board of trustees may not appoint themselves to the governing board of a community college district;[334] that a city council may not appoint one of its members to the city's police reserve;[335] that the governing body of an entity that is authorized to make appointments to the board of directors of the Edwards Aquifer Authority may not appoint one of its own members to that position;[336] that the board of trustees of a community college district may not appoint one of its own as interim

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[326]Tex. Att'y Gen. LO-93-059.

[327]Tex. Att'y Gen. Op. No. JM-814 (1987).

[328]Tex. Att'y Gen. Op. No. JM-203 (1984).

[329]Tex. Att'y Gen. Op. No. JM-163 (1984); *see infra* p. 57.

[330]Tex. Att'y Gen. LO-96-078.

[331]Tex. Att'y Gen. Op. Nos. GA-0015 (2003) at 1, JC-0564 (2002) at 1-2.

[332]8 S.W.2d 666 (Tex. 1928).

[333]*Id.* at 674.

[334]Tex. Att'y Gen. Op. No. JM-934 (1988).

[335]Tex. Att'y Gen. Op. No. JM-386 (1985).

[336]Tex. Att'y Gen. LO-93-070.

chancellor;[337] and that a member of a city council may not appoint himself to the board of the city's crime control and prevention district.[338] A home-rule city may not by ordinance exempt a city council appointment to the governing body of another political subdivision from the common-law doctrine of incompatibility.[339]

3. Self-Employment

Some kinds of self-appointment incompatibility shade into the area of "self-employment" incompatibility. Although it clearly derives from the "self-appointment" prohibition announced in *Ehlinger v. Clark, supra*, self-employment incompatibility was not fully recognized in Texas until a 1975 opinion of the attorney general. There, the question was presented of whether a public school teacher was eligible to serve on the board of trustees of the district in which she was employed as a teacher.[340] On the basis of *Ehlinger* and out-of-state authority, the opinion concluded that the "positions of public school teacher for an independent school district and trustee for the same district are legally incompatible and cannot be simultaneously occupied by the same person."[341]

Since 1975, the attorney general has periodically addressed the issue of "self-employment" incompatibility. A municipal employee may not, for example, serve as commissioner for that city.[342] A city manager may not serve as police chief if, as city manager, he has supervisory authority over the chief.[343] A chief appraiser may not be a member of the appraisal district board.[344] And the chair of the Public Utility Commission may not be appointed as acting executive director, because a statute makes the executive director the commission's employee.[345]

On the other hand, a jailer is the employee of the sheriff, and consequently there is no impediment to a constable being employed as a jailer.[346] Likewise, a volunteer fire fighter is not an employee either of the sheriff, the city council, or the commissioners court, and as a result, neither a sheriff, a member of a city council, nor a county commissioner is precluded from becoming a volunteer fire fighter.[347] A mayor may serve as both a member and executive director of an industrial development

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[337]Tex. Att'y Gen. LO-92-008.

[338]Tex. Att'y Gen. Op. No. JC-0474 (2002).

[339]Tex. Att'y Gen. Op. No. JC-0225 (2000).

[340]Tex. Att'y Gen. LA-114 (1975).

[341]*Id.*

[342]Tex. Att'y Gen. LO-97-034.

[343]Tex. Att'y Gen. LO-89-002.

[344]Tex. Att'y Gen. LO-90-045.

[345]Tex. Att'y Gen. LO-89-057.

[346]Tex. Att'y Gen. LO-89-038.

[347]Tex. Att'y Gen. Op. No. JC-0385 (2001); Tex. Att'y Gen. LO-94-070, LO-93-054. *But cf.* Tex. Att'y Gen. Op. No. JC-0199 (2000) (member of City of Gilmer volunteer fire department prohibited from serving as member of Gilmer City Council because city charter designated volunteer fire department as the "Fire Department for the City of Gilmer"). The conclusion of the letter opinion was addressed by the legislature in 2001 to permit a member of a city council to "serve as a volunteer for an organization that protects the health, safety, or welfare of the municipality," if the city council adopts a resolution allowing members to perform such services. *See* TEX. LOC. GOV'T CODE ANN. § 21.002 (Vernon (continued...)

corporation created by his city, because a board member of an industrial development corporation does not hold a "public office."[348] And, a regent of a state university may serve as a volunteer, uncompensated coach,[349] although this decision has recently been questioned.[350] In Attorney General Opinion JC-0371 (2001), the attorney general was asked whether a school district trustee was permitted "to serve as a volunteer, unpaid, part-time history teacher [in his district]. . . for one period a day . . . for a single semester." In holding that the trustee was barred from doing so by self-employment incompatibility, the attorney general indicated that a fundamental test under this aspect of the doctrine was one of "supervision." "[T]he nature of the teaching profession, its statutory subordination to school and district administrative officials, and the significance that courts and this office have attached to *supervision* as the key to self-employment incompatibility, mean that the mere absence of compensation and certain non-teaching duties are not sufficient to permit a school district trustee to serve as a volunteer teacher in his district."[351] Furthermore, even though the trustee proposed to teach a single class for only one semester, his position could not be said to be "intermittent."[352]

Ordinarily, self-employment incompatibility will arise only where one position is an office and the other an employment. But in one instance, the attorney general has held that a junior college trustee may not serve as a member of the Higher Education Coordinating Board, since the board of trustees of a junior college is subordinate to the Coordinating Board in some of its principal duties.[353] On the other hand, no incompatibility occurs when a teacher is elected to the State Board of Education. School district employees are directly subordinate to the local school board, and any conflict between the state board and a local board of trustees is relevant only to incompatibility between the state board and the local school trustees. A teacher's relationship with the state board is too indirect to give rise to incompatibility.[354]

4. Conflicting Loyalties

The third aspect of incompatibility may be denominated "conflicting loyalties." It was first addressed by a Texas court in the 1927 case of *Thomas v. Abernathy County Line Independent School District*,[355] wherein the court found the offices of school trustee and city alderman to be incompatible:

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[347](...continued)
Supp. 2002). *See also* Tex. Att'y Gen. Op. No. JC-0564 (2002) (although the legislature has preempted the doctrine of self-employment incompatibility with regard to dual service in city governing bodies and volunteer fire departments, a city may not provide by ordinance that such dual service operates as an automatic resignation from the city council).

[348]Tex. Att'y Gen. Op. No. JC-0547 (2002).

[349]Tex. Att'y Gen. LO-98-036.

[350]Tex. Att'y Gen. Op. No. JC-0371 (2001).

[351]*Id.*

[352]Tex. Att'y Gen. Op. No. JC-0371 (2001).

[353]Tex. Att'y Gen. Op. No. JM-97 (1983).

[354]Tex. Att'y Gen. Op. No. JM-203 (1984).

[355]290 S.W. at 153.

> **In our opinion the offices of school trustee and alderman are incompatible; for under our system there are in the city council or board of alderman various directory or supervisory powers exertable in respect to school property located within the city or town and in respect to the duties of school trustee performable within its limits — *e.g.*, there might well arise a conflict of discretion or duty in respect to health, quarantine, sanitary, and fire prevention regulations. . . . If the same person could be a school trustee and a member of the city council or board of alderman at the same time, school policies, in many important respects, would be subject to direction of the council or aldermen instead of to that of the trustees.**[356]

It is now generally held that both positions must be "offices" in order for "conflicting loyalties" incompatibility to be applicable.[357] Thus, a county attorney not subject to the Professional Prosecutors Act may simultaneously serve as city attorney for a municipality in his county, since a city attorney does not ordinarily hold an "office."[358] Where both are in fact offices, it is the relationship between the two positions that creates the potential for conflict. If, for example, two governmental bodies are authorized to contract with each other, one person may not serve as a member of both.[359] Where both governmental bodies have the power of taxation, the potential for conflict is probably insurmountable.[360] Where the geographical boundaries of two governmental bodies overlap, there is always the potential for conflict.[361] It has been said, for example, that an individual may not simultaneously hold the offices of mayor and director of a hospital district board that has condemned property in the mayor's city.[362] But it may also arise whenever one governmental body has authority to impose its will on the other in any matter whatsoever.[363]

Conflicting loyalties has also been applied where one of the officers is not a member of a local governing board but holds some other official position. The attorney general has held, for example, that a county attorney may not serve on the board of trustees of a school district located within his county, since a county attorney is authorized to investigate matters and initiate actions involving school trustees.[364] Likewise, a county tax assessor-collector may not serve on the board of trustees of an independent school district that contracts with the county for the collection of taxes.[365] While a district judge may not simultaneously serve as a school trustee of a district within his

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[356]*Id*. at 153.

[357]Tex. Att'y Gen. Op. No. JM-1266 (1990); Tex. Att'y Gen. LO-96-148, LO-95-052, LO-95-029, LO-93-027.

[358]Tex. Att'y Gen. Op. No. JC-0054 (1999).

[359]Tex. Att'y Gen. Op. Nos. DM-311 (1994), JM-1266 (1990), JM-634 (1987); Tex. Att'y Gen. LO-93-022, LO-88-132, LO-88-049.

[360]Tex. Att'y Gen. Op. Nos. GA-0032 (2003), JC-0557 (2002), JM-1266 (1990).

[361]Tex. Att'y Gen. Op. Nos. JC-0339 (2001), JM-1266 (1990), JM-129 (1984).

[362]Tex. Att'y Gen. Op. No. JC-0363 (2001).

[363]*Thomas*, 290 S.W. at 153; Tex. Att'y Gen. Op. No. JM-129 (1984).

[364]Tex. Att'y Gen. LO-95-029.

[365]Tex. Att'y Gen. LO-92-004.

jurisdiction,[366] a municipal judge is not barred from serving as an elected junior college trustee.[367] Finally, it has been held that a county auditor may not be a member of the city council of a municipality located in his county, because his municipal duties may conflict with his county duties with regard to real property and the transfer of funds.[368]

On the other hand, a member of the board of directors of a river authority that imposes no taxes is not precluded from serving as a member of the board of an appraisal district.[369] A member of a school district board of trustees is not as a matter of law barred from simultaneously holding the office of county treasurer.[370] A justice of the peace is not barred from serving as a municipal judge for a city located in the same precinct. The mere fact that the courts have concurrent jurisdiction does not create an incompatibility.[371]

5. Overcoming Common-Law Incompatibility

Since incompatibility is a common-law doctrine, it may be overcome by statute.[372] Section 6.03(a) of the Tax Code, for example, permits a tax assessor-collector to serve on the board of directors of an appraisal district, and thus prevails over conflicting loyalties incompatibility.[373] Another statute prescribes the composition of the board of the Clear Creek Watershed Flood Control District to include certain members of component bodies.[374] And a home-rule city may overcome self-employment incompatibility by providing in its charter that its mayor may serve as city manager.[375] It may not, however, overcome self-appointment incompatibility when the appointment is to the board of another governmental body.[376]

D. Judges

It is necessary to add a word about judges. Canon 4H of the Code of Judicial Conduct provides:

> **A judge should not accept appointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A**

[366]Tex. Att'y Gen. LO-98-094.

[367]Tex. Att'y Gen. Op. No. JC-0216 (2000).

[368]Tex. Att'y Gen. Op. No. JM-133 (1984).

[369]Tex. Att'y Gen. Op. No. DM-47 (1991).

[370]Tex. Att'y Gen. Op. No. JC-0490 (2002).

[371]Tex. Att'y Gen. Op. No. JM-819 (1987).

[372]Tex. Att'y Gen. LO-95-052, LO-94-020.

[373]Tex. Att'y Gen. Op. No. JM-1157 (1990).

[374]Tex. Att'y Gen. LO-96-064.

[375]Tex. Att'y Gen. Op. No. JM-1087 (1989).

[376]Tex. Att'y Gen. Op. No. JC-0225 (2000).

judge, however, may represent his or her country, state, or locality on ceremonial occasions or in connection with historical, educational, and cultural activities.[377]

Article V, section 1-a of the Texas Constitution declares that "[a]ny Justice or Judge . . . may . . . be removed from office for . . . willful violation of the Code of Judicial Conduct."[378] The attorney general has held that these provisions bar a county court-at-law judge from serving as a trustee for an independent school district.[379] Thus, judges may be subject to additional dual office holding limitations beyond those found in article XVI, section 40, and the common-law doctrine of incompatibility. On the other hand, Canon 4H does not preclude a judge from serving in another elected position, such a junior college trustee.[380]

In Attorney General Letter Opinion 93-059, the attorney general concluded that a police officer was not barred by the common-law doctrine of incompatibility from serving as a municipal court judge in a different city. Likewise, in Attorney General Letter Opinion 92-035, the attorney general said that a justice of the peace may hold the position of deputy sheriff in a county other than the county he serves as justice of the peace. In Public Statement PS-2000-1, however, the State Commission on Judicial Conduct declared that "an act that is legal is not necessarily an act that is ethical," and that, as a result, the separation of powers doctrine of the Texas Constitution requires the conclusion that "any judge who attempts to serve both [executive and judicial] branches cannot accomplish the task without impairing the effectiveness of one or both positions." Consequently, any judge, including a municipal judge and a justice of the peace, who contemplates the assumption of a second office, of whatever kind, should consult the State Commission on Judicial Conduct.

E. Consequences of Dual Office Holding

Qualification for and acceptance of a second office operates as an automatic resignation from the first office.[381] But this principle apparently operates only when both positions are "offices." The attorney general has held that *ipso facto* relinquishment does not apply when one of the positions is a mere "employment."[382] Furthermore, *Ehlinger v. Clark*,[383] indicates that a "self-appointment" may be altogether void.[384] Thus, automatic resignation should be deemed to operate only in those instances in which a public officer accepts a second office in contravention of article XVI, section 40, or article XVI, section 12, or when he does so in violation of the "conflicting loyalties" aspect of the common-law doctrine of incompatibility.

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[377]Canon 4H of the Code of Judicial Conduct does not apply to a county judge, a justice of the peace, or a municipal judge. TEX. CODE JUD. CONDUCT, Canon 6, *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G. app. B (Vernon Supp. 2004); *see* Tex. Att'y Gen. Op. No. JC-0216 (2000).

[378]TEX. CONST. art. V, § 1-a(6)A; *see also* TEX. GOV'T CODE ANN. ch. 33 (Vernon 1988 & Supp. 2004).

[379]Tex. Att'y Gen. Op. No. JM-213 (1984).

[380]Tex. Att'y Gen. Op. No. JC-0216 (2000).

[381]*Pruitt v. Glen Rose Indep. Sch. Dist.*, 84 S.W.2d 1004 (Tex. Comm'n App. 1935, judgm't adopted).

[382]Tex. Att'y Gen. LO-89-057.

[383]8 S.W.2d 666.

[384]Tex. Att'y Gen. LO-89-057.

V. Automatic Resignation (Resign to Run) and Other Constitutional Limitations on Sequential Office Holding

In addition to prohibiting certain officeholders from holding two or more offices at one time, the Texas Constitution also limits certain officeholders from seeking or holding subsequent office.

A. Automatic Resignation (Resign to Run): Texas Constitution Article XI, Section 11 and Article XVI, Section 65 Limit Certain Officers from Announcing Their Candidacy for Another Office More Than a Year Before the Expiration of Their Current Term

Article XVI, section 65,[385] which provides that certain elected district, county and precinct officers who announce their candidacy for another office more than a year before the expiration of their current term of office automatically resign from office, is a relatively recent addition to the Texas Constitution. The operative language of section 65, often referred to as the "resign to run" provision, states as follows:

> **If any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (1) year, such announcement or such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to law in the same manner as other vacancies for such office are filled.**

[385] Article XVI, section 65 in its entirety provides as follows:

> (a) This section applies to the following offices: District Clerks; County Clerks; County Judges; Judges of the County Courts at Law, County Criminal Courts, County Probate Courts and County Domestic Relations Courts; County Treasurers; Criminal District Attorneys; County Surveyors; Inspectors of Hides and Animals; County Commissioners; Justices of the Peace; Sheriffs; Assessors and Collectors of Taxes; District Attorneys; County Attorneys; Public Weighers; and Constables.
>
> (b) If any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term of the office then held shall exceed one (1) year, such announcement or such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to law in the same manner as other vacancies for such office are filled.

This language was added to section 65 in November 1958.[386] Article XVI, section 65 had been adopted in 1954 to extend the terms of certain officers from two to four years.[387] The terms were staggered so that approximately one-half of the offices would be regularly filled by election every two years.[388] The increase in term length made it possible for these officers to devote almost their entire terms to the duties of office, in contrast to the old system of having to run for reelection one year out of every two.[389] The staggered four-year terms of office also made it possible, however, for an officer to run for a different office at the general election in the middle of his term, thus defeating the purpose of the 1954 amendment — to permit an official to give his undivided attention to his office for at least three years.[390] The legislature proposed the "resign to run" provision in 1958 to correct this unanticipated effect of the 1954 amendment.[391] Article XI, section 11 of the Texas Constitution, which contains a similar "resign to run" provision[392] applicable to an elected or appointed municipal officer whose term of office exceeds two years,[393] was also proposed and adopted in 1958.[394]

Article XVI, section 65 applies only to the officeholders specifically listed in subsection (a), including, among others, county commissioners, county treasurers, district, county and criminal district attorneys, sheriffs, constables, certain judges, and district and county clerks.[395] Automatic

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[386]*See* H.J. Res. 31, 55th Leg., R.S., 1957 Tex. Gen. Laws 1641; Amendments to Constitution of Texas, 1959 Tex. Gen. Laws XXV, XXVIII.

[387]*See* TEXAS LEGISLATIVE COUNCIL, INFORMATION CONCERNING CONSTITUTIONAL AMENDMENTS TO BE CONSIDERED NOVEMBER 4, Amendment No. 4 – H.J.R. 31 (1958); *see* S.J. Res. 4, § 12, 53d Leg., R.S., 1953 Tex. Gen. Laws 1164, 1166; Amendments to Constitution of Texas, 1955 Tex. Gen. Laws XXXV, XLIV.

[388]*See* TEXAS LEGISLATIVE COUNCIL, *supra*, at 1 (1958).

[389]*See id*. at 2 (arguments for amendment).

[390]*See id.* at 1.

[391]*See id*.; *see also* Tex. Att'y Gen. Op. No. WW-788 (1960) at 3 (citing press reports). Attorney General Opinion WW-788 also stated that another purpose of the 1958 amendment to article XVI, section 65 was to reduce the duration of appointments. *See* Tex. Att'y Gen. Op. No. WW-788 (1960) at 3.

[392]Article XI, section 11, which was revised in 2001, provides in pertinent part: "[S]uch [municipal] officers, elective or appointive, are subject to Section 65(b), Article XVI, of this constitution, providing for automatic resignation in certain circumstances, in the same manner as a county or district officer to which that section applies." TEX. CONST. art. XI, § 11(a). For the complete text of article XI, section 11, *see* app. at 84.

[393]*See* Tex. Att'y Gen. Op. No. M-586 (1970) (Tex. Const. art. XI, § 11 prohibition applies only to municipal officers whose term of office exceeds two years); *see also* Tex. Att'y Gen. Op. No. JM-553 (1986) (same).

[394]*See* H.J. Res. 48, 55th Leg., R.S., 1957 Tex. Gen. Laws 1645, 1645; Amendments to Constitution of Texas, 1959 Tex. Gen. Laws XXV, XXVIII.

[395]*See supra* note 381, text of Tex. Const. art. XVI, § 65(a), for a complete list. Article XVI, section 65 does not apply to officeholders not listed in subsection (a), such as members of a state board, *see* Tex. Att'y Gen. Op. No. JM-413 (1985), or district judges, *see* Tex. Att'y Gen. Op. No. JM-402 (1985). The United States Supreme Court upheld article XVI, section 65 against a claim that it violates the Federal Equal Protection Clause because it applies to some officials and not to others. *See Clements v. Fashing*, 457 U.S. 957 (1982). Although article XVI, section 65 is limited to elected district, county and precinct officers, this office has held that a county commissioners court may prohibit certain county employees from running for office in a partisan election. *See* Tex. Att'y Gen. Op. No. JM-521 (1986). In addition, statutes may disqualify certain officeholders who run for another office. *See, e.g.*, TEX. GOV'T CODE ANN. § 30.010975 (Vernon Supp. 2004) (automatic resignation provision applicable only to certain municipal judges); Act of May 28, 1997, 75th Leg., R.S., ch. 1349, § 75, 1997 Tex. Gen. Laws 5080, 5097 (enacting TEX. WATER CODE ANN. § 49.072, which provided that water district director who became candidate for another office was no longer qualified to serve), *repealed by* Act of May 30, 1999, 76th Leg., R.S., ch. 1354, § 15, 1999 Tex. Gen. Laws 4589, 4593; *see also* TEX. CODE JUD.

(continued...)

resignation occurs when any such officeholder "announce[s] [his] . . . candidacy, or shall in fact become a candidate . . . for any office of profit or trust under the laws of this State or the United States." Below we discuss three concepts relevant to resign to run: (1) candidacy; (2) office of profit or trust; and (3) the consequences of automatic resignation.

1. Candidacy: What constitutes an announcement? What is a candidate "in fact"?

An officeholder automatically resigns if he or she announces his or her candidacy or in fact becomes a candidate for another office when his or her remaining time in office exceeds one year. Opinions of this office suggest that an officeholder announces his or her candidacy for office "[i]f a reasonable person may conclude [from] the statement that the individual intends, without qualification, to run for the office in question."[396] Thus, the attorney general has concluded that a person who has merely stated that he will "seriously consider running" for an office if the incumbent resigns has not announced his candidacy for purposes of article XVI, section 65.[397] By contrast, a person who states in a public meeting or press release that he will run for a particular office has announced his candidacy for purposes of article XVI, section 65.[398]

An officer "in fact becomes a candidate" by the act of applying for a place on the ballot; it is not relevant to article XVI, section 65 whether the officer is eligible to hold the second office or whether his or her name is actually placed on the ballot.[399] An officeholder automatically resigns under article XVI, section 65, even if the officeholder is ineligible to hold the office for which he has filed.[400] An officeholder does not trigger the automatic resignation provision, however, by seeking a gubernatorial appointment to an elected office[401] or by the mere act of seeking a political party's executive committee's nomination to be the party's candidate in a general election.[402]

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[395](...continued)
CONDUCT, Canon 5(4), *reprinted in* TEX. GOV'T CODE ANN., tit. 2, subtit. G app. B (Vernon Supp. 2004) ("A judge shall resign from judicial office upon becoming a candidate in a contested election for a non-judicial office either in a primary or in a general or in a special election. A judge may continue to hold judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention or while being a candidate for election to any judicial office.").

[396]Tex. Att'y Gen. LO-95-071.

[397]*See id.*

[398]*See* Tex. Att'y Gen. Op. Nos. DM-377 (1996) (county court at law judge's statement at commissioners court meeting that he was "at that moment" a candidate for a judgeship constituted an announcement for purposes of Tex. Const. art. XVI, § 65), WW-1253 (1962) (justice of peace's issuance of press release stating that he would be candidate for another office constituted an announcement for purposes of Tex. Const. art. XVI, § 65).

[399]*See* Tex. Att'y Gen. Op. No. JC-0249 (2000) at 3.

[400]*See* Tex. Att'y Gen. Op. No. JM-132 (1984).

[401]*See* Tex. Att'y Gen. LO-96-107.

[402]*See* Tex. Att'y Gen. Op. No. JC-0249 (2000) at 3-4.

In addition, an officeholder automatically resigns even if he is not precluded from simultaneously holding the two offices under article XVI, section 40, the constitutional dual office holding prohibition.[403]

Section 172.021 of the Election Code provides that circulation of a signature petition in connection with a candidate's application for a place on the ballot does not constitute candidacy or an announcement of candidacy for purposes of article XVI, section 65 or article XI, section 11. Similarly, section 251.001 of the Election Code provides that the filing of a campaign treasurer appointment does not constitute candidacy or an announcement of candidacy for purposes of those provisions.

2. Office of Profit or Trust: Which candidacies are affected?

The term "office of trust" as used in article XVI, section 65 is interchangeable with the term "office."[404] An individual who holds an office of trust "is invested with some portion of the sovereign functions of the government, to be exercised by him for the benefit of the public."[405] An officer who is paid holds an "office of profit."[406] Thus, "office of profit or trust" is a broad term that embraces any office, paid or unpaid, including, for example, such offices as state legislator[407] or member of a home-rule or general-law city council,[408] a water district[409] or water control and improvement district[410] board, or a school or hospital district board.[411] An office of a political party is not an "office of profit or trust."[412]

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[403]*See Ramirez v. Flores*, 505 S.W.2d 406, 410-11 (Tex. Civ. App.–San Antonio 1973, writ ref'd n.r.e.) (holding that automatic resignation provision not affected by amendment to Tex. Const. art. XVI, § 40 excepting certain officers from certain dual office holding limitations).

[404]*See* Tex. Att'y Gen. LO-96-107 ("office of trust" as used in Tex. Const. art. XVI, § 65 is interchangeable with "office").

[405]Tex. Att'y Gen. Op. No. JM-395 (1985) (relying upon definition of "office of trust" in *Kimbrough v. Barnett*, 55 S.W. 120 (Tex. 1900), and *Ramirez*, 505 S.W.2d at 409).

[406]No cases or attorney general opinions discuss the term "office of profit" as used in article XVI, section 65. "Office of profit" appears elsewhere in the Texas Constitution. *See* TEX. CONST. art. III, §§ 18, 20, *id.* art. XVI §§ 5, 12. Courts equate the term "office of profit" with the term "lucrative office," and have concluded that an office is lucrative if the officeholder receives any compensation, no matter how small. *See Dawkins v. Meyer*, 825 S.W.2d 444, 446-47 (Tex. 1992) (relying upon *Willis v. Potts*, 377 S.W.2d 622, 623 (Tex. 1964)). Reimbursement for expenses alone does not render an office lucrative. *See id*.

[407]*See* Tex. Att'y Gen. LO-97-092.

[408]*See* Tex. Att'y Gen. Op. Nos. JM-553 (1986) (home-rule city council member holds an office of trust within meaning of Tex. Const. art. XVI, § 65), JM-395 (1985) (general-law city council member holds an office of trust within meaning of Tex. Const. art. XVI, § 65); *see also* Tex. Att'y Gen. Op. No. JC-0318 (2000) at 3 (concluding that mayor of a particular city held an office of profit within the meaning of Tex. Const. art. XI, § 11).

[409]*See* Tex. Att'y Gen. Op. No. JM-132 (1984).

[410]*See* Tex. Att'y Gen. Op. No. H-767 (1967).

[411]*See Ramirez*, 505 S.W.2d at 409 (trustee of independent school district holds "office of trust"); Tex. Att'y Gen. Op. No. JC-0403 (2001) (trustee of consolidated school district holds "office of profit or trust"); Tex. Att'y Gen. LO-96-107 (uncompensated member of hospital district board holds "office of trust").

[412]Tex. Att'y Gen. Op. No. JC-0562 (2002).

3. Consequences of Automatic Resignation

An automatic resignation under article XVI, section 65 becomes effective immediately upon the officeholder's announcement rather than when the officeholder qualifies for the second office.[413] This office has concluded that a person who automatically resigns by operation of article XVI, section 65 cannot undo the resignation by withdrawing his candidacy.[414] This office has also concluded, however, that an officeholder who automatically resigns under article XVI, section 65 holds over in office until his successor is appointed and qualifies for office[415] by operation of the constitutional holdover provision, article XVI, section 17, which states as follows: "All officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified." The same is true for municipal officers who automatically resign under article XI, section 11.[416] An officeholder who automatically resigns is ineligible for appointment to fill the vacancy created by the resignation.[417]

The attorney general recently addressed whether a county commissioners court is required to fill a vacancy in office when an officer automatically resigns by operation of article XVI, section 65.[418] The attorney general concluded that a commissioners court has no enforceable duty to fill such a vacancy.[419] However, the attorney general also noted that in some extraordinary circumstances there may be a basis for removing commissioners for their failure to fill a vacancy.[420]

Significantly, article XI, section 11, providing for the automatic resignation of municipal officers, operates differently in this regard. Unlike its counterpart, article XI, section 11 mandates that "any vacancy or vacancies occurring on such [municipal] governing body shall not be filled by appointment but must be filled by majority vote of the qualified voters at a special election called for such purpose within one hundred and twenty (120) days after such vacancy or vacancies occur."[421] Thus, when a vacancy arises by operation of article XI, section 11, the vacancy may not be filled by appointment. Furthermore, the officer charged with initiating an election to fill the vacancy must call an election in time to ensure that the vacancy is filled within 120 days after the vacancy occurs. The duty to hold an election to fill a vacancy under article XI, section 11 is a ministerial, non-discretionary, enforceable duty.[422]

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[413]*See Ramirez*, 505 S.W.2d at 409-11.

[414]*See* Tex. Att'y Gen. LO-94-059.

[415]*See* Tex. Att'y Gen. Op. Nos. DM-377 (1996), H-161 (1973), C-43 (1963), WW-1253 (1962).

[416]*See* Tex. Att'y Gen. Op. Nos. JC-0403 (2001), JC-0318 (2000).

[417]*See* Tex. Att'y Gen. Op. Nos. DM-377 (1996), WW-788 (1960).

[418]*See* Tex. Att'y Gen. Op. No. JC-0140 (1999) (addressing commissioners court's duty to fill vacancy in the office of a constable who had automatically resigned by announcing his candidacy for school district trustee more than one year before the expiration of his term).

[419]*See id.* at 1-3.

[420]*See id.* at 3-4.

[421]TEX. CONST. art. XI, § 11(b).

[422]*See* Tex. Att'y Gen. Op. Nos. JC-0403 (2001), JC-0318 (2000).

B. Other Constitutional Limitations on Sequential Office Holding

Article III of the Texas Constitution contains two provisions that limit sequential office holding by candidates for and members of the Texas Legislature. Section 19 affects the eligibility of officeholders to serve in the legislature while section 18 affects the eligibility of legislators to hold subsequent elected and appointed offices.

1. Article III, Section 19: Limitations on Officers' Subsequent Service in the Texas Legislature

Article III, section 19 limits the eligibility of a broad spectrum of officeholders to serve in the Texas Legislature:[423]

> **No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature.**

Below we examine the offices embraced by this provision and the duration of section 19 ineligibility.

a. Offices Affected

Section 19 makes a broad array of officeholders ineligible to serve in the legislature — not just judges, the Secretary of State, the Attorney General, and court clerks — but also "any person holding a lucrative office under the United States, or this State, or any foreign government." The latter phrase has been the subject of several judicial opinions. These cases hold that an officer who receives a salary, fees or any other compensation holds a "lucrative office" within this provision.[424] An office is lucrative even if the officeholder's compensation is quite insignificant, such as a small per diem.[425] Reimbursement for expenses alone, however, does not render an office lucrative.[426] An

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[423]The United States Supreme Court upheld article III, section 19 against a claim that it violates the Federal Equal Protection Clause because it bars officeholders from running for the legislature but not for other offices. *See Clements*, 457 U.S. 957.

[424]*See Whitehead v. Julian*, 476 S.W.2d 844, 845 (Tex. 1972).

[425]*See, e.g.*, *Dawkins v. Meyer*, 825 S.W.2d 444, 446-47 (Tex. 1992) (state agency board member who received $30 per diem in addition to expenses held lucrative office within meaning of Tex. Const. art. III, § 19); *Willis v. Potts*, 377 S.W.2d 622, 623 (Tex. 1964) (city council member who received $10 per diem in addition to expenses held lucrative office within meaning of Tex. Const. art. III, § 19).

[426]*See Whitehead*, 476 S.W.2d at 845 (mayor who received only $50 monthly expense allowance and whose expenses exceeded allowance did not hold lucrative office within meaning of Tex. Const. art. III, § 19); *see also* Tex. Att'y Gen. Op. No. JC-0464 (2002) (board member of state agency who was entitled only to reimbursement for actual and necessary travel expenses did not hold lucrative office within meaning of Tex. Const. art. III, § 19). Article XVI, section 12 of the Texas Constitution in effect extends article III, section 19 by making a person who holds an office of *trust* under the United States, another state, or a foreign government ineligible to serve in the legislature. *See* TEX. CONST. art. XVI, § 12 ("No member of Congress, nor person holding or exercising any office of profit or trust, under the United States, or either of them, or under any foreign power, shall be eligible as a member of the Legislature, or hold or exercise any office of profit or trust under this State.").

"office under . . . this State" embraces not only elected and appointed state offices[427] but also positions held by officers of political subdivisions who exercise a portion of the sovereign power of the state,[428] including, for example, a city council member or county commissioner.[429]

b. Duration of Ineligibility

The effect of section 19 is somewhat unsettled after the Texas Supreme Court's decision in *Wentworth v. Meyer*.[430] Prior to that decision, section 19 had been construed to provide that an officeholder was ineligible to serve as a legislator during the entire term of the office to which he was elected or appointed, even though he resigned before running for the legislature.[431] In *Wentworth*, the Texas Supreme Court held that article III, section 19 did not make an individual ineligible for the state senate, even though he had been appointed to a state board for a term that overlapped the legislative term by twenty-one days. The court equated the phrase "term for which he is elected or appointed" with an officeholder's tenure in office as opposed to the duration of the term.

This office has concluded that "section 19, as interpreted in *Wentworth*, does not disqualify the holder of a lucrative office from running for the legislature even though the term of the lucrative office overlaps the legislative term, if the officeholder resigns from the lucrative office before filing for the legislature."[432] Thus, an officeholder who resigns from office prior to filing for office is eligible to serve in the legislature. It is not clear from *Wentworth*, however, whether an officeholder who resigns from lucrative office *after* filing for office is disqualified.[433] This question must be clarified by the courts.

Also unsettled in the wake of *Wentworth* is the relationship between article III, section 19 and the constitutional holdover provision, article XVI, section 17. Under article XVI, section 17, an officeholder who resigns remains in office until his successor is qualified. The effect of article XVI, section 17 was not an issue in *Wentworth* because there the first office had been filled by appointment of a successor.[434] It remains for the judicial branch to clarify whether an officeholder

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[427]*See, e.g., Dawkins*, 825 S.W.2d at 447-50 (state agency board member).

[428]*Willis*, 377 S.W.2d 622, 624-25 (Tex. 1964).

[429]*See, e.g., id.* (city council member holds office under this state within meaning of Tex. Const. art. III, § 19); *Lee v. Daniels*, 377 S.W.2d 618 (Tex. 1964) (county commissioner holds office under this state within meaning of Tex. Const. art. III, § 19).

[430]839 S.W.2d 766 (Tex. 1992).

[431]*See Lee*, 377 S.W.2d 618, *overruled by Wentworth v. Meyer*, 839 S.W.2d 766 (1992); *Willis*, 377 S.W.2d 622; *Kirk v. Gordon*, 376 S.W.2d 560 (Tex. 1964), *overruled by Wentworth*, 839 S.W.2d 766 (1992); Tex. Att'y Gen. Op. Nos. MW-513 (1982), H-278 (1974); *see also Dawkins*, 825 S.W.2d 444.

[432]Tex. Att'y Gen. LO-95-069, at 3.

[433]*See id.* (concluding that five of *Wentworth* justices agreed "that resignation prior to the filing date would remove an officeholder from the restrictions of article III, section 19, and individual justices among them might find a later resignation sufficient"); *see also* Tex. Att'y Gen. LO-97-092.

[434]*Wentworth*, 839 S.W.2d at 769.

who resigns to run for the legislature in reliance on *Wentworth* is immediately eligible to seek legislative office or is ineligible to do so until his successor has qualified.[435]

2. Article III, Section 18: Limitations on Legislators' Eligibility to Hold Subsequent Offices

Article III, section 18, which affects legislators' eligibility to hold subsequent elected and appointed offices, provides in pertinent part[436] as follows:

> **No Senator or Representative shall, during the term for which he was elected, be eligible to (1) any civil office of profit under this State which shall have been created, or the emoluments of which may have been increased, during such term, or (2) any office or place, the appointment to which may be made, in whole or in part, by either branch of the Legislature; provided, however, the fact that the term of office of Senators and Representatives does not end precisely on the last day of December but extends a few days into January of the succeeding year shall be considered as de minimis, and the ineligibility herein created shall terminate on the last day in December of the last full calendar year of the term for which he was elected.**

Below we examine the circumstances under which section 18 applies to bar a legislator from subsequent office, the duration of a legislator's term of office under section 18, and the effect of a legislator's resignation.

a. Offices Affected

Section 18 makes a legislator ineligible for subsequent office under three circumstances: (1) when the "civil office of profit under this State" has been created by the legislature during the legislator's term of office; (2) when the emoluments of the "civil office of profit under this State" have been increased by the legislature during the legislator's term of office; and (3) when "the appointment . . . may be made, in whole or in part, by either branch of the Legislature" during the legislator's term of office. The phrase "civil office of profit under this State" embraces any compensated state or local office,[437] including, for example, a state office like governor or attorney general[438] or a local

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[435]In Letter Opinion 89-106, this office concluded that an officer-elect who declined to qualify for a new term in office was not ineligible under article III, section 19 and that the officer-elect's term in office was not extended by the holdover provision. *See* Tex. Att'y Gen. LO-89-106.

[436]For the complete text of article III, section 18, *see* app. at 83.

[437]For purposes of article III, section 18, the determining factor in distinguishing an officer from a mere employee "is whether any sovereign function of the government is conferred upon the individual to be exercised by him for the benefit of the public largely independent of the control of others." Tex. Att'y Gen. LO-96-080 (concluding that position of chancellor of state university system was not civil office of profit within the meaning of Tex. Const. art. III, § 18). This office has also stated that a civil office of profit must involve service for a fixed term. *See* Tex. Att'y Gen. Op. No. JM-847 (1988) (special commissioner appointed by court to one case does not serve for a fixed term and therefore does not hold an office for purposes of Tex. Const. art. III, § 18).

[438]*See Strake v. Court of Appeals*, 704 S.W.2d 746 (Tex. 1986) (attorney general); *Hall v. Baum*, 452 S.W.2d 699 (Tex. 1970) (governor).

office like county commissioner[439] or district clerk.[440] The legislature increases the emoluments of an office whenever it increases the office's salary, even if the increase is insubstantial or does not exceed the rate of inflation.[441] An increase in emoluments means only actual pecuniary gain; it does not include a contingent and remote benefit.[442]

b. Term of Office

A legislator is ineligible under section 18 only during "the term for which he was elected." A legislator is eligible once his legislative term expires. A legislator is not disqualified to run for an office during his legislative term if he will be eligible to assume the second office at the time the term for the new office begins.[443]

Legislators take office on the day set for convening the legislature following the general election and serve "for the full term of years to which elected and until their successors shall have been elected and qualified."[444] The terms of elective local and statewide offices commence in the January following a general election.[445] A legislator whose term will expire the first day of a legislative session is not ineligible to assume an office with a term commencing in January due to the language in section 18 providing that ineligibility terminates on the last day in December of the last full calendar year of the term for which the legislator is elected. Thus, for example, a legislator whose ineligibility will terminate December 31st may become a candidate for county commissioner for a term beginning January 1st even though the legislature increased the emoluments of that office during his legislative term.[446] Section 18 generally has a greater impact on state senators who serve four year terms as opposed to state representatives who serve two year terms.[447]

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[439]*See* Tex. Att'y Gen. Op. No. M-399 (1969) (county commissioner).

[440]*See Kothmann v. Daniels*, 397 S.W.2d 940, 942 (Tex. Civ. App.–San Antonio 1965, no writ) (district clerk holds a civil office of profit).

[441]*See Strake*, 704 S.W.2d at 748 (Tex. 1986) (holding that 3 percent increase in salary of office of attorney general constituted an increase in emoluments of that office); *Hall*, 452 S.W.2d at 703 ($1250 monthly increase in salary of governor was an increase in emoluments of that office).

[442]*See Brown v. Meyer*, 787 S.W.2d 42 (Tex. 1990) (increase in potential retirement benefits of attorney general held not to constitute increase in emoluments).

[443]*See Kothmann*, 397 S.W.2d at 942-43.

[444]TEX CONST. art. III, §§ 3 (senators), 4 (representatives).

[445]Terms of office for elective state, district, county and precinct officers commence on January 1 of the year following the general election, *see* TEX. GOV'T CODE ANN. § 601.003(a), (b) (Vernon 1994), with the exception of the Governor, Lieutenant Governor, and members of the legislature. *Id*. § 601.003(c); *see also* TEX. CONST. art. III, §§ 3 (senators), 4 (representatives), art. IV, §§ 4 (Governor installed first Tuesday after organization of legislature), 5 (Lieutenant Governor continues in office for same time as Governor).

[446]*See* Tex. Att'y Gen. Op. No. M-399 (1969).

[447]TEX CONST. art. III, §§ 3 (senators), 4 (representatives). *See generally Hall*, 452 S.W.2d at 703-05 (concluding that article III, section 18, which operates to bar only certain senators from seeking an office, and does not deny those senators equal protection).

c. Effect of Resignation During Legislative Term

Article III, section 18 has traditionally been understood to preclude legislators from resigning to run for or to be appointed to subsequent office.[448] As the interpretive commentary to section 18 states, "The language is designed to prevent legislators from resigning to take state offices which have been created, or the emoluments of which may have been increased during their term of office." Another commentator has explained that section 18 "bars a legislator from running for elective office, even though he resigns from the legislature before getting on the ballot, if the office was created or its salary increased during his term."[449]

The Texas Supreme Court's construction of article III, section 19 in *Wentworth* raises questions about the proper construction of article III, section 18. Again, section 19 provides that an officeholder is ineligible to run for legislative office "during the term for which he is elected or appointed."[450] In *Wentworth*, the court construed this phrase to mean not the entire term of office but rather only the time a person actually serves in office, and concluded that a person who had resigned from a state appointive office was eligible to run for legislative office even though the terms of the two offices overlapped.[451] The dissenting opinions suggested that this construction of "term of office" has implications for section 18: "The parallel phrases in sections 18 and 19 cannot reasonably be construed to have different meanings. If term means tenure, then section 18 is rendered meaningless and no longer prevents a legislator from resigning to seek the office which he or she has voted to create or expand."[452]

It remains to be seen whether *Wentworth* will affect the courts' construction of section 18. However, the Attorney General has concluded that, given section 18's purpose and the differences between the two provisions, the Texas Supreme Court would not apply the *Wentworth* rationale to section 18 and that in section 18 "the phrase 'during the term for which he was elected' must be read literally."[453] Thus, this office recently construed section 18 to preclude a legislator who resigns from office from being appointed to another office requiring senate confirmation during the legislator's term.[454]

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[448]*See Spears v. Davis*, 398 S.W.2d 921, 929 (Tex. 1966) (section 18 designed to remove "any improper personal motive of gain that might influence a Legislator to create or increase the emoluments of a public office with the intention of resigning his legislative post in order to take the office"); Tex. Att'y Gen. LA-58 (1973) (member of Sixty-third Legislature who resigns from office ineligible for appointment to office created by that legislature).

[449]*See* 1 GEORGE D. BRADEN, THE CONSTITUTION OF THE STATE OF TEXAS: AN ANNOTATED AND COMPARATIVE ANALYSIS 134 (1977).

[450]*Wentworth*, 839 S.W.2d 766.

[451]*See id*. at 767-69.

[452]*Id*. at 789 (Doggett, J. dissenting); *see also id*. at 775 (Hecht, J. concurring); *id*. at 783 (Phillips, J. dissenting).

[453]Tex. Att'y Gen. Op. No. GA-0006 (2002) at 5.

[454]*Id.*

VI. The Whistleblower Act

A. History and Purpose

"Whistleblowing" has been defined as "the act of a man or woman who, believing the public interest overrides the interest of the organization he serves, publicly 'blows the whistle' if the organization is involved in corrupt, illegal, fraudulent, or harmful activity."[455] Chapter 554 of the Government Code, commonly known as the Whistleblower Act, was initially enacted by the legislature in 1983.[456] It has been extensively amended, most recently in 1995.[457] As discussed in section VI.C.1., *supra*, Chapter 554 broadly applies to various units of government. There are other anti-retaliation statutes concerning specific situations beyond the scope of this article.[458]

The purposes of the act have been described as: (1) to protect a public employee from retaliation by his employer when, in good faith, the employee reports a violation of law; and (2) to secure in consequence lawful conduct on the part of those who direct and control the affairs of public bodies.[459] Another court has declared that the statute's purpose is to "enhance openness in government and compel the government's compliance with the law by protecting those who inform authorities of wrongdoing."[460]

Most courts have held that, since the statute has a "remedial purpose," it should be liberally construed to effect that purpose.[461] One court, however, has disagreed, noting that, in the absence of legislative history and therefore legislative intent, many courts have expanded the law beyond the words provided by the bill's sponsor.[462] The result "has been a shift from a balanced provision of protection for employees who report real violations to one which encourages litigation over disagreements about whether an agency is fulfilling its administrative goals based on an employee's own personal points of view."[463] This remains, however, very much the minority view.

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[455]*Stinnett v. Williamson County Sheriff's Dep't*, 858 S.W.2d 573, 575 (Tex. App.–Austin 1993, writ denied).

[456]Act of May 30, 1983, 68th Leg., R.S., ch. 832, 1983 Tex. Gen. Laws 4751.

[457]Act of May 25, 1995, 74th Leg., R.S., ch. 721, 1995 Tex. Gen. Laws 3812.

[458]*See, e.g.*, TEX. FAM. CODE ANN. § 261.110(b) (reporting child abuse) (Vernon 2002); TEX. HEALTH & SAFETY CODE ANN. § § 161.164 (applicable to hospitals and other facilities), 242.133 (applicable to convalecent and nursing homes) (Vernon 2001); TEX. LABOR CODE ANN. § 411.082 (Vernon 1996) (reporting occupation health or safety law violations).

[459]*Travis County v. Colunga*, 753 S.W.2d 716, 718-19 (Tex. App–Austin 1988, writ denied); *see also Town of Flower Mound v. Teague*, 111 S.W.3d 742, 752 (Tex. App.–Fort Worth 2003, no pet.).

[460]*Davis v. Ector County*, 40 F.3d 777, 785 (5th Cir. 1994).

[461]*See, e.g., Harris County v. Lawson*, 122 S.W.3d 276, 280 (Tex. App.–Houston [1st Dist] 2003, pet. filed); *Rogers v. City of Fort Worth*, 89 S.W.3d 265, 274 (Tex. App.–Fort Worth 2002, no pet.); *Castaneda v. Tex. Dep't of Agric.*, 831 S.W.2d 501, 503 (Tex. App.–Corpus Christi 1992, writ denied); *Davis*, 40 F.3d at 785.

[462]*Tex. Dep't of Criminal Justice v. Terrell*, 925 S.W.2d 44, 57 (Tex. App.–Tyler 1995, no writ).

[463]*Id.* at 58.

B. Waiver of Immunity

The Whistleblower Act is strictly a creature of statute. No cause of action for whistleblowing existed at common law.[464] No remedy exists at present for a claim against a private employer under the Whistleblower Act.[465]

Prior to 1995, some governmental bodies that were sued under the Whistleblower Act raised the matter of sovereign immunity, although the courts that considered the issue held that, in enacting the statute, the legislature unambiguously waived governmental immunity both from suit and from liability.[466] In 1995, however, the legislature added section 554.0035 to the Government Code,[467] which states that "[a] public employee who alleges a violation of this chapter may sue the employing state or local governmental entity for the relief provided by this chapter" and that, to the extent of liability, "[s]overeign immunity is waived and abolished." A plurality of the Texas Supreme Court held that the state also may not assert immunity against a suit to enforce an agreement settling a Whistleblower Act claim.[468]

C. Who It Regulates and Who It Protects

1. Who It Regulates

The Whistleblower Act applies to every "state governmental entity" or "local governmental entity," as defined in the statute.[469] The definition of "state governmental entity" is divided into the three departments of state government: executive, legislative and judicial. The executive branch embraces every "board, commission, department, office, or other agency in the executive branch" that is "created under the constitution or a statute of the state" and includes every "institution of higher education, as defined by Section 61.003, Education Code."[470] The legislative branch comprises "the legislature or a legislative agency."[471] The judicial branch consists of "the Texas

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[464]*Wichita County v. Hart*, 917 S.W.2d 779, 782 (Tex. 1996).

[465]*Austin v. HealthTrust, Inc.-The Hosp. Co.*, 967 S.W.2d 400, 401 (Tex. 1998); *Thompson v. El Centro del Barrio*, 905 S.W.2d 356, 358-59 (Tex. App.–San Antonio 1995, writ denied).

[466]*See, e.g., Tex. Dep't of Human Servs. v. Green*, 855 S.W.2d 136, 143 (Tex. App.–Austin 1993, writ denied); *City of Alamo v. Holton*, 934 S.W.2d 833, 836 (Tex. App.–Corpus Christi 1996, no writ).

[467]Act of May 25, 1995, 74th Leg., R.S., ch. 721, § 4, 1995 Tex. Gen. Laws 3812, 3813.

[468]*Tex. A&M Univ.-Kingsville v. Lawson*, 87 S.W.3d 518, 522-23 (Tex. 2002).

[469]TEX. GOV'T CODE ANN. § 554.001 (Vernon Supp. 2004).

[470]*Id.* § 554.001(5)(A).

[471]*Id.* § 554.001(5)(B).

Supreme Court, the Texas Court of Criminal Appeals, a court of appeals, a state judicial agency, or the State Bar of Texas."[472] District courts are not specifically mentioned in this rather detailed definition. Furthermore, whistleblower claims brought by an employee and member of the Texas National Guard, a state agency, against the Department of the Adjutant General, who is for some purposes a state officer, are nonjusticiable by civilian courts.[473]

"Local governmental entity" is defined as "a political subdivision of the state, including a: (A) county; (B) municipality; (C) public school district; or (D) special-purpose district or authority."[474] When a whistleblower claim is directed against a county officer, the county as a whole constitutes the governmental unit.[475] Thus, a county is liable under the Whistleblower Act in a cause of action against the sheriff.[476] The "workplace" in such a situation is the county rather than one's immediate or departmental supervisor.[477] It is not clear whether certain entities are subject to the Whistleblower Act. A community action agency *might* be classified as a "special-purpose district or authority," but an aggrieved employee must demonstrate that it properly belongs in that category.[478]

The Whistleblower Act does not protect an employee solely against the acts of an individual supervisor. Rather, "it seeks to protect the individual employee against collective acts of the agency, the bureaucracy, the institution, and the system that retaliates."[479]

2. Who It Protects

The beneficiary of the Whistleblower Act's protections — the whistleblower himself — must be a "public employee."[480] "Public employee" is defined in the Act as "an employee or appointed officer other than an independent contractor who is paid to perform services for a state or local governmental entity."[481] The statute does not distinguish between a probationary employee and a non-probationary employee.[482] An independent contractor, however, does not fall within the ambit of the term "public employee."[483]

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[472]*Id.* § 554.001(5)(C).

[473]*Newth v. Adjutant General's Dep't*, 883 S.W.2d 356, 357 (Tex. App.–Austin 1994, writ denied).

[474]TEX. GOV'T CODE ANN. § 554.001(2) (Vernon Supp. 2004).

[475]*Wichita County v. Hart*, 892 S.W.2d 912, 929 (Tex. App.–Austin 1994), *rev'd on other grounds*, 917 S.W.2d 779 (Tex. 1996).

[476]*Id.*; *see also Robertson County v. Wymola*, 17 S.W.3d 334 (Tex. App.–Austin 2000, writ denied); *Tarrant County v. Bivins*, 936 S.W.2d 419, 42-22 (Tex. App.–Fort Worth 1996, no writ).

[477]*Davis*, 40 F.3d at 786.

[478]*Casillas v. Pecos County Cmty. Action Agency*, 792 S.W.2d 203, 205 (Tex. App.–Austin 1990, writ denied).

[479]*City of Fort Worth v. Zimlich*, 975 S.W.2d 399, 406 (Tex. App.–Austin 1998), *rev'd on other grounds*, 29 S.W.3d 62 (Tex. 2000); *City of San Antonio v. Heim*, 932 S.W.2d 287, 293 (Tex. App.–Austin 1996, writ denied).

[480]TEX. GOV'T CODE ANN. § 554.002(a) (Vernon Supp. 2004).

[481]*Id.* § 554.001(4).

[482]*Holton*, 934 S.W.2d at 836.

[483]*Denton County v. Howard*, 22 S.W.3d 113, 119 (Tex. App.–Fort Worth 2000, no pet.); *Alaniz v. Galena Park Indep. Sch. Dist.*, 833 S.W.2d 204, 206 (Tex. App.–Houston [14th Dist.] 1992, no writ).

D. What It Prohibits

1. Elements of the Offense

a. In General

One court has said that a cause of action under the Whistleblower Act comprises four elements: (1) that the employee reported an alleged violation of law to an appropriate law enforcement authority; (2) that he made the report in good faith; (3) that the employer took adverse employment action against him because he made the report; and (4) that the employer's action proximately caused the employee's injuries.[484] Another court has said that, in order to establish a claim under the Whistleblower Act, an employee must show that (1) a state agency or local government (2) suspends, discharges or discriminates (3) against a public employee (4) who reports in good faith a violation of law (5) to an appropriate law enforcement authority.[485]

b. "Who in Good Faith Reports a Violation of Law"

An aggrieved employee must report a "violation of law." "Law" is defined in the Whistleblower Act as "a state or federal statute; . . . an ordinance of a local governmental body; or . . . a rule adopted under a statute or ordinance."[486] The term "violation of law" was intended to include "the violation of rules of conduct prescribed by an official authority, whether the violation carries a *civil or criminal* sanction."[487] On the other hand, it does not protect against violations of internal policy that are not promulgated pursuant to statute or ordinance.[488] An employee need not initiate a report of a violation, but may disclose the violation in response to a supervisor's request for information.[489] A "report" embraces "any disclosure of information regarding a public servant's employer tending to directly or circumstantially prove the substance of a violation of criminal or civil law, the State or Federal Constitution, statutes, administrative rules or regulations."[490]

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[484]*Forsyth v. City of Dallas*, 91 F.3d 769, 775 (5th Cir. 1996), *cert. denied*, 522 U.S. 816 (1996); *see also Tharling v. City of Port Lavaca*, 329 F.3d 422, 428 (5th Cir. 2003).

[485]*Heim*, 932 S.W.2d at 290.

[486]TEX. GOV'T CODE ANN. § 554.001(1) (Vernon Supp. 2004).

[487]*Colunga*, 753 S.W.2d at 719 (emphasis added); *accord Llanes v. Corpus Christi Ind. Sch. Dist.*, 64 S.W.3d 638, 642 (Tex. App.–Corpus Christi 2001, pet denied).

[488]*City of Houston v. Kallina*, 97 S.W.3d 170, 174 (Tex. App.–Houston [14th Dist.] 2002, pet. dism'd); *Ruiz v. City of San Antonio*, 966 S.W.2d 128, 130 (Tex. App.–Austin 1998, no pet.).

[489]*Castaneda v. Tex. Dep't of Agric.*, 831 S.W.2d 501, 502 (Tex. App.–Corpus Christi 1992, writ denied); *Davis*, 40 F.3d at 785.

[490]*Castaneda*, 831 S.W.2d at 503-04.

The Act affords no protection to an employee who reports *only* his own illegal conduct.[491] On the other hand, an employee may satisfy the requirements of the Whistleblower Act even though he himself participates in the reported conduct.[492] One court has said that "if the public employee establishes the requisite elements required for a whistleblower claim . . . . then the public employee can still benefit from the act's protection even if he participated in the reported conduct."[493]

In addition to requiring that a report allege a "violation of law," the Act also specifies that the report be made "in good faith."[494] The Texas Supreme Court has adopted a two-part standard for "good faith." It requires (1) that the employee believe that the conduct reported was a violation; and (2) that the employee's belief was reasonable in light of the employee's training and experience.[495] The first prong of the test relates to the employee's "honesty in fact."[496] Whether an employee holds a good faith belief that the reported conduct is a violation of law may involve question of facts.[497] It has been said, however, that an employee does not act in good faith when his report of a "violation of law" is based entirely on unsubstantiated rumor and innuendo.[498] It is important to note that no actual "violation of law" need have occurred, but only that the employee believe "in good faith" that it occurred.[499] Although one court has said that the reported violation of law must be one that had a probable adverse effect upon the public good or society in general,[500] such a strict standard has not been imposed elsewhere.[501]

The second prong of the "good faith" test is designed to ensure that the employer's retaliatory action against a whistleblowing employee is proscribed only if a reasonably prudent employee in similar circumstances would have believed that the facts reported constituted a violation of law.[502] "Good faith" must take into account differences in training and experience.[503] A police officer, for example,

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[491]*Gold v. City of College Station*, 40 S.W.3d 637, 649 (Tex. App.–Houston [1st Dist.] 2001, pet. granted, judgm't vacated w.r.m.).

[492]*Id.* at 649.

[493]*Id.*

[494]TEX. GOV'T CODE ANN. § 554.002(a) (Vernon Supp. 2004).

[495]*Hart*, 917 S.W.2d at 784-85.

[496]*Id.*

[497]*Rodriguez v. Laredo Indep. Sch. Dist.*, 82 F. Supp.2d 679, 684 (S.D. Tex. 2000).

[498]*Terrell*, 18 S.W.3d at 277.

[499]*City of Houston v. Leach*, 819 S.W.2d 185, 194 (Tex. App.–Houston [14th Dist.] 1991, no writ); *Lastor v. City of Hearne*, 810 S.W.2d 742, 744 (Tex. App.–Waco 1991, writ denied); *City of Brenham v. Honerkamp*, 950 S.W.2d 760, 766 (Tex. App.–Austin 1997, pet. denied).`

[500]*Terrell*, 925 S.W.2d at 60.

[501]*City of Fort Worth v. Johnson*, 105 S.W.3d 154, 161 (Tex. App.–Waco 2003, no pet.) (declining to follow *Terrell*).

[502]*Hart*, 917 S.W.2d at 784-85.

[503]*Id.*

may have more experience than a teacher or clerk in determining whether a particular action violates the law.[504] A peace officer is thus held to a higher standard than another employee who might be expected to have less familiarity with legal requirements.[505]

The Texas Supreme Court has also declared that an employee's motivation is not necessarily relevant to the matter of "good faith."[506] Bad motives never acted upon cannot be the basis for a whistleblower action.[507] Even malice should not negate whistleblower protection if the employee honestly believes that a violation of law occurred and that belief was objectively reasonable.[508] Although one court has held that where the employee is motivated by a personality conflict over management and personnel differences, the "good faith" burden has not been met,[509] the Texas Supreme Court has not adopted this view.

c. "By the Employing Entity or Another Public Employee"

In order to fall within the protection of the Whistleblower Act, the "violation of law" that is the subject of the "report" must have been committed "by the employing governmental entity or another public employee." Where, for example, a jail employee reports a violation by a detainee, the former has no cause of action under the statute.[510] As one court has noted, the statute has been universally interpreted to require the whistleblower's employer to have itself committed the violation. Texas law does not protect whistleblowers who report violations of law by third parties.[511]

d. "To an Appropriate Law Enforcement Authority"

In 1995, the legislature clarified the statutory requirement that the whistleblower's report be made "to an appropriate law enforcement authority"[512] by providing in section 554.002(b):

> **(b) In this section, a report is made to an appropriate law enforcement authority if the authority is a part of a state or local governmental entity or of the federal government that the employee in good faith believes is authorized to:**

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[504] *Id.*

[505] *Harris County Precinct Four Constable Dep't v. Grabowski*, 922 S.W.2d 954, 955 (Tex. 1996); *see also Donlevy v. City of the Colony*, 8 S.W.3d 754 (Tex. App.–Fort Worth 1999, no pet.).

[506] *Hart*, 917 S.W.2d at 785.

[507] *Zimlich*, 29 S.W.3d at 68.

[508] *Id.*

[509] *Terrell*, 925 S.W.2d at 60.

[510] *Garay v. County of Bexar*, 810 S.W.2d 760, 766-67 (Tex. App.–San Antonio 1991, writ denied).

[511] *See Denton v. Morgan*, 136 F.3d 1038, 1044 (5th Cir. 1998).

[512] Act of May 25, 1995, 74th Leg., R.S., ch. 721, § 2, 1995 Tex. Gen. Laws 3812, 3812.

(1) regulate under or enforce the law alleged to be violated in the report; or

(2) investigate or prosecute a violation of criminal law.[513]

In *Texas Department of Transportation v. Needham*,[514] the Texas Supreme Court construed what constitutes "an appropriate law enforcement authority," and defined what good faith belief means in this context. The court held that an governmental entity is an appropriate law enforcement authority if it possess the authority to investigate or prosecute a violation of the specific law the employer was alleged to have violated.[515] The court explained that "it is clearly not enough that a government entity has general authority to regulate, enforce, investigate, or prosecute," and an employer's authority to investigate and discipline its employees did not suffice under the statute.[516] The court correlated the good faith requirement in section 554.002(b) with good faith under section 554.002(a), and concluded that the requirement has both an objective and subjective component.[517] The court held that in this context, "'good faith' means: (1) the employee believed the governmental entity was authorized to (a) regulate under or enforce the law alleged to be violated in the report, or (b) investigate or prosecute a violation of criminal law; and (2) the employee's belief was reasonable in light of the employee's training and experience."[518]

The Whistleblower Act does not require that the violation of law be reported to the *most* appropriate law enforcement authority, but only to *an* appropriate law enforcement authority.[519] One court has said that "appropriate law enforcement authority" most likely refers to the entity rather than to an individual officer or employee of the entity.[520]

Whether any particular party is an "appropriate law enforcement authority" depends on the law reported to have been violated[521] Where a claim is made by an employee against a sheriff, a report made to the "Sheriff's Department" satisfies the statute.[522] However, a city's general authority to regulate, enforce and investigate claims of sexual harassment is not sufficient to make it an

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[513]TEX. GOV'T CODE ANN. § 554.002(b) (Vernon Supp. 2004).

[514]82 S.W.3d 314 (Tex. 2002).

[515]*Id.* at 319-20.

[516]*Id.*

[517]*Id*. at 320.

[518]*Id.* at 321.

[519]*Colunga*, 753 S.W.2d at 721.

[520]*Wymola*, 17 S.W.3d at 340.

[521]*Needham*, 82 S.W.3d at 320.

[522]*Wymola*, 17 S.W.3d at 341.

appropriate law enforcement authority to report sexual harassment.[523] Also, an outside auditor does not constitute an appropriate law enforcement authority.[524] And the media can never be an appropriate law enforcement authority under the statute.[525] The Texas Supreme Court has said that, "as a matter of law, the Whistleblower Act is not implicated merely by reports made to the press."[526]

2. The Prohibited Conduct

If a public employee in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority, the state or local governmental entity "may not suspend or terminate the employment of, or take other adverse personnel action against" the whistleblowing employee.[527] "Personnel action" is defined in the statute as "an action that affects a public employee's compensation, promotion, demotion, transfer, work assignment, or performance evaluation."[528] Thus, the Whistleblower Act shields the employee from various kinds of potential discrimination.[529] In addition to prohibiting specific acts attributable to a single official, the statute has been held to protect against an atmosphere of "pervasive retaliation by an entire institution."[530]

A decision to terminate and actual termination do not constitute two separate causes of action. The first is the necessary predicate for termination.[531] Constructive discharge is a termination for purposes of the Whistleblower Act.[532] The legislature could not have intended to provide a cause of action for employees who were fired for reporting violations of the law, while at the same time excluding employees who were coerced into resigning.[533]

In *Texas Department of Human Services v. Hinds*,[534] the Texas Supreme Court held that the Whistleblower Act requires a "causal link" between the employee's report and the governmental entity's prohibited action. The report need not be the employer's sole motivation for taking action against the employee.[535] Rather, the "standard of causation" is "that the employee's protected conduct must be such that, without it, the employer's prohibited conduct would not have occurred

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[523]*City of Weatherford v. Catron*, 83 S.W.3d 261, 268 (Tex. App.–Fort Worth 2002, no pet.).

[524]*West v. Brazos River Harbor Navigation Dist.*, 836 F. Supp. 1331, 1337 (S.D. Tex. 1993).

[525]*City of Beaumont v. Bouillion*, 896 S.W.2d 143, 145 (Tex. 1995).

[526]*Id.* at 146.

[527]TEX. GOV'T CODE ANN. § 554.002(a) (Vernon Supp. 2004).

[528]*Id.* § 554.001(3).

[529]*See Forsyth*, 91 F.3d at 776; *see also Heim*, 932 S.W.2d at 294-95.

[530]*Heim*, 932 S.W.2d at 294-95.

[531]*Villarreal v. Williams*, 971 S.W.2d 622, 624 (Tex. App.–San Antonio 1998, no pet.).

[532]*Univ. of Tex. Med. Branch at Galveston v. Hohman*, 6 S.W.3d 767, 772 (Tex. App.–Houston [1st Dist.] 1999, pet. dism'd w.o.j.); *see also City of Fort Worth v. DeOreo*, 114 S.W.3d 664, 677 (Tex. App.–Fort Worth 2003, no pet.).

[533]*Hohman*, 6 S.W.3d at 773.

[534]904 S.W.2d 629, 633 (Tex. 1995).

[535]*Id.* at 631.

when it did."[536] Such a requirement of a causal nexus "best protects employees from unlawful retaliation without punishing employers for legitimately sanctioning misconduct or harboring bad motives never acted upon."[537] Subsequent cases have described this standard as a "'but for' causal nexus requirement."[538]

The Texas Supreme Court has said that a jury may not infer causation without some evidence to support such a finding.[539] Circumstantial evidence may be sufficient to establish a causal link between the adverse employment action and the reporting of illegal conduct.[540] Such evidence may include: (1) knowledge of the report of illegal conduct; (2) expression of a negative attitude toward the employee's report of the conduct; (3) failure to adhere to established company policies regarding employment decisions; (4) discriminatory treatment in comparison to similarly situated employees; and (5) evidence that the stated reason for the adverse employment action was false.[541] But as the court has noted, "evidence that an adverse employment action was preceded by a superior's negative attitude toward an employee's report of illegal conduct is not enough, standing alone, to show a causal connection between the two events."[542]

E. Procedural Matters

1. Venue

Prior to 1995, venue for actions under the Whistleblower Act could be maintained either in the county in which the employee resided or in a district court in Travis County.[543] The statute now provides that "[a] public employee of a state governmental entity may sue under this chapter in a district court of the county in which the cause of action arises or in a district court of Travis County."[544] When suit is filed against a local governmental entity, venue is proper "in a district court of the county in which the cause of action arises," or "in a district court of any county in the same geographic area that has established with the county in which the cause of action arises a council of governments or other regional commission under Chapter 391, Local Government Code."[545] The Texas Supreme Court has held, however, that venue under the Whistleblower Act is permissive and is trumped by the mandatory county venue statute found in the Civil Practice and Remedies Code that requires all suits against a county to be brought in that county.[546]

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[536] *Id.* at 636.

[537] *Id.*

[538] *See, e.g.*, *DeOreo*, 114 S.W.3d at 670; *Teague*, 111 S.W.3d at 755; *Johnson*, 105 S.W.3d at 163.

[539] *Zimlich*, 29 S.W.3d at 68.

[540] *Id.* at 69.

[541] *Id.*; *see also Gold*, 40 S.W.3d at 645.

[542] *Zimlich*, 29 S.W.2d at 69.

[543] *See Watson v. City of Odessa*, 893 S.W.2d 197, 199 (Tex. App.–El Paso 1995, writ denied).

[544] TEX. GOV'T CODE ANN. § 554.007(a) (Vernon Supp. 2004).

[545] *Id.* § 554.007(b).

[546] *Zimlich*, 29 S.W.3d at 72; *Hart*, 917 S.W.2d at 782-83.

2. Burden of Proof

The Whistleblower Act places the burden of proof in a whistleblower cause of action on the aggrieved employee.[547] The employee has the burden of proving that he was terminated, or otherwise retaliated against, for reporting a violation of law.[548] If, however, the adverse personnel action occurs not later than the 90th day after the employee's report, the adverse personnel action is "presumed . . . to be because the employee made the report."[549] The statutory presumption of retaliation relieves the plaintiff of the *initial* burden of proving that he was terminated for reporting allegedly illegal conduct.[550] This rule of procedure aids the plaintiff because the evidence necessary to establish the plaintiff's case is often exclusively within the possession of the defendant.[551] This presumption is subject to rebuttal, however.[552] When the defendant discloses the facts in its possession and such evidence is sufficient to support a finding of non-retaliation, the case proceeds as if no presumption ever existed.[553]Even if the employee is entitled to the presumption, he retains the burden of proof *on the whole case*.[554]

The statute also provides that "[i]t is an affirmative defense to a suit under this chapter" that the governmental entity would have taken the adverse personnel action against the employee for a reason "that is not related to the fact that the employee made a report protected under this chapter of a violation of law."[555]

3. Limitations

A public employee who seeks relief under the Whistleblower Act is required to bring suit by "not later than the 90th day after the date on which the alleged violation" either occurred or "was discovered by the employee through reasonable diligence."[556] The "alleged violation," of course, is the adverse employment action.

Where an employee is given advance notice of termination, limitations begin running only when he receives "unequivocal notice of termination."[557] The relevant date for limitations purposes is the date upon which the whistleblower discovered, through reasonable diligence, that he or she was

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[547]TEX. GOV'T CODE ANN. § 554.004(a) (Vernon Supp. 2004).

[548]*Brown*, 960 S.W.2d at 813.

[549]TEX. GOV'T CODE ANN. § 554.004(a) (Vernon Supp. 2004).

[550]*Tex. A&M Univ. v. Chambers*, 31 S.W.3d 780, 784 (Tex. App.–Austin 2000, pet. denied); *Schindley v. N.E. Tex. Cmty. Coll.*, 13 S.W.3d 62, 67 (Tex. App.–Texarkana 2000, pet. denied).

[551]*Chambers*, 31 S.W.3d at 784.

[552]TEX. GOV'T CODE ANN. § 554.004(a) (Vernon Supp. 2004).

[553]*Chambers*, 31 S.W.3d at 784.

[554]*City of Dallas v. Moreau*, 697 S.W.2d 472, 476 (Tex. App.–Dallas 1985, no writ); *see also Garza v. City of Mission*, 684 S.W.2d 148, 151-52 (Tex. App.–Corpus Christi 1984, writ dism'd).

[555]TEX. GOV'T CODE ANN. § 554.004(b) (Vernon Supp. 2004).

[556]*Id.* § 554.005 (Vernon 1994).

[557]*Villarreal*, 971 S.W.2d at 625.

terminated, even if that discovery occurred after the actual date of termination.[558] As one court has said, equitable considerations may require that the limitations period be tolled until facts supportive of a cause of action are or should be apparent to a reasonably prudent person similarly situated; the focus is on what event, in fairness and logic, should have alerted the average lay person to act to protect his rights.[559]

4. Grievance and Appeal Procedures

Prior to the 1995 amendments, the Whistleblower Act required an employee to *exhaust* the grievance procedure before filing suit.[560]The statute now requires that, prior to filing suit, an aggrieved employee "must initiate action under the grievance or appeal procedures of the employing state or local governmental entity."[561] The employee is prohibited from filing suit at any time before either the completion of the internal grievance procedure, or the end of the 60th day after the grievance procedure is initiated.[562] The employee must invoke the grievance or appeal procedure "not later than the 90th day after the date on which the alleged violation" either occurred or "was discovered by the employee through reasonable diligence."[563] Failure to invoke the grievance or appeal procedure within 90 days bars an employee's claim.[564] The statute provides, however, that "[t]ime used by the employee in acting under the grievance or appeal procedures is excluded" from the 90-day limitations period for filing suit.[565] As one court has said, the time an employee utilizes in filing a grievance procedure tolls the statute of limitations until the employee terminates the grievance procedure.[566]

Sometimes the governmental entity will delay in resolving the matter administratively. In that event, the statute provides that, "[i]f a final decision is not rendered" before the 61st day after the employee has initiated the procedure, "the employee may elect" either to continue using the administrative remedy, in which case he has 30 days from its final resolution to file suit; or to terminate the administrative proceedings and file suit within the limitation period provided by section 554.005.[567] If he selects the latter, the 90-day period for filing suit is extended by the amount of time he spent pursuing the grievance internally.[568] Moreover, it has been held that an employee who has initiated a grievance, waited 60 days for a decision, and timely filed suit, may continue to participate in the grievance procedure without depriving the court of jurisdiction.[569]

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[558]*Tex. A&M Univ. at Corpus Christi v. Hamann*, 3 S.W.3d 215, 218 (Tex. App.–Corpus Christi 1999, pet. denied).

[559]*Univ. of Tex.-Pan Am. v. De Los Santos*, 997 S.W.2d 817, 820 (Tex. App.–Corpus Christi 1999, no pet.).

[560]*City of San Antonio v. Marin*, 19 S.W.3d 438, 440 (Tex. App.–San Antonio 2000, no pet.).

[561]TEX. GOV'T CODE ANN. § 554.006(a) (Vernon Supp. 2004).

[562]*Marin*, 19 S.W.3d at 441.

[563]TEX. GOV'T CODE ANN. § 554.006(b) (Vernon Supp. 2004).

[564]*Hockaday v. Tex. Dep't of Criminal Justice*, 914 F. Supp. 1439, 1443 (S.D. Tex. 1996).

[565]TEX. GOV'T CODE ANN. § 554.006(c) (Vernon Supp. 2004).

[566]*See Castleberry Indep. Sch. Dist. v. Doe*, 35 S.W.3d 777, 781 (Tex. App.–Fort Worth 2001, pet. dism'd w.o.j.).

[567]TEX. GOV'T CODE ANN. § 554.006(d) (Vernon Supp. 2004).

[568]*Wagner v. Tex. A&M Univ.*, 939 F. Supp. 1297, 1323 (S.D. Tex. 1996).

[569]*Harris County v. Lawson*,122 S.W.3d 276, 285 (Tex. App.–Houston [1st Dist. 2003, pet. filed).

The employee need not specifically allege his whistleblower claim during the grievance process.[570] Neither does the statute require an employee to use particular words when filing a grievance.[571] A handwritten complaint drafted by an employee will not be held to the same exacting standard required of attorneys drafting pleadings.[572]

The Whistleblower Act does not contemplate a single, systematic method necessary to constitute a "grievance or appeal procedure."[573] Where it is unclear whether an employer has a grievance procedure, or, if so, what that procedure is, an employee who notifies his employer on or before the 90th day that he is invoking the procedure has fulfilled his obligation under the statute.[574] Indeed, one court has held that a former employee's assertion that his employer did not maintain a grievance procedure was sufficient to confer jurisdiction on the court and thereby shift the burden to the employer of establishing that the employee acted in bad faith in pleading the absence of a grievance procedure in order to fraudulently confer jurisdiction.[575] On the other hand, the Whistleblower Act requires an employee to utilize all procedures in place for resolving disputes, whether they are denominated "grievance" or "appeal" procedures.[576] Where the county provides a three-step grievance procedure, the employee must exhaust all three steps.[577] Uncertainty about the employer's ability to render a final decision does not permit the employee to forego instituting the next step in the grievance process.[578] On the other hand, a failure of a city employee to make a report to the city's Office of Inspector General is not fatal to a claim under the Whistleblower Act.[579] The Office of Inspector General constitutes neither a grievance nor an appellate body.[580]

F. Damages and Penalties

1. Relief Available to Employee

The Whistleblower Act now provides that a public employee who prevails in a whistleblower cause of action may be awarded (1) injunctive relief, (2) actual damages, (3) court costs, and (4) reasonable attorney fees.[581] A public employee who is suspended or terminated is entitled to (1) reinstatement to the employee's former position or an equivalent position; (2) compensation for wages lost during the period of suspension or termination; and (3) reinstatement of fringe benefits and seniority rights

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[570]*Gregg County v. Farrar*, 933 S.W.2d 769, 773 (Tex. App.–Austin 1996, writ denied).

[571]*City of Austin v. Ender*, 30 S.W.3d 590, 594 (Tex. App.–Austin 2000, no pet.).

[572]*Id.* at 595.

[573]*Wagner*, 939 F. Supp. at 1324.

[574]*Hohman*, 6 S.W.3d at 774; *Curbo v. State*, 998 S.W.2d 337, 339-40 (Tex. App.–Austin 1999, pet. filed); *Beiser v. Tomball Hosp. Auth.*, 902 S.W.2d 721, 724 (Tex. App.–Houston [1st Dist.] 1995, writ denied); *see also Brown*, 960 S.W.2d at 813.

[575]*Curbo*, 998 S.W.2d at 343.

[576]*Farrar*, 933 S.W.2d at 775.

[577]*Id.* at 776.

[578]*Id.*

[579]*City of Houston v. Cotton*, 31 S.W.3d 823, 825 (Tex. App.–Houston [1st Dist.] 2000, pet. denied).

[580]*Id.*

[581]TEX. GOV'T CODE ANN. § 554.003(a) (Vernon Supp. 2004).

lost because of the suspension or termination.[582] Compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses are limited, based on the size of the governmental entity, to the following: $50,000 for 100 or fewer employees; $100,000 for 101-200 employees; $200,000 for 201-500 employees; and $250,000 for more than 500 employees.[583]

Past lost wages are determined on the basis of the income actually lost because of the retaliation minus any benefits received, such as unemployment compensation or income from a new job. The amount is calculated from the date of the retaliatory action to the date of trial.[584] Reinstatement and lost wages for the period subsequent to reinstatement are mutually exclusive remedies, and an aggrieved employee may not recover both.[585] "Future pecuniary losses" for wages may be measured either by actual lost wages or by loss of earning capacity.[586] A plaintiff need not prove future lost wages with absolute certainty. As one court has said, "the mere fact that lost future earnings are inherently speculative will not defeat an award so long as plaintiff proves the amount of such damages with the degree of certainty of which it is susceptible."[587]

Prior to 1995, punitive or exemplary damages were recoverable under the Whistleblower Act,[588] but the 1995 amendments abolished recovery for exemplary damages.

2. Civil Penalty

In addition to the specific statutory relief available to a prevailing employee, the Whistleblower Act also provides that a supervisor who wrongfully suspends, terminates the employment of, or takes an adverse personnel action against a public employee "is liable for a civil penalty not to exceed $15,000."[589] This civil penalty is not awarded to the aggrieved employee, but must "be deposited in the state treasury."[590] The personal liability of "a supervisor or other individual" under the Whistleblower Act is limited to the civil penalty.[591] Individual supervisors and other persons are not liable for damages to the employee.[592] The civil penalty may not, however, be paid by the employing governmental entity.[593] Only the attorney general or an appropriate prosecuting attorney may act to secure the penalty.[594]

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[582] *Id.* § 554.003(b).

[583] *Id.* § 554.003(c).

[584] *Housing Auth. of City of Crystal City v. Lopez*, 955 S.W.2d 152, 156 (Tex. App.–Austin 1997, no pet.).

[585] *City of Ingleside v. Kneuper*, 768 S.W.2d 451, 458 (Tex. App.–Austin 1989, writ denied).

[586] *Strube*, 953 S.W.2d at 856; *Hart*, 892 S.W.2d at 925, *rev'd on other grounds*, 917 S.W. 2d 779.

[587] *Zimlich*, 975 S.W.2d at 411.

[588] *See, e.g.*, *Green*, 855 S.W.2d 136.

[589] TEX. GOV'T CODE ANN. § 554.008(a) (Vernon Supp. 2004).

[590] *Id.* § 554.008(c).

[591] *Id.* § 544.008(e).

[592] *Green*, 855 S.W.2d at 142.

[593] TEX. GOV'T CODE ANN. § 554.008(d) (Vernon Supp. 2004).

[594] *Id.* § 554.008(b).

G. Notice to Employees

The Whistleblower Act provides that "[a] state or local governmental entity shall inform its employees of their rights" under the statute "by posting a sign in a prominent location in the workplace."[595] The attorney general is directed to "prescribe the design and content of the sign."[596] Failure to post the sign does not toll the statutory limitations period.[597]

H. Audit after Suit

Whenever a suit against a state governmental entity results in liability of $10,000 or more, the attorney general is required to "provide to the state auditor's office a brief memorandum describing the facts and disposition of the suit."[598] Within 90 days thereafter, the state auditor may then "audit or investigate the state governmental entity to determine any changes necessary to correct the problems that gave rise to the whistleblower suit and shall recommend such changes to the Legislative Audit Committee, the Legislative Budget Board, and the governing board or chief executive officer of the entity involved."[599]

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[595] *Id.* § 554.009(a).

[596] *Id.* § 554.009(b).

[597] *Harris County v. Going*, 896 S.W.2d 305, 311 (Tex. App.–Houston [1st Dist.] 1995, writ denied).

[598] TEX. GOV'T CODE ANN. § 554.010(a) (Vernon Supp. 2004).

[599] *Id.* § 554.010(b).

Appendix

Conflict of Interest

Texas Constitution, article III, section 18. Ineligibility for other offices; interest in contracts

Sec. 18. . . . No member of either House shall vote for any other member for any office whatever, which may be filled by a vote of the Legislature, except in such cases as are in this Constitution provided, nor shall any member of the Legislature be interested, either directly or indirectly, in any contract with the State, or any county thereof, authorized by any law passed during the term for which he was elected.

Local Government Code Section 81.002

§ 81.002. Oath, Bond

(a) Before undertaking the duties of the county judge or a county commissioner, a person must take the official oath and swear in writing that the person will not be interested, directly or indirectly, in a contract with or claim against the county except:
   (1) a contract or claim expressly authorized by law; or
   (2) a warrant issued to the judge or commissioner as a fee of office.

(b) A commissioner must execute a bond, payable to the county treasurer, in the amount of $3,000. The bond must be approved by the county judge and must be conditioned on the faithful performance of the commissioner's official duties. The bond must also be conditioned that the commissioner:
   (1) will reimburse the county for all county funds illegally paid to the commissioner; and
   (2) will not vote or consent to make a payment of county funds except for a lawful purpose.

(c) Subject to the provisions of Chapter 171, the county judge or a county commissioner may serve as a member of the governing body of or as an officer or director of an entity that does business with the county, excluding a publicly traded corporation or a subsidiary, affiliate, or subdivision of a publicly traded corporation.

Local Government Code Chapter 171. Regulation of Conflicts of Interest of Officers of Municipalities, Counties, and Certain Other Local Governments

§ 171.001. Definitions

In this chapter:

(1) "Local public official" means a member of the governing body or another officer, whether elected, appointed, paid, or unpaid, of any district (including a school district), county, municipality, precinct, central appraisal district, transit authority or district, or other local governmental entity who exercises responsibilities beyond those that are advisory in nature.

(2) "Business entity" means a sole proprietorship, partnership, firm, corporation, holding company, joint-stock company, receivership, trust, or any other entity recognized by law.

§ 171.002. Substantial Interest in Business Entity

(a) For purposes of this chapter, a person has a substantial interest in a business entity if:
   (1) the person owns 10 percent or more of the voting stock or shares of the business entity or owns either 10 percent or more or $15,000 or more of the fair market value of the business entity; or
   (2) funds received by the person from the business entity exceed 10 percent of the person's gross income for the previous year.

(b) A person has a substantial interest in real property if the interest is an equitable or legal ownership with a fair market value of $2,500 or more.

(c) A local public official is considered to have a substantial interest under this section if a person related to the official in the first degree by consanguinity or affinity, as determined under Chapter 573, Government Code, has a substantial interest under this section.

§ 171.0025. Application of Chapter to Member of Higher Education Authority

This chapter does not apply to a board member of a higher education authority created under Chapter 53, Education Code, unless a vote, act, or other participation by the board member in the affairs of the higher education authority would provide a financial benefit to a financial institution, school, college, or university that is:
   (1) a source of income to the board member; or
   (2) a business entity in which the board member has an interest distinguishable from a financial benefit available to any other similar financial institution or other school, college, or university whose students are eligible for a student loan available under Chapter 53, Education Code.

§ 171.003. Prohibited Acts; Penalty

(a) A local public official commits an offense if the official knowingly:
   (1) violates Section 171.004;
   (2) acts as surety for a business entity that has work, business, or a contract with the governmental entity; or
   (3) acts as surety on any official bond required of an officer of the governmental entity.

(b) An offense under this section is a Class A misdemeanor.

§ 171.004. Affidavit and Abstention From Voting Required

(a) If a local public official has a substantial interest in a business entity or in real property, the official shall file, before a vote or decision on any matter involving the business entity or the real property, an affidavit stating the nature and extent of the interest and shall abstain from further participation in the matter if:

(1) in the case of a substantial interest in a business entity the action on the matter will have a special economic effect on the business entity that is distinguishable from the effect on the public; or
(2) in the case of a substantial interest in real property, it is reasonably foreseeable that an action on the matter will have a special economic effect on the value of the property, distinguishable from its effect on the public.

(b) The affidavit must be filed with the official record keeper of the governmental entity.

(c) If a local public official is required to file and does file an affidavit under Subsection (a), the official is not required to abstain from further participation in the matter requiring the affidavit if a majority of the members of the governmental entity of which the official is a member is composed of persons who are likewise required to file and who do file affidavits of similar interests on the same official action.

§ 171.005. Voting on Budget

(a) The governing body of a governmental entity shall take a separate vote 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.

(b) Except as provided by Section 171.004(c), the affected member may not participate in that separate vote. The member may vote on a final budget if:
(1) the member has complied with this chapter; and
(2) the matter in which the member is concerned has been resolved.

§ 171.006. Effect of Violation of Chapter

The finding by a court of a violation under this chapter does not render an action of the governing body voidable unless the measure that was the subject of an action involving a conflict of interest would not have passed the governing body without the vote of the person who violated the chapter.

§ 171.007. Common Law Preempted; Cumulative of Municipal Provisions

(a) This chapter preempts the common law of conflict of interests as applied to local public officials.

(b) This chapter is cumulative of municipal charter provisions and municipal ordinances defining and prohibiting conflicts of interests.

§ 171.008. Renumbered as § 171.006 by Acts 1989, 71st Leg., ch. 1, § 40(a), eff. Aug. 28, 1989

§ 171.009. Service on Board of Corporation for No Compensation

It shall be lawful for a local public official to serve as a member of the board of directors of private, nonprofit corporations when such officials receive no compensation or other remuneration from the nonprofit corporation or other nonprofit entity.

§ 171.010. Practice of Law

(a) For purposes of this chapter, a county judge or county commissioner engaged in the private practice of law has a substantial interest in a business entity if the official has entered a court appearance or signed court pleadings in a matter relating to that business entity.
(b) A county judge or county commissioner that has a substantial interest in a business entity as described by Subsection (a) must comply with this chapter.
(c) A judge of a constitutional county court may not enter a court appearance or sign court pleadings as an attorney in any matter before:
  (1) the court over which the judge presides; or
  (2) any court in this state over which the judge's court exercises appellate jurisdiction.
(d) Upon compliance with this chapter, a county judge or commissioner may practice law in the courts located in the county where the county judge or commissioner serves.

Penal Code Chapter 39. Abuse of Office

§ 39.01. Definitions

In this chapter:
(1) "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:
  (A) imposes a duty on the public servant; or
  (B) governs the conduct of the public servant.
(2) "Misuse" means to deal with property contrary to:
  (A) an agreement under which the public servant holds the property;
  (B) a contract of employment or oath of office of a public servant;
  (C) a law, including provisions of the General Appropriations Act specifically relating to government property, that prescribes the manner of custody or disposition of the property; or
  (D) a limited purpose for which the property is delivered or received.

§ 39.02. Abuse of Official Capacity

(a) A public servant commits an offense if, with intent to obtain a benefit or with intent to harm or defraud another, he intentionally or knowingly:
  (1) violates a law relating to the public servant's office or employment; or
  (2) misuses government property, services, personnel, or any other thing of value belonging to the government that has come into the public servant's custody or possession by virtue of the public servant's office or employment.
  (b) An offense under Subsection (a)(1) is a Class A misdemeanor.
  (c) An offense under Subsection (a)(2) is:
    (1) a Class C misdemeanor if the value of the use of the thing misused is less than $20;
    (2) a Class B misdemeanor if the value of the use of the thing misused is $20 or more but less than $500;

(3) a Class A misdemeanor if the value of the use of the thing misused is $500 or more but less than $1,500;
(4) a state jail felony if the value of the use of the thing misused is $1,500 or more but less than $20,000;
(5) a felony of the third degree if the value of the use of the thing misused is $20,000 or more but less than $100,000;
(6) a felony of the second degree if the value of the use of the thing misused is $100,000 or more but less than $200,000; or
(7) a felony of the first degree if the value of the use of the thing misused is $200,000 or more.

(d) A discount or award given for travel, such as frequent flyer miles, rental car or hotel discounts, or food coupons, are not things of value belonging to the government for purposes of this section due to the administrative difficulty and cost involved in recapturing the discount or award for a governmental entity.

Nepotism

Government Code Chapter 573. Degrees of Relationship; Nepotism Prohibitions

Subchapter A. General Provisions

§ 573.001. Definitions

In this chapter:
(1) "Candidate" has the meaning assigned by Section 251.001, Election Code.
(2) "Position" includes an office, clerkship, employment, or duty.
(3) "Public official" means:
(A) an officer of this state or of a district, county, municipality, precinct, school district, or other political subdivision of this state;
(B) an officer or member of a board of this state or of a district, county, municipality, school district, or other political subdivision of this state; or
(C) a judge of a court created by or under a statute of this state.

§ 573.002. Degrees of Relationship

Except as provided by Section 573.043, this chapter applies to relationships within the third degree by consanguinity or within the second degree by affinity.

§ 573.021. Method of Computing Degree of Relationship

The degree of a relationship is computed by the civil law method.

§ 573.022. Determination of Consanguinity

(a) Two individuals are related to each other by consanguinity if:
  (1) one is a descendant of the other; or
  (2) they share a common ancestor.
(b) An adopted child is considered to be a child of the adoptive parent for this purpose.

§ 573.023. Computation of Degree of Consanguinity

(a) The degree of relationship by consanguinity between an individual and the individual's descendant is determined by the number of generations that separate them. A parent and child are related in the first degree, a grandparent and grandchild in the second degree, a great-grandparent and great-grandchild in the third degree and so on.
(b) If an individual and the individual's relative are related by consanguinity, but neither is descended from the other, the degree of relationship is determined by adding:
  (1) the number of generations between the individual and the nearest common ancestor of the individual and the individual's relative; and
  (2) the number of generations between the relative and the nearest common ancestor.
(c) An individual's relatives within the third degree by consanguinity are the individual's:
  (1) parent or child (relatives in the first degree);
  (2) brother, sister, grandparent, or grandchild (relatives in the second degree); and
  (3) great-grandparent, great-grandchild, aunt who is a sister of a parent of the individual, uncle who is a brother of a parent of the individual, nephew who is a child of a brother or sister of the individual, or niece who is a child of a brother or sister of the individual (relatives in the third degree).

§ 573.024. Determination of Affinity

(a) Two individuals are related to each other by affinity if:
  (1) they are married to each other; or
  (2) the spouse of one of the individuals is related by consanguinity to the other individual.
(b) The ending of a marriage by divorce or the death of a spouse ends relationships by affinity created by that marriage unless a child of that marriage is living, in which case the marriage is considered to continue as long as a child of that marriage lives.
(c) Subsection (b) applies to a member of the board of trustees of or an officer of a school district only until the youngest child of the marriage reaches the age of 21 years.

§ 573.025. Computation of Degree of Affinity

(a) A husband and wife are related to each other in the first degree by affinity. For other relationships by affinity, the degree of relationship is the same as the degree of the underlying relationship by consanguinity. For example: if two individuals are related to each other in the second degree by consanguinity, the spouse of one of the individuals is related to the other individual in the second degree by affinity.

(b) An individual's relatives within the third degree by affinity are:
   (1) anyone related by consanguinity to the individual's spouse in one of the ways named in Section 573.023(c); and
   (2) the spouse of anyone related to the individual by consanguinity in one of the ways named in Section 573.023(c).

Subchapter C. Nepotism Prohibitions

§ 573.041. Prohibition Applicable to Public Official

A public official may not appoint, confirm the appointment of, or vote for the appointment or confirmation of the appointment of an individual to a position that is to be directly or indirectly compensated from public funds or fees of office if:
   (1) the individual is related to the public official within a degree described by Section 573.002; or
   (2) the public official holds the appointment or confirmation authority as a member of a state or local board, the legislature, or a court and the individual is related to another member of that board, legislature, or court within a degree described by Section 573.002.

§ 573.042. Prohibition Applicable to Candidate

(a) A candidate may not take an affirmative action to influence the following individuals regarding the appointment, reappointment, confirmation of the appointment or reappointment, employment, reemployment, change in status, compensation, or dismissal of another individual related to the candidate within a degree described by Section 573.002:
   (1) an employee of the office to which the candidate seeks election; or
   (2) an employee or another officer of the governmental body to which the candidate seeks election, if the office the candidate seeks is one office of a multimember governmental body.

(b) The prohibition imposed by this section does not apply to a candidate's actions taken regarding a bona fide class or category of employees or prospective employees.

§ 573.043. Prohibition Applicable to District Judge

A district judge may not appoint as official stenographer of the judge's district an individual related to the judge or to the district attorney of the district within the third degree.

§ 573.044. Prohibition Applicable to Trading

A public official may not appoint, confirm the appointment of, or vote for the appointment or confirmation of the appointment of an individual to a position in which the individual's services are under the public official's direction or control and that is to be compensated directly or indirectly from public funds or fees of office if:

(1) the individual is related to another public official within a degree described by Section 573.002; and
(2) the appointment, confirmation of the appointment, or vote for appointment or confirmation of the appointment would be carried out in whole or partial consideration for the other public official appointing, confirming the appointment, or voting for the appointment or confirmation of the appointment of an individual who is related to the first public official within a degree described by Section 573.002.

Subchapter D. Exceptions

§ 573.061. General Exceptions

Section 573.041 does not apply to:
(1) an appointment to the office of a notary public or to the confirmation of that appointment;
(2) an appointment of a page, secretary, attendant, or other employee by the legislature for attendance on any member of the legislature who, because of physical infirmities, is required to have a personal attendant;
(3) a confirmation of the appointment of an appointee appointed to a first term on a date when no individual related to the appointee within a degree described by Section 573.002 was a member of or a candidate for the legislature, or confirmation on reappointment of the appointee to any subsequent consecutive term;
(4) an appointment or employment of a bus driver by a school district if:
  (A) the district is located wholly in a county with a population of less than 35,000; or
  (B) the district is located in more than one county and the county in which the largest part of the district is located has a population of less than 35,000;
(5) an appointment or employment of a personal attendant by an officer of the state or a political subdivision of the state for attendance on the officer who, because of physical infirmities, is required to have a personal attendant.
(6) an appointment or employment of a substitute teacher by a school district; or
(7) an appointment of employment of a person by a municipality that has a population of less than 200.

§ 573.062. Continuous Employment

(a) A nepotism prohibition prescribed by Section 573.041 or by a municipal charter or ordinance does not apply to an appointment, confirmation of an appointment, or vote for an appointment or confirmation of an appointment of an individual to a position if:
  (1) the individual is employed in the position immediately before the election or appointment of the public official to whom the individual is related in a prohibited degree; and
  (2) that prior employment of the individual is continuous for at least:
    (A) 30 days, if the public official is appointed;
    (B) six months, if the public official is elected at an election other than the general election for state and county officers; or

(C) one year, if the public official is elected at the general election for state and county officers.

(b) If, under Subsection (a), an individual continues in a position, the public official to whom the individual is related in a prohibited degree may not participate in any deliberation or voting on the appointment, reappointment, confirmation of the appointment or reappointment, employment, reemployment, change in status, compensation, or dismissal of the individual if that action applies only to the individual and is not taken regarding a bona fide class or category of employees.

Subchapter E. Enforcement

§ 573.081. Removal In General

(a) An individual who violates Subchapter C or Section 573.062(b) shall be removed from the individual's position. The removal must be made in accordance with the removal provisions in the constitution of this state, if applicable. If a provision of the constitution does not govern the removal, the removal must be by a quo warranto proceeding.

(b) A removal from a position shall be made immediately and summarily by the original appointing authority if a criminal conviction against the appointee for a violation of Subchapter C or Section 573.062(b) becomes final. If the removal is not made within 30 days after the date the conviction becomes final, the individual holding the position may be removed under Subsection (a).

§ 573.082. Removal by Quo Warranto Proceeding

(a) A quo warranto proceeding under this chapter must be brought by the attorney general in a district court in Travis County or in a district court of the county in which the defendant resides.

(b) The district or county attorney of the county in which a suit is filed under this section shall assist the attorney general at the attorney general's discretion.

§ 573.083. Withholding Payment of Compensation

A public official may not approve an account or draw or authorize the drawing of a warrant or order to pay the compensation of an ineligible individual if the official knows the individual is ineligible.

§ 573.084. Criminal Penalty

(a) An individual commits an offense involving official misconduct if the individual violates Subchapter C or Section 573.062(b) or 573.083.

(b) An offense under this section is a misdemeanor punishable by a fine not less than $100 or more than $1,000.

Dual Office Holding

Texas Constitution, Article II, Section 1. Division of powers; three separate departments; exercise of power properly attached to other departments

Sec. 1. The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.

Texas Constitution, Article V, Section 1-a. Retirement, censure, removal and compensation of justices and judges; State Commission on Judicial Conduct; procedure

Sec. 1-a. (1) Subject to the further provisions of this Section, the Legislature shall provide for the retirement and compensation of Justices and Judges of the Appellate Courts and District and Criminal District Courts on account of length of service, age and disability, and for their reassignment to active duty where and when needed. . . .

(2) – (5). . . [composition and proceeding of State Commission on Judicial Conduct].

(6) A. Any Justice or Judge of the courts established by this Constitution or created by the Legislature as provided in Section 1, Article V, of this Constitution, may, subject to the other provisions hereof, be removed from office for willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful or persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit upon the judiciary or administration of justice. Any person holding such office may be disciplined or censured, in lieu of removal from office, as provided by this section. Any person holding an office specified in this subsection may be suspended from office with or without pay by the Commission immediately on being indicted by a State or Federal grand jury for a felony offense or charged with a misdemeanor involving official misconduct. On the filing of a sworn complaint charging a person holding such office with willful or persistent violation of rules promulgated by the Supreme Court of Texas, incompetence in performing the duties of the office, willful violation of the Code of Judicial Conduct, or willful and persistent conduct that is clearly inconsistent with the proper performance of his duties or casts public discredit on the judiciary or on the administration of justice, the Commission, after giving the person notice and an opportunity to appear and be heard before the Commission, may recommend to the Supreme Court the suspension of such person from office. The Supreme Court, after considering the record of such appearance and the recommendation of the Commission, may suspend the person from office with or without pay, pending final disposition of the charge.

B. [retirement or removal for disability seriously interfering with the performance of duties].

C. The law relating to the removal, discipline, suspension, or censure of a Justice or Judge of the courts established by this Constitution or created by the Legislature as provided in this Constitution applies to a master or magistrate appointed as provided by law to serve a trial court of this State and to a retired or former Judge who continues as a judicial officer subject to an assignment to sit on a court of this State. Under the law relating to the removal of an active Justice or Judge, the Commission and the review tribunal may prohibit a retired or former Judge from holding judicial office in the future or from sitting on a court of this State by assignment.

(7) – (10) [powers and duties of Commission with respect to misconduct or disability of judges named in subsection (6), paragraph A]

(11) The Supreme Court shall by rule provide for the procedure before the Commission, Masters, review tribunal, and the Supreme Court. . . .

(12) No person holding an office specified in Subsection (6) of this Section shall sit as a member of the Commission in any proceeding involving his own suspension, discipline, censure, retirement or removal.

(13) This Section 1-a is alternative to and cumulative of, the methods of removal of persons holding an office named in Paragraph A of Subsection (6) of this Section provided elsewhere in this Constitution.

(14) The Legislature may promulgate laws in furtherance of this Section that are not inconsistent with its provisions.

Texas Constitution, Article XVI, Section 12. Members of Congress; officers of United States or foreign power; ineligibility to hold office

Sec. 12. No member of Congress, nor person holding or exercising any office of profit or trust, under the United States, or either of them, or under any foreign power, shall be eligible as a member of the Legislature, or hold or exercise any office of profit or trust under this State.

Texas Constitution, Article XVI, Section 40. Holding more than one office; exceptions; right to vote

Sec. 40. (a) No person shall hold or exercise at the same time, more than one civil office of emolument, except that of Justice of the Peace, County Commissioner, Notary Public and Postmaster, Officer of the National Guard, the National Guard Reserve, and the Officers Reserve Corps of the United States and enlisted men of the National Guard, the National Guard Reserve, and the Organized Reserves of the United States, and retired officers of the United States Army, Air Force, Navy, Marine Corps, and Coast Guard, and retired warrant officers, and retired enlisted men of the United States Army, Air Force, Navy, Marine Corps, and Coast Guard, and the officers and directors of soil and water conservation districts, unless otherwise specially provided herein. Provided, that nothing in this Constitution shall be construed to prohibit an officer or enlisted man

of the National Guard, and the National Guard Reserve, or an officer in the Officers Reserve Corps of the United States, or an enlisted man in the Organized Reserves of the United States, or retired officers of the United States Army, Air Force, Navy, Marine Corps, and Coast Guard, and retired warrant officers, and retired enlisted men of the United States Army, Air Force, Navy, Marine Corps, and Coast Guard, and officers of the State soil and water conservation districts, from holding at the same time any other office or position of honor, trust or profit, under this State or the United States, or from voting at any election, general, special or primary in this State when otherwise qualified.

(b) State employees or other individuals who receive all or part of their compensation either directly or indirectly from funds of the State of Texas and who are not State officers, shall not be barred from serving as members of the governing bodies of school districts, cities, towns, or other local governmental districts. Such State employees or other individuals may not receive a salary for serving as members of such governing bodies, except that:

(1) a schoolteacher, retired schoolteacher, or retired school administrator may receive compensation for serving as a member of a governing body of a school district, city, town, or local governmental district, including a water district created under Section 59, Article XVI, or Section 52, Article III; and

(2) a faculty member or retired faculty member of a public institution of higher education may receive compensation for serving as a member of a governing body of a water district created under Section 59 of this article or under Section 52, Article III, of this constitution.

(c) It is further provided that a nonelective State officer may hold other nonelective offices under the State or the United States, if the other office is of benefit to the State of Texas or is required by the State or Federal law, and there is no conflict with the original office for which he receives salary or compensation.

(d) No member of the Legislature of this State may hold any other office or position of profit under this State, or the United States, except as a notary public if qualified by law.

Automatic Resignation and Sequential Office Holding

Texas Constitution, Article III, Section 18. Ineligibility for other offices; interest in contracts (first clause)

Sec. 18. No Senator or Representative shall, during the term for which he was elected, be eligible to (1) any civil office of profit under this State which shall have been created, or the emoluments of which may have been increased, during such term, or (2) any office or place, the appointment to which may be made, in whole or in part, by either branch of the Legislature; provided, however, the fact that the term of office of Senators and Representatives does not end precisely on the last day of December but extends a few days into January of the succeeding year shall be considered as de minimis, and the ineligibility herein created shall terminate on the last day in December of the last full calendar year of the term for which he was elected. . . .

Texas Constitution, Article III, Section 19. Ineligibility of persons holding other offices

Sec. 19. No judge of any court, Secretary of State, Attorney General, clerk of any court of record, or any person holding a lucrative office under the United States, or this State, or any foreign government shall during the term for which he is elected or appointed, be eligible to the Legislature.

Texas Constitution, Article XI, Section 11. Term of office exceeding two years in home rule and general law cities; vacancies

Sec. 11. (a) A Home Rule City may provide by charter or charter amendment, and a city, town or village operating under the general laws may provide by majority vote of the qualified voters voting at an election called for that purpose, for a longer term of office than two (2) years for its officers, either elective or appointive, or both, but not to exceed four (4) years; provided, however, that tenure under Civil Service shall not be affected hereby; provided, however, that such officers, elective or appointive, are subject to Section 65(b), Article XVI, of this constitution, providing for automatic resignation in certain circumstances, in the same manner as a county or district officer to which that section applies.

(b) A municipality so providing a term exceeding two (2) years but not exceeding four (4) years for any of its non-civil service officers must elect all of the members of its governing body by majority vote of the qualified voters in such municipality, and any vacancy or vacancies occurring on such governing body shall not be filled by appointment but must be filled by majority vote of the qualified voters at a special election called for such purpose within one hundred and twenty (120) days after such vacancy or vacancies occur.

Texas Constitution, Article XVI, Section 17. Officers to serve until successors qualified

Sec. 17. All officers within this State shall continue to perform the duties of their offices until their successors shall be duly qualified.

Texas Constitution, Article XVI, Section 65. Persons holding certain public offices; candidacy for election to constitute resignation of office

Sec. 65. (a) This section applies to the following offices: District Clerks; County Clerks; County Judges; Judges of the County Courts at Law, County Criminal Courts, County Probate Courts and County Domestic Relations Courts; County Treasurers; Criminal District Attorneys; County Surveyors; Inspectors of Hides and Animals; County Commissioners; Justices of the Peace; Sheriffs; Assessors and Collectors of Taxes; District Attorneys; County Attorneys; Public Weighers; and Constables.

(b) If any of the officers named herein shall announce their candidacy, or shall in fact become a candidate, in any General, Special or Primary Election, for any office of profit or trust under the laws of this State or the United States other than the office then held, at any time when the unexpired term

of the office then held shall exceed one (1) year, such announcement or such candidacy shall constitute an automatic resignation of the office then held, and the vacancy thereby created shall be filled pursuant to law in the same manner as other vacancies for such office are filled.

Whistleblower Act

Government Code, Chapter 554. Protection for Reporting Violations of Law

§ 554.001. Definitions

In this chapter:

(1) "Law" means:
  (A) a state or federal statute;
  (B) an ordinance of a local governmental entity; or
  (C) a rule adopted under a statute or ordinance.

(2) "Local governmental entity" means a political subdivision of the state, including a:
  (A) county;
  (B) municipality;
  (C) public school district; or
  (D) special-purpose district or authority.

(3) "Personnel action" means an action that affects a public employee's compensation, promotion, demotion, transfer, work assignment, or performance evaluation.

(4) "Public employee" means an employee or appointed officer other than an independent contractor who is paid to perform services for a state or local governmental entity.

(5) "State governmental entity" means:
  (A) a board, commission, department, office, or other agency in the executive branch of state government, created under the constitution or a statute of the state, including an institution of higher education, as defined by Section 61.003, Education Code;
  (B) the legislature or a legislative agency; or
  (C) the Texas Supreme Court, the Texas Court of Criminal Appeals, a court of appeals, a state judicial agency, or the State Bar of Texas.

§ 554.002. Retaliation Prohibited for Reporting Violation of Law

(a) A state or local governmental entity may not suspend or terminate the employment of, or take other adverse personnel action against, a public employee who in good faith reports a violation of law by the employing governmental entity or another public employee to an appropriate law enforcement authority.

(b) In this section, a report is made to an appropriate law enforcement authority if the authority is a part of a state or local governmental entity or of the federal government that the employee in good faith believes is authorized to:
  (1) regulate under or enforce the law alleged to be violated in the report; or
  (2) investigate or prosecute a violation of criminal law.

§ 554.003. Relief Available to Public Employee

(a) A public employee whose employment is suspended or terminated or who is subjected to an adverse personnel action in violation of Section 554.002 is entitled to sue for:
  (1) injunctive relief;
  (2) actual damages;
  (3) court costs; and
  (4) reasonable attorney fees.

(b) In addition to relief under Subsection (a), a public employee whose employment is suspended or terminated in violation of this chapter is entitled to:
  (1) reinstatement to the employee's former position or an equivalent position;
  (2) compensation for wages lost during the period of suspension or termination; and
  (3) reinstatement of fringe benefits and seniority rights lost because of the suspension or termination.

(c) In a suit under this chapter against an employing state or local governmental entity, a public employee may not recover compensatory damages for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses in an amount that exceeds:
  (1) $50,000, if the employing state or local governmental entity has fewer than 101 employees in each of 20 or more calendar weeks in the calendar year in which the suit is filed or in the preceding year;
  (2) $100,000, if the employing state or local governmental entity has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the calendar year in which the suit is filed or in the preceding year;
  (3) $200,000, if the employing state or local governmental entity has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the calendar year in which the suit is filed or in the preceding year; and
  (4) $250,000, if the employing state or local governmental entity has more than 500 employees in each of 20 or more calendar weeks in the calendar year in which the suit is filed or in the preceding year.

(d) If more than one subdivision of Subsection (c) applies to an employing state or local governmental entity, the amount of monetary damages that may be recovered from the entity in a suit brought under this chapter is governed by the applicable provision that provides the highest damage award.

§ 554.0035. Waiver of Immunity

A public employee who alleges a violation of this chapter may sue the employing state or local governmental entity for the relief provided by this chapter. Sovereign immunity is waived and abolished to the extent of liability for the relief allowed under this chapter for a violation of this chapter.

§ 554.004. Burden of Proof; Presumption; Affirmative Defense

(a) A public employee who sues under this chapter has the burden of proof, except that if the suspension or termination of, or adverse personnel action against, a public employee occurs not later than the 90th day after the date on which the employee reports a violation of law, the suspension, termination, or adverse personnel action is presumed, subject to rebuttal, to be because the employee made the report.

(b) It is an affirmative defense to a suit under this chapter that the employing state or local governmental entity would have taken the action against the employee that forms the basis of the suit based solely on information, observation, or evidence that is not related to the fact that the employee made a report protected under this chapter of a violation of law.

§ 554.005. Limitation Period

Except as provided by Section 554.006, a public employee who seeks relief under this chapter must sue not later than the 90th day after the date on which the alleged violation of this chapter:

(1) occurred; or

(2) was discovered by the employee through reasonable diligence.

§ 554.006. Use of Grievance or Appeal Procedures

(a) A public employee must initiate action under the grievance or appeal procedures of the employing state or local governmental entity relating to suspension or termination of employment or adverse personnel action before suing under this chapter.

(b) The employee must invoke the applicable grievance or appeal procedures not later than the 90th day after the date on which the alleged violation of this chapter:

(1) occurred; or

(2) was discovered by the employee through reasonable diligence.

(c) Time used by the employee in acting under the grievance or appeal procedures is excluded, except as provided by Subsection (d), from the period established by Section 554.005.

(d) If a final decision is not rendered before the 61st day after the date procedures are initiated under Subsection (a), the employee may elect to:

(1) exhaust the applicable procedures under Subsection (a), in which event the employee must sue not later than the 30th day after the date those procedures are exhausted to obtain relief under this chapter; or

(2) terminate procedures under Subsection (a), in which event the employee must sue within the time remaining under Section 554.005 to obtain relief under this chapter.

§ 554.007. Where Suit Brought

(a) A public employee of a state governmental entity may sue under this chapter in a district court of the county in which the cause of action arises or in a district court of Travis County.

(b) A public employee of a local governmental entity may sue under this chapter in a district court of the county in which the cause of action arises or in a district court of any county in the same geographic area that has established with the county in which the cause of action arises a council of governments or other regional commission under Chapter 391, Local Government Code.

§ 554.008. Civil Penalty

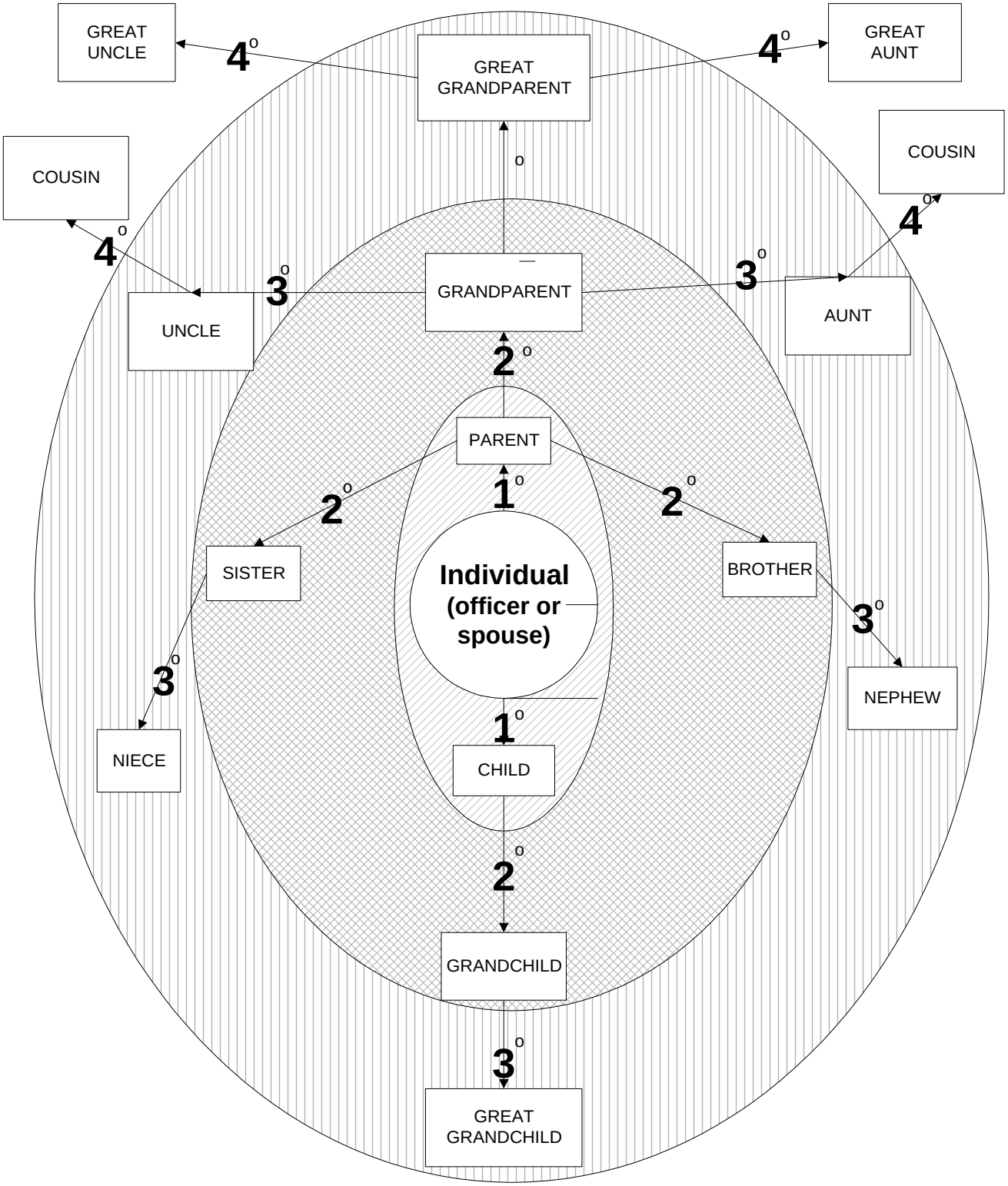
(a) A supervisor who in violation of this chapter suspends or terminates the employment of a public employee or takes an adverse personnel action against the employee is liable for a civil penalty not to exceed $15,000.
(b) The attorney general or appropriate prosecuting attorney may sue to collect a civil penalty under this section.
(c) A civil penalty collected under this section shall be deposited in the state treasury.
(d) A civil penalty assessed under this section shall be paid by the supervisor and may not be paid by the employing governmental entity.
(e) The personal liability of a supervisor or other individual under this chapter is limited to the civil penalty that may be assessed under this section.

§ 554.009. Notice to Employees

(a) A state or local governmental entity shall inform its employees of their rights under this chapter by posting a sign in a prominent location in the workplace.
(b) The attorney general shall prescribe the design and content of the sign required by this section.

§ 554.010. Audit of State Governmental Entity After Suit

(a) At the conclusion of a suit that is brought under this chapter against a state governmental entity subject to audit under Section 321.013 and in which the entity is required to pay $10,000 or more under the terms of a settlement agreement or final judgment, the attorney general shall provide to the state auditor's office a brief memorandum describing the facts and disposition of the suit.
(b) Not later than the 90th day after the date on which the state auditor's office receives the memorandum required by Subsection (a), the auditor may audit or investigate the state governmental entity to determine any changes necessary to correct the problems that gave rise to the whistleblower suit and shall recommend such changes to the Legislative Audit Committee, the Legislative Budget Board, and the governing board or chief executive officer of the entity involved. In conducting the audit or investigation, the auditor shall have access to all records pertaining to the suit.



Degrees of Relationship Chart

When determining the degree of relationship by consanguinity, the individual in the center is the officer. For relationships by affinity, the officer's spouse is the individual in the center.

NOTES