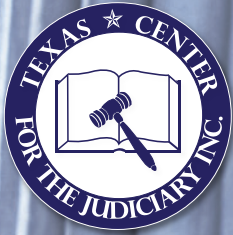


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THE OFFICIAL PUBLICATION OF THE TEXAS CENTER FOR THE JUDICIARY



In Chambers

INSIDE:

*Modernizing Jury Instructions in
the Age of Social Media*

Photos from Recent Conferences

Awards and Honors

Ethics

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*Readers are encouraged to write letters and submit questions, comments, or story ideas for **In Chambers**. To do so, please contact Courtney Gabriele, Program Attorney at 512.482.8986 or toll free at 888.785.8986, or via email at courtneyg@yourhonor.com. Articles subject to editing for clarity or space availability.*

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Editor's Note: *This article is based, in part, on a section from the 2011 cumulative supplement to his book, Maryland Criminal Jury Instructions and Commentary (LexisNexis:3rd ed., 2009). In Texas, on January 1, 2014, the Supreme Court of Texas prescribed jury instructions by order under Texas Rule of Civil Procedure 226a, which includes an instruction prohibiting jurors use of social media. TEX. R. CIV. PRO. 226a.*



Modernizing Jury Instructions in the Age of Social Media

By David E. Aaronson and Sydney M. Patterson

Following a jury trial in Vermont, the defendant, a Somali Bantu immigrant, was convicted of aggravated sexual assault on a child. A juror obtained information on the Internet about Somali culture and religion, a subject that played a significant role at trial, which the juror discussed for 10–15 minutes during deliberations to support his own position. The Vermont Supreme Court reversed, finding prejudicial error because this information had the capacity to affect the jury's verdict, as jurors could have relied on it to interpret the testimony of the Somali witnesses and determine the credibility of these witnesses.¹

In the political corruption trial of former Baltimore Mayor Sheila Dixon, five jurors used social media to have direct, case-related communications with one another while the trial was ongoing. The case, which resulted in the conviction of Dixon, was challenged after the verdict when Dixon's attorneys discovered that the five jurors had become Facebook friends during the course of the trial and had posted discussions about the trial on their pages. Dixon's attorneys alleged that the five "Facebook Friends" may have bullied other jurors into the guilty verdict, contending that they were "a caucus separate and apart" from their colleagues. Before presiding Circuit Court Judge Dennis Sweeney questioned the jurors about their conduct, which was in direct violation of his specific instruction to avoid discussing the case on social media sites, the prosecutors and Dixon reached a plea deal that ended Dixon's appeals.²

However, Judge Sweeney did question one juror who had posted "F--- the Judge" on his Facebook page after Judge Sweeney had called a hearing on the matter. Judge Sweeney reportedly asked the juror about his offensive comment and was told, "Hey Judge, that's just Facebook stuff."³

These cases illustrate the two broad categories of improper juror social media use: (1) use of the Internet to conduct research, investigating facts or the law; and (2) use of social media to contact others or post/publish information.⁴

The use of social media is now an integral part of the communication lexicon. It is commonplace to communicate and do research electronically through the use of e-mail, text messaging, or Twitter, through blogs and websites, such as Wikipedia, and search engines, such as Google, or other social networking websites, such as Facebook, LinkedIn, and YouTube.

Social media use by jurors poses many new litigation challenges and increases the risk of familiar jury concerns, such as exposure to news and media accounts of a trial that contain material not admitted into evidence. Juror misconduct using social media may have a direct impact on the administration, fairness, and

integrity of the criminal justice system. In modern jury trials, judges, the parties, and their attorneys expect that many, if not most, jurors use social media.

Unlike inadmissible or stricken evidence heard by a jury during trial, *ex parte* information a juror obtains online cannot be addressed by the court with a curative or limiting instruction to correct any prejudicial effects.⁵ Both the state and the defense are likewise deprived of the opportunity to consider and address the *ex parte* information by tailoring their case strategy or closing statement accordingly. Moreover, complications may arise during jury deliberations because the individual jurors will not all be considering the same evidence in reaching a verdict. Jurors who conduct online research may be tempted to share the results of their research with their fellow jurors.

The Sixth Amendment guarantees a criminal defendant “the right to a speedy and public trial, by an impartial jury of the State.” The Supreme Court held that the failure to provide a defendant with an impartial hearing “violates even the minimal standards of due process.”⁶ The Sixth Amendment guarantee of an impartial jury has been defined by the courts as one “capable and willing to decide the case solely on the evidence before it.”⁷ Due process and the rules of evidence provide that juries may consider only legally admissible evidence that is subject to cross-examination in open court.⁸ Dispositive evidence may be kept out for various reasons, such as the manner in which it was obtained, or because it is determined to be unduly prejudicial. It is important that jurors do *not* know what is excluded and why it is excluded.

A growing number of cases address issues arising from allegations of improper juror use of social media. Between 1999 and 2010, 90 verdicts were challenged on the basis of Internet-related juror misconduct, according to a Reuters Legal study—more than half within a two-year period. Of the 90 challenges, 28 were overturned or had mistrials declared. In three-quarters of the cases in which judges declined to declare mistrials, Internet-related juror misconduct was present.⁹

Jury instructions are a critical component of efforts to prevent juror social media-related misconduct. Professor Morrison observes: “The first line of defense is obviously to address the issue in jury instructions.”¹⁰ The purpose of this article is to discuss a sampling of cases showing the need for social media jury instructions and the range of misconduct in criminal cases that modern social media jury instructions should address; identify criteria based on a review of federal and state social media jury instructions that should be useful in evaluating any pattern social media jury instruction; and, finally, to propose model instructions for jurisdictions seeking to adopt or improve their social media jury instructions.

Illustrative Cases Involving Jury Misconduct

The following cases illustrate the need for modernizing social media jury instructions and the range of juror misconduct that should be addressed.¹¹

Improper use of the Internet to conduct research, investigating facts or the law. Trial safeguards may be significantly compromised when jurors conduct online research about the case without the knowledge of the court or trial counsel. Conducting Internet research allows a juror to read media stories about the crime, find personal information about the parties, including criminal history, and even view the scene of the crime using Google Maps’ Street View, all without leaving the courthouse or home. The vast amount of information available increases the likelihood that the juror may be influenced by information that is prejudicial, unreliable, or inaccurate, or even evidence that has been ruled inadmissible.¹²

Despite instructions from the judge not to conduct research on the case, a juror in a murder trial looked up definitions online for the terms “livor mortis” and “algor mortis” and the role it might have had in fixing the time of a beating victim’s death. When asked about it, the juror responded, “To me that wasn’t research. It was a definition.” The Court of Special Appeals reversed the conviction and ordered a new trial, finding that the juror’s online search was in direct violation of the trial court judge’s order prohibiting jurors from researching

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the case.¹³

After repeated explicit instructions not to conduct Internet research, a juror in a capital murder trial researched how a person could suffer “retinal detachment,” the injury suffered by the victim. In the resulting contempt proceeding for misconduct, the juror’s attorney explained that the juror misunderstood the judge’s instruction not to conduct research, believing the judge was referring only to facts in the case, not related issues such as how a person could suffer certain injuries.¹⁴

In a federal case, defendants were charged with illegally operating an Internet pharmacy. After seven weeks of trial throughout which the judge gave repeated instructions not to conduct online research, it was discovered during deliberations that nine of the 12 jurors had conducted Internet research about the case during the trial. The jurors had Googled news articles, medical terms, the lawyers, the defendants, and evidence that had been specifically excluded by the judge. One juror discovered that a defendant had previously been implicated in a related criminal matter—evidence the defendant’s attorney had specifically moved *in limine* to exclude.¹⁵

Internet research conducted by a juror and shared with fellow jury members does not always influence the jury’s deliberative process to the extent that a mistrial or reversal is warranted. A judge will consider the type of information that resulted from the research in making this determination. For example, where a juror in California told his fellow jurors that his online search for “great bodily injury” retrieved no information, the court found that the juror’s misconduct did not prejudice the defendant. The court found no substantial likelihood that the information seen by the juror in conducting the search of the term with no special legal meaning influenced him in any way detrimental to the defendant.¹⁶

Improper use of the Internet to communicate with others. Courts admonish jurors not to discuss the case among themselves prior to final deliberations to avoid having the jurors form opinions before they have heard all of the evidence in the case. In addition, jurors are admonished not to communicate about the case with third parties due to the concern that jurors may reach a verdict on the basis of an improper communication rather than the evidence admitted at trial.

Despite the apparent clarity of such jury instructions, a more specific instruction that addresses social media use is needed in order to adequately admonish jurors. Case law suggests that many jurors do not understand that acts such as tweeting or updating a Facebook status are the type of communication or discussion that courts prohibit. For many jurors, updating a Facebook status to reflect daily thoughts and activities is a matter of habit, and they no longer give it much thought. Others may simply determine that updating a Facebook status is a one-sided communication and, therefore, not the type of communication addressed by the court.¹⁷

For example, the day before a verdict was announced in a criminal trial in Michigan, a juror posted on her Facebook page that she was “actually excited for jury duty tomorrow. It’s gonna be fun to tell the defendant they’re GUILTY.” Defense counsel discovered the Facebook post and reported the juror, who was removed prior to the start of the second day of the two-day trial.¹⁸

After sentencing a gang member to prison for murder, a California judge reportedly “ripped into” the jury foreman, holding him in contempt for writing a blog that exposed the details of the case during trial. Despite daily instructions to refrain from discussing the case, the jury foreman had been blogging about the case throughout the trial and deliberations, posting a photograph of the murder weapon, and running a chat room where people could ask him questions about the case. In his testimony at the contempt hearing, the foreman said he did not believe his blog constituted “discussing the case” in defiance of the judge’s instructions.¹⁹

At the conclusion of the evidence in the sentencing phase of a capital murder trial in *Dimas-Martinez v. State*,²⁰ a juror tweeted, “Choices to be made. Hearts to be broken. We each define the great line.”²¹ When the court questioned the juror, he admitted that he had disregarded the court’s instruction not to tweet about the case. The court denied the request of counsel to remove the juror for his misconduct and the fact that one of the juror’s Twitter followers was a reporter.²² Thereafter, during jury deliberations in the sentencing phase of



the trial, the juror tweeted, "If its [sic] wisdom we seek . . . We should run to the strong tower."²³ An hour before the jury announced that it had reached a sentence, the juror tweeted, "Its [sic] over."²⁴ The trial court denied the defendant's motion for a new trial, finding that the defendant suffered no prejudice. The Arkansas Supreme Court reversed the defendant's conviction and sentence, finding that the trial court's failure to acknowledge the juror's inability to follow the court's directions was an abuse of discretion. The court recognized that when jurors post musings, thoughts, or any other information about trials on any online forums, "[t]he possibility for prejudice is simply too high."²⁵ The court found that "[s]uch a fact is underscored in this case . . . because one of the juror's Twitter followers was a reporter."²⁶

In a civil auto accident case in Texas, a juror pleaded guilty to four counts of contempt for trying to "friend" the defendant on Facebook and for discussing the case on his Facebook page. The misconduct was brought to the attention of the trial judge after the defendant notified her lawyer of the contact, and her lawyer informed the trial judge. The juror was sentenced to two days of community service.²⁷

Many tweets or e-mails sent during trial may be found to be innocuous, such as comments about jury duty or lack of refreshments. For example, in the federal corruption trial of former Pennsylvania state senator Vincent Fumo, the district court held that a juror's Facebook posts and tweets, including one stating, "Stay tuned for a big announcement on Monday everyone!" did not prejudice the defendant. The Third Circuit held that there was no abuse of discretion in the district court's finding that the juror's statements were innocuous. Far from raising specific facts about the trial or indicating any bias toward the parties, the postings were "so vague as to be virtually meaningless" and "nothing more than harmless ramblings."²⁸

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Distinguishing Harmless from Prejudicial Error

Improper use of social media by jurors, when discovered and challenged, may be viewed by the trial and appellate courts as harmless rather than prejudicial error. Judges have substantial discretion to determine on a case-by-case basis whether juror misconduct is prejudicial enough to a criminal defendant or the state to warrant removing the juror from the panel, declaring a mistrial, or, if on appeal, reversing a conviction. When an issue of misconduct arises, the presiding judge has a duty to fully investigate allegations of misconduct to assess the extent of any prejudice.²⁹

Courts have assessed the prejudicial impact of juror misconduct involving Internet research by looking at the totality of the circumstances, including the type of information that resulted from the improper research, the stage of the trial when the misconduct occurred, whether the extrinsic evidence was communicated to the other jurors, and whether it related to a material issue in the case.³⁰

In drawing the line between prejudicial information and harmless error, social psychologists Julie Blackman and Ellen Brickman classify the nature of the information that jurors might discover online as falling within five broad categories: (1) media accounts of the case; (2) virtual physical or other factual evidence; (3) expert opinions; (4) personal and professional information on the parties involved, including the judge, attorneys, and the defendant in criminal cases; and (5) the law (such as researching sentences associated with conviction for the particular crime charged).³¹

While trial judges have considerable discretion to assess whether juror misconduct is unduly prejudicial, they are required to reasonably exercise this discretion. In *State v. Gunnell*,³² the issue before the Ohio Supreme Court was whether the trial court acted unreasonably in addressing juror misconduct and in determining that a manifest necessity existed for a mistrial. The misconduct involved a juror who conducted Internet research on “involuntary manslaughter” and attempted to bring the printed material into the jury room during deliberations. The trial court questioned the juror about the information she had found and why she had looked for it, but did not ask her “a single question about the prejudice or bias, if any, created by the improper information or her ability to disregard it.”³³ The Ohio Supreme Court found that the trial court had not exercised sound discretion in determining whether juror bias existed and whether it could be cured. The court held that although it was error for the juror to conduct outside research, “it was also error for the judge to make no more than a limited inquiry of the juror—an inquiry that merely established the misconduct, not any prejudice from it.”³⁴

Internet research consisting of looking up the meaning of a word may not be found to be sufficiently prejudicial, while research that uncovers an inadmissible prior conviction of the defendant is more likely to result in reversible error. Misconduct involving research related to a material issue in a case, such as a factual dispute or the credibility of a witness or party is also more likely to be found prejudicial.

In *Wardlaw v. State*,³⁵ a juror’s online research led the Maryland Court of Special Appeals to order a new trial for the defendant accused of rape of his 17-year-old daughter. At trial, the defendant’s daughter testified that she had sex with the defendant on three different occasions and that she had been diagnosed with oppositional defiant disorder. A juror conducted online research on “oppositional defiant disorder,” and reported to the other jurors her finding that lying was associated with the disorder. Because the daughter’s credibility was a crucial issue, and there was no other evidence to substantiate her allegations, the court found that the juror’s research constituted egregious misconduct and that the trial court’s failure to question the jurors about the influence of the individual juror’s online research required a reversal.

Other Remedies to Deter Improper Juror Use of Social Media

Many courts and legislatures have adopted remedies to supplement social media jury instructions. The use of some of these remedies may increase the effectiveness of social media jury instructions.

A complementary response may include showing a film to prospective jurors shortly after they report for jury duty, illustrating prohibited uses of social media, explaining why using social media is prohibited, and notifying them of the penalties that may be imposed. The court's social media jury instructions might be included in this initial presentation.

Attorneys may use *voir dire* to ask prospective jurors, or request the judge inquire, about their social media use and whether they would be able to comply with the judge's instructions prohibiting improper social media use. *Voir dire* may provide another opportunity to repeat the court's social media jury instructions and educate jurors at an early stage of the process.

Another suggestion is to require that jurors sign a written statement, possibly under oath, acknowledging that they have been notified of prohibited social media uses and agreeing to abide by the prohibitions, subject to penalties.³⁶

The threat of sanctions such as fines and contempt may be helpful in deterring the kind of misconduct, such as Facebook posts and tweets, which is easily detected. Also, judges have discretion to confiscate all electronic devices during jury deliberations or, in a trial of brief duration, for the entire trial.³⁷ Although it is not a widely used remedy, a judge may require that jurors be sequestered for the duration of the trial or during jury deliberation. Some of these approaches may discourage citizens from serving as jurors.³⁸

Under a California law, jurors who use electronic or wireless communication to conduct their own research on a case, or talk to outsiders about it, can be sentenced to jail time of up to six months for criminal contempt.³⁹ The law was reportedly prompted by numerous accounts of jurors using electronic devices to research or communicate about cases.⁴⁰

Other states have adopted different prophylactic measures to supplement social media jury instructions. Michigan, for example, recently implemented new jury reform rules that attempt to reduce the incidence of "Google mistrials" by aiming to "alleviate the stress jurors feel about not being able to talk about the case."⁴¹ The new jury reform rules include permitting jurors to submit questions to witnesses through the judge and to take their notes into the jury room for use during deliberations.⁴² Remedies that allow jurors to take on a more active role may lessen the likelihood that jurors will feel the need to seek additional information on the Internet.⁴³

Four Criteria for Modernizing Social Media Jury Instructions

Among the most practical and cost-effective solutions for accommodating social media in the courtroom is to adopt explicit and explanatory jury instructions that address improper social media use.

Of the 47 states and the District of Columbia that have compiled criminal jury instructions, 11 have yet to formally adopt modern instructions that address the Internet or social media. Thirty-six states and four federal circuits have adopted pattern criminal jury instructions that address social media use with varying degrees of specificity. Several of these states contain only blanket admonitions not to use social media to research or communicate about the case.⁴⁴

Based on a review of the criminal pattern jury instructions on improper social media use that have been adopted by states and federal circuits and our review of applicable case law, we have identified four criteria that jurisdictions should consider in adopting or revising modern social media jury instructions.

1. Use plain language and social media terminology. Jury instructions should use plain language and common social media terminology that accurately describe the prohibited social media conduct, such as "texting," "e-mailing," "tweeting," or "posting." The cases discussed above illustrate that many jurors do not understand that prohibited "communications" or "discussions" include a blog entry or a Facebook update and that prohibited "research" means that jurors cannot use a dictionary or a Google search to obtain the definition of a word they do not understand. Jury instructions need to clearly describe the types of information that

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may not be shared, such as “facts,” “impressions,” “opinions,” “thoughts,” and “reactions” about the case, any place discussed in the testimony, or any of the individuals participating in the trial, including the parties, witnesses, attorneys, court personnel, and the judge. Using social media terminology in a way that indicates an understanding of social media use puts the admonition in context for jurors, encouraging attentive listening and improving juror comprehension.

Hawaii’s standard criminal jury instruction, amended in 2009 by the Hawaii Supreme Court to address juror use of social media, uses effective social media terminology in admonishing jurors not to communicate about the case, stating, “No discussion also means no e-mailing, text messaging, tweeting, [or] blogging . . .”⁴⁵

2. Give specific examples of prohibited social media conduct. Providing specific examples of prohibited social media reduces the likelihood of misinterpretation by individual jurors.⁴⁶ Instructions are most effective when only a few selective examples are provided to jurors along with the rationale for the restrictions, rather than an admonition consisting of a long list of examples of prohibited social media conduct. By providing specific examples of prohibited social media use, such as using Wikipedia or Googling to look up the definition of a word or obtain other information about the case, there is less ambiguity. It is often not the means of conducting research that the juror misunderstood, but the term “research” itself.⁴⁷

A proposed instruction by retired Maryland Circuit Court Judge Dennis Sweeney addresses this issue by instructing jurors not to conduct research and then defining what constitutes research: “I mean ‘research’ in the broadest possible meaning of the word. That is, you cannot use a public library, a dictionary, or a simple Google search to clarify or obtain, for example, even something as simple as the definition of a word you do not understand.”⁴⁸

A predominant use of social media sites is to “post” or “publish” information that may be directed to no one in particular, yet viewable to everyone, using popular features like a tweet, a Facebook status, or a blog post. Given its widespread popularity, this particular use of social media should be specifically addressed in jury instructions to resolve any misconceptions jurors may entertain regarding their duty not to communicate about the case. As opposed to “communicating” or “discussing” information, which usually implies a two-sided interaction, this particular use of social media is more accurately described by using different terminology, such as “posting” or “publishing” information.

The ongoing emergence of new technology will likely require periodic revisions to keep jury instructions updated with current examples of social media misconduct. New Mexico’s social media jury instructions include a blank space meant to be filled in by the judge with up-to-date illustrations.⁴⁹ This type of provision provides built-in flexibility and ensures that the instruction will be adaptable and well-tailored to new technology and social media.

3. Explain the rationale for social media restrictions. Jurors who are provided with the rationale underlying social media restrictions are less likely to arrive at the mistaken conclusion that they have not run afoul of the court’s admonitions. Also, jurors are more likely to understand that compliance with the restrictions helps ensure that the parties receive a fair trial. Jurors need to be informed, for example, that tweeting case-specific information is prohibited because it divulges that information to outsiders and may be viewable by a witness excluded from proceedings prior to testimony. In addition, social media use can take many forms, and providing jurors with the rationale for the restrictions will equip them with the means to evaluate their own social media conduct and determine whether it falls within the court’s admonition. Finally, jurors will be better able to see the restrictions as meaningful and important, rather than a boilerplate limitation on their conduct.⁵⁰

Our review of criminal pattern jury instructions on improper social media use that have been adopted by federal circuits and the states leads us to conclude that the most prevalent and serious deficiency is an inadequate explanation of the rationale for social media prohibitions. Professor Morrison states: “Probably the most helpful way to give instructions is to explain to jurors why they should not surf, blog, or tweet during

trial. If this instruction comes across as nothing more than another admonition, jurors may well shrug it off.”⁵¹ Professor Hoffmeister adds:

Providing the “why” is important because jurors in the Digital Age are more receptive to learning information online. Moreover, many jurors today feel comfortable using technology to discover facts for themselves or communicate with others. As a result, it is a challenge to get these jurors to give up their methods of learning and acquiring information and adhere to the court’s instructions.⁵²

4. Describe the consequences of violating social media restrictions. To further impress upon jurors the importance of the social media restrictions, courts should inform jurors of the consequences of failing to adhere to them, such as mistrials, resulting in a substantial waste of time and resources, and disciplinary sanctions for jurors who violate the court’s instructions. Hoffmeister suggests the following language:

If you communicate with anyone about the case or do outside research during the trial, it could lead to a mistrial, which is a tremendous expense and inconvenience to the parties, the court, and, ultimately, you as taxpayers. Furthermore, you could be held in contempt of court and subject to punishment such as paying the costs associated with having a new trial.⁵³

Application of Criteria to Illustrative Modern Social Media Jury Instructions

The following are excerpts from selected jury instructions that address the two categories of social media use in which most instances of juror misconduct occur: the use of social media to conduct case-related research and the use of social media to communicate or post/publish information about a case. In addition, the following instructions also contain one or more of the four criteria for effective social media jury instructions discussed above.

U.S. Judicial Conference. On August 21, 2012, the U.S. Judicial Conference Committee on Court Administration and Case Management approved a model jury instruction to help deter jurors from using social media to research or communicate about cases on which they serve. The instruction is an updated version of a prior social media instruction adopted in January 2010. The following is an excerpt from the updated 2012 instruction:

You, as jurors, must decide this case based solely on the evidence presented here within the four walls of this courtroom. This means that during the trial you must not conduct any independent research about this case, the matters in the case, and the individuals or corporations involved in the case. In other words, you should not consult dictionaries or reference materials, search the internet, websites, blogs, or use any other electronic tools to obtain information about this case or to help you decide the case. Please do not try to find out information from any source outside the confines of this courtroom.

....

I know that many of you use cell phones, Blackberries, the internet and other tools of technology. You also must not talk to anyone at any time about this case or use these tools to communicate electronically with anyone about the case. This includes your family and friends. You may not communicate with anyone about the case on your cell phone, through e-mail, Blackberry, iPhone, text messaging, or on Twitter, through any

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blog or website, including Facebook, Google+, My Space, LinkedIn, or YouTube. You may not use any similar technology of social media, even if I have not specifically mentioned it here. I expect you will inform me as soon as you become aware of another juror's violation of these instructions.⁵⁴

Minnesota. Recognizing the need to use plain language jury instructions, Minnesota's criminal jury instructions provide two versions of its preliminary criminal instruction, an original version and a more simplified plain language version. A note to judges in the instructions explains, "Each judge will probably find jurors respond best to a statement about the process and the case that is phrased as naturally as possible by the judge."⁵⁵ The following is an excerpt from the plain language version:

When you go home during the trial, do not talk to your family, friends, or others about the case. You may tell them you are a juror on a criminal case and that is all that you should tell them. Do not report your experiences as a juror while the trial and deliberations are going on. Do not e-mail, blog, tweet, text or post anything to your Facebook, MySpace, or other social networking sites about this trial. Do not visit any "chat rooms" where this case may be discussed.

Do not read or listen to news reports about the case.

Do not do your own investigation. Do not ask people about this case. Do not visit any of the locations mentioned in the trial. Do not research anything about the case, including the issues, evidence, parties, witnesses, location, or the law, through any form of written, print, electronic or Internet media.

....

If you do not follow these instructions, you may jeopardize the trial. This may require the whole trial to be redone and we will have to start over.⁵⁶

Idaho. Instructions in this article are based, in part, on Idaho's criminal jury instruction on juror conduct. Idaho's instruction improves juror comprehension by addressing social media restrictions as they apply to specific popular uses of social media, such as looking up information online as a matter of routine. The instruction also accomplishes this by addressing social media using the popular terminology, such as "Googling," the most common way of referring to looking something up on the Internet. Instructions not to "Google" anything makes it instantly clear to jurors the type of conduct that is prohibited.

In our daily lives we may be used to looking for information on-line and to "Google" something as a matter of routine. Also, in a trial it can be very tempting for jurors to do their own research to make sure they are making the correct decision. You must resist that temptation for our system of justice to work as it should. I specifically instruct that you must decide the case only on the evidence received here in court. If you communicate with anyone about the case or do outside research during the trial it could cause us to have to start the trial over with new jurors and you could be held in contempt of court.⁵⁷

Utah. The "model" jury instruction we propose below is based, in part, on Utah's criminal jury instruction, which contains elements of all the criteria suggested for effective social media instructions. Utah's instruction is also unique in that it references the growing number of trials that have been disrupted by jurors who have failed to abide by social media restrictions. The reference to real events may be more effective in commanding the interest and attention of the jury because it lessens the impression of being a boilerplate admonition.

Also, Utah's instruction is unusual because it attempts to cast doubt in the minds of jurors that they can avoid the consequences of violating the court's instructions by doing so surreptitiously, or by evading detection until after the conclusion of the trial.

Jurors have caused serious problems during trials by using computer and electronic communication technology. You may be tempted to use these devices to investigate the case, or to share your thoughts about the trial with others. However, you must not use any of these electronic devices while you are serving as a juror.

You violate your oath as a juror if you conduct your own investigations or communicate about this trial with others, and you may face serious consequences if you do. Let me be clear: do not "Google" the parties, witnesses, issues, or counsel; do not "Tweet" or text about the trial

Please understand that the rules of evidence and procedure have developed over hundreds of years in order to ensure the fair resolution of disputes. The fairness of the entire system depends on you reaching your decisions based on evidence presented to you in court, and not on other sources of information.

Post-trial investigations are common and can disclose these improper activities. If they are discovered, they will be brought to my attention and the entire case might have to be retried, at substantial cost.⁵⁸

Proposed "Model" Social Media Jury Instructions

Needless to say, there is no "perfect" social media instruction, and some jurors will disregard any social media jury instruction. The effectiveness of an instruction will depend, in part, on such factors as the delivery of the instructions, their repetition at various points throughout the trial, and the use of complementary remedies to deter social media misconduct.

The proposed social media jury instructions, below, are based on jury instructions published in the 2011 *Supplement to Maryland Criminal Jury Instructions and Commentary*. They include two versions of the instruction: an "amplified instruction" to be given at the beginning and conclusion of the trial and an "abbreviated instruction" to be given, as appropriate, before a recess and before jurors leave for home at the end of a trial day.

Social Media Cautioning: Beginning and End of Trial

(Amplified Instruction)

There are rules that each of you must follow in order to have a fair trial in this case. If you fail to follow these rules, you violate your oath as a juror and may face serious consequences. You must not be exposed to any information other than the evidence presented in this courtroom. This includes any information about issues or people involved in this trial. I now want to give you a detailed explanation about what you should and should not do during your time as jurors.

First, do not communicate to anyone any information about this case, or disclose your thoughts about this case or the individuals participating in it. This includes, but is not limited to, discussing the evidence, the lawyers, the court, or your thoughts, opinions, and reactions about any aspect of the case. In addition to not talking face to face with anyone, you must not share information with anyone about the case by any other means, for example, by texting, emailing, tweeting, or posting on social-networking sites such as Facebook. This includes not communicating with your fellow jurors until I give you the case for deliberation. It also applies to communicating with everyone else, including your family members and your employer, although you may

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notify your family and your employer that you have been seated as a juror in the case.

Second, you must not conduct your own research or investigation about the case or try to get information from any source other than what you see and hear in the courtroom. I use the word “research” in the broadest possible meaning of the word. This means, for example, you cannot use a dictionary or a Google search to obtain even something as simple as the definition of a word you do not understand. You must not consult any news sources, reference materials, or “Google” any information about the case, the law that applies to the case, or the people involved, including the defendant, the witnesses, the lawyers, or myself. You must not do any personal investigation, including visiting any of the places related to this case or viewing them on the Internet, for example, using Google Maps. This applies whether you are in the courthouse, at home, or anywhere else.

In summary, you may not use any social media technology to conduct your own investigation or communicate about matters related to this case. Let me be clear: do not “Google” the parties, witnesses, issues, or counsel; do not “tweet” or text about the trial; do not text or email information about the case; do not post updates about the trial on Facebook; do not use Google Maps or other Internet sources. Even using something as seemingly innocent as “Wikipedia” to obtain information related to this case can result in serious consequences.

It is important that you understand why these rules exist and why they are so important:

Only you have been qualified to be jurors in this case and only you have taken an oath to be fair and impartial.

The law does not permit you to talk among yourselves about the case until I tell you to begin deliberations because early discussions can lead to a premature final decision.

In our daily lives we may be used to looking for information online and to “Google” something as a matter of routine. Also, in a trial it can be very tempting for jurors to do their own research to make sure they are making the correct decision, but you must resist the temptation to seek outside information. Looking for outside information is unfair because the parties do not have the opportunity to refute, explain or correct what you have discovered. The trial process works by each side knowing exactly what evidence is being considered by you and what law you are applying to the facts you find.

For this reason, you are not permitted to visit a place discussed in the testimony. First, you cannot always be sure that the place is in the same condition as it was on the day in question. Second, even if it were in the same condition, once you go to a place discussed in the testimony to evaluate the evidence in light of what you see, you become a witness, not a juror. As a witness, you may now have a mistaken view of the scene that may not be subject to correction by either party.

Finally, you must not read or listen to any news accounts of the case, and you must not do research on any fact, issue, or law related to the case. For instance, the law often uses words and phrases in special ways, so it’s important that any definitions you hear come only from me, and not from any other source. Your decision must be based solely on the testimony and other evidence presented in this courtroom. It would not be fair to the parties for you to base your decision on some reporter’s view or opinion, or upon information you acquire outside the courtroom which may be incomplete, misleading, or inaccurate.

These rules are designed to help guarantee a fair trial. The fairness of the entire system depends on your reaching your verdict based solely on the evidence presented to you in court. If you violate these rules, you jeopardize the fairness of these proceedings and could be held in contempt of court. Also, a mistrial could result that would require the entire trial process to start over. As you can imagine, a mistrial is a tremendous expense and inconvenience to the parties, the court, and the taxpayers. [Post-trial investigations are common and can disclose these improper activities. If they are discovered, they will be brought to my attention and the entire case might have to be retried.]

I trust that you understand and appreciate the importance of following these rules and, based on your oath and promise, I know you will do so.

[If any of you have any difficulty whatsoever in following these instructions, please notify the bailiff or the clerk, who will notify me. If any of you become aware that one of your fellow jurors has done something that violates these instructions, you are obligated to report that as well. If a headline or announcement catches your attention, do not read or listen further. If anyone tries to contact you about the case, either directly or indirectly, or sends you any information about the case, please report this promptly as well.]⁵⁹

Social Media Cautioning: During Trial (Abbreviated Instruction)

Let me remind you once again that you must decide this case based only on the evidence introduced at trial. You must not communicate or share any information with anyone about this case, or disclose your thoughts about it or the individuals participating in it. This includes, but is not limited to, discussing the evidence, the lawyers, the court, or your thoughts, opinions, and reactions about any aspect of the case. In addition to not talking face to face with anyone about the case, you must not communicate information about the case by any means, including texting, emailing, tweeting, or posting on social-networking sites like Facebook. You also must not read or listen to any news accounts of the case. Finally, you must not conduct your own research or investigation about the case or try to get information from any source other than what you see and hear in the courtroom. This means, for example, you cannot use a dictionary or a Google search to obtain even something as simple as the definition of a word you do not understand.

In summary, do not “Google” the parties, witnesses, issues, or counsel; do not “tweet” or text about the trial; do not text or email information on the case; do not post updates about the trial on Facebook; do not use Google Maps or other Internet sources. Even using something as seemingly innocent as “Wikipedia” to obtain information related to this case can result in serious consequences.

[If any of you have any difficulty whatsoever in following these instructions, please notify the bailiff or the clerk, who will notify me. If any of you become aware that one of your fellow jurors has done something that violates these instructions, you are obligated to report that as well. If a headline or announcement catches your attention, do not read or listen further. If anyone tries to contact you about the case, either directly or indirectly, or sends you any information about the case, please report this promptly as well.]⁶⁰

Conclusion

An increasing number of cases address issues arising from allegations of juror misconduct using social media. At least 36 states and four federal circuits have adopted jury instructions that seek to deter juror misuse of social media with varying degrees of specificity and effectiveness, as reflected in the case law. A review of these jury instructions suggests that effective social media instructions should meet four criteria: (1) use plain language and social media terminology; (2) give specific examples of prohibited social media conduct; (3) explain the rationale for social media restrictions; and (4) describe the consequences of violating social media restrictions. The most common and serious deficiency is an inadequate explanation of the rationale for social media restrictions.

We propose two “model” jury instructions—an amplified and an abbreviated version—that should reduce juror misunderstanding and confusion, enable jurors to better understand the restrictions as meaningful and important, and direct juror attention to the serious consequences of violating the court’s instructions. ❖

Endnotes

1 *State v. Abdi*, 45 A.3d 29 (Vt. 2012).

2 See *Dennis Sweeney, Social Media and Jurors*, 43 Md. B.J. 44, 46 (2010).

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- 3 [See Brian Grow, *As Jurors Go Online, U.S. Trials Go Off Track*, REUTERS LEGAL \(DEC. 8, 2010\).](#)
- 4 [See Caren Myers Morrison, *Can the Jury Trial Survive Google?*, 25 CRIM. JUST. 4, 5 \(WINTER 2011\).](#)
- 5 *See, e.g., Hopt v. Utah*, 120 U.S. 430 (1887) (holding that a trial should not be suspended where an error in admission of testimony can be corrected by its withdrawal with proper instruction from the court to disregard it).
- 6 *Irvin v. Dowd*, 366 U.S. 717, 721–22 (1961).
- 7 *See Smith v. Phillips*, 455 U.S. 209, 217 (1982).
- 8 *See Ronald D. Spears*, *Looking for “Facts” in All the Wrong Places*, 98 ILL. B.J. 102 (2010).
- 9 *See Grow, As Jurors Go Online, supra.*
- 10 *Morrison, Can the Jury Trial Survive Google?*, *supra*, at 12; *see also* Thaddeus Hoffmeister, [Google, Gadgets, and Guilt: Juror Misconduct in the Digital Age](#), 83 U. COLO. L. REV. 409, 451–52 (2012) (noting that the majority of respondents to the author’s juror survey selected modernized jury instructions as the most effective method of preventing online research and improper communication by jurors); Emily M. Janoski-Haehlen, [The Courts Are All a “Twitter”](#): *The Implications of Social Media Use in the Courts*, 46 VAL. U. L. REV. 43, 61 (2011) (“Adopting pattern jury instructions that specifically address the use of social media sites is the most logical place to start.”).
- 11 *For additional cases in which allegations were made of improper juror use of social media, see* George L. Blum, *Annotation, Prejudicial Effect of Juror Misconduct Arising from Internet Usage*, 48 A.L.R.6th 135 (2009); Eric P. Robinson, [Jury Instructions for the Modern Age: A 50-State Survey of Jury Instructions on Internet and Social Media](#), 1 REYNOLDS CTS. & MEDIA L.J. 307 (2011). *See generally* Eric P. Robinson, [BLOG L. ONLINE](#), (last visited Nov. 9, 2012) (covering the spectrum of blog and Internet law and policy, including up-to-date coverage of emerging cases involving juror misconduct).
- 12 *See, e.g., Caren Myers Morrison, Jury 2.0*, 62 HASTINGS L.J. 1579, 1584 (2011).
- 13 *Clark v. State*, No. 0953/08 (Md. Ct. Spec. App. Dec. 3, 2009) (unreported opinion); *see also* Dennis Sweeney, *Social Media and Jurors, supra*, at 46.
- 14 [Brian Grow, *Juror Could Face Charges for Online Research*, REUTERS LEGAL \(JAN. 19, 2011\).](#)
- 15 *See John Schwartz, As Jurors Turn to Web, Mistrials Are Popping Up*, N.Y. TIMES, MAR. 18, 2009, at A1.
- 16 *See People v. Hamlin*, 89 Cal. Rptr. 3d 402 (Ct. App. 2009).
- 17 Hoffmeister, *supra*, at 433–34; *see also* Paula Hannaford-Agor, [Google Mistrials, Twittering Jurors, Juror Blogs, and Other Technological Hazards](#), CT. MANAGER, SUMMER 2009, at 42–43 (2009) (stating that for some, tweeting and blogging are simply an extension of thinking, rather than a form of written communication).
- 18 Hoffmeister, *supra*, at 429.
- 19 [Raul Hernandez, *Juror Held in Contempt for Blog of Murder Trial*, VENTURA COUNTY STAR \(JAN. 23, 2008\)](#); *see also* *State v. Goupil*, 908 A.2d 1256 (N.H. 2006).
- 20 *Dimas-Martinez v. State*, 2011 Ark. 515 (2011).
- 21 *Id.*, slip op. at 12.
- 22 *Id.*
- 23 *Id.*, slip op. at 14.
- 24 *Id.*, slip op. at 15.
- 25 *Id.*, slip op. at 16–17.
- 26 *Id.*, slip op. at 17.
- 27 *See Eva-Marie Ayala, Tarrant County Juror Sentenced to Community Service for Trying to “Friend” Defendant on Facebook*, FORT WORTH STAR-TELEGRAM, AUG. 28, 2011.
- 28 *United States v. Fumo*, 655 F.3d 288, 299, 305–06 (3d Cir. 2011); *see also* [Michael C. Bromby, Paper Presented at the Jury Research Symposium, Institute for Advanced Studies, Glasgow: The Temptation to Tweet—Jurors’ Activities Outside the Trial 2–4 \(Mar. 25–26, 2010\).](#)
- 29 *See, e.g., Remmer v. United States*, 350 U.S. 377, 379 (1956).
- 30 *See Amanda McGee, Note, Juror Misconduct in the Twenty-First Century: The Prevalence of the Internet and Its Effect on American Courtrooms*, 30 LOY. L.A. ENT. L. REV. 301, 313–14 (2010).

- 31 [Julie Blackman & Ellen Brickman, Let's Talk: Addressing the Challenges of Internet-Era Jurors](#), *JURY EXPERT*, MAR. 2011, AT 7–8.
- 32 *State v. Gunnell*, 973 N.E. 2d 243 (Ohio 2012).
- 33 *Id.* at 247.
- 34 *Id.* at 251.
- 35 *Wardlaw v. State*, 971 A.2d 331 (Md. Ct. Spec. App. 2009).
- 36 See Hoffmeister, *supra*, at 456–57.
- 37 See Ralph Artigliere et al., *Reining in Juror Misconduct: Practical Suggestions for Judges and Lawyers*, *FLA. B.J.*, Jan. 2010, at 8, 12.
- 38 Hoffmeister, *supra*, at 436–41; see also [Dennis M. Sweeney, Md. Circuit Court Judge \(Retired\), Address to the Litigation Section of the Maryland State Bar Association: The Internet, Social Media and Jury Trials: Lessons Learned from the Dixon Trial](#) (Apr. 29, 2010) (“Banning all cell phones, I-Pads [sic], and laptops for everyone called in for jury duty is unlikely to work and will be viewed as a Luddite solution with little support in the jury pool.”).
- 39 A.B. 141, 2011 Leg., Reg. Sess. (Cal. 2011).
- 40 [Eric P. Robinson, New California Law Prohibits Jurors' Social Media Use](#), *CITIZEN MEDIA L. PROJECT* (SEPT. 1, 2011).
- 41 See Lindsay M. Sestile, *Michigan Adopts New Jury-Reform Rules*, *LITIG. NEWS*, Sept. 28, 2011.
- 42 *MICH. ADMIN. CODE* r. 2.513 (2011).
- 43 See Morrison, *Jury 2.0*, *supra*, at 1625–31 (supporting a more active role for the jury on the ground that allowing them to ask questions will reduce the urge to seek information online).
- 44 See Robinson, *Jury Instructions for the Modern Age*, *supra*.
- 45 *HAW. CRIMINAL JURY INSTRUCTIONS* 2.01 (rev. 2009); see also Jana Lauren Harris, *Social Media in the Jury Room Can Sabotage Trials*, *FINDLAW KNOWLEDGE-BASE*, July 28, 2009 (“[D]o not ‘Google’ any party . . . ‘blog’ about the case or . . . ‘tweet’ about anything . . .”).
- 46 See [Tricia R. DeLeon & Janelle S. Forteza, Is Your Jury Panel Googling during the Trial?](#), 52 *ADVOC.* 36, 38 (2010) (quoting statements made by Texas judges suggesting that jurors do not think of their Internet activities as violating their jury instructions).
- 47 See Grow, *Juror Could Face Charges for Online Research*, *supra* (discussing a mistrial in Pennsylvania caused by a juror who conducted online research about the injuries suffered by the victim and later explained that she misunderstood the judge’s instruction not to conduct research, believing the judge was referring only to facts in the case, not related issues such as how a person could suffer certain injuries).
- 48 [Dennis M. Sweeney, Worlds Collide: The Digital Native Enters the Jury Box](#), 1 *REYNOLDS CTS. & MEDIA L.J.* 121 (2011).
- 49 [N.M. UNIFORM JURY INSTRUCTIONS CRIMINAL 14-101](#) (2011).
- 50 For a good example of a thorough rationale for social media restrictions, see [Eleventh Circuit Pattern Jury Instructions \(Criminal Cases\) 1 \(2010\)](#) (preliminary instruction).
- 51 Morrison, *Can the Jury Trial Survive Google?*, *supra*, at 12–13.
- 52 Hoffmeister, *supra*, at 453–54 (footnotes omitted).
- 53 *Id.* at 467.
- 54 [U.S. Judicial Conference Comm. on Court Admin. & Case Mgmt., Proposed Model Jury Instruction on the Use of Electronic Technology to Conduct Research on or Communicate about a Case \(June 2012\)](#).
- 55 10 *MINNESOTA PRACTICE, JURY INSTRUCTION GUIDES—CRIMINAL (CRIMJIG)* ch. 1, n.1 (5th ed. 2010).
- 56 *Id.* at CRIMJIG 2.08.
- 57 *IDAHO CRIMINAL JURY INSTRUCTIONS* 108 (2010).
- 58 *MODEL UTAH JURY INSTRUCTIONS, CRIMINAL 109B* (2d ed. 2010) (recess admonition).
- 59 DAVID E. AARONSON, *MARYLAND CRIMINAL JURY INSTRUCTIONS AND COMMENTARY* § 1.06(E) (3d ed. 2009 & Supp. 2011).
- 60 *Id.* § 1.06(G).

Actions by Judges: Immunity – Liability – Indemnity¹

By David A. Harris, Assistant Attorney General



Introduction

Judges, like any other defendant, can be sued in either state or federal court. The doctrine of judicial immunity is well established in state and federal law. The majority of suits against judges have been filed in federal court. For this reason, the main focus of this paper is judicial liability in federal rather than state court. As with every other area of the law, this subject matter is evolving. You should maintain an awareness of legislation and cases which impact judicial immunity during the time that you are on the bench.

Sovereign Immunity

In 2011 the Texas Supreme Court interpreted [§101.106\(f\) Tex. Civ. Prac. & Rem. Code](#) to hold that any common law cause of action against an employee arising from the course and scope of the governmental employee's position is effectively a suit against the employee in their official capacity. If the employee files the proper motion, the suit against him must be dismissed.² The plaintiff has 30 days to voluntarily dismiss the employee and name the agency as the defendant. When ruling on motions of this type involving other agencies, it would behoove you to bear in mind that any judicial erosion of this immunity will be applicable to the judicial realm. This immunity has been used to extricate judges from suits when their actions were not clearly judicial.

Judicial Immunity

It is hornbook law, settled in our jurisprudence for over a century, that a judge enjoys absolute immunity from liability for damages for judicial acts performed within his jurisdiction. The doctrine of absolute judicial immunity protects judges from liability for all actions taken in their judicial capacities, so long as they do not act in a clear absence of all jurisdiction.³ It is well settled that the doctrine of absolute judicial immunity protects a judicial officer not only from liability, but also from suit.⁴

In *Mireles v. Waco*, the United States Supreme Court reiterated the long standing rule that absolute judicial immunity is overcome in only two rather narrow sets of circumstances: first, a judge is not immune from liability for non-judicial actions, i.e., actions not taken in the judge's judicial capacity; and second, a judge is not immune for actions, though judicial in nature, taken in a complete absence of all jurisdiction.

Judges are absolutely immune against an action for damages for acts performed in their judicial capacity, even when such acts are alleged to have been done maliciously or corruptly.⁵ The fact that it is alleged that the judge acted pursuant to a conspiracy and committed grave procedural errors is not sufficient to avoid absolute judicial immunity.⁶ Grave procedural errors do not deprive a judge of all jurisdiction.⁷

In determining whether a judge's actions were "judicial in nature" the Federal Court is to consider whether (1) the precise act complained of is a normal judicial function; (2) the acts occurred in the courtroom or appropriate adjacent spaces such as the judge's chambers; (3) the controversy centered around a case pending before the court; and (4) the acts arose directly out of a visit to the judge in his official capacity. A judge's acts

are judicial in nature if they are normally performed by a judge and the parties affected “dealt with the judge in his judicial capacity.”⁸ These four factors are broadly construed in favor of immunity, and the absence of one or more factors does not prevent a determination that judicial immunity applies in a particular case. These factors should be construed broadly in favor of immunity, and should be construed generously to the holder of the immunity and in light of the policies underlying judicial immunity.⁹

There are two tests found in the above discussion of judicial immunity. When gauging your entitlement to judicial immunity you must first determine whether or not you are engaged in a judicial function (see Four Part Test) and if so, whether or not you are acting in an absence of jurisdiction.

When gauging their own conduct, most judges have a tendency to be overly generous in determining whether or not they are entitled to judicial immunity. For this reason, it would be wise for every judge to be familiar with *Forrester v. White*.

Forrester v. White¹⁰

Forrester v. White is a United States Supreme Court case that was decided in 1988. The defendant judge had hired, promoted, then demoted, and ultimately fired a female probation officer. The defendant judge was sued for sexual discrimination. The United States Supreme Court ultimately determined that the defendant judge was not entitled to judicial immunity. They noted that judges act in administrative, legislative, and executive functions. All of these functions could be legislatively assigned. They went on to discuss the various capacities that judges act in other than the judicial capacity.

The Court then analyzed the facts before them. It opined that while the actions of supervising the Court “. . . may be important in providing the necessary conditions of a sound adjudicative system. The decisions at issue, however, were not themselves judicial or adjudicative.” They noted that there was no reasonable distinction between the actions of this type taken by judges and any other governmental office. Finally, they determined that qualified immunity would be sufficient to provide the judge with sufficient safeguards to make a judge feel comfortable in discharging an incompetent employee.

A strict reading of *Forrester* suggests that only actions taken in the narrow confines of the courtroom are protected by judicial immunity. This is the position pressed by plaintiff’s attorneys seeking to subject judges to liability. They will always try to paint the “complained-of conduct” as an administrative act since it is undisputed that such actions are no longer protected by any type of judicial immunity. As a judge you will be required to participate in functions other than presiding over your court. The status or nature of most of these functions have yet to be determined by any court.

Judicial Immunity Limitations

Since 2000, there has been an increase in the number of suits filed against judges by attorneys in Texas. Fortunately, most of these cases have been disposed of at the trial court level, and no appeal has been taken. This section is included so that you are aware of the types of challenges that are being made to judicial immunity.

Alexander v. Tarrant County. A probationer being housed at a shock incarceration facility died from a rare staph infection. The parents of the deceased brought a civil rights suit against the Tarrant County criminal judges asserting that they had breached their administrative duties to the deceased probationer by allowing a private sector contractor to operate the facility. The Texas Code of Criminal Procedure mandates that sole responsibility for the supervision of probationers rests with the judiciary. Moreover, [Chapter 76 of the Texas Government Code](#) mandates the establishment of Adult Probation Departments. The federal judge determined that the defendant judges were not entitled to judicial immunity. His rationale was that the statute entitled rather than mandated judicial participation in the Adult Probation Departments. This test was never reviewed

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by the Fifth Circuit. The case was subsequently dismissed due to Plaintiff's failure to state a claim against the judges sufficient to overcome an assertion of qualified immunity. Qualified immunity will be discussed below. Plaintiff agreed to forego the appeal of this dismissal as a part of a settlement of an ancillary case.

Davis v. Tarrant County. Plaintiff is a criminal defense attorney practicing law in Tarrant County, Texas. He applied to be placed on the felony appointment list mandated by the Fair Defense Act. The district judges voted to exclude Plaintiff from the list, and suit was brought against the district judges asserting that the passage of the Fair Defense Act changed the character of appointment of counsel from a judicial act to an administrative act. The federal judge dismissed this case based upon judicial immunity. On April 8, 2009, the Fifth Circuit affirmed the trial court's dismissal.¹¹ This case contains a good discussion of the "nature of the act" analysis. Ultimately, the Fifth Circuit determined that even though the creation of a list of attorneys has been determined to be an administrative act,¹² the creation of a list under the Fair Defense Act is judicial.

Qualified Immunity

You will recall that when the United States Supreme Court decided *Forrester v. White*, they determined that depriving judges of judicial immunity in the employment context should not adversely impact the operation of the court. They specifically stated that the defenses available in the doctrine of qualified immunity should be sufficient to allow for the efficient operation of the court in personnel matters.

The doctrine of qualified immunity shields governmental officials from civil liability "to the extent that their conduct is objectively reasonable in light of clearly established law."¹³ The burden of negating the defense of qualified immunity lies with the plaintiff.¹⁴ When a motion for summary judgment is before the Court on qualified immunity, the district court must make two determinations: (1) whether the conduct at issue, as a matter of law, is unreasonable in light of clearly established law; and (2) whether there exists a genuine issue of material fact that the defendant actually engaged in such conduct.¹⁵

Qualified immunity protects a defendant from suits arising from the performance of their discretionary duties so long as they act in good faith in the exercise of duties that are within the scope of their authority. This immunity attaches to an official's actions when his or her job requires the exercise of personal judgment and discretion. The purpose of such immunity is to insulate government employees from personal liability and from the harassment of litigation.¹⁶ Moreover, it is also a prerequisite to liability that the law that the defendant allegedly violated was "clearly recognized" at the time of the violation.¹⁷ The Supreme Court has encouraged trial courts to make the qualified immunity determination as early as possible. If the defendant can establish his entitlement to qualified immunity as a matter of law, it functionally can be as effective as judicial immunity.

Texas is in the Fifth Circuit. The Fifth Circuit has mandated that once a defendant raises qualified immunity in their answer, the plaintiff must overcome the assertion of qualified immunity with specific (non-conclusory) allegations sufficient to overcome the assertion of qualified immunity.¹⁸

The Fifth Circuit does not allow any discovery until the plaintiff has met this pleading threshold. Other circuits are not as rigid in their interpretation of qualified immunity. Many courts allow limited discovery on the subject of qualified immunity. In most instances, a denial of qualified immunity is immediately appealable. However, the plaintiff can successfully defeat an interlocutory appeal if they can establish that the analysis of qualified immunity rests in any part on a factual determination.

As a general rule, a defendant can only be held liable for a violation of 42 U.S.C. § 1983 if they were actually personally involved in the action that allegedly brought about a harm. The Fifth Circuit has held that lawsuits against supervisory personnel based on their positions of authority are claims of liability under the doctrine of respondent superior which generally does not apply in § 1983 cases.¹⁹ A supervisor may be held liable if there is personal involvement in a constitutional deprivation, a causal connection between the supervisor's

wrongful conduct and a constitutional deprivation, or if supervisory officials implement a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force behind a constitutional deprivation.²⁰ Qualified immunity does not attach to anything other than discretionary actions. If an action is ministerial (mandated by law or a rule), qualified immunity does not attach. An important distinction should be drawn between duties which are legislatively mandated, and those which allow the discretion in how the duty is to be performed to be left up to the actor.

Injunctive / Declaratory Relief

Be aware of the fact that judges are subject to injunctive and declaratory relief just like any other official. Such a suit on the equity side of the docket also avoids the bar of sovereign and Eleventh Amendment immunity. While there is no risk that a judge will be required to pay monetary damages, a prevailing plaintiff is entitled to recover court costs and attorney's fees.

Conclusion

We have seen that all actions taken by judges are not judicial in nature. The character of the action determines whether or not an act taken by a judge will be protected by judicial immunity. Judges and other governmental officials can act in either an official or individual capacity. If a judge is engaged in a non-judicial function, he may be protected by legislative or prosecutorial immunity. If the action is administrative in nature, the judge is only protected by the defense of official immunity. If a judge is found to be liable for an improper action for which no immunity attaches, he is personally responsible for any damages assessed against him in excess of any potential available indemnification limits afforded by state statute. County judges look to the county to provide indemnification, but there will also be limits to that indemnification. Probate judge bond liability is beyond the scope of this paper.

What You Can Do

I would encourage every judge to become proactive in understanding the potential scope of their liability as well as the indemnification potentially available to protect them in the event of an adverse verdict. In addition to becoming acutely familiar with the test to be used in determining when actions are judicial, the judge should familiarize themselves with the interpretation of qualified immunity. I would encourage judges to determine the appropriateness of their involvement in potentially dangerous situations by applying the same test that they would apply in determining whether or not they would allow expert testimony in their court. Specifically, if the judge, by education, training, or experience does not possess any greater expertise than a layperson in a particular subject area, they should be loathe to impose their judgment or opinion in any situation.

If employment decisions are being made in a department or agency over which the judge has supervisory control, the judge should be reluctant to interfere with such decisions unless the judge possesses professional knowledge or expertise which equips them to do so. Put another way, the judge's personal preferences and personality should not create, or be the basis of conflicts. I would recommend that you create a notebook containing the statutes which impose any duties and/or obligations on you. Be familiar with the wording of the statute, and at the time you are performing the duties mandated by the statute be sensitive to the fact that you may be engaged in an administrative acts.

Keep in mind that if you are acting in an administrative capacity your only immunity may be qualified immunity. Qualified immunity only attaches to discretionary tasks. Put another way, if the statute mandates that you take a particular action, and you do not do so, you are not performing a discretionary task, and

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qualified immunity will not be available. Finally, I would encourage you to start thinking and acting like judges. Obviously, each of you had to select a political party to reach the bench that you now hold. Political infighting in the judiciary will only inure to the benefit of those seeking to expand judicial exposure. As noted above, the litmus test in qualified immunity is a “reasonableness” standard. Put another way, consistency among the judiciary will inure to the benefit of all judges. Similarly, open communication on the proper way to handle challenges facing judges should lead to more consistency thereby strengthening the potential defense of qualified immunity.

You should also be aware of the fact that a matter has been handled in a particular way in the past is not a guarantee that there will not be future liability. Talk to more experienced judges, and benefit from their experience. You should also take the time to examine their recommendations in the new light of potential judicial immunity, and determine whether or not improvements can be made to existing systems. ❖

Endnotes

¹The scope of this paper exceeds the available space. The full paper is available through the course materials for The College for New Judges on the Texas Center website.

²*Franka v. Velasquez*, 332 S.W.3d 367 (Tex. 2011).

³See *Mireles v. Waco*, 502 U.S. 9, 11-12, 112 S.Ct. 286, 288, 116 L.Ed.2d 9 (1991); *Stump v. Sparkman*, 435 U.S. 349, 356-358, 98 S.Ct. 1099, 1104-1105, 55 L.Ed.2d 331 (1978).

⁴See *Mireles v. Waco*, 502 U.S. at 11, 112 S.Ct. at 288.

⁵See *Mireles v. Waco*, 502 U.S. 11, 112 S.Ct. at 288; *Stump v. Sparkman*, 435 U.S. at 356-358, 98 S.Ct. at 1104-1105.

⁶See *Mitchell v. McBryde*, 944 F.2d at 230; *Stump v. Sparkman*, 435 U.S. at 359, 98 S.Ct. at 1106.

⁷See *Malina v. Gonzales*, 994 F.2d at 1125 and *Holloway v. Walker*, 765 F.2d at 522 (holding that mere allegations that a judge performed judicial acts pursuant to a bribe or conspiracy will not suffice to avoid absolute immunity).

⁸*Boyd v. Biggers*, 31 F.3d at 285 quoting *Mireles v. Waco*, 502 U.S. at 12, 112 S.Ct. at 288, which in turn quoted *Stump v. Sparkman*, 435 U.S. at 362, 98 S.Ct. at 1107.

⁹*Adams v. McIlhany*, 764 F.2d 294, 297 (51st Cir. 1985).

¹⁰484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988).

¹¹565 F.3d 214 (5th Cir. 2009)(writ denied), 130 S.Ct. 624 (2009).

¹²*Mitchell v. Fishbein*, 377 F.3d 157 (2nd Cir. 2004).

¹³*Kinney v. Weaver*, 367 F.3d 337, 346 (5th Cir. 2004)(*en banc*)(quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982).

¹⁴*Foster v. City of Lake Jackson*, 28 F.3d 425, 428 (5th Cir. 1994).

¹⁵*Kinney*, 367 F.3d at 346; see also *Conroe Creosoting Co. v. Montgomery County*, 249 F.3d 337, 350 (5th Cir. 2001).

¹⁶*Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d. 396 (1982). See also *Saucier v. Katz*, 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

¹⁷*Will v. Hallock*, 129 S.Ct. 952, 163 L.Ed.2d 836 (2006).

¹⁸*Wicks v. Mississippi State Employment Servs.*, 41 F.3d 991 (5th Cir. 1995).

¹⁹*Williams v. Luna*, 909 F.2d 121 (5th Cir. 1990).

²⁰*Thompkins v. Belt*, 828 F.2d 298 (5th Cir. 1987).

Overview of the Law of Misappropriation of Trade Secrets and Noncompete Agreements in Texas¹

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The Texas Supreme Court observed some time ago, before the full swing of the internet revolution or the proliferation of social media, that “we live in a world of high employee mobility and easy transportability of information.”² That observation is even truer today, and the risks to employers of losing important information are multiplied many times over by the acceleration of technology. One recent study found that “[n]early 60 percent of employees who quit a job or are asked to leave are stealing company data.”³ Close to 90 percent of defendants in trade-secret cases are the plaintiffs’ former employees or business partners.⁴ This article explores ways in which the legal system can help employers protect themselves from misappropriation of their trade secrets by and unfair competition from departing employees⁵



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I. Trade Secrets

A. Potential Claims

1. State Law Causes of Action

This spring, the Texas Legislature enacted the Texas Uniform Trade Secrets Act (“TUTSA”).⁶ TUTSA applies to the misappropriation of trade secrets that occurs on or after September 1, 2013, TUTSA’s effective date.⁷ Because existing law will continue to govern claims based on misappropriation occurring pre-TUTSA, and because the common law is likely to have some effect on how Texas judges interpret and apply TUTSA, this paper addresses current trade-secret remedies as well as the remedies that are available under TUTSA as of September 1, 2013.

a. Misappropriation of Trade Secrets

(1) Occurring Before September 1, 2013

(a) Common Law

There are many similar, but slightly different, iterations of the elements of a trade-secret claim under Texas common law. Texas state courts have typically required the following four elements⁸:

- i. Existence of a trade secret;
- ii. Acquisition of the trade secret through breach of a confidential or contractual relationship or through other improper means;
- iii. Unauthorized use or disclosure of the trade secret; and
- iv. Damages.

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In contrast, federal courts applying Texas law have often stated that the claim requires proof of only three elements: “(a) a trade secret existed; (b) the trade secret was acquired through a breach of a confidential relationship or discovered by improper means; and (c) use of the trade secret without authorization from the plaintiff.”⁹ In fact, the Fifth Circuit has questioned whether damages are an essential element of a trade-secret claim.¹⁰ More recently, however, the Fifth Circuit recited the claim as having four elements, including damages.¹¹

In the trade secret context, injunctive relief is often as important—if not more so—than damages. As with the merits-based elements, the necessary showing for injunctive relief is stated somewhat differently in federal and state court. In state court, a plaintiff must “plead and prove three elements to obtain a temporary injunction: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim.”¹² To obtain injunctive relief in federal court, a plaintiff must show a substantial likelihood of success on the merits, a substantial threat of irreparable harm absent an injunction, a balance of hardships in [the plaintiff’s] favor, and no disservice to the public interest.”¹³

Existence of Trade Secret

In the seminal case of *Hyde Corp. v. Huffines*, the Texas Supreme Court defined a trade secret as “any formula, pattern, device or compilation of information which is used in one’s business and presents an opportunity to obtain an advantage over competitors who do not know or use it.”¹⁴ Although this definition would seem to require that a plaintiff is actually using the trade secret, it has been interpreted as requiring only that a plaintiff be “in possession of the information and . . . in a position to use it” to his competitive advantage.¹⁵ Accordingly, “the mere fact that a company is not utilizing information at the present time does not prevent that information from being subject to trade-secret protection.”¹⁶

Not surprisingly, secrecy is a crucial part of the definition.¹⁷ “While absolute secrecy is not required, a substantial element of secrecy must be demonstrated.”¹⁸ In determining whether something is a trade secret, Texas courts examine six factors, taken from the Restatement¹⁹:

- (1) Extent to which the information is known outside of his business;
- (2) Extent to which it is known by employees and others involved in his business;
- (3) Extent of the measures taken by him to guard the secrecy of the information;
- (4) Value of the information to him and to his competitors;
- (5) Amount of effort or money expended by him in developing the information;
- (6) Ease or difficulty with which the information could be properly acquired or duplicated by others.

The six factors are “relevant but not dispositive,” and a plaintiff does not necessarily have to satisfy all six factors.²⁰ Other circumstances, such as industry custom and the way in which other jurisdictions have treated the type of information at issue, may also be relevant.²¹ The factors should be weighed “in the context of the surrounding circumstances.”²²

“Items such as customer lists, pricing information, client information, customer preferences, buyer contacts, market strategies, blueprints, and drawings have been shown to be trade secrets” under the common law test.²³ “[C]ompilations of information, even readily available information, may constitute a trade secret.”²⁴ Negative know how can also be a protectable trade secret because “[k]nowing what not to do often leads automatically to knowing what to do.”²⁵

Acquisition in Violation of a Confidential or Contractual Relationship or by Improper Means

The second element requires that there be something untoward about the acquisition of the trade secret. It can be satisfied by proof that the trade secret was acquired in violation of a confidential or contractual relationship, as is often the case in trade secret cases involving former employees.²⁶

A confidential or contractual relationship is not a requirement, however, and acquisition by improper means is also actionable. “A complete catalogue of improper means is not possible. In general they are means which fall below the generally accepted standards of commercial morality and reasonable conduct.”²⁷ Duping a third party into breaching a nondisclosure agreement is one example of improper means.²⁸ Taking aerial photographs of a chemical plant before the roof could be fully constructed is another.²⁹ In characterizing that conduct as improper, the Fifth Circuit stressed that improper means need not require “a trespass, other illegal conduct, or breach of a confidential relationship.”³⁰ Rather, “[t]o obtain knowledge of a process without spending the time and money to discover it independently is *improper* unless the holder voluntarily discloses it or fails to take reasonable precautions to ensure its secrecy.”³¹

Unauthorized Use or Disclosure

The third element is unauthorized use or disclosure. The Fifth Circuit has stated that “[a]ctual use or disclosure of the trade secret is a required element of the tort” under the common law.³² State courts have acknowledged a similar “actual use” requirement.³³

The meaning of “use,” however, is a somewhat flexible concept.³⁴ Although the Texas Supreme Court has not elaborated on the definition of “use,” intermediate appellate courts have defined “use” as “commercial use, by which a person seeks to profit from the use of the secret.”³⁵ Relying on the Restatement, the Fifth Circuit has defined “use” as follows: “Any exploitation of the trade secret that is likely to result in injury to the trade secret owner or enrichment to the defendant is a ‘use’ Thus, marketing goods that embody the trade secret, employing the trade secret in manufacturing or production, relying on the trade secret to assist or accelerate research or development, or soliciting customers through the use of information that is a trade secret . . . all constitute ‘use.’”³⁶ Accordingly, whether there has been “use” of a trade secret may depend upon the nature of the trade secret, the circumstances of its misappropriation, and the benefit the defendant is alleged to have obtained from the misappropriation.³⁷ “[M]any, if not most,” trade secret cases “rest[] on circumstantial evidence,”³⁸ and courts will infer use when it is appropriate.

The “actual use” requirement can be problematic in cases in which a plaintiff is facing a very real threat of use. Consequently, threatened use or disclosure—as opposed to actual use or disclosure—can be sufficient for injunctive relief.³⁹ In these cases, the courts granted injunctive relief, even when there was no evidence of actual use, when the defendants possessed confidential information, were in a position to use it, and the courts found it likely that the defendants would in fact use the confidential information.⁴⁰

Where a plaintiff does no more than establish “a theoretical possibility” that a defendant could divulge its trade secrets, courts will not order an injunction, particularly when the defendant has no need to use the plaintiff’s confidential information.⁴¹

Damages

The final element of a common-law trade-secret misappropriation claim is damages.⁴² As the Fifth Circuit has explained, a “flexible approach” should be used to calculate damages for misappropriation.⁴³ Accordingly, damages “can take several forms: the value of plaintiff’s lost profits; the defendant’s actual profits from the use of the secret; the value that a reasonably prudent investor would have paid for the trade secret; the development costs the defendant avoided incurring through misappropriation; and a ‘reasonable royalty.’”⁴⁴ A plaintiff need not prove damages with exact precision.⁴⁵

As mentioned above, the Fifth Circuit has suggested that damages may not be an essential element of a trade-secret claim and stated that “[c]ertainly damages need not be shown to get an injunction to protect the trade secret.”⁴⁶ Whether a showing of damages is relevant to a likelihood of success on the merits, however, a showing of some type of injury is undoubtedly relevant to a likelihood of irreparable harm.⁴⁷

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In the injunction context, “An injury is irreparable if the injured party cannot be compensated adequately in damages or if the damages cannot be measured by any certain pecuniary standard. To demonstrate probable injury or harm, an applicant must show an injury for which there can be no real legal measure of damages or none that can be determined with a sufficient degree of certainty.”⁴⁸ In other words, if a plaintiff’s harm can be adequately addressed by money damages, it will not be entitled to an injunction.⁴⁹ Injuries that cannot be adequately compensated by damages include injuries that are difficult or impossible to quantify.⁵⁰

Although some jurisdictions routinely apply a presumption of harm when a trade-secret plaintiff shows a likelihood of success on the merits, only a couple Texas courts have relied on such a presumption.⁵¹ Accordingly, the most prudent course for plaintiffs litigating trade-secret claims in Texas is to demonstrate an actual likelihood of harm instead of relying upon a presumption.⁵²

Attorney’s Fees, Punitive Damages, and Limitations

Attorney’s fees are not recoverable for a common-law trade-secret misappropriation claim, although they can be recovered if the misappropriation is also a breach of contract, or if the plaintiff asserts the claim under the Texas Theft Liability Act.⁵³

Punitive damages are available for the common-law tort of trade-secret misappropriation only upon a finding that the harm to the plaintiff resulted from fraud, malice, or gross negligence.⁵⁴ In addition, the plaintiff must recover actual damages; nominal damages are insufficient.⁵⁵ Punitive damages are limited “to the greater of (1)(A) two times the amount of economic damages; plus (B) an amount equal to any noneconomic damages found by the jury, not to exceed \$750,000; or (2) \$200,000.”⁵⁶

The statute of limitations for trade-secret misappropriation is three years.⁵⁷

For misappropriations made on or after September 1, 2013, TUTSA will apply instead of the common law.⁵⁸ However, to the extent the common law is not in conflict with TUTSA, it will almost certainly still be an important guide to courts and litigants.

(b) Texas Theft Liability Act

For misappropriation occurring prior to September 1, 2013, the Texas Theft Liability Act (“TTLA”) provides another cause of action for trade-secret misappropriation.⁵⁹ The TTLA allows a plaintiff to seek damages for “theft,” defined as “unlawfully appropriating property” as described by the section of the Texas Penal Code criminalizing theft of trade secrets, among other sections.⁶⁰ The Penal Code provides that a “person commits an offense if, without the owner’s effective consent, he knowingly: (1) steals a trade secret; (2) makes a copy of an article representing a trade secret; or (3) communicates or transmits a trade secret.”⁶¹

Misappropriation under the TTLA, accordingly, appears to have five elements⁶²:

1. Ownership of a trade secret (as that term is defined in the Penal Code);
2. Unlawful appropriation, or theft (as that term is defined in the Penal Code);
3. The unlawful appropriation was made knowingly;
4. The unlawful appropriation was made without the owner’s effective consent; and
5. Damages.

The Penal Code defines “trade secret” as “the whole or any part of any scientific or technical information, design, process, procedure, formula, or improvement that has value and that the owner has taken measures to prevent from becoming available to persons other than those selected by the owner to have access for limited purposes.”⁶³ The incorporation of the adjectives “scientific or technical” would seem to make this definition somewhat narrower than the common-law definition, but courts have concluded that “[t]he statutory definition of trade secret comports with the definition used when tort and contract trade secret law is considered.”⁶⁴

Relatively few cases have meaningfully explored the TTLA in the trade secret context, but it could certainly be useful.⁶⁵ The misappropriation/theft element may be more difficult to prove under the TTLA than under the common law, however.⁶⁶

Available Remedies

The TTLA allows a successful plaintiff to recover from the thief actual damages and, in addition, damages in a sum not to exceed \$1,000.⁶⁷ The TTLA does not expressly create a right to punitive damages, but the Texas Damages Act exempts theft punishable as a third-degree felony—like theft of trade secrets, TEX. PENAL CODE § 31.05(c)—from the cap on punitive damages, suggesting that punitive damages are available and potentially quite substantial.⁶⁸ Because knowing appropriation is an element of trade-secret theft under the TTLA, the fraud, malice, or gross negligence standard of Civil Practice and Remedies Code § 41.003(A) should be easily satisfied.⁶⁹ The TTLA “does not authorize injunctive relief.”⁷⁰

Attorney’s Fees, Punitive Damages, and Limitations

The TTLA provides that a prevailing party “shall be awarded court costs and reasonable and necessary attorney’s fees.”⁷¹ To be a prevailing party, a plaintiff must receive an actual damages award.⁷² In contrast, a defendant can “[c]learly . . . be a prevailing party under the TTLA. And a defendant who was accused of theft but not found liable would obviously suffer no damages due to theft, but would still be the prevailing party.”⁷³ Parties should specifically plead for attorney’s fees under the TTLA.⁷⁴

The TTLA does not contain a statute of limitations.⁷⁵ There do not appear to be any published opinions addressing the statute of limitations for a TTLA claim based on theft of trade secrets. For TTLA claims based on other types of theft, courts have looked to the most analogous statute of limitations in Chapter Sixteen of the Civil Practice and Remedies Code.⁷⁶ Under this logic, the general three-year statute of limitations “for misappropriation of trade secrets” would apply.⁷⁷ As no court has addressed this precise issue, it is possible that trade-secret TTLA claims could be subject to a different limitations period.

The TTLA is not a viable cause of action for misappropriation of trade secrets made on or after September 1, 2013.⁷⁸

(2) Occurring On or After September 1, 2013 – TUTSA

The Texas Uniform Trade Secrets Act applies “to the misappropriation of a trade secret made on or after” September 1, 2013.⁷⁹ Misappropriations made before September 1, 2013, are governed by then-existing law, even if suit is not filed until on or after that date.⁸⁰ Further citations to TUTSA in this section will be to the act as it appears in Chapter 134A of the Texas Civil Practice and Remedies Code.

Definitions

In keeping with the common law, TUTSA defines “misappropriation” broadly, incorporating the concepts of “improper means” and duties of confidentiality.⁸¹ The definition of “misappropriation” also includes the “disclosure or use of a trade secret of another without express or implied consent by a person who: before a material change of the person’s position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake”; *id.* at 134A.002(3)(B)(iii)—a situation that is not clearly actionable under the common law.

“Improper means” is defined to “include[] theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, to limit use, or to prohibit discovery of a trade secret, or espionage through electronic means.”⁸² Given that the common law’s definition of “improper means” is intentionally imprecise (i.e. means which fall below the generally accepted standards of commercial morality and reasonable conduct),

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and that the list is merely inclusive, the definition is likely to be interpreted expansively.

The term “trade secret” itself is defined as “information, including a formula, pattern, compilation, program, device, method, technique, process, financial data, or list of actual or potential customers or suppliers, that⁸³:

- A. derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
- B. is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

Again, this definition—which omits the Restatement’s language, quoted in *Huffines*, requiring that the plaintiff “use” the trade secret in its business—is consistent with the common law. Importantly for many Texas employers, the definition departs from the Uniform Trade Secrets Act in that it continues to expressly recognize financial data and customer lists as trade secrets.⁸⁴

Available Relief

TUTSA allows injunctive relief for “[a]ctual or threatened misappropriation,” putting to rest once and for all the question of whether actual use is a requirement.⁸⁵ TUTSA also specifically provides that an “injunction may be continued for an additional reasonable period of time,” even when the trade secret has ceased to exist, “in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.”⁸⁶ “In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.”⁸⁷ TUTSA does not define “appropriate circumstances,” but this provision may lessen the general reluctance to award mandatory (as opposed to prohibitory) injunctive relief.⁸⁸

In addition to, or instead of, injunctive relief, a successful plaintiff can recover damages, which “can include both the actual loss caused by misappropriation and the unjust enrichment caused by misappropriation that is not taken into account in computing actual loss.”⁸⁹ Alternatively, damages “may be measured by imposition of liability for a reasonable royalty.”⁹⁰ The reasonable-royalty measure of damages is limited on its face to “a misappropriator’s unauthorized disclosure or use of a trade secret,” suggesting that it may not be available for a misappropriator who merely acquires a trade secret by improper means but does not disclose or use it.⁹¹

Attorney’s Fees, Punitive Damages, and Limitations

In an important departure from the common law, TUTSA gives courts discretion to award attorney’s fees to a “prevailing party” in certain circumstances.⁹² A prevailing defendant may recover attorney’s fees if “a claim of misappropriation is made in bad faith” or “a motion to terminate an injunction is . . . resisted in bad faith.”⁹³ A prevailing plaintiff may recover attorney’s fees if “willful and malicious misappropriation exists” or if “a motion to terminate an injunction is made . . . in bad faith.”⁹⁴ TUTSA does not define “willful and malicious,” “bad faith,” or “prevailing party.” Because TUTSA authorizes injunctive relief as well as damages, and because the attorney’s fees section specifically addresses motions to terminate injunctions, it may be that a plaintiff who obtains either damages or injunctive relief—assuming the requisite showing of willfulness or maliciousness—would be a prevailing party.⁹⁵

Punitive damages are available, but not mandatory, upon proof by clear and convincing evidence of “willful and malicious misappropriation.”⁹⁶ The amount of punitive damages may not exceed twice the actual loss, unjust enrichment, or reasonable royalty recovered under §134A.004(a).⁹⁷

TUTSA does not contain a specific statute of limitations, but it is likely that the current three-year statute of limitations “for misappropriation of trade secrets” will apply.⁹⁸



Preemption of Conflicting Remedies

For trade-secret misappropriation made on or after September 1, 2013, TUTSA “displaces conflicting tort, restitutionary, and other law of this state providing civil remedies for misappropriation of a trade secret.”⁹⁹ In addition to this general provision, TUTSA also specifically amends the TTLA to remove misappropriation of trade secrets, as defined in Texas Penal Code § 31.05, from the definition of theft in the TTLA, making trade-secret theft non-actionable under the TTLA, even without the general “displacement” provision.¹⁰⁰

TUTSA does not affect “other civil remedies,” as long as they are “not based upon misappropriation of a trade secret,” and it does not affect contractual or criminal remedies, “whether or not [they are] based upon misappropriation of a trade secret.”¹⁰¹ Accordingly, “other civil remedies” remain viable to the extent they (a) do not conflict with TUTSA or (b) are not based on misappropriation. The scope of TUTSA’s preemption provision will likely be the subject of some litigation.

b. Breach of Contract and Other State Law Causes of Action

Cases involving misappropriation of trade secrets frequently involve claims for breach of contract, too. TUTSA “does not affect contractual remedies, whether or not based upon misappropriation of a trade secret,” so available contract claims should be pursued for misappropriation occurring both before and after September 1, 2013.¹⁰² Benefits of asserting a contract claim, if one is available, include the availability of attorney’s fees, either under the terms of the contract or Tex. Civ. Prac. & Rem. Code § 38.001(8),¹⁰³ and a four-year statute of limitations, Tex. Civ. Prac. & Rem. Code § 16.051.

Trade-secret cases can also implicate a number of torts—including breach of fiduciary duty, conversion, fraud, conspiracy, and tortious interference—that are often asserted as supplemental causes of action. As

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mentioned above, the extent to which TUTSA will preempt these causes of action is unclear.¹⁰⁴

2. Federal Cause of Action - CFAA

The Computer Fraud and Abuse Act (“CFAA”) makes it a crime to, among other things, “intentionally access[] a computer without authorization or exceed[] authorized access” and thereby obtain “information from any protected computer,” which is broadly defined as a computer “used in or affecting interstate or foreign commerce or communication.”¹⁰⁵ CFAA also creates a civil cause of action for any person “who suffers damage or loss by reason of a violation,” as long as the CFAA violation causes loss aggregating at least \$5,000 in value during any one-year period.¹⁰⁶ Accordingly, the elements for a civil claim under this subsection of CFAA are¹⁰⁷:

- i. Intentional
- ii. Access of a protected computer
- iii. Without authorization or exceeding authorized access
- iv. Thereby obtaining information from the computer
- v. Loss aggregating at least \$5,000 in value during any one-year period.¹⁰⁸

Authorized Access

CFAA was originally enacted as a statute to prevent computer hacking, and courts have struggled with the extent to which CFAA can be applied in the context of an employee who is technically authorized to access a computer but uses that access for an unauthorized purpose.¹⁰⁹ “Authorized access,” which is the lynchpin of the struggle, is not defined by the statute. Some courts, most notably the Ninth Circuit, have interpreted CFAA narrowly and found it to be inapplicable in the employment context unless an employee lacks permission to access a particular computer at all.¹¹⁰

So far, the Fifth Circuit has taken a fairly broad approach to CFAA. In *United States v. John*, the court held that “‘authorized access’ or ‘authorization’ may encompass limits placed on *the use* of information obtained by permitted access to a computer system and data available on that system[,] . . . at least when the user knows or reasonably should know that he or she is not authorized to access a computer and information obtainable from that access in furtherance of or to perpetrate a crime.”¹¹¹ “To give but one example,” the court wrote, “an employer may ‘authorize’ employees to utilize computers for any lawful purpose but not for unlawful purposes and only in furtherance of the employer’s business. An employee would ‘exceed[] authorized access’ if he or she used that access to obtain or steal information as part of a criminal scheme.”¹¹² Thus, even though the defendant in *John*, an account manager at Citigroup, “was authorized to view and print all of the information that she accessed and that she provided to” her half-brother to incur fraudulent charges on Citigroup customers’ accounts, the defendant’s “use of Citigroup’s computer system to perpetrate fraud was not an intended use of that system” and was thus actionable under CFAA.¹¹³ Supporting this conclusion was the fact that the defendant’s “use of Citigroup’s computer system to perpetrate a fraud was also contrary to Citigroup employee policies, of which she was aware.”¹¹⁴

In spite of the Fifth Circuit’s interpretation of CFAA, which incorporates an employer’s “intended use” into the statutory definition of authorization, it is a somewhat open question whether the court would find CFAA applicable in a typical employment-related trade-secret misappropriation case. In *John*, the Fifth Circuit distinguished *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127 (9th Cir. 2009), a case in which an employer “alleged that an employee e-mailed to his and his wife’s personal computers proprietary documents to which his employer had given him access with the intention of using the information to compete with his employer once he resigned.”¹¹⁵ The Ninth Circuit—concerned at least in part with the idea that a defendant’s breach of “a state law duty of loyalty to an employer in accessing and using that information to further his own competing business” could give rise to criminal liability under CFAA—stated that “[t]he definition of the term ‘exceeds authorized access’ . . . implies that an employee can violate employer-placed limits on accessing information

stored on the computer and still have authorization to access that computer.”¹¹⁶ In rejecting the Ninth Circuit’s interpretation, the Fifth Circuit wrote that the concerns in *Brekka* were not present in *John* because “[a]n authorized computer user ‘has reason to know’ that he or she is not authorized to access data or information in furtherance of a criminally fraudulent scheme.”¹¹⁷

Because the facts of *John* are at least somewhat distinguishable from the typical trade-secret misappropriation case, and because of the circuit split on CFAA’s application, a CFAA claim on this type of facts is not a sure thing.¹¹⁸ However, at least one Texas district court, relying on *John*, has found CFAA applicable to a typical trade-secret scenario.¹¹⁹ In *Meats by Linz*, an employee accessed his employer’s computer system and downloaded a confidential document hours before resigning to work for a competitor.¹²⁰ The court denied the employee’s 12(b)(6) motion to dismiss, observing that the employer had sufficiently alleged that the employee had “accessed the . . . computer system and the [document] and then used it, in violation of the restrictive covenant agreement . . . , to compete directly with the employer in the restricted geographical area. . . .”¹²¹

Available Damages

CFAA allows a successful plaintiff to recover “compensatory damages and injunctive relief or other equitable relief.”¹²² When a \$5,000 loss threshold provides the basis for a CFAA claim, as would likely be the situation in most trade-secret cases, damages “are limited to economic damages.”¹²³ The statute’s definition of “loss”—“any reasonable cost to any victim, including the cost of responding to an offense, conducting a damage assessment, and restoring the data, program, system, or information to its condition prior to the offense, and any revenue lost, cost incurred, or other consequential damages incurred because of interruption of service,” § 1030(e)(11)—is instructive as to what types of compensatory damages should be recoverable under CFAA.

The Second Circuit has suggested that only those damages that fit within the definition of “loss” are recoverable.¹²⁴ Accordingly, the damages available under CFAA may be different than what practitioners typically think of in the trade-secret context. Indeed, one court has found that “trade secret value” is not an actionable loss under CFAA—at least when that value is derived from the defendants’ alleged profits—because it is not an “imminently foreseeable effect of unauthorized computer access,” unlike the other costs listed in the statute.¹²⁵

That said, the provision defining “loss” is “broadly worded” and has been held to “plainly” provide for “consequential damages” such as “the costs incurred as part of the response to a CFAA violation, including the investigation of an offense.”¹²⁶ This type of consequential damages is available even when a plaintiff is limited to purely economic damages.¹²⁷ Even if the investigation determines that the harm is less than anticipated, the costs of investigation could still be recoverable because “hindsight must not guide such an analysis of whether such actions were reasonably necessary in response to a CFAA violation.”¹²⁸ Given that the “financial impact of even a relatively narrow intrusion can be extensive,” the importance of recovering this type of damages is significant.

Remember that CFAA creates a civil cause of action for any person “who suffers damage or loss.”¹²⁹ In addition to defining “loss,” the statute also defines “damage,” as “any impairment to the integrity or availability of data, a program, a system, or information.”¹³⁰ Even though the statutory list of what counts as a “loss” is not limited on its face to cases involving the statutory definition of “damage”—and is in fact non-exclusive, covering “any reasonable cost”—some courts have stated that “the meaning of ‘loss,’ both before and after the term was defined by statute, has consistently meant a cost of investigating or remedying damage to a computer, or a cost incurred because the computer’s service was interrupted.”¹³¹

Other courts have not interpreted the meaning of “loss” so narrowly.¹³² At least one court has determined that incorporating a damage or interruption-of-service requirement “would eliminate many reasonable costs that would otherwise be recoverable and would conflict with the broad language of the statute.”¹³³ The Fifth Circuit has not addressed the issue.

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Attorneys' Fees, Punitive Damages, and Limitations

CFAA does not provide for the recovery of attorney's fees.¹³⁴ However, some courts have found that attorney's fees that "pertain to investigating a CFAA violation" should be recoverable.¹³⁵ Attorney's fees that pertain to *prosecuting* a CFAA violation, in contrast, are unavailable.¹³⁶ CFAA does not provide for punitive damages.¹³⁷ The statute of limitations for CFAA civil claims is two years.¹³⁸

II. Inevitable Disclosure

"There are circumstances in which trade secrets inevitably will be used or disclosed, even if the defendant swears that he or she will keep the information confidential."¹³⁹ These circumstances have led some courts to apply what has become known as the doctrine of inevitable disclosure.

"Courts applying the doctrine have differed over its reach and the circumstances required for its application, but, generally speaking, the doctrine applies when a defendant has had access to trade secrets and then defects to the [competitor] to perform duties so similar that the court believes that those duties cannot be performed without making use of trade secrets relating to the previous affiliation."¹⁴⁰ Under such circumstances, some courts have prohibited defendants from working for the competition, or limited the manner in which they are allowed to do so, even in the absence of a noncompetition agreement.¹⁴¹ In another iteration of the doctrine, some courts have allowed plaintiffs asserting breach of contract claims based on noncompetition agreements to rely on the inevitable disclosure doctrine to establish irreparable harm in seeking an injunction.¹⁴² No Texas case has expressly adopted the doctrine.¹⁴³ However, several courts applying Texas law have implicitly employed "what might be viewed as a modified version of the doctrine."¹⁴⁴

In both *Conley* and *Rugen*, the Dallas Court of Appeals affirmed injunctions against former employees when the former employees possessed confidential information and were in a position to use it for their own benefit and to the detriment of their former employers; in both cases, the court found these circumstances made it "probable" that the former employees would use or disclose the information.¹⁴⁵ In *Conley*, the injunction prevented the former employee from using or disclosing the plaintiff's confidential information and from working in a certain project for his new employer, and in *Rugen*, the injunction prevented the former employee from soliciting the plaintiff's customers or employees—even though neither former employee was subject to an enforceable noncompetition agreement.¹⁴⁶ "At times," the court wrote, "an injunction is the only effective relief an employer has when a former employee possesses confidential information."¹⁴⁷

More recently, the Houston Court of Appeals (First District) declined to decide whether to adopt the test applied in *Conley* and *Rugen*.¹⁴⁸ In that case, the court affirmed the trial court's order denying a temporary injunction because the "evidence raise[d] a reasonable inference that [the defendant] did not need to and would not use [the plaintiff's] confidential information, i.e., that disclosure and use was not probable."¹⁴⁹ Practically speaking, the distinctions between these cases are likely explained by the deference given to trial courts' findings of fact and determinations of credibility. In other words, in *Conley* and *Rugen*, the trial courts were justified in believing that the defendants would probably use or disclose trade secrets, and in *Cardinal Health*, the trial court was justified in believing that use or disclosure was not probable.¹⁵⁰

Read together, these cases addressing inevitable (or, more accurately, probable) disclosure implicate a couple of guiding principles. First, *Cardinal Health* is a good reminder that there is no irrebuttable presumption that a former employee in a position to use trade secrets for a competitor will necessarily do so. Second, cases like *Conley* and *Rugen* exemplify the broad equitable powers trial courts have to fashion injunctions. While these broad powers may encourage practitioners to be aggressive in seeking injunctive relief, in these authors' opinion the reality is that courts are naturally reticent to issue broad injunctive remedies in the absence of compelling facts justifying them, particularly where the remedy sought may exceed the scope of any contractual restrictions imposed on a defendant.

III. Competition and Solicitation

One way to avoid having to litigate inevitable-disclosure issues is to have employees sign reasonably tailored covenants not to compete, which can help protect trade secrets, as well as other important business interests.¹⁵¹ Indeed, alleged breaches of noncompetition agreements are frequently litigated alongside allegations of trade secret misappropriation. While there is a strong public interest in protecting trade secrets, however, conflicting interests can be implicated by covenants not to compete.

The Texas Legislature has attempted to balance these competing interests in the Covenants Not to Compete Act, codified at Texas Business & Commerce Code §§ 15.50-.52. The Covenants Not to Compete Act is intended “to maintain and promote economic competition in trade and commerce” by “prohibit[ing] naked restrictions on employee mobility that impede competition while allowing employers and employees to agree to reasonable restrictions on mobility that are ancillary to or part of a valid contract having a primary purpose that is unrelated to restraining competition between the parties,” thereby encouraging employers to invest in trade-secret development, goodwill, and employee training.¹⁵²

A. Covenants Not to Compete

In Texas, a covenant not to compete is enforceable only¹⁵³:

1. If it is ancillary to or part of an otherwise enforceable agreement at the time the agreement is made, and
2. To the extent that it contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.

This statute, although intended to codify the common law, caused much confusion for litigants—and courts—for many years. The storied history of covenants not to compete in Texas has been well-documented by able judges and commentators and, for the most part, will not be repeated here.¹⁵⁴ Although practitioners should be familiar with the significant non-compete cases from the Texas Supreme Court—including *Marsh*, 354 S.W.3d 764; *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 849 (Tex. 2009); *Alex Sheshunoff Mgmt. Servs., L.P. v. Johnson*, 209 S.W.3d 644, 652-53 (Tex. 2006); and *Light v. Centel Cellular Co. of Tex.*, 883 S.W.2d 642, 644 (Tex. 1994)¹⁵⁵—this article’s modest goal is merely to summarize the current state of the law on covenants not to compete.

1. Ancillary to Or Part of an Otherwise Enforceable Agreement

a. An Otherwise Enforceable Agreement Requires the Exchange of Non-Illusory Promises

There is a “two-step threshold inquiry to determine if a covenant not to compete is enforceable.”¹⁵⁶ First, courts decide whether there is an “otherwise enforceable agreement,” i.e. an enforceable agreement in addition to a covenant not to compete, between the parties.¹⁵⁷ If so, courts then determine whether the covenant not to compete is “ancillary to or part of” that otherwise enforceable agreement.¹⁵⁸

“The ‘otherwise enforceable agreement’ requirement is satisfied when the covenant is ‘part of an agreement that contain[s] mutual non-illusory promises.’”¹⁵⁹ The mutual promises need not be express, and implied promises can be sufficient.¹⁶⁰ When there is “offer, acceptance, and consideration for the mutual promises,” then an otherwise enforceable agreement exists.¹⁶¹ An unilateral contract that becomes enforceable by performance, even though not enforceable when initially made, satisfies the “otherwise enforceable agreement” requirement.¹⁶²

In the at-will employment context, the parties “always retain[] the option of discontinuing employment” for any reason,” so any promise made in an at-will contract that depends on continued employment is

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illusory.¹⁶³ However, “‘otherwise enforceable agreements’ can emanate from at-will employment so long as the consideration for any promise is not illusory.”¹⁶⁴

b. “Ancillary to or Part of” Requires a Reasonable Relationship to an Interest Worthy of Protection

In *Light*, the Texas Supreme Court employed a two-pronged approach to determine whether a covenant was “ancillary to or part of” an otherwise enforceable agreement, requiring that “(1) the consideration given by the employer in the otherwise enforceable agreement must give rise to the employer’s interest in restraining the employee from competing; and (2) the covenant must be designed to enforce the employee’s consideration or return promise in the otherwise enforceable agreement.”¹⁶⁵ The “give rise” requirement led commentators to observe that “[o]ther than a promise not to disclose trade secrets and confidential information, little else seem[ed] to satisfy this prong of the statute.”¹⁶⁶

In 2011, the Texas Supreme Court criticized *Light*’s conclusion as contrary to the language and purpose of § 15.50.¹⁶⁷ Now, post-*Marsh*, the requirement that a covenant not to compete be “ancillary to or part of an otherwise enforceable agreement” is met when the covenant is “reasonably related to an interest worthy of protection”¹⁶⁸ Although *Marsh* focused the brunt of its criticism on *Light*’s first prong, it also criticized the second prong (requiring the covenant to be designed to enforce the employee’s return promise), suggesting that *Marsh*’s “reasonably related” test could replace the *Light* test in its entirety.¹⁶⁹

Under *Marsh*, interests that are “worthy of protection”—and thus can support the enforcement of a covenant not to compete—include “trade secrets, confidential information or goodwill.”¹⁷⁰

In *Marsh*, “options to purchase [company] stock at a discounted price provided the required statutory nexus between the noncompete and the company’s interest in protecting its goodwill. Exercising the stock options to purchase [company] stock triggered the restraints in the noncompete.”

By awarding Cook stock options, *Marsh* linked the interests of a key employee with the company’s long-term business interests. Stockholders are “owners” who, beyond employees, benefit from the growth and development of the company. Owners’ interests are furthered by fostering the goodwill between the employer and its clients. The stock options are reasonably related to the protection of this business goodwill.¹⁷¹

Marsh leaves open the question of whether financial incentives that do not create an ownership interest would be sufficient.¹⁷²

c. At the Time the Agreement Is Made

In *Light*’s infamous footnote six, the court stated that a “unilateral contract, since it could be accepted only by future performance, could not support a covenant not to compete inasmuch as it was not an ‘otherwise enforceable agreement at the time the agreement is made’ as required by § 15.50.”¹⁷³ In 2006, the *Sheshunoff* court rejected this interpretation, deciding that the “otherwise enforceable agreement” does not need to be enforceable “at the time the agreement is made.”¹⁷⁴ Rather, “the covenant need only be ‘ancillary to or part of’ the agreement at the time the agreement is made.”¹⁷⁵ Put differently, “an employer [cannot] spring a non-compete covenant on an existing employee and enforce such a covenant absent new consideration from the employer. . . . The covenant cannot be a stand-alone promise from the employee lacking any new consideration from the employer.”¹⁷⁶

d. Examples of Agreements That Satisfy the “Ancillary to or Part of an Otherwise Enforceable Agreement at the Time the Agreement Is Made” Requirement

- An award of discounted stock options when the employee exercised the options.¹⁷⁷
- An implied agreement to provide confidential information to an employee “[w]hen the nature of the work the employee is hired to perform requires confidential information to be provided.”¹⁷⁸
- A promise to provide an employee special training and access to confidential information, even though

the promise was illusory when made, when the employer actually performed the promise by providing training and confidential information.¹⁷⁹

- An agreement between distributors and a magazine publisher “granting [the distributors] the right to use [the publisher’s] trademarks and logos, along with the opportunity to keep the revenues derived from selling advertising, [which] linked [the distributors’] pecuniary interests with [the publisher’s] interest in protecting the company’s goodwill: namely, the relationships developed with its customers and advertisers.”¹⁸⁰

Because Texas law on covenants not to compete has evolved so dramatically in recent years, this article will not attempt to explore whether other covenants, found unenforceable under *Light* and its progeny, would pass muster now. As one commentator has observed, “*Marsh USA’s* approach would seem to give employers more leeway and flexibility to construct covenants not to compete as they deem necessary to protect their business goodwill.”¹⁸¹ Employers should be mindful of this flexibility in considering how aggressively to pursue claims for breach of covenants not to compete, and employees should be aware that their covenants not to compete likely have more teeth than they would have just a few years ago.

2. Reasonable Limitations on Time, Geography, and Scope of Activity

Although the bulk of litigation surrounding § 15.50 has centered on the “ancillary to or part of an otherwise enforceable agreement at the time the agreement is made” requirement, “the statute’s core inquiry is whether the covenant ‘contains limitations as to time, geographical area, and scope of activity to be restrained that are reasonable and do not impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee.’”¹⁸² Accordingly, the *Sheshunoff* court cautioned that “[c]oncerns that have driven disputes over whether a covenant is ancillary to an otherwise enforceable agreement—such as the amount of information an employee has received, its importance, its true degree of confidentiality, and the time period over which it is received—are better addressed in determining whether and to what extent a restraint on competition is justified.”¹⁸³ Because the statute requires courts to consider whether limitations “impose a greater restraint than is necessary to protect the goodwill or other business interest of the promisee,” Tex. Bus. & Com. Code § 15.50(a), courts’ analyses of reasonableness frequently involve a balancing of the respective parties’ interests.¹⁸⁴ A covenant’s limitations on time, geographical area, and scope of activity “should be considered in combination with one another, rather than as stand alone requirements.”¹⁸⁵ Accordingly, for example, a covenant that contains nearly unlimited limitations on geographic area and scope of activity may be reasonable if it has a relatively short duration. Similarly, a covenant containing no express geographic restriction may still be reasonable if it is sufficiently narrow as to the scope of activity prohibited.¹⁸⁶ In general, a covenant that imposes industry-wide restrictions with no limitations on the time and geographic area will be considered unreasonable.¹⁸⁷

An employee’s recitations in a restrictive covenant that the limitations as to time, geographical area, and scope of activity to be restrained are reasonable can weigh in favor of enforcing the covenant.¹⁸⁸ An employee who agrees to similar restrictions in a new job may also face an uphill battle.¹⁸⁹

a. Reasonableness of Particular Limitations

In determining whether the time restrictions in a covenant are reasonable, “it is appropriate for the court to consider whether the interests which the covenant was designed to protect are still outstanding and to balance those interests against the hardships which would be imposed upon the employee by enforcement of the restrictions.”¹⁹⁰ “Two to five years has repeatedly been held as a reasonable time in a noncompetition agreement.”¹⁹¹ Of course, a five-year restriction may be reasonable under the specific circumstances of one case but unreasonable in another, so employers should carefully consider how long of a restriction is truly necessary to protect their legitimate interests.

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“Generally, a reasonable area for purposes of a covenant not to compete is considered to be the territory in which the employee worked while in the employment of his employer.”¹⁹² A geographical limitation probably cannot include “areas where an employer does not currently operate but has targeted for future potential expansion,” particularly where the employee to be restrained was not involved in expansion efforts.¹⁹³ In the context of successor companies, “when a business is sold and the covenant not to compete is assigned to the purchaser, the reasonable geographic restriction must be ‘no larger than to protect the business sold.’”¹⁹⁴ “Texas courts have upheld nationwide geographic limitations in non-compete agreements when it has been clearly established that the business is national in character.”¹⁹⁵

As for permissible restrictions on the scope of activity, Texas courts generally require “a connection between the personal involvement” of the former employee and the activity restricted.¹⁹⁶ A personal connection between the employee and restrained activity appears to be more important with lower-level employees.¹⁹⁷

b. Reformation and Extension

If a court finds that a covenant not to compete is ancillary to or part of an otherwise enforceable agreement but contains unreasonable limitations, “the court shall reform the covenant to the extent necessary to cause the limitations contained in the covenant as to time, geographical area, and scope of activity to be restrained to be reasonable and to impose a restraint that is not greater than necessary to protect the goodwill or other business interest of the promisee and enforce the covenant as reformed.”¹⁹⁸ Under the express language of the statute, reformation is mandatory if requested, but reformation is also subject to waiver.¹⁹⁹ Conversely, courts can also broaden the time period of restraint set forth in the contract, under their equitable powers.²⁰⁰

3. Remedies

Damages

If an employer is successful in proving breach of a covenant not to compete, a court “may award” damages, injunctive relief, or both.²⁰¹ However, if a court is required to reform a covenant because its limitations are unreasonable (as applied to the defendant), the court may not award damages for a pre-reformation breach but is instead limited to granting injunctive relief.²⁰²

Lost profits—which can include profits made by a former employee’s new employer, if those profits would have accrued to the plaintiff in the absence of a breach—are the most common measure of damages for breach of a covenant not to compete.²⁰³

Injunctive Relief

To obtain injunctive relief under § 15.51, most state courts require a plaintiff to “plead and prove a cause of action against the defendant, a probable right to the relief sought, and a probable, imminent, and irreparable injury in the interim”—the three standard elements that apply in the context of most injunctions.²⁰⁴ As in the trade-secret context, the federal standard for injunctive relief is somewhat different, and federal courts require a plaintiff to establish: “(1) a substantial likelihood that it will prevail on the merits; (2) a substantial threat that it will suffer irreparable injury if the injunction is not granted; (3) that the threatened injury to it outweighs the threatened harm the injunction may do to [the defendant]; and (4) that granting the preliminary injunction will not disserve the public interest.”²⁰⁵

Some state courts, however, have held that § 15.51 eliminates the irreparable injury requirement—at least at the permanent injunction stage—because the statute does not expressly require it and because § 15.52 preempts other procedures and remedies in an action to enforce a covenant not to compete.²⁰⁶ The greater weight of authority demonstrates that irreparable injury is still a necessary showing at the temporary injunction stage.²⁰⁷ There do not appear to be any federal cases dispensing with the irreparable injury requirement, for

either preliminary or permanent injunctions.²⁰⁸

Money damages may or may not be adequate in the face of continued competition.²⁰⁹ In some cases, irreparable injury can be presumed.²¹⁰ Contractual stipulations of irreparable harm are generally “insufficient to support a finding of irreparable harm for injunctive relief.”²¹¹

Attorney’s Fees, Punitive Damages, and Limitations

Where a covenant is ancillary to an agreement whose primary purpose is to obligate an employee to render personal services, the employee may recover attorney’s fees if she can establish that the employer “knew at the time of the execution of the agreement that the covenant did not contain [reasonable] limitations,” and the employer “sought to enforce the covenant to a greater extent than was necessary to protect [its] goodwill or other business interest.”²¹² An attempt to enforce a covenant not to compete with virtually no limitations, as written, could very well result in an award of the employee’s fees.²¹³

An employer probably may not recover its attorney’s fees for successfully proving breach of a covenant not to compete.²¹⁴ The remedies available under the Covenants Not to Compete Act are “exclusive and preempt any other . . . procedures and remedies in an action to enforce a covenant not to compete under common law or otherwise.”²¹⁵ Accordingly, attorney’s fees are likely unavailable to a prevailing party even when such fees would otherwise be available under the express terms of a written contract, under Tex. Civ. Prac. & Rem. Code § 38.001(8), or under the Declaratory Judgments Act.²¹⁶

Although prior case law suggests that an employer could recover punitive damages if it alleged a separate intentional tort, “in connection with a suit upon a [noncompetition] contract,” and proves that it suffered actual damages, *City Prods. Corp. v. Berman*, 610 S.W.2d 446, 450 (Tex. 1980), this case was decided before § 15.52 was enacted.²¹⁷ Since the Covenants Not to Compete Act does not provide for punitive damages, they may be preempted as well.

The Covenants Not to Compete Act does not contain a separate limitations period, so the limitations period for breach of a covenant not to compete should be that relating to other contract breach claims.²¹⁸ It is fair to conclude, however, that any significant unjustified delay in filing an equitable action will result in denial of equitable relief, even if the contract breach claim is timely.

B. Other Restrictive Covenants

The Covenants Not to Compete Act clearly covers covenants that directly restrain competition. The limitations on covenants not to compete apply equally to covenants not to solicit customers, *Miller Paper Co. v. Roberts Paper Co.*, 901 S.W.2d 593, 600 (Tex. App.—Amarillo 1995, no writ), as well as to agreements that penalize competition, even if they do not prohibit it outright.²¹⁹

It is not entirely clear whether a covenant not to recruit employees is subject to the same analysis as a covenant not to compete. In *Marsh*, the Texas Supreme Court stated that “Covenants that . . . restrict [former employees’] solicitation of the former employers’ customers *and employees* are restraints on trade and are governed by the Act,” strongly suggesting that the analysis should be the same.²²⁰ Although the agreement at issue in *Marsh* included a non-recruitment clause, it does not appear that the case actually involved employee recruitment, and so the language about soliciting former employees may be dicta.

Some federal courts applying Texas law have required non-recruitment covenants to satisfy the same requirements as non-compete agreements.²²¹ Other courts, at least pre-*Marsh*, have held that employee nonrecruitment agreements are not restraints on trade and are therefore enforceable just like any other contract, i.e. without the limitations imposed by § 15.50.²²² Covenants “not to disclose trade secrets and confidential information are not expressly governed by the Act” and are not subject to the requirements set forth in Tex. Bus. Com. Code § 15.50.²²³ ❖

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Endnotes

- 1 This article accompanied a presentation made by Mr. Hayes to the judiciary in October 2013.
- 2 *Computer Assocs. Int'l v. Altai, Inc.*, 918 S.W.2d 453, 457 (Tex. 1996).
- 3 Brian Krebs, *Data Theft Common by Departing Employees*, *THE WASHINGTON POST* (Feb. 26, 2009).
- 4 David S. Almeling et al., *A Statistical Analysis of Trade Secret Litigation in Federal Courts*, 45 *GONZAGA L. REV.* 291, 294 (2010) (85%); DAVID S. ALMELING ET AL., *A STATISTICAL ANALYSIS OF TRADE SECRET LITIGATION IN STATE COURTS*, 46 *GONZAGA L. REV.* 57, 59 (2011) (93%). THESE ARTICLES BY DAVID ALMELING AND HIS COLLEAGUES PROVIDE AN INTERESTING STATISTICAL ANALYSIS OF TRADE SECRET CASES IN FEDERAL DISTRICT COURTS BETWEEN 1950 AND 2008, AND IN STATE APPELLATE COURTS BETWEEN 1995 AND 2009. ALTHOUGH THEY ARE NOT SPECIFICALLY INFORMATIVE AS TO TEXAS LAW, THEY ARE WELL WORTH READING FOR CONTEXT AROUND TRADE-SECRET LITIGATION TRENDS.
- 5 There can be criminal ramifications for theft of trade secrets, too, under both Texas and federal law, but such ramifications are beyond the scope of this article. See, e.g., *TEX. PENAL CODE* § 31.05; 18 U.S.C. § 1030. UNFAIR COMPETITION MAY ALSO IMPLICATE ANTITRUST LAWS, WHICH ARE SIMILARLY BEYOND THE SCOPE OF THIS ARTICLE.
- 6 S.B. 953, 83d Leg., Reg. Sess. (Tex. 2013) (codified at *TEX. CIV. PRAC. & REM. CODE* § 134A.001-.008).
- 7 *Id.* at §§ 3, 4.
- 8 *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 769 (Tex. 1958); *Twister B.V. v. Newton Research Partners, LP*, 364 S.W.3d 428, 437 (Tex. App.—Dallas 2012, no pet.); *Trilogy Software, Inc. v. Callidus Software, Inc.*, 143 S.W.3d 452, 463 (Tex. App.—Austin 2001, pet. denied).
- 9 See, e.g., *Phillips v. Frey*, 20 F.3d 623, 627 (5th Cir. 1994).
- 10 *Cudd Pressure Control, Inc. v. Roles*, 328 Fed. Appx. 961, 964 (5th Cir. 2009).
- 11 *Bohnsack v. Varco, L.P.*, 668 F.3d 262, 279 (5th Cir. 2012).
- 12 *Sharma v. Vinmar Int'l, Ltd.*, 231 S.W.3d 405, 419 (Tex. App.—Houston [14th Dist.] 2007, no pet.) (citing *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002)).
- 13 *Daniels Health Scis., LLC v. Vascular Health Scis., LLC*, 710 F.3d 579, 582 (5th Cir. 2013).
- 14 314 S.W.2d 763, 776 (Tex. 1958); accord *In re Bass*, 113 S.W.3d 735, 739 (Tex. 2003); *Computer Assocs. Int'l v. Altai, Inc.*, 918 S.W.2d 453, 455 (Tex. 1996).
- 15 *Fox v. Tropical Warehouses, Inc.*, 121 S.W.3d 853, 860 (Tex. App.—Fort Worth 2003, no pet.).
- 16 *Ctr. for Econ. Justice v. Am. Ins. Ass'n*, 39 S.W.3d 337, 347 n.7 (Tex. App.—Austin 2001, no pet.). *Huffines'* definition of a trade secret also quoted language from the Restatement stating that a trade secret “differs from other secret information in a business in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business.” 314 S.W.2d 763, 776 (Tex. 1958). In *CQ Inc. v. TXU Mining Co. LP*, the Fifth Circuit found that a particular strategy did not qualify as a trade secret under Texas law because it was tailored to a single project, “not to the mining industry generally,” and therefore did not meet the continuous-use requirement. 565 F.3d 268, 275 (5th Cir. 2009).
- 17 *Luccous v. J. C. Kinley Co.*, 376 S.W.2d 336, 338 (Tex. 1964); *Boeing Co. v. Abbott*, No. 03-10-00411-CV, ___ S.W.3d ___, 2012 Tex. App. LEXIS 1925, *15 (Tex. App.—Austin Mar. 9, 2012, pet. filed).
- 18 *Id.*
- 19 *In re Bass*, 113 S.W.3d at 739 (citing *RESTATEMENT OF TORTS* § 757 CMT. B. (1939); *RESTATEMENT (THIRD) OF UNFAIR COMPETITION* § 39 REPORTER'S N. CMT. D.; AND *HYDE v. HUFFINES*, 314 S.W.2D 763 (TEX. 1958)). A CONTRACTUAL PROVISION STATING THAT SOMETHING IS A TRADE SECRET “DOES NOT CONCLUSIVELY MAKE IT SO.” *AMWAY CORP. v. BHIP GLOBAL, INC.*, No. 4:10-CV-549, 2013 U.S. DIST. LEXIS 75393, *5 (E.D. TEX. MAY 29, 2013).
- 20 *In re Bass*, 113 S.W.3d at 740.
- 21 *Id.*
- 22 *Id.*
- 23 *T-N-T Motorsports v. Hennessey Motorsports*, 965 S.W.2d 18, 22 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd).
- 24 *Correa v. Houston Surgical Assistant Servs., Inc.*, No. 14-12-01050-CV, 2013 Tex. App. LEXIS 9397, *21 (Tex. App.—Houston [14th Dist.] July 30, 2013, no pet. h.).
- 25 *Metallurgical Indus., Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1203 (5th Cir. 1986). But see *Hurst v. Hughes Tool Co.*, 634 F.2d 895, 899 (5th Cir. 1981) (finding that use of information that “provided only negative, ‘what not to do,’ input” did not establish liability).
- 26 See, e.g., *Am. Derringer Corp. v. Bond*, 924 S.W.2d 773, 777 (Tex. App.—Waco 1996, no writ) (stating that employees are forbidden

“from using confidential or proprietary information acquired during the relationship in a manner adverse to the employer,” even in the absence of a written contract).

27 *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 785 (5th Cir. 1999) (quoting *E.I. DuPont deNemours & Co. v. Christopher*, 431 F.2d 1012 (5th Cir. 1970)).

28 *See id.*

29 *DuPont v. Christopher*, 431 F.2d at 1013, 1015.

30 *Id.* at 1014.

31 *Id.* at 1015-16.

32 *Metallurgical Indus., Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1205 (5th Cir. 1986).

33 *Global Water Group, Inc. v. Atchley*, 244 S.W.3d 924, 930 (Tex. App.—Dallas 2008, *pet. denied*); *IBP, Inc. v. Klumpe*, 101 S.W.3d 461, 477 (Tex. App.—Amarillo 2001, *pet. denied*); *Atlantic Richfield Co. v. Misty Prods., Inc.*, 820 S.W.2d 414, 422 (Tex. App.—Houston [14th Dist.] 1991, *writ denied*); see also *Computer Assocs. Int'l v. Altai, Inc.*, 918 S.W.2d 453, 455 (Tex. 1996) (“A cause of action for misappropriation of trade secrets accrues when the trade secret is actually used.”).

34 *See Twister B.V. v. Newton Research Partners, LP*, 364 S.W.3d 428, 438-39 (Tex. App.—Dallas 2012, *no pet.*) (acknowledging use requirement, in context of specific jurisdiction analysis, but recognizing that “use” can have many meanings).

35 *Trilogy Software, Inc. v. Callidus Software, Inc.*, 143 S.W.3d 452, 464 (Tex. App.—Austin 2004, *no pet.*); accord *Bishop v. Miller*, No. 14-12-00264-CV, 2013 Tex. App. LEXIS 11614, *36 (Tex. App.—Houston [14th Dist.] Sept. 12, 2013, *no pet. h.*) (emphasizing that use occurs when a person “seeks to profit” from the trade secret’s use).

36 *Gen. Universal Sys. v. HAL, Inc.* 500 F.3d 444, 450 n.4 (5th Cir. 2007) (quoting RESTATEMENT (THIRD) OF UNFAIR COMPETITION §40 CMT. c).

37 Compare *Fourtek*, 790 F.2d at 1205 (“where the trade secret is used to improve manufacturing,” products using the trade secret must actually be put “into commercial operation”); with *Univ. Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518, 540, 542 (5th Cir. 1974) (“exercise of control and dominion” constituted commercial use because “the trade secret itself was what to be sold”). Courts have occasionally defined “use” as “any misappropriation, followed by an exercise of control and dominion.” *Univ. Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518, 542 (5th Cir. 1974); *Garth v. Staktek Corp.*, 876 S.W.2d 545, 548 (Tex. App.—Austin 1994, *writ dismissed w.o.j.*). Subsequent courts have found this definition overbroad, at least in most circumstances, and distinguished the facts of both *Lykes* and *Garth*. See *Metallurgical Indus., Inc. v. Fourtek, Inc.*, 790 F.2d 1195, 1205 (5th Cir. 1986); *IBP, Inc. v. Klumpe*, 101 S.W.3d 461, 476 (Tex. App.—Amarillo 2001, *pet. denied*).

38 *Sw. Energy Prod. Co. v. Berry-Helfand*, No. 12-11-00370-CV, 2013 Tex. App. LEXIS 8549, *40 (Tex. App.—Tyler July 10, 2013, *no pet. h.*).

39 *Fox v. Tropical Warehouses, Inc.*, 121 S.W.3d 853, 860 (Tex. App.—Fort Worth 2003, *no pet.*); *T-N-T Motorsports v. Hennessey Motorsports*, 965 S.W.2d 18, 24 (Tex. App.—Houston [1st Dist.] 1998, *no pet.*); *Rugen v. Interactive Business Sys.*, 864 S.W.2d 548, 552 (Tex. App.—Dallas 1993, *no writ*).

40 *See id.*

41 *EMSL Analytical, Inc. v. Younker*, 154 S.W.3d 693, 697 (Tex. App.—Houston [14th Dist.] 2004, *no pet.*); accord *Cardinal Health Staffing Network v. Bowen*, 106 S.W.3d 230, 243 (Tex. App.—Houston [1st Dist.] 2003, *no pet.*) (“evidence raises a reasonable inference that [defendant] did not need to and would not use [plaintiff’s] confidential information, i.e., that disclosure and use was not probable”).

42 *See, e.g., Bohnsack v. Varco, L.P.*, 668 F.3d 262, 279 (5th Cir. 2012); *Trilogy Software, Inc. v. Callidus Software, Inc.*, 143 S.W.3d 452, 463 (Tex. App.—Austin 2004, *pet. denied*).

43 *Univ. Computing Co. v. Lykes-Youngstown Corp.*, 504 F.2d 518, 535-40 (5th Cir. 1974); accord *Bohnsack*, 668 F.3d at 280.

44 *Id.* (internal citations omitted).

45 *See id.* (affirming jury’s award of \$600,000 because the jury had “sufficient evidence to determine the value a reasonably prudent investor would pay for the trade secret”). In the context of lost profits, the loss need not “be susceptible to exact calculation,” but “the injured party must show the amount of the loss by competent evidence with reasonable certainty.” *Rusty’s Weigh Scales & Serv. v. N. Tex. Scales, Inc.*, 314 S.W.3d 105, 110 (Tex. App.—El Paso 2010, *no pet.*).

46 *Cudd Pressure Control, Inc. v. Roles*, 328 Fed. Appx. 961, 964 (5th Cir. 2009); see also *IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191, 200 (Tex. App.—Fort Worth 2005, *no pet.*) (looking at harm only under irreparable injury prong).

47 *See id.*; cf. *Daniels Health Scis., LLC v. Vascular Health Scis., LLC*, 710 F.3d 579, 582, 585 (5th Cir. 2013) (looking at harm under both success-on-the-merits and irreparable-injury prongs).

48 *Institutional Secs. Corp. v. Hood*, 390 S.W.3d 680, 684 (Tex. App.—Dallas 2012, *no pet.*).

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49 *T-N-T Motorsports v. Hennessey Motorsports*, 965 S.W.2d 18, 24 (Tex. App.—Houston [14th Dist.] 1998, no pet.); see also *Interox Am. v. PPG Indus., Inc.*, 736 F.2d 194, 202 (5th Cir. 1999) (affirming denial of injunction where “an adequate damage award could be assessed based upon either the estimated value of the technology or upon the value paid by a licensee of the technology”).

50 See, e.g., *Daniels Health Scis., LLC v. Vascular Health Scis., LLC*, 710 F.3d 579, 585 (5th Cir. 2013) (no adequate remedy at law when court found that use of trade secret would cause reputational harm and damage funding changes); *IAC, Ltd.*, 160 S.W.3d at 200 (“incalculable loss of business goodwill”); *Fox v. Tropical Warehouses, Inc.*, 121 S.W.3d 853, (Tex. App.—Fort Worth 2003, no pet.) (damages from end of business “would be difficult to calculate”); *T-N-T Motorsports*, 965 S.W.2d at 24 (inadequate legal remedy where plaintiff’s gross sales were estimated to drop about \$2 million and the loss of good will would be “immeasurable”). An injunction’s language should be “as definite, clear, and precise as possible . . .” so that the injunction satisfies Texas Rule of Civil Procedure 683. *Comutek Computer & Office Supplies, Inc. v. Walton*, 156 S.W.3d 217, 220-21 (Tex. App.—Dallas 2005, no pet.). For examples of cases addressing Rule 683’s application in the trade secret and covenant not to compete context, see *Ramirez v. Ignite Holdings, LTD*, No. 05-12-01024-CV, 2013 Tex. App. LEXIS 10775, *7-11 (Tex. App.—Dallas Aug. 26, 2013, no pet. h.); *In re Krueger*, No. 03-12-00838-CV, 2013 Tex. App. LEXIS 5984, *14-28 (Tex. App.—Austin May 16, 2013, orig. proceeding); *IAC, Ltd. v. Bell Helicopter Textron, Inc.*, 160 S.W.3d 191, 201-02 (Tex. App.—Fort Worth 2005, no pet.); *Comutek*, 156 S.W.3d at 222-23; *Rugen v. Interactive Bus. Sys., Inc.*, 864 S.W.2d 548, 552 (Tex. App.—Dallas 1993, no writ); *Safeguard Bus. Sys., Inc. v. Schaffer*, 822 S.W.2d 640, 644-45 (Tex. App.—Dallas 1991, no writ).

51 *IAC, Ltd.*, 160 S.W.3d at 200; *Hill v. McLane Co.*, No. 03-10-00293-CV, 2011 Tex. App. LEXIS 169, *14 (Tex. App.—Austin Jan. 5, 2011, no pet.); cf. *W.R. Grace & Co.-Conn v. Henson*, No. 13-06-668-CV, 2007 Tex. App. LEXIS 6771, *9 n.3 (Tex. App.—Corpus Christi Aug. 23, 2007 no pet.) (noting there is no presumption of irreparable harm when there is no proof that confidential information has been misused); see also Part II, below (discussing doctrine of inevitable disclosure).

52 See *Fox v. Tropical Warehouses, Inc.*, 121 S.W.3d at 861 (“An injunction is not proper when the claimed injury is merely speculative; fear and apprehension of injury are not sufficient to support a temporary injunction.”).

53 See below at Subparts I.A.1.a.(1)(b), I.A.1.b.

54 *Wellogix, Inc. v. Accenture, L.L.P.*, 716 F.3d 867, 883-84 (5th Cir. 2013); *Zoecon Indus. v. Am. Stockman Tag Co.*, 713 F.2d 1174, 1180 (5th Cir. 1983); TEX. CIV. PRAC. & REM. CODE § 41.003(A).

55 *Id.* at § 41.004(a).

56 *Id.* at § 41.008(b).

57 TEX. CIV. PRAC. & REM. CODE § 16.010(A).

58 See below at Part I.A.1.a.(2).

59 TEX. CIV. PRAC. & REM. CODE §§ 134.001-.005; TEX. PENAL CODE § 31.05.

60 TEX. CIV. PRAC. & REM. CODE §§ 134.002-.003; TEX. PENAL CODE § 31.05.

61 TEX. PENAL CODE § 31.05(B).

62 TEX. CIV. PRAC. & REM. CODE §§ 134.002-.005; TEX. PENAL CODE § 31.05.

63 *Id.* at § 31.05(4).

64 *IBP, Inc. v. Klumpe*, 101 S.W.3d 461, 472 (Tex. App.—Amarillo 2001, pet. denied); accord *Sw. Energy Prod. Co. v. Berry-Helfand*, No. 12-11-00370-CV, 2013 Tex. App. LEXIS 8549, *43 (Tex. App. Tyler July 10, 2013, no pet. h.).

65 See, e.g., *M-I LLC v. Stelly*, 733 F. Supp.2 759, 777-78 (S.D. Tex. 2010) (declining to dismiss TTLA claim when plaintiff employer alleged that former employee transferred his employer’s files onto an external memory device just days before he notified the employer he was quitting to work for a competitor).

66 See *Sw. Energy Prod. Co. v. Berry-Helfand*, 2013 Tex. App. LEXIS 8549, at *42-45 (finding insufficient evidence to support TTLA claim, even where evidence was sufficient for common law misappropriation claim, when no evidence defendant committed “theft” as that term is used in the penal code).

67 TEX. CIV. PRAC. & REM. CODE § 134.005(A)(1). \$5,000, IN ADDITION TO ACTUAL DAMAGES, CAN BE RECOVERED “FROM A PARENT OR OTHER PERSON WHO HAS THE DUTY OF CONTROL AND REASONABLE DISCIPLINE OF A CHILD” WHO COMMITS THEFT. TEX. CIV. PRAC. & REM. CODE §§ 134.003(B); 134.005(A)(2).

68 TEX. CIV. PRAC. & REM. CODE § 41.008(b).

69 See *Bransom v. Standard Hardware*, 874 S.W.2d 919, 927 (Tex. App.—Fort Worth 1994, writ denied) (“Malice [under 41.003] may be implied from the knowing conversion of another’s property when the defendant knew or should have known he had no legal right to the property.”).

70 *Glattly v. Air Starter Components, Inc.*, 332 S.W.3d 620, 641 (Tex. App.—Houston [1st Dist.] 2010, pet. denied).

- 71 *TEX. CIV. PRAC. & REM. CODE* § 134.005(b).
- 72 *Glattly v. Air Starter Components, Inc.*, 332 S.W.3d 620, 641 (Tex. App.—Houston [1st Dist.] 2010, pet. denied) (citing *Intercontinental Group Partnership v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 653-56 (Tex. 2009)).
- 73 *Rx.com v. Hruska*, No. H-05-4148, 2006 U.S. Dist. LEXIS 82493, *12 (S.D. Tex. Nov. 13, 2006).
- 74 *Raytheon Co. v. Indigo Sys. Corp.*, No. 4:07-CV-109, 2010 U.S. Dist. LEXIS 144751, *6-8 (E.D. Tex. Sept. 17, 2010) (denying \$28 million in attorney's fees to prevailing defendants when defendants did not specifically seek fees under the TTLA).
- 75 See *TEX. CIV. PRAC. & REM. CODE* § 134.001-.005.
- 76 See, e.g., *Hoffart v. Wiggins*, No. 1:08-CV-46, 2010 U.S. Dist. LEXIS 19504, *4-5 (E.D. Tex. March 3, 2010) (applying § 16.003(a)'s two-year statute of limitations to claims for conversion of personal property and TTLA claim with same factual basis, vacated on other grounds, 406 Fed. Appx. 834 (5th Cir. 2010); *J&J Sports Prods. v. JWW Mgmt., Inc.*, 324 S.W.3d 823, 832 (Tex. App.—Fort Worth 2010, no pet.) (same).
- 77 See *TEX. CIV. PRAC. & REM. CODE* § 16.010.
- 78 See below at Part II.A.1.a.(2).
- 79 S.B. 953, 83d Leg., Reg. Sess., §§ 3, 4 (Tex. 2013) (codified at *TEX. CIV. PRAC. & REM. CODE* §§ 134A.001-.008).
- 80 See *id.*
- 81 *TEX. CIV. PRAC. & REM. CODE* § 134A.002(3).
- 82 *Id.* at § 134A.002(2).
- 83 *Id.* at § 134A.002(6).
- 84 Cf. *UNIF. TRADE SECRETS ACT* § 1(4) (AMENDED 1985).
- 85 *TEX. CIV. PRAC. & REM. CODE* § 134A.003(A).
- 86 *Id.*
- 87 *Id.* at 134A.003(c).
- 88 See, e.g., *Justin Industries, Inc. v. Choctaw Secur., L.P.*, 747 F. Supp. 1218, 1220 n.5 N.D. Tex. 1990 (“Injunctions are extraordinary remedies that are generally not favored . . . and mandatory injunctions are even less favored than prohibitory injunctions since they compel a person to act rather than simply maintain the status quo.”).
- 89 *Id.* at § 134A.004(a).
- 90 *Id.*
- 91 See *id.*; § 134A.002(3).
- 92 *Id.* at § 134A.005.
- 93 *Id.* at § 134A.005(1)&(2).
- 94 *Id.* at § 134A.005(2)&(3).
- 95 Significant cases discussing the types of relief that can confer prevailing-party status, at least in other contexts, include *Lefemine v. Wideman*, ___ U.S. ___, 133 S. Ct. 9, 10 (2012) (permanent injunction, without any money damages, made plaintiff prevailing party); *Sole v. Wyner*, 551 U.S. 74, 86 (2007) (plaintiff who obtains a preliminary injunction but then loses on the merits will not be a prevailing party); *Dearmore v. City of Garland*, 519 F.3d 517, 521-24 (5th Cir. 2008) (preliminary injunction can make a plaintiff a prevailing party if the injunction is “based upon an unambiguous indication of probable success on the merits of the plaintiff’s claims as opposed to a mere balancing of the equities in favor of the plaintiff, . . . that causes the defendant to moot the action, which prevents the plaintiff from obtaining final relief on the merits”); *Intercontinental Group P’ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 655 (Tex. 2009) (“Whether a party prevails turns on whether the party prevails upon the court to award it something, either monetary or equitable.”).
- 96 *Id.* at § 134A.004(b).
- 97 *Id.*
- 98 See *TEX. CIV. PRAC. & REM. CODE* § 16.010.
- 99 *TEX. CIV. PRAC. & REM. CODE* § 134A.007(A).
- 100 S.B. 953, 83d Leg., Reg. Sess., § 2 (Tex. 2013).
- 101 *TEX. CIV. PRAC. & REM. CODE* § 134A.007(b)(1)-(3).

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102 *TEX. CIV. PRAC. & REM. CODE* § 134A.007(b)(1).

103 Note, however, that TUTSA may eliminate the availability of attorney's fees under § 38.001(8) for trade-secret claims. Cf. *Franlink v. GJMS Unlimited, Inc.*, 401 S.W.3d 705, 711-12 (Tex. App.—Houston [14th Dist.] 2013, pet. filed) (determining that the attorney's fees provision of the Covenants Not to Compete Act preempts § 38.001(8)). Accordingly, for misappropriations made on or after September 1, 2013, attorney's fees may be available only when the specific circumstances spelled out in TUTSA are met or when the terms of a contract expressly provide for attorney's fees.

104 These related causes of action are beyond the scope—and page limits—of this article, but for cases addressing each of these causes of action in the trade-secret context see, for example, *Navigant Consulting, Inc. v. Wilkinson*, 508 F.3d 277, 283 (5th Cir. 2007) (breach of fiduciary duty); *Tex. Integrated Conveyor Sys. v. Innovative Conveyor Concepts*, 300 S.W.3d 348, 365-80 (Tex. App.—Dallas 2009, pet. denied) (conversion, fraud, tortious interference); *IBP, Inc. v. Klumpe*, 101 S.W.3d 461, 475 (Tex. App.—Amarillo 2001, pet. denied) (conspiracy). Although it is not uncommon for litigants to plead a separate cause of action for unfair competition, it may not actually be a separate tort. See *Los Cucos Mexican Cafe, Inc. v. Sanchez*, No. 13-05-578-CV, 2007 Tex. App. LEXIS 3408, *13-14 (Tex. App.—Corpus Christi May 3, 2007, no pet.) (citing *U.S. Sporting Prods., Inc. v. Johnny Stewart Game Calls, Inc.*, 865 S.W.2d 214, 217 (Tex. App.—Waco 1993, writ denied), and describing unfair competition as “an ‘umbrella’ for all statutory and nonstatutory causes of action arising out of business conduct which is contrary to honest practice in industrial or commercial matters”). But see *Dresser-Rand Co. v. Virtual Automation, Inc.*, 361 F.3d 831, 839 (5th Cir. 2004) (analyzing claim for “unfair competition by misappropriation” using somewhat different elements than for typical misappropriation claim).

105 18 U.S.C. § 1030(a)(2), (e)(2)(b). Depending on the facts, other subsections of CFAA may also apply to bad employee conduct. See, e.g., 18 U.S.C. § 1030(a)(4)&(5). This article focuses on (a)(2), the subsection most likely to apply in a trade-secret misappropriation case.

106 *Id.* at § 1030(g), (c)(4)(A)(i)(I). Other, less generally applicable, facts can give rise to civil causes of action under CFAA as well. See 18 U.S.C. § 1030(c)(4)(A)(i)(II-IV) (violations affecting medical care, causing physical injury, or threatening public health or safety).

107 18 U.S.C. § 1030(a)(2), (c)(4)(A)(i)(I), (g).

108 Although CFAA generally creates a cause of action for any person who has suffered “damage or loss,” two terms that are separately defined in the statute, the specific cause of action addressed in this article specifically requires a \$5,000 loss. 18 U.S.C. § 1030 (c)(4)(A)(i)(I).

109 See, e.g., *Stephanie Greene and Christine Neylon O'Brien, Exceeding Authorized Access in the Workplace: Prosecuting Disloyal Conduct Under the Computer Fraud and Abuse Act*, 50 *AM. BUS. L.J.* 281, 292-315 (2013) (DISCUSSING CIRCUIT SPLIT).

110 See *LVRC Holdings LLC v. Brekka*, 581 F.3d 1127, 1135 (9th Cir. 2009) (“[A] person who ‘intentionally accesses a computer without authorization’ accesses a computer without any permission at all, while a person who ‘exceeds authorized access’ has permission to access the computer, but accesses information on the computer that the person is not entitled to access.”); accord *U.S. v. Nosal*, 676 F.3d 854, 858 (9th Cir. 2012) (*en banc*).

111 597 F.3d 263, 271 (5th Cir. 2010).

112 *Id.*

113 *Id.* at 271-72.

114 *Id.* at 272.

115 *John*, 597 F.3d at 273.

116 *Id.* at 272-73 (quoting *Brekka*, 581 F.3d at 1134-35) (internal quotation marks and citations omitted).

117 *Id.* at 273. The Fifth Circuit also wrote that “the Ninth Circuit’s reasoning at least implies that when an employee knows that the purpose for which she is accessing information in a computer is both in violation of an employer’s policies and is part of an illegal scheme, it would be ‘proper’ to conclude that such conduct ‘exceeds authorized access’ within the meaning of § 1030(a)(2).” *United States v. John*, 597 F.3d 263, 273 (5th Cir. 2010). The Ninth Circuit rejected this implication in *Nosal*. See generally *United States v. Nosal*, 676 F.3d 854 (9th Cir. 2012) (*en banc*).

118 See *id.*; see also *id.* at 272 (“not necessarily agree[ing] with the First Circuit] that” a competing employee’s “violat[ion of] a confidentiality agreement” to mine his “former employer’s public website for pricing information” would give rise to CFAA liability). One article has suggested that “[t]he Ninth Circuit appears to be at the forefront of a new trend that recognizes dangers in deploying the CFAA as a catch-all statute to pursue or prosecute employees for fraudulent or disloyal use of workplace computers,” providing further reason to consider CFAA only as a supplemental remedy for other trade-secret causes of action. *Stephanie Greene and Christine Neylon O'Brien, Exceeding Authorized Access in the Workplace: Prosecuting Disloyal Conduct Under the Computer Fraud and Abuse Act*, 50 *AM. BUS. L.J.* 281, 286-87 (2013).

119 *Meats by Linz, Inc. v. Dear*, No. 3:10-CV-1511-D, 2011 U.S. Dist. LEXIS 42800, *6-9 (N.D. Tex. Apr. 20, 2011) (*mem. op.*).

120 *Id.* at *3-4.

121 *Id.* at *8-9.

122 18 U.S.C. § 1030(g).

123 *Id.*

124 See *Nexans Wires S.A. v. Sark-USA, Inc.*, 166 F. App'x 559, 562 (2d Cir. 2006) (“[T]he plain language of the statute treats lost revenue as a different concept from incurred costs, and permits recovery of the former only where connected to an ‘interruption in service.’”).

125 *Resdev, LLC v. Lot Builders Ass’n*, No. 6:04-cv-1374-Orl-31DAB, 2005 U.S. Dist. LEXIS 19099, *13 (M.D. Fla. Aug. 10, 2005); see also *Animators at Law, Inc. v. Capital Legal Solutions, LLC*, 786 F. Supp. 2d 1114, 1121 (E.D. Va. 2011) (“lost revenue damages may qualify as losses under the CFAA when they result from time spent responding to an offense, but further lost revenue or consequential damages—such as the losses associated with a missed business opportunity—are only recoverable if they were ‘incurred because of interruption of service.’”).

126 *A.V. v. iParadigms, LLC*, 562 F.3d 630, 646 (4th Cir. 2009); see also *EF Cultural Travel BV v. Explorica*, 274 F.3d 577, 584 (1st Cir. 2001) (“cost of diagnostic measures that [plaintiff] took after it learned of [defendant’s] access to its website” recoverable as “loss”).

127 *iParadigms*, 562 F.3d at 646. Accordingly, as long as the costs of investigation are (i) in response to a CFAA offense and (ii) reasonable and necessary, they should be recoverable. *Animators at Law, Inc. v. Capital Legal Solutions, LLC*, 786 F. Supp. 2d 1114, 1121 (E.D. Va. 2011).

128 *Id.*

129 18 U.S.C. § 1030(g).

130 18 U.S.C. § 1030(e)(8).

131 *Nexans Wires S.A. v. Sark-USA, Inc.*, 319 F. Supp. 2d 468, 475 (S.D.N.Y. 2004), *aff’d*, 166 Fed. Appx. 559 (2d Cir. 2006); see also *Quantlab Techs. Ltd. (BVI) v. Godlevsky*, 719 F. Supp. 2d 766, 776 (S.D. Tex. 2010) (“[T]he term ‘loss’ encompasses only two types of harm: costs to investigate and respond to a computer intrusion, and costs associated with a service interruption.”); *L-3 Commc’ns Westwood Corp. v. Robichaux*, No. 06-0279, 2007 U.S. Dist. LEXIS 16789 * (E.D. La. Mar. 8, 2007) (“Losses under CFAA are compensable when they result from damage to a computer system or the inoperability of the accessed system.”).

132 See, e.g., *Barnstormers, Inc. v. Wing Walkers, LLC*, No. EP-10-CV-261-KC, 2011 U.S. Dist. LEXIS 47143, *29-30 (W.D. Tex. May 3, 2011); *Meats by Linz, Inc. v. Dear*, No. 3:10-CV-1511-D; 2011 U.S. Dist. LEXIS 42800, *9 (N.D. Tex. Apr. 20, 2011); *Multiven, Inc. v. Cisco Sys.*, 725 F. Supp. 2d 887, 895 (N.D. Cal. 2010).

133 *CollegeSource, Inc. v. Academyone, Inc.*, No. 10-3542, 2012 U.S. Dist. LEXIS 153197, *46 (E.D. Pa. Oct. 25, 2012).

134 See generally 18 U.S.C. § 1030.

135 *E. R. James Real Estate Servs., LLC v. Spinell*, No. 11 C 4476, 2011 U.S. Dist. LEXIS 124044, *7 (N.D. Ill. Oct. 26, 2011); accord *Animators at Law, Inc. v. Capital Legal Solutions, LLC*, 786 F. Supp. 2d 1114, 1122 (E.D. Va. 2011); *NCMIC Fin. Corp. v. Artino*, 638 F. Supp. 2d 1042, 1065 (S.D. Iowa 2009).

136 *Id.*

137 *Id.*; *Garland-Sash v. Lewis*, No. 05 Civ. 6827, 2007 U.S. Dist. LEXIS 20909, *7 (S.D.N.Y. Mar. 26, 2007), vacated in part on other grounds, 348 Fed. Appx. 639 (2d Cir. Oct. 8, 2009).

138 18 U.S.C. § 1030(g).

139 *Linda K. Stevens, Trade Secrets & Inevitable Disclosure*, 36 *TORT & INS. L. J.* 917, 929 (2001).

140 *Id.*

141 See, e.g., *PepsiCo, Inc. v. Redmond*, 54 F.3d 1262 (7th Cir. 1995).

142 See, e.g., *Aspect Software, Inc. v. Barnett*, 787 F. Supp. 2d 118 (D. Mass. 2011); see also Elizabeth A. Rowe, *When Trade Secrets Become Shackles: Fairness and the Inevitable Disclosure Doctrine*, 7 *TUL. J. TECH. & INTELL. PROP.* 167, 175 (2005) (EXPLORING DIFFERENT APPLICATIONS OF THE DOCTRINE).

143 *M-I, L.L.C. v. Stelly*, No. H-09-cv-01552, 2009 U.S. Dist. LEXIS 65866, *21 (S.D. Tex. July 30, 2009); *Cardinal Health Staffing Network v. Bowen*, 106 S.W.3d 230, 242 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

144 *Id.* (citing *Conley v. DSC Commc’ns Corp.*, No. 05-98-01051-CV, 1999 Tex. App. LEXIS 1321, *9-22 (Tex. App.—Dallas 1999, no pet.); and *Rugen v. Interactive Bus. Sys., Inc.*, 864 S.W.2d 548, 551-52 (Tex. App.—Dallas 1993, no writ)); see also *FMC Corp. v. Varco Int’l, Inc.*, 677 F.2d 500, 504 (5th Cir. 1982) (“it appears very possible that a trade secret will be revealed in violation of Witt’s agreement with FMC”); *Baker Petrolite Corp. v. Spicer*, No. 06-1749, 2006 U.S. Dist. LEXIS 41535, *26 (S.D. Tex. June 20, 2006) (“Even assuming the best of good faith,

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Spicer will have difficulty preventing his knowledge of Baker's products and processes relating to specific locations and customers from infiltrating his work if Spicer works with those customers in those specific locations."); *Weed Eater, Inc. v. Dowling*, 562 S.W.2d 898, 902 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.) ("Even in the best of good faith, Dowling can hardly prevent his knowledge of his former employer's confidential methods from showing up in his work.").

145 *Conley*, 1999 Tex. App. LEXIS 1321, *21-22; *Rugen*, 864 S.W.2d at 552.

146 *Id.*

147 *Rugen*, 864 S.W.2d at 552.

148 *Cardinal Health*, 106 S.W.3d at 242-43.

149 *Id.* at 243.

150 In *Conley v. DSC Commc'ns Corp.*, the court held that proof of "misconduct on the part of an employee in taking or threatening to use a former employer's confidential information is a factor supporting issuance of a temporary injunction on the probable disclosure theory" but is not a necessary requirement. No. 05-98-01051-CV, 1999 Tex. App. LEXIS 1321, *12-14 (Tex. App.—Dallas 1999, no pet.). Opinions of other courts could be read to require some sort of misconduct. *W.R. Grace & Co.-Conn v. Henson*, No. 13-06-668-CV, 2007 Tex. App. LEXIS 6771, *9 n.3 (Tex. App.—Corpus Christi Aug. 23, 2007 no pet.) (refusing to apply presumption of irreparable harm when there was no proof that confidential information had been misused). Again, the difference between these cases could represent deference to trial courts' roles as fact-finders.

151 In the authors' observation there tends to be a connection between states that allow noncompetition agreements, and those that recognize (or have not yet rejected) inevitable disclosure of trade secret theories. The analysis inherent in determining whether a defendant should be enjoined in a non-compete case is very similar to the same analysis undertaken in many trade-secret theft cases, even if the equitable relief sought may differ. It is probably fair to assume that where non-compete agreements are difficult to enforce, a litigant might expect a more difficult challenge in securing equitable relief in an inevitable disclosure of trade secrets case.

152 *Marsh United States, Inc. v. Cook*, 354 S.W.3d 764, 769-70 (Tex. 2011); TEX. BUS. & COM. CODE § 15.04.

153 TEX. BUS. & COM. CODE § 15.50(A). The special rules that apply to physicians and non-competition agreements, see TEX. BUS. & COM. CODE § 15.50(b)&(c), are beyond the scope of this article.

154 See, e.g., *Marsh*, 354 S.W.3d at 768-76; *Michael D. Paul, Marsh USA Inc. v. Cook: One Final Step Away from Light*, 43 ST. MARY'S L.J. 791 (2012).

155 The Texas Supreme Court has not expressly overruled *Light*, although it has retreated considerably from *Light*'s holding and analysis. Accordingly, this article will attempt to cite *Light* only for those propositions that have not been questioned by subsequent cases.

156 *Marsh*, 354 S.W.3d at 773.

157 *Id.*

158 *Id.*

159 *Id.* (quoting *Sheshunoff*, 209 S.W.3d at 648-49, and *Light*, 883 S.W.2d at 646).

160 *Mann Frankfort*, 289 S.W.3d at 850.

161 *Marsh*, 354 S.W.3d at 772.

162 *Sheshunoff*, 209 S.W.3d at 650-51. One court recently found that a one-year covenant not to compete did not fall within the statute of frauds. *Cuidado Casero Home Health of El Paso, Inc. v. Ayuda Home Health Care Servs., LLC*, No. 08-11-00332-CV, 2013 Tex. App. LEXIS 6299, *29-32 (Tex. App.—El Paso May 22, 2013, no pet. h.). Beware that the statute of frauds could render unenforceable either a longer non-compete agreement or the agreement to which the non-compete agreement is ancillary. See *C.S.C.S., Inc. v. Carter*, 129 S.W.3d 584, 590 (Tex. App.—Dallas 2003, no pet.) (noncompetition agreement signed four days before two-year employment agreement was reduced to writing; noncompete agreement was unenforceable because an oral agreement for employment for more than one year is within the statute of frauds and there was therefore no enforceable agreement to which noncompete was ancillary).

163 *Light*, 883 S.W.2d at 644-45; accord *Curtis v. Ziff Energy Group, Ltd.*, 12 S.W.3d 114, 118 (Tex. App.—Houston [14th Dist.] 1999, no pet.); *Donahue v. Bowles, Troy, Donahue, Johnson, Inc.*, 949 S.W.2d 746, 750 (Tex. App.—Dallas 1997, writ denied).

164 *Light*, 883 S.W.2d at 645.

165 *Light*, 883 S.W.2d at 647.

166 *Michael D. Paul & Ian C. Crawford, Refocusing Light: Alex Sheshunoff Management Services, L.P. v. Johnson Moves Back to the Basics of Covenants Not to Compete*, 38 ST. MARY'S L.J. 727, 731 (2007) (QUOTED IN *MARSH*, 354 S.W.3D AT 774).

167 *Marsh*, 354 S.W.3d at 775.

168 *Id.*

169 *Id.* at 774 n.6, 777 n.7. See, e.g., *Travelhost, Inc. v. Brady*, No. 3:11-CV-454-M-BK, 2012 U.S. Dist. LEXIS 21320, *12 (N.D. Tex. Feb. 1, 2012) (not mentioning the designed-to-enforce prong in its description of the test); *Lazer Spot, Inc. v. Hiring Partners, Inc.*, 387 S.W.3d 40, 46 (Tex. App. Texarkana 2012, pet. denied) (same). But see *CDX Holdings, Inc. v. Heddon*, No. 3:12-CV-126-N, 2012 U.S. Dist. LEXIS 86041, *21-22 (N.D. Tex. Mar. 2, 2012) (finding both that stock options were reasonably related to a company's interest in protecting its goodwill and that the employee's non-competition and non-solicitation covenants were designed to enforce the employee's return promise).

170 354 S.W.3d at 775.

171 *Id.* at 777.

172 See *id.* at 790 (Green, J., dissenting) ("Any financial incentive given to an employee can arguably motivate the employee to increase his employer's goodwill, and every employee, if he performs his job as expected, creates goodwill for his employer. . . . Under the Court's reasoning, a raise, a bonus, or even a salary could support an enforceable covenant."). Prior to *Marsh*, numerous Texas courts had determined that various forms of financial consideration could not support an enforceable covenant not to compete under the "give rise" test in *Light*. See *Valley Diagnostic Clinic v. Dougherty*, 287 S.W.3d 151, 157 (Tex. App.—Corpus Christi 2009, no pet.) ("A [deferred] compensation provision made only in exchange for a non-compete promise is precisely the sort of restraint of trade that Texas law prohibits."); *Trilogy Software, Inc. v. Callidus Software, Inc.*, 143 S.W.3d 452, 463 (Tex. App.—Austin 2004, pet. denied) ("[F]inancial benefits [such as allowing a former employee to stay on payroll for a month to preserve immigration status] do not give rise to an 'interest worthy of protection' by the covenant not to compete."); *Strickland v. Meditronic, Inc.*, 97 S.W.3d 835, 839 (Tex. App.—Dallas 2003, pet. dismissed w.o.j) ("Medtronic's consideration is the promise to give ninety days notice prior to terminating without cause and the promise to compensate Strickland in the event of economic hardship resulting from the non-compete agreement. Such promises do not give rise to an interest worthy of protection by a covenant not to compete.").

173 *Light*, 883 S.W.2d at 645 n.6.

174 209 S.W.3d at 651.

175 *Id.*

176 *Id.*

177 *Marsh*, 354 S.W.3d at 777; see also *CDX Holdings, Inc. v. Heddon*, No. 3:12-CV-126-N, 2012 U.S. Dist. LEXIS 86041, *22-23 (N.D. Tex. Mar. 2, 2012) (a stock incentive plan, even where the employee did not exercise his options).

178 *Mann Frankfort*, 289 S.W.3d at 850.

179 *Sheshunoff*, 209 S.W.3d at 655.

180 *Travelhost, Inc. v. Brady*, No. 3:11-CV-454-M-BK, 2012 U.S. Dist. LEXIS 21320, *12 (N.D. Tex. Feb. 1, 2012).

181 *Michael D. Paul, Marsh USA Inc. v. Cook: One Final Step Away from Light*, 43 St. MARY'S L.J. 791, 820 (2012).

182 *Sheshunoff*, 209 S.W.3d at 655 (quoting TEX. BUS. & COM. CODE § 15.50(A)); SEE ALSO *MARSH*, 354 S.W.3D AT 777 ("The hallmark of enforcement is whether or not the covenant is reasonable.").

183 *Id.* (referring to "the overly technical disputes that our opinion in *Light* seems to have engendered").

184 See, e.g., *Bob Pagan Ford, Inc. v. Smith*, 638 S.W.2d 176, 178 (Tex. App.—Houston [1st Dist.] 1982, no writ).

185 *M-I LLC v. Stelly*, 733 F. Supp. 2d 759, 799 (S.D. Tex. 2010).

186 See, e.g., *Drummond Am., LLC v. Share Corp.*, 692 F. Supp. 2d 650, 655 (E.D. Tex. 2010); *Sheshunoff*, 209 S.W.3d at 656-57.

187 *Justin Belt Co. v. Yost*, 502 S.W.2d 681, 685 (Tex. 1973).

188 *Sheshunoff*, 209 S.W.3d at 656-57.

189 *Id.*

190 *Bob Pagan Ford*, 638 S.W.2d at 178.

191 *Gallagher Healthcare Ins. Servs. v. Vogelsang*, 312 S.W.3d 640, 655 (Tex. App.—Houston [1st Dist.] 2009, pet. denied).

192 *Cobb v. Caye Publ. Group, Inc.*, 322 S.W.3d 780, 784 (Tex. App.—Fort Worth 2010, no pet.); accord *Weatherford Oil Tool Co. v. Campbell*, 161 Tex. 310, 313 (Tex. 1960); *Butler v. Arrow Mirror & Glass, Inc.*, 51 S.W.3d 787, 792 (Tex. App.—Houston [1st Dist.] 2001, no pet.); *Zep Mfg. Co. v. Harthcock*, 824 S.W.2d 654, 660-61 (Tex. App.—Dallas 1992, no writ).

193 *Cobb*, 322 S.W.3d at 785-86.

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194 *M-I LLC v. Stelly*, 733 F. Supp. 2d 759, 795 (S.D. Tex. 2010) (quoting *Williams v. Powell Elec. Mfg. Co.*, 508 S.W.2d 665, 668 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ)).

195 *Vais Arms, Inc. v. Vais*, 383 F.3d 287, 296 n.20 (5th Cir. 2004).

196 *Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381, 387 (Tex. 1991); accord *Weatherford Oil Tool*, 161 Tex. at 313.

197 See *M-I LLC v. Stelly*, 733 F. Supp. 2d at 798-99 (finding a “ban on all customer and potential customer contacts,” even those customers with whom the defendant did not interact, to be reasonable, in part due to the defendant’s “upper management position”).

198 TEX. BUS. & COM. CODE § 15.51(c).

199 *Emergicare Sys. Corp. v. Bourdon*, 942 S.W.2d 201, 204 (Tex. App.—Eastland 1997, no writ).

200 *Guy Carpenter & Co. v. Provenzale*, 334 F.3d 459, 464 (5th Cir. 2003); *Farmer v. Holley*, 237 S.W.3d 758, 761 (Tex. App.—Waco 2007, pet. denied). But see *Sadler Clinic Ass’n, P.A. v. Hart*, 403 S.W.3d 891, 2013 Tex. App. LEXIS 7183, *16-18 (Tex. App.—Beaumont 2013, pet. denied) (discussing reasons for and declining to grant equitable extension).

201 TEX. BUS. & COM. CODE § 15.51(A).

202 *Id.* at § 15.51(c); *Mann Frankfort*, 289 S.W.3d at 855.

203 *Chandler v. Mastercraft Dental Corp.*, 739 S.W.2d 460, 466 (Tex. App.—Fort Worth 1987, writ denied); *Arabesque Studios v. Academy of Fine Arts*, 529 S.W.2d 564, 569 (Tex. Civ. App.—Dallas 1975, no writ)

204 *Reach Group, L.L.C. v. Angelina Group*, 173 S.W.3d 834, 837 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (citing *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002)).

205 *Travelhost, Inc. v. Figg*, No. 3:11-CV-0455-D, 2011 U.S. Dist. LEXIS 134470, *5 (N.D. Tex. Nov. 22, 2011).

206 *Heritage Operating, L.P. v. Rhine Bros, LLC*, No. 02-10-00474-CV, 2012 Tex. App. LEXIS 4939, *19-20 (Tex. App.—Fort Worth June 21, 2012, no pet.); *Butler v. Arrow Mirror & Glass, Inc.*, 51 S.W.3d 787, 795 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

207 *EMSL Analytical, Inc. v. Younker*, 154 S.W.3d 693, 695 (Tex. App.—Houston [14th Dist.] 2004, no pet.); *Cardinal Health Staffing Network v. Bowen*, 106 S.W.3d 230, 239 (Tex. App.—Houston [1st Dist.] 2003, no pet.); *NMTC Corp. v. Conarro*, 99 S.W.3d 865, 868 (Tex. App.—Beaumont 2003, no pet.). Some Texas courts, most noticeably the Dallas Court of Appeals, have issued conflicting opinions on the matter. See *Loye v. Travelhost, Inc.*, 156 S.W.3d 615, 619 (Tex. App.—Dallas 2004, no pet.) (listing irreparable-injury requirement in standard for temporary injunction even though court was considering covenant not to compete); *C.S.C.S., Inc. v. Carter*, 129 S.W.3d 584, 589 (Tex. App.—Dallas 2003, no pet.) (not addressing whether irreparable injury is required because the case could be decided on the probable-right-to-relief requirement); *Hilb, Rogal & Hamilton Co. v. Wurzman*, 861 S.W.2d 30, 34 (Tex. App.—Dallas 1993, no writ) (pre-15.52 case not specifically addressing what is required to obtain injunctive relief under the statute but stating that “[t]he criteria for enforceability of covenants not to compete under section 15.50 are completely different from the common law requirements for injunctive relief”).

208 See, e.g., *Travelhost, Inc. v. Figg*, 2011 U.S. Dist. LEXIS 134470, at *9; *TransPerfect Translations, Inc. v. Leslie*, 594 F.Supp.2d 742, 757 n.7 (S.D. Tex. 2009).

209 Compare *Reach Group, L.L.C. v. Angelina Group*, 173 S.W.3d 834, 837 (Tex. App.—Houston [14th Dist.] 2005, no pet.) (plaintiff had adequate remedy at law when the amount of revenue plaintiff would lose as a result of competition were capable of being calculated precisely), with *Hartwell’s Office World, Inc. v. Systex Corp.*, 598 S.W.2d 636, 639 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref’d n.r.e.) (“[M]ere reimbursement for profits lost would not afford complete, final and equal relief because appellees would still be able to compete in the area in violation of the express agreement not to compete.”).

210 *Cambridge Strategics, LLC v. Cook*, No. 3:10-CV-2167-L, 2010 U.S. Dist. LEXIS 133702, *17 (N.D. Tex. Dec. 17, 2010) (“Under Texas law, covenants not to compete present the paradigm of irreparable injury, so that reasonable enforcement appears to be the rule rather than the exception.”); *Wright v. Sport Supply Group, Inc.*, 137 S.W.3d 289, 293-94 (Tex. App.—Beaumont 2004, no pet.) (where former employee was selling to plaintiff’s former customers in his old territory, “the harm was more than imminent; it was actual and ongoing”); *Cardinal Health*, 106 S.W.3d at 236 (“proof that a highly trained employee is continuing to breach a non-competition covenant gives rise to a rebuttable presumption that the applicant is suffering irreparable injury”).

211 *W. R. Grace & Co.- Conn v. Taylor*, No. 14-06-01056-CV, 2007 Tex. App. LEXIS 3779, *7 n.7 (Tex. App.—Houston [14th Dist.] May 17, 2007, no pet.). That said, such stipulations can be persuasive evidence of such harm. See, e.g., *Wright v. Sport Supply Group, Inc.*, 137 S.W.3d 289, 293-94 (Tex. App.—Beaumont 2004, no pet.).

212 TEX. BUS. & COM. CODE § 15.51(c).

213 *Keynon Int’l Emergency Servs. v. Malcolm*, No. 12-20306, 2013 U.S. App. LEXIS 9704, *9-14 (5th Cir. May 14, 2013).

214 *Franlink v. GJMS Unlimited, Inc.*, 401 S.W.3d 705, 711-12, (Tex. App.—Houston [14th Dist.] 2013, pet. filed); *Glattly v. Air Starter*

Components, Inc., 332 S.W.3d 620, 645 (Tex. App.—Houston [1st Dist.] 2010, pet. denied); *Perez v. Tex. Disposal Sys., Inc.*, 103 S.W.3d 591, 593-94 (Tex. App.—San Antonio 2003, pet. denied).

215 *TEX. BUS. & COM. CODE* § 15.52.

216 *Sadler Clinic Ass'n, P.A. v. Hart*, 403 S.W.3d 891, 2013 Tex. App. LEXIS 7183, *19-21 (Tex. App.—Beaumont 2013, pet. denied) (“the exclusivity and preemption provision of the Covenants Not to Compete Act precludes an award of attorney fees under the Declaratory Judgments Act”); *Glattly*, 332 S.W.3d at 645 (preemption provision applies to “the common law that a party may recover attorney’s fees if provide for by contract”); *Franlink*, 401 S.W.3d at 711-12 (same result as to *TEX. CIV. PRAC. & REM. CODE* § 38.001(8)); *Perez*, 103 S.W.3d at 593-94 (same). But see *Butler v. Arrow Mirror & Glass, Inc.*, 51 S.W.3d 787, 797 (Tex. App.—HOUSTON [1ST DIST.] 2001, NO PET.) (awarding attorney’s fees under 38.001(8) when employer obtained permanent injunction for breach of a covenant not to compete, but not discussing preemption issue).

217 *H.B. 7, 73rd Leg., Reg. Sess., ch. 965* § 3 (1993).

218 See *TEX. CIV. PRAC. & REM. CODE* § 16.051.

219 *Peat Marwick Main & Co. v. Haass*, 818 S.W.2d 381, 388 (Tex. 1991).

220 354 S.W.3d at 768 (emphasis added). This article focuses on the extent to which duties not to compete post-employment can be enforced through written agreements. Employees may, at least in certain cases, owe their employers fiduciary duties during employment. See, e.g., *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 202 (Tex. 2002).

221 *CDX Holdings, Inc. v. Heddon*, No. 3:12-CV-126-N, 2012 U.S. Dist. LEXIS 86041, *29 (N.D. Tex. Mar. 2, 2012) (finding non-recruitment provision overbroad under § 15.50 when it prohibited the defendant from recruiting any of the plaintiff’s employees, even those with whom the defendant had no contact while working for the plaintiff); *Rimkus Consulting Grp., Inc. v. Cammarata*, 255 F.R.D. 417, 438-39 (S.D. Tex. 2008) (holding a covenant not to solicit customers or employees “is also a restraint on trade and competition and must meet the criteria of section 15.50 of the Texas Business and Commerce Code to be enforceable”); *Olander v. Compass Bank*, 172 F. Supp. 2d 846, 851 (S.D. Tex. 2001) (“A provision restricting solicitation of former employees and customers restrains trade and constitutes a covenant not to compete.”).

222 See *Baker Petrolite Corp. v. Spicer*, No. 06-1749, 2006 U.S. Dist. LEXIS 41535, *11-12 (S.D. Tex. June 20, 2006); *Nova Consulting Group, Inc. v. Eng’g Consulting Servs.*, SA-03-CA-305-FB, 2005 U.S. Dist. LEXIS 46925, *71 (W.D. Tex. June 3, 2005); *Totino v. Alexander & Assocs.*, No. 01-97-01204-CV, 1998 Tex. App. LEXIS 5295, *29-30 (Tex. App.—Houston [1st Dist.] 1998, no pet.).

223 *Marsh*, 354 S.W.3d at 768 (Tex. 2011); see also *CRC-Evans Pipeline Int’l, Inc. v. Myers*, 927 S.W.2d 259, 265 (Tex. App.—Houston [1st Dist.] 1996, no writ) (“Non-disclosure covenants are more readily enforced than non-compete covenants, because they are not restraints on trade, as are non-compete covenants.”); accord *Zep Mfg. Co. v. Harthcock*, 824 S.W.2d 654, 663 (Tex. App.—Dallas 1992, no writ).

2014 WINTER REGIONALS

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2014 WINTER REGIONALS





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2013 COLLEGE FOR NEW JUDGES

2013 College for New Judges Graduates



Hon. Barbara Hervey Appointed to the New National Forensic Science Commission

On January 10, 2014, the U.S. Department of Justice and U.S. Department of Commerce's National Institute of Standards and Technology announced the appointment of commissioners to the newly formed National Forensic Science Commission. Judge Barbara Hervey from the Texas Court of Criminal Appeals was chosen to be a member of the Commission out of more than 300 candidates.



About the National Forensic Science Commission

The National Forensic Science Commission was formed to examine the forensic-science community and the efficacy of the use of forensic science in the criminal-justice system. The Commission will make recommendations to the United States Attorney General regarding the current and future needs of the forensic-science community, best practices for collecting and analyzing forensic science, and how forensic science can best be used to solve crimes and protect the public.

The members of the commission, in accordance with the mandates of the U.S. Congress, come from a variety of backgrounds, including scientists, members of academia, judges, lawyers, and other interested stakeholders. The broad cross-section of experience of the appointed commissioners will facilitate the presentment and consideration of a wide swath of issues and perspectives relevant to forensic science.

Press Release, Texas Court of Criminal Appeals, Judge Barbara Hervey of the Court of Criminal Appeals Appointed to the New National Forensic Science Commission (Jan. 13, 2014) (on file with author). ❖

Hon. Randy Shelton Awarded 2013 Minnie Rogers Juvenile Justice Center Award



On January 7, 2014, Judge Randy Shelton, 279th District Court, received the 2013 Minnie Rogers Juvenile Justice Center Award from the Jefferson County Juvenile Probation Department "for outstanding achievement and contributions to the youth of Southeast Texas and for making youth a priority in the community."

"It was an honor to receive the award from an organization that I respect and admire," Judge Shelton said. "Any success I have achieved in working with at-risk children in the Juvenile Justice System and the juvenile drug court program is largely due to the professionalism of the probation officers and treatment providers."

Judge Shelton has been the judge of the 279th District Court in Jefferson County since 2007. He graduated from South Texas College of Law in 1989 and worked in a private law practice in Beaumont, Texas, until he took the bench. He has been broad certified in family law since 1998. In 2011, Judge Shelton was also selected as the Family Advocate of the Year by the Family Services of Southeast Texas. ❖

Texas Women Lawyers Honor Judge Maria Salas-Mendoza

Texas Women Lawyers (“TWL”) announced [on January 29, 2014] that it is honored to present the 2014 Texas Women Lawyers’ Pathfinder Award to the Honorable Maria Salas-Mendoza, District Court Judge for the 120th Judicial District Court in El Paso, Texas. The TWL Pathfinder Award honors an individual each year who has been a champion promoting the advancement of women in the law and who exemplify professionalism, leadership and commitment to the public interest. “Judge Salas-Mendoza is an outstanding example of someone who has promoted the law and justice through her commitments to mentoring and her community,” said Deirdre Carey Brown, the TWL Pathfinder Committee Chair.

For over 20 years, Judge Maria Salas-Mendoza has been dedicated to increasing educational access and opportunities for students, in particular students of disadvantaged and non-traditional backgrounds. Judge Salas-Mendoza is also an advocate for “Project Future,” a project of the El Paso Women’s Bar Association in collaboration with El Paso County, which gives young adults who have aged out of foster care a chance to obtain professional work experience through placement in jobs with El Paso County departments. Judge Salas-Mendoza has committed hundreds of hours to speaking to students about the importance of education at numerous career day events and student visits to the Court. Judge Salas-Mendoza was elected judge of the 120th Judicial District Court in 2006. She is the proud mother of four children. Judge Salas-Mendoza’s commitment to the public interest provides a wonderful example for other lawyers to follow.

The presentation of the 2014 Texas Women Lawyers Pathfinder Award will be at TWL’s Annual CLE in Dallas on February 28, 2014. All Texas lawyers are invited to register for the CLE. More information about the CLE and online registration can be found on TWL’s website www.texaswomenlawyers.org

Texas Women Lawyers is an organization committed to the empowerment of women lawyers to achieve full rights, privileges and responsibilities in the legal profession.

Press release, PR Newswire, Texas Women Lawyers’ 2014 Pathfinder Award Honors Judge Marisa Salas-Mendoza for Her Dedication to Youth and Justice (Jan. 29, 2014), available at <http://www.prnewswire.com/news-releases/texas-women-lawyers-2014-pathfinder-award-honors-judge-maria-salas-mendoza-for-her-dedication-to-youth-and-justice-242550471.html> ❖



SMU Names Hon. Mary Murphy and Hon. Elizabeth Lang-Miers Distinguished Alumni

The Distinguished Alumni Award is the highest and most prestigious award the University can bestow upon its alumni. The award is presented to an alumnus or alumna of SMU who has demonstrated a record of distinguished service and extraordinary achievement in a particular discipline, organization, or cause that brings distinction to the University. Each year, individuals are chosen by the SMU Alumni Board Nominations Committee to receive this prominent award.

This year, two of the Texas' judiciary's finest were chosen as honorees: Justice Mary Murphy, the Presiding Judge of the First Administrative Judicial Region, and Justice Elizabeth Lang-Miers, from the Fifth Court of Appeals in Dallas. On March 27, 2014, Justice Murphy will accept SMU's *Distinguished Alumni Award for Judicial Service* and Justice Lang-Miers will receive its *Honorary Alumna Award*. Congratulations to both Justices for their outstanding achievements! ❖



Justice Mary Murphy



Justice Elizabeth Lang-Miers



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Distinguished Alumni Award for Judicial Service

Wm. Stephen Boyd '81
Chief Legal Officer of Baylor Scott & White Health
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Distinguished Global Alumni Award

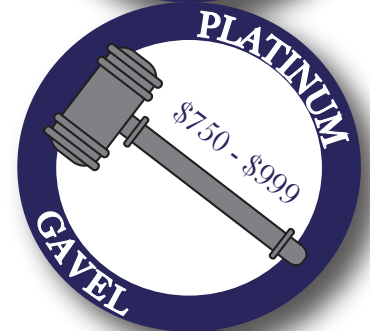
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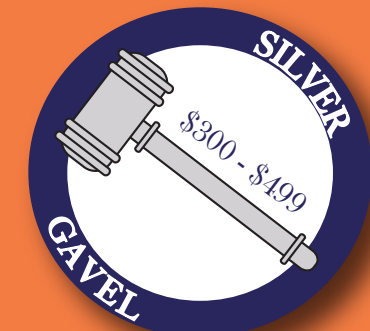
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Advisory Opinion Summaries

September 1, 2013 - March 7, 2014

Texas Ethics Commission

[EAO No. 514 \(2013\)](#) – A principal campaign committee formed under federal law to support a candidate for federal congressional office located in Texas that makes political contributions to state or local candidates in Texas is not required to file a campaign treasurer appointment or campaign finance reports under Title 15 of the Election Code. Additionally, the committee is not required to file with the Texas Ethics Commission a copy of each document required to be filed under federal law that is related to the candidacy of the federal candidate for which the committee is formed.

[EAO No. 515 \(2014\)](#) – A registered lobbyist must disclose in a registration the full name and address of a candidate or officeholder who uses political contributions to compensate or reimburse the registrant for services rendered by the registrant. A registrant must also disclose the full name and address of a candidate or officeholder who uses political contributions to compensate or reimburse an entity that employs or hires the registrant to render services for the candidate or officeholder. A registrant is not required to disclose compensation or reimbursement received by an entity for services rendered by someone other than the registrant or a person acting as an agent of the registrant.

[EAO No. 516 \(2014\)](#) – A city may not use its resources to create or maintain political advertising bearing the name of a political committee pursuant to the “adopt-a-park” program described in this opinion.

These summaries have been taken directly from the TEC’s website. To see summaries from previous years, please visit: <http://www.ethics.state.tx.us/legal/AT-eaosquery.html>.

Judicial Section of the State Bar of Texas Committee on Judicial Ethics

None for this time period.

State Commission on Judicial Conduct

None for this time period.

American Bar Association’s Judicial Ethics Opinion

None for this time period. ❖

DISCIPLINARY ACTIONS

FY 14

(September 1, 2013 – August 31, 2014)

State Commission on Judicial Conduct

Public Reprimand: The Commission found the Trinity County Justice of the Peace (JP) violated Canon 2B by lending the prestige of his office for private interests and allowing a relationship to influence his judicial conduct or judgment. JP's personal friend, who he was admittedly dating, was arrested for Driving While Intoxicated. JP asked his colleague who was scheduled to magistrate the case if he could do it instead. JP set a PR bond for her release stating that he knew she would "not run." Furthermore, JP previously received a Public Admonishment in 2011 for lending the prestige of his judicial office in an attempt to assist L.D.'s daughter with a pending criminal matter, which the Commission found to be an aggravating factor. The Commission concluded that although JP had the legal authority to magistrate a defendant charged with Driving While Intoxicated, and the discretion to release that defendant on a PR bond, his intervention in this particular case, which involved his girlfriend, created the appearance and the reality that he was allowing his relationship with her to influence his judicial conduct and judgment, that he was giving her favorable treatment, and that she was in a special position to influence the judge. (09/17/14).

Public Admonishment: The Commission found that Victoria County District Judge (DJ) violated Canon 3B(8) by communicating, *ex parte*, with one of the parties to a trial over which he was presiding. DJ was presiding over an action by Jones against a former client, Whatley, for attorney's fees. DJ issued a take nothing judgment which the appellate court reversed. DJ then announced that he was awarding Jones \$40,000. After testimony from Whatley, he lowered it to \$26,694. DJ then had a conversation with Jones at the courthouse, stating that he and Whatley "need[ed] to consider mediation" and that "he was inclined to sign a judgment that would provide [Jones] with a larger amount than he had previously." Whatley's attorney, Clark, was not present for this conversation. Jones sent a letter informing

Clark of the conversation and Clark responded with an objection to the *ex parte* communication and a request to the judge to meet before the matter was set for trial. The following day, DJ issued a judgment awarding \$45,000 in fees to Jones without a hearing or providing Whatley a chance to be heard. The Commission concluded from the facts and evidence presented that DJ engaged in an improper *ex parte* communication with Jones concerning a contested issue in a pending case, which resulted in the entry of a judgment in favor of Jones without affording Whatley the right to be heard. In reaching its decision, the Commission took into account the fact that DJ had been sanctioned previously for engaging in similar conduct.

Private Sanctions

The judge wore a Halloween costume while presiding over a misdemeanor criminal docket, which demonstrated a failure to conduct court proceedings with the proper order and decorum, and a failure to treat the defendants, victims, and their family members with appropriate dignity. [Violation of Canons 3B(3) and 3B(4) of the Texas Code of Judicial Conduct, and Article V, §1a(6)A of the Texas Constitution.] Private Reprimand of a County Court at Law Judge. (08/19/13).

The judge made a phone call to the arresting police officer on behalf of a friend, which was perceived by the officer as an improper attempt by the judge to use the prestige of judicial office to advance the arrestee's private interests. [Violation of Canon 2B of the Texas Code of Judicial Conduct.] Private Admonition of a Municipal Court Judge. (08/19/13).

The judge failed to follow the law and demonstrated a lack of professional competence in the law when he removed a criminal defendant's court-appointed attorney based solely on the fact that a family member had posted a pretrial bond to obtain the defendant's release from jail. The judge

took this action without conducting an indigency hearing and without making any finding on the record that there had been a material change in the defendant's financial circumstances that warranted removal of his court-appointed counsel. [Violation of Canons 2A, 3B(2), 3B(8) of the Texas Code of Judicial Conduct.] Private Reprimand of a Retired District Judge. (08/19/13).

The judge failed to follow the law and demonstrated a lack of professional competence in the law when she: 1) became involved in a church dispute over which she had no jurisdiction; 2) granted a writ of re-entry in a case in which the parties were not in a landlord-tenant relationship; 3) denied a litigant's right to be heard at the hearing; and 4) denied the litigant's right to appeal the order granting the writ of re-entry and/or advised the litigant that a writ of re-entry was not an appealable order. [Violation of Canons 2A, 3B(2) and 3B(8) of the Texas Code of Judicial Conduct.] Private Admonition and Order of Additional Education of a Justice of the Peace. (09/10/13).

The judge failed to follow the law when he *sua sponte* remanded a defendant into custody and doubled her bond after she appeared in court without her attorney. There was no evidence in the record that (a) the defendant had missed a court date or was late for the hearing, (b) her bond was defective or insufficient, or (c) "other good and sufficient cause" existed for sending her to jail. Absent a record of the judge's reasons for finding the bond insufficient, one could conclude that the defendant served three days in jail simply because she came to court without her attorney. [Violation of Canon 2A of the Texas Code of Judicial Conduct.] Private Reprimand of a Senior Judge. (09/16/13).

The judge lost his patience, and failed to act in a dignified, courteous manner when he ordered law enforcement officers and members of the victim's family to leave the courthouse following a criminal trial. The judge should have exercised more judicial restraint and decorum in the manner in which he continued to pursue the departure of these individuals while they waited in the safety of the district attorney's office. It appeared, given the history of conflict between the judge and the district attorney, that the judge may have been taking out his anger or frustration with the district attorney by lashing out at the family members instead, leaving

the family members feeling victimized once more. [Violation of Canon 3B(4) of the Texas Code of Judicial Conduct.] Private Admonition of a District Judge. (09/16/13).

The judge failed to treat an employee in a patient, dignified and courteous manner when he touched her and/or made comments to her that he knew, or should have known, she would find offensive. While the judge may not have had the intent to offend and/or may not have initially realized that his conduct was offensive, his failure to curtail his actions after being notified that his conduct made the employee feel uncomfortable led to negative media attention that centered on the fact that he ultimately entered a plea of *nolo contendere* to criminal charges that were filed against him. [Violation of Canon 3B(4) of the Texas Code of Judicial Conduct and Article V, §1-a(6)A of the Texas Constitution.] Private Reprimand of a Former County Judge. (09/23/13).

The judge failed to adequately supervise his court staff, failed to follow the law, and/or demonstrated a lack of professional competence in the law when: 1) the defendant's change of plea was accepted by telephone without any written documentation; 2) the defendant was prevented by the court clerk from having the judge determine whether he could be placed on a payment plan, as required by Article 45.041(b)(2) of the Texas Code of Criminal Procedure; 3) the judge signed and issued a *capias pro fine* warrant that improperly directed law enforcement officials to incarcerate the defendant, rather than directing them to take the defendant to court for a hearing to be conducted pursuant to Article 45.046 of the Texas Code of Criminal Procedure; and 4) the judge's court staff engaged in inadequate record-keeping procedures, which contributed to the confusion that occurred in resolving the defendant's case. [Violation of Canons 2A and 3B(2) of the Texas Code of Judicial Conduct.] Private Admonition and Order of Additional Education of a Justice of the Peace. (09/23/13).

The judge's demeanor while presiding over court cases demonstrated a willful and/or persistent failure to maintain patience, courtesy, and dignity toward litigants, attorney[s], and others with whom he deals in an official capacity. The Commission determined that the judge's judicial style and his methods for controlling the courtroom and dealing with difficult litigants needed to be reexamined and modified to ensure compliance with the judge's duties under the

Code. Additionally, the Commission found that the judge's handling of a contempt of court proceeding failed to comply with the law because the show cause notice did not provide sufficient detail of the alleged contemptuous conduct and because the judge left the contempt charges pending and unresolved indefinitely. [Violation of Canons 2A and B(4) of the Texas Code of Judicial Conduct.] Private Admonition of a Justice of the Peace. (11/01/13).

The judge's letter requesting a continuance on behalf of an employee of the court who had a traffic-related offense pending in another court constituted an improper use of the prestige of judicial office to advance the employee's private interests, and raised concerns that the judge was using his higher court position in an attempt to influence a lower court judge to grant the employee relief that would not otherwise have been granted had it been filed by the employee herself or by an attorney acting on her behalf. [Violation of Canon 2B of the Texas Code of Judicial Conduct.] Private Admonition of a District Court Judge. (11/06/13).

The judge allowed her name and judicial title to be used to solicit funds and/or otherwise promote a fundraising event held on behalf of a non-profit organization that relied on fundraising to promote their charity work in the local community. The Commission also found that asking individuals to purchase tickets to attend a fundraising event, and using court resources (email and computer) would necessarily fall within the type of "fundraising" generally prohibited by the canons. [Violation of Canons 2B and 4C(2) of the Texas Code of Judicial Conduct.] Private Admonition of a Municipal Court Judge. (11/13/13).

The judge failed to follow the law, and/or demonstrated a lack of professional competence in the law when: 1) the judge signed and issued *capias pro fine* warrants that improperly directed law enforcement officers to incarcerate a defendant rather than directing them to bring the defendant before the court; and 2) the judge charged the defendant with numerous Failure to Appear offenses, assessing additional fines and costs against the defendant, in cases that had already been adjudicated. [Violation of Canons 2A and 3B(2) of the Texas Code of Judicial Conduct.] Private Order of Additional Education of a Justice of the Peace. (11/15/13).

The judge failed to comply with the law and failed to maintain professional competence in the law when, without proper notice or an opportunity to be heard, she held a litigant in contempt of court and had her incarcerated over the weekend for failing to comply with temporary orders. Based on her testimony before the Commission, it appeared the judge failed to appreciate the distinction between criminal versus civil contempt, direct versus constructive contempt, and the proper procedures to follow in each type of case before subjecting a litigant to incarceration. [Violation of Canons 2A, 3B(2) and 3B(8) of the Texas Code of Judicial Conduct.] Private Reprimand and Order of Additional Education of a District Court Judge. (12/19/13).

The judge failed to maintain order and decorum in the courtroom and failed to treat litigants with dignity by allowing them to perform pushups in the courtroom for being late to court. [Violation of Canons 3B(3) and 3B(4) of the Texas Code of Judicial Conduct.] Private Admonition of a District Court Judge. (01/08/14). ❖

Texas Ethics Commission

Sworn Complaints

Editor's Note: Complaint orders with duplicative facts and findings to those listed below were omitted.

Date Issued	Violations	Sanction
09/05/13	Respondent was a domestic non-profit corporation. Respondent violated sections 253.003 and 253.094 by making an unlawful contribution to a candidate for City Council for \$500. Corporations are prohibited from making political contributions. Respondent also violated section 571.1242(c) by failing to respond to the complaint within 25 business days. SC-313345	\$500 civil penalty
10/07/13	Respondent was a candidate for County Sheriff. Respondent violated section 254.061(2) by failing to list a telephone number for the campaign treasurer. Respondent also violated section 254.001 by failing to keep a record of cash donors so that he was able to report their full name and address with their contribution amount. Respondent also failed to disclose the purpose of two expenditures, which is a violation of section 254.031(a)(3). SC-31205127 Furthermore, respondent failed to timely file reports. SC-31205184	\$500 civil penalty & \$250 civil penalty
10/07/13	Respondent was a candidate for District Judge. When he filed his campaign treasurer notice, respondent declared his intent to not comply with the voluntary limits on expenditures under the Judicial Campaign Fairness Act. Thus, any political advertising used during his campaign was required to include the following statement: "Political advertising paid for by (name of candidate or committee), (who or which) has rejected the voluntary limits of the Judicial Campaign Fairness Act." Respondent failed to do this and was therefore in violation of section 255.008. The Commission did not accept the excuse that the advertising he used was left over from a previous election, nor did they accept the excuse that he did not <i>actually</i> exceed the limits. SC-31207208	\$100 civil penalty
12/23/13	Respondent is a member of a City Council. Respondent listed the contributors of \$32,840 as corporations. In his response, he stated that the contributors were actually the owners of the businesses. While that meant respondent did not improperly accept contributions from corporations, he still violated section 254.031(a)(1) by improperly listing the names of contributors. Moreover, respondent completely or partially omitted the date, name, and/or address of several contributors, i.e. "Pete of Fort Bend Mechanical" and "anonymous" in Vietnamese are not sufficient disclosures of a contributor's name. He also failed to disclose this information for expenditures on several reports. Furthermore, respondent violated section 254.031(a)(3) by listing "campaign manager" and "staff member" as the purpose of several expenditures, instead of a description of the goods or services purchased. Respondent also violated section 254.061(1) by failing to identify the election in which he was running on his reports. Respondent's reports also did not cover the correct time periods, which meant the total contributions and expenditures maintained were incorrect. Finally, respondent did not properly notarize his reports and sign the required affidavit. SC-31011387	\$7,000 civil penalty

Date Issued	Violations	Sanction
12/23/13	Respondent was a campaign treasurer for a specific-purpose committee. Respondent violated section 254.031(a)(8) by reporting \$5,387.32 less than the actual total of contributions maintained. Respondent also violated 254.031(a)(1) because he only listed one initial as the first name of some contributors, but their corresponding checks contained two initials listed for their first name. Respondent violated section 254.031(a)(3) by failing to disclose the address of payees for expenditures over \$100. However, this did not apply to expenditures made to entities whose complete address is readily ascertainable by searching their name. The Commission also found that using "fundraising expense" as the purpose of an expenditure is insufficient because it simply repeats the category. Section 254.031(a)(3) was violated when respondent failed to disclose the details of expenditures made for travel outside Texas on Schedule T. Respondent also purchased an asset over \$500, a campaign computer, and did not disclose it on Schedule M. Respondent violated 253.1611(b) by making political contributions to a political committee in connection with a primary election. The expenditures were not ear marked for a nonpolitical purpose nor were they in exchange for goods or services, therefore they were in violation. Respondent also listed a reimbursement to himself for phone expenses, without disclosing telephone-related expenditures or a personal loan. Finally, respondent was late in filing his 30-day pre-election report. SC-31205185	\$1,000 civil penalty
01/02/14	Respondent is a District Judge. Respondent violated sections 254.031(a)(1) and 254.031(a)(3) by improperly listing the names of contributors and payees. Respondent also failed to list the principal occupation and job title for contributors that individually contributed \$50 or more, which violated section 254.0611(a)(2)(A). Respondent also violated section 253.1611(a) by using campaign funds to make a political contribution to another candidate that exceeded \$100. The respondent disclosed two political expenditures to candidates totaling \$340 at fundraiser and auction events for the candidates. Although the respondent swore that she did not understand that the restriction applied when she purchased items for use in her campaign, the fact that the items were purchased at candidate fundraising events indicate that purchases made would benefit the candidates holding the fundraisers. SC-31207223	\$300 civil penalty
01/02/14	Respondent is a member of City Council. The Commission found that respondent did not violate section 254.031(a)(1) by omitting a political committee's name because he listed its address and out-of-state committee ID#, thus its name was readily ascertainable. Respondent did violate section 254.031(a)(8) by reporting \$0 contributions maintained when bank statements showed between \$880 and \$9,545 in contributions for that time period. Respondent violated section 254.031(a)(3) by listing PayPal as a payee, when he should have listed the individual that was the ultimate recipient of the funds. The Commission also found that listing "Event Item" as the purpose of an expenditure under the category "Event Expense" was insufficient and essentially repeating the category. Respondent also failed to properly disclose his out-of-state travel on Schedule T. Filing an amended report past the deadline due to an omission put respondent in violation of section 254.063 because it meant the original report filed was incomplete. SC-3130335	\$750 civil penalty

Date Issued	Violations	Sanction
01/24/14	Respondent is a campaign treasurer for a general-purpose political committee. Respondent violated section 254.031(a)(3) by failing to disclose the proper addresses of candidates that it made contributions to exceeding \$100. Respondent listed its own address instead of the addresses of the individual candidates to whom the contributions were made. Respondent also failed to list a loan repayment as a political expenditure. He also violated sections 254.031(a)(1) and 254.031(a)(6) failing to report a lender's loan forgiveness as a political contribution. The original loan was given to RCA with the intent that it be used in connection with RCA's activities as a political committee. Moreover, both the original loan and the subsequent forgiveness thereof constituted direct or indirect transfers of money by the individual lender to RCA. Accordingly, the forgiveness of the \$55,157.05 outstanding balance by the individual lender was a political contribution to RCA that the respondent was required to disclose. Respondent also failed to file timely reports and was late responding to the sworn complaints. SC-3130351 and SC-3130106	\$750 civil penalty

Endnotes

Omitted opinions include:

- **SC-312241** (12/20/12) (accepted contributions from a corporation)
- **SC-3120117** (09/10/13) (failed to timely file reports)
- **SC-31205186** (09/10/13) (failed to timely file reports)
- **SC-31205187** (09/10/13) (failed to timely file reports)
- **SC-3130353** (12/19/13) (made a prohibited contribution)
- **SC-31310162** (01/24/14) (failed to list the candidates supported or opposed, failed to disclose full names of payees, failed to disclose purpose of expenditures, and improperly listed administrative expenses as non-political)

Life on the Bench

By: Judge Mark D. Atkinson

Spending many years on the Bench affords one many memorable experiences, as I'm sure many of you can attest. I was recently reflecting upon a couple of related incidents that happened in my early years that really pointed out the contrast and improvement in courthouse security over the years.

In 1987, my county was struggling to keep up with the demands brought on by rapid expansion in the number of courts. Courtrooms were built-out in very old buildings which became "annex courthouses." It was far from ideal. Prisoners were brought to court by parade, handcuffed together and escorted by our bailiffs. In our annex, prisoners occasionally slipped away from custody and found their way to the stairwell leading to the street. While awaiting hearings, they were held in cramped cells adjacent to the courtrooms. When there was insufficient room in the cells, the prisoners were brought to the courtroom, seated in the jury box and handcuffed to chairs.

When I first took the Bench we had a staff composed of two bailiffs, assigned by the Sheriff's Department, two clerks, a probation officer, a court reporter and a court coordinator. The bailiffs were in charge of courtroom security and of the handling of prisoners on their journey from jail to court.



Cliff was one of our bailiffs. I don't know what it was about him, but he never seemed the type for the job. He was very nice and quiet; but it's as if there was always something else on his mind -- like maybe law enforcement was not his number one career choice.

One morning, a prisoner escaped from the courtroom. Cliff had brought a prisoner over from the jail then secured her by handcuffing her to a chair in the empty jury box. She was young and pretty.

She begged Cliff to loosen the handcuffs, protesting that they were hurting her wrists. He loosened the cuffs some, and left to check on other prisoners. The next time I looked from the Bench toward the jury box, I saw, where she had been secured, an empty set of handcuffs hanging from a chair, still slightly swinging.

The young lady managed to exit the courthouse through a side stairwell. Once she reached the street

the young lady took off running through the east side of downtown, where she was found, the newspaper would report the next day, about an hour and a half later, hiding under a raised house about three miles away. Cliff was very embarrassed by the episode, especially when named in the newspaper.

It got even worse for Cliff, however. About a week later, one of the prisoners he brought over from the jail was a young man in a wheelchair. His leg was in a cast, a result of it being broken while he attempted to flee from an arresting officer. As a result of pain medication, he dozed off and on, as Cliff pushed the wheelchair from the jail. It was a rickety thing which had been used for decades in the jail, and it wobbled and clacked like a bad grocery cart. The young man was wheeled down several blocks from the jail to our courthouse. He was required to attend a brief hearing, and then returned to the jail.

As Cliff wheeled the fellow back, he fell asleep. There was, at the entrance to the jail, a downward sloping ramp, with a hairpin turn midway. Opposite the turn was a brick wall.

As Cliff began the descent down the ramp, he would later recount, both of the wheelchair's handgrips came off in his hands. The chair and the large, sleeping man began hurtling down the ramp, heading for a collision with the brick wall, wobbling as it gathered speed. Cliff watched in horror, before he took off running, catching the chair only a few feet from doom, saving the sleeping passenger from being smashed into the brick wall.

Cliff was still shaking when he returned to the courtroom and reported what had just happened. He said that he had, during the event, imagined the headlines that would name the bailiff who had allowed a sleeping prisoner in a wheelchair to "escape," resulting in his severe injury or worse – this bailiff's second escape in a week.

Cliff came by the next morning to tell me that he had resigned from the sheriff's department and was moving to a more laid-back town to look for a different line of work. He later sent us a postcard advising us that he was doing well. It had no return address.

Eventually, our county did build a new, secure, courthouse. ❖

Spotlight on the Staff



Katie Jackson. Katie has worked at the Texas Center since January of this year as the Program Administrator for the Texas Children’s Justice Act program. She was born in Texas, but she was raised in Kansas City. Katie has her BA in philosophy, and two MEd degrees – one in early childhood education and the other in education policy. Katie has spent most of her professional career as a teacher of young children, and she has held a variety of academic research positions on projects concerning child welfare. When not in the office, you can find Katie training in self-defense, taking her dogs to the park, or reading a novel with a hot cup of tea. If you have any questions about the Texas CJA grant or scholarship program, Katie is happy to help!

Aaron Gutierrez. Aaron is the newest addition to the Texas Center. He comes from the University of Texas at Austin where he graduated and was employed for the last 15 years. He feels his experience in Continuing Education will serve him in his new role as Registrar. He is excited to be part of the TCJ and looks forward to being a valuable member of the team.

In his free time, he likes to visit the Alamo Drafthouse to see movies, read and enjoy the Austin live music scene. He also volunteers every year during SXSW as a theater manager and enjoys trivia contests.



Upcoming Conferences

DWI Court Team Training
April 7-9, 2014
Embassy Suites, San Marcos

Texas College for Judicial Studies
May 5-9, 2014
Sheraton Capitol, Austin

Criminal Justice Conference
May 15-16, 2014
Hilton Bella Harbor, Rockwall

Child Welfare Conference
June 9-11, 2014
Hyatt Regency, Lost Pines

Professional Development Program
June 15-20, 2014
Embassy Suites, San Marcos

Civil Justice Conference
June 30-July 1, 2014
Hyatt Regency, Lost Pines

DWI Conference
July 10-11, 2014
Radisson, Austin

Annual Judicial Education Conference
Sept 7-10, 2014
Omni, Fort Worth

College for New Judges
December 7-12, 2014
Sheraton Capitol, Austin

Family Violence Conference
January 28-29, 2015
Westin Riverwalk, San Antonio

Criminal Justice Conference
February 26-27, 2015
Sheraton Capitol, Austin

Texas College for Judicial Studies
March 26-27, 2015
Hyatt Regency, Lost Pines

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Spotlight on Cameron County’s Veteran Court

By Hon. David Sanchez, with contributions from Hon. Mark D. Atkinson

Veterans frequently return home from serving their country with invisible wounds which often go undiagnosed and untreated. These injuries have profound effects on their lives and the lives of those around them. These veterans often self-medicate with alcohol and drugs. That frequently results in their getting entangled in the criminal justice system. The special needs and circumstances of these individuals are being addressed, more and more, in specialized courts known as veterans courts.

The Cameron County Veterans Court is one of 17 veterans courts in Texas. Veterans Courts in the U.S. have only been in existence since 2008 with the first being established in Buffalo, New York. Since then they have spread throughout the nation, and into Texas. These specialty courts focus on drug, alcohol, and other addictions, with treatment through supervised sentences.



Hon. David Sanchez



Some courts supervise through community supervision (probation) and some use pre-trial diversion models. Studies indicate that treatment court protocols are effective in reducing recidivism. While veterans courts may be criticized by some as being soft on crime, individuals going through a veterans treatment court undergo much more strenuous and rigid programs than many of those sentenced to traditional probation. While Cameron County, Texas may be located at a far corner of the state geographically, its Cameron County judges have taken on the responsibility of being at the forefront in establishing and operating these therapeutic courts.

It is not surprising that funding is one of the greatest obstacles in creating and maintaining a specialty court such as a veterans court, and so it was in Cameron County. The endeavor to create a veterans court in Cameron County was initiated in 2012, when Judge Arturo C. Nelson, Judge of the 138th District Court who presides over the Cameron County Divert (drug) Court, began a push to create the court. At first, there was little or no movement. Then, upon accepting Judge Nelson's invitation to a National Drug Court Conference, County Commissioner Dan Sanchez lent his assistance to making the Cameron County Veterans Court a reality. Upon returning from the conference, he volunteered his brother, David A. Sanchez, Judge of the 444th District Court to take on the responsibility of creating and presiding over the Cameron County Veterans Court. A team was assembled to travel to Bexar County to observe an operating veterans court. The team returned to Cameron County excited, but with a persistent problem—funding.

Progress was slow. Then, in 2013, the local Department of Veterans Affairs office was assigned a new Veterans Justice Outreach Officer (VJO), Dr. Yasisca Pujols. Dr. Pujols geographical area of responsibility was reduced by 50 percent of the previous VJO. With less area to cover and an exciting new position, she assisted in showing the team that, with a few people volunteering a little bit of time and effort, and department heads working together, the Cameron County Veterans Court could become a reality.

Judge Nelson provided the team with the funds necessary for travel to attend the nation's first Veterans Court Conference in Washington D.C. in December 2013. With much excitement and incredible support from Congressman Filemon Vela and commissioner's court advocate, Commissioner Dan Sanchez, the Cameron County Veterans Court was created. Its first session was conducted January 21. The Court operates with the assistance of different departments in the County including the Community Supervision and Corrections Department and the District Attorney's office. The court has support, as well, from the Department of Veterans Affairs, as well as Tropical Texas, a local grant-funded health services provider that provides services to individuals not completely covered by the V.A. The indigent defense fund provides most of the compensation for the defense counsel that is part of the team. With teamwork and support, the Cameron County Veterans Court is up and running and has increased its participant list to approximately 35 veterans, in less than two months. Please feel free to call them for help. Incidentally they are much appreciative of Judge David Garcia who presides over the Veterans Court in Denton County for all his insight and advice. ❖



as of 3/7/14

NEW JUDGES

Hon. Langston Scott Adams
Hon. Bret Griffin
Justice Leanne Johnson
Hon. Kelley Peacock
Hon. Lindsey Scott
Hon. Tina Torres
Hon. Amanda Torres

Jefferson County Court at Law No. 3
212th District Court
9th Court of Appeals
Cherokee County Court at Law
252nd Criminal District Court
Bexar County Court at Law No. 10
Nueces County Court at Law No. 5

Beaumont
Galveston
Beaumont
Rusk
Beaumont
San Antonio
Corpus Christi

IN MEMORIAM

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Hon. William Shaver
Hon. Robert "Bob" Seerden
Hon. Ann Pier Baker
Hon. Jeffrey V. Coen
Hon. Ernest Franklin Cadenhead Jr.
Hon. Jim Clack
Hon. John Paul Davis
Hon. Fred Edwards
Hon. Mark Owens
Hon. Kenneth Vaughan

116th District Court
140th District Court
13th Court of Appeals
Walker County Court at Law
254th Family District Court
35th District Court
109th District Court
Jefferson County Court at Law No. 3
9th District Court
Ector County Court at Law No. 2
Dallas County Criminal Court of Appeals No. 2

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Hon. Quay Parker	In Memory of Hon. Frank Andrews
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Hon. Dean Rucker	In Memory of Hon. Mark D. Owens County Court At Law #2 Ector County, Texas
Hon. Luz Chapa	In Memory of Hon. Sam M. Paxson, who served on the judiciary for 40 years in El Paso County
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Hon. Bobs Parks	In Memory of Jim Clack
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Hon. Robert Brotherton	In Honor of The Staff of the Texas Center for the Judiciary
Hon. Nancy Berger	In Honor of William Brigham

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Crime Stoppers Sets New Records

This past year, efforts from more than 150 local non-profit Crime Stoppers programs, by passing on anonymous tips to law enforcement, cleared thousands of



cases. Over \$2 million in property was recovered and over \$30 million in narcotics were taken off the streets throughout Texas. To ensure even greater success in the coming years, local Crime Stoppers programs need your help. Judges having jurisdiction of a criminal case can help Crime Stoppers in two ways:

1) **Conditions of Community Supervision:** a judge may impose conditions of community service, which may include the condition that the defendant shall make one payment in an amount not to exceed \$50 to a certified Crime Stoppers program (Article 42.12, Section 11(a)(21), *Tex. Code of Crim. Pro.*).

2) **Repayment of Reward:** After a defendant has been convicted of a felony offense, the judge may order a defendant to repay all or part of a reward paid by a Crime Stoppers organization (Article 37.073(a), *Tex. Code of Crim. Pro.*).

The Texas 10 Most Wanted program, the statewide Crime Stoppers Program administered by DPS, set a new record in 2013 in total captures, with anonymous tips leading to the arrest of 32 wanted fugitives — 19 of whom were sex offenders. This topped its 2012 efforts that resulted in 30 apprehended felons, of whom eight were sex offenders.

[Texas Crime Stoppers](#) is administered by the [Criminal Justice Division \(CJD\) of the Office of the Governor](#) in cooperation with the [Texas Crime Stoppers Council](#). CJD and the Council work together to provide support and public funding for programs certified by the Council. Once certified, local programs are eligible to receive money through their local adult probation department; eligible for repayment of rewards; and may apply for grants through CJD. As a local non-profit, these programs rely heavily on donations from their community to fund rewards, tip lines, advertisements and other administrative costs.

If you have any questions about Crime Stoppers organizations in your area or would like to learn more about starting a local, non-profit Crime Stopper program in your community, please contact Kelly McBride at the Criminal Justice Division of the Office of the Governor at (512) 463-1715. You can also visit us on [Facebook](#) for up-to-date information about the program.

MORE ONLINE:

[TIRF Report: Impaired Driving Risk Assessment](#)

[Latest DWI Newsletter](#)

Go to the [Texas Center website](#) for links to Research Findings on Civil Protective Orders, Texas Pattern Jury Charges and all the resources the Texas Center has to offer.

Court Services Consultant Available through Texas Office of Court Administration



On January 1, Texas courts welcomed 64 new members to the judiciary. Fifty-five judges were elected and ten judges were appointed to fill an un-expired term. If you are one of these new judicial members of our courts, welcome! If you were one of the 28 participants at the College for New Judges, I hope you visited the OCA resource table and found the information helpful.

The Texas Supreme Court has constitutional responsibility for the efficient administration of the judicial system and possesses the authority to make rules of administration applicable to the courts.¹ Under the direction of the chief justice, the Office of Court Administration (OCA) aids the Supreme Court in carrying out its administrative duties by providing administrative support and technical assistance to all courts in the state.

In the past year, OCA has reinstated a program that many judges have found beneficial to their courts – a court services consultant. I am Aurora Zamora and I serve as OCA's court services consultant. My role is to provide assistance to you and your court in evaluating and implementing case management and administrative programs to improve the efficiency of court operations and the administration of justice – a key element of OCA's mission.

My tenure in the court system spans more than 25 years in a rural district court of general jurisdiction, with a concurrent 17-year tenure in a specialty court, which presided over child support enforcement cases.

Let my experience as a former court administrator, my knowledge of case management practices and procedures, and my training in judicial administration, work for you. Whether this is your first term or your eighth, the administrative duties of your office can be overwhelming and a distraction to your judicial responsibilities.

Services from the Court Services Consultant include:

- Research and study your court case activity, as it relates to case management procedures and practices;
- Provide technical assistance (via telephone or on-site) on court administration matters, including assignment of judges, jury management, development of forms, development of court calendars and implementation of best practices in caseload management;
- Provide your new or existing staff with support and training, as they learn their new role or renew their interest in an existing role; and
- Study and make recommendations on specific issues impacting your court.

These services are free to any court in Texas. If your court project requires extensive travel, OCA may request that you cover my travel expenses.

Over the last six months, more than a dozen courts have received assistance through this program. While some courts requested assistance relating to minor issues; others were quite extensive and addressed issues impacting multiple courts.

Nothing is more exciting to me nor brings me as much satisfaction as providing our courts with the tools that will produce *effective* administration of justice. Keep OCA foremost in your mind as you fulfill your duties and give me a call or send me an email, I am here to help! Contact Ms. Zamora at 512.463.0976 or 512.418.6832 or email her Aurora.Zamora@txcourts.gov.

¹ Article V, Section 31 of the Texas Constitution.