

“Don’t Do It, Even If It Feels Good”

Problem Areas with Potential to Cost You Credibility or Your Job

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This may come as a shock, so it would be a good idea to be seated for this revelation. Sometimes, elected officers do things that are really bad, really stupid, or both. Of course, misbehavior by public officials is regrettable, but it’s nothing new. Sadly, the concept is well enough established that it is expressly addressed in the Texas Constitution. There, we find article 5, section 24, which provides:

County judges, county attorneys, clerks of the District and County Courts, justices of the peace, constables, and other county officers, may be removed by the Judges of the District Courts for incompetency, official misconduct, habitual drunkenness, or other causes defined by law, upon the cause therefore being set forth in writing and the finding of its truth by a jury.¹

How this is to be carried out is not spelled out in certain terms by the Constitution. Instead, article 15, section 7 requires the Legislature to “provide by law for the trial and removal from office of all officers of this State”² While this provision by its own terms applies to state officials, its scope has been judicially interpreted to include county and municipal officers, as well.³ And it isn’t just misconduct while in office that concerned the Constitution’s framers. Run-ins with the law before taking office, as well as during a term of office, bear upon the ability to occupy elected office. In particular, the Constitution prompts the Legislature to address the issue by stating:

Laws shall be made to exclude from office, serving on juries, and from the right of suffrage, those who may have been or shall hereafter be convicted of bribery, perjury, forgery, or other high crimes.⁴

“High crimes” within this provision now appear to mean felonies, as well as criminal conduct which demonstrates the same type of moral corruption and dishonesty inherent in the offenses that are explicitly named in its language.⁵

That people who do bad things probably shouldn’t be allowed to hold public office seems plain enough. But what are those “bad things”? And what happens when someone slips up in that manner? Since the Constitution at least initially addresses those issues, the Legislature is not entirely free to speak to them as it sees fit.⁶ Given the constitutional

dimension of those questions, understanding the answers is a solid first step toward staying out of trouble and, just as importantly, staying in office. But as alluded to above, the Constitution itself is sketchy about what can get you into trouble and how the wheels begin to turn once you find yourself there. So arming yourself with the appropriate understanding has to begin with the statutes that address the subject.

There are several statutes that authorize removal from office when a public official runs afoul of their requirements. Whatever the conduct or misconduct that a statute applicable to a public official addresses, however, there are four basic removal procedures with which you as a county official may need to be concerned.⁷ Getting a grip on each of those procedures is important, since each of them is specially tailored to consider only certain types of acts or omissions. Thus, the act in question and the officer involved will dictate which of the procedures will be appropriate in a given situation. The schemes flow from chapter 66 of the Civil Practice and Remedies Code (entitled “Quo Warranto”), chapter 87 of the Local Government Code (entitled “Removal of County Officers from Office; Filling of Vacancies”) and article 5, section 1-a of the Texas Constitution in tandem with the Code of Judicial Conduct.⁸ Each serves a function similar to, but distinct from, the others. Of them, quo warranto and civil removal are the most common procedures and will be the focus of this discussion. To understand them, it may be useful to discuss their basic purposes before examining each procedure in detail.

I. Quo Warranto

This type of proceeding is as ancient in origin as it is foreign-sounding. Quo warranto is “an ancient common-law writ in the nature of a writ of right for the king against a person who claimed or usurped any office, franchise, or liberty, to inquire by what authority he supported his claim, in order to determine the right.”⁹ Such suits to challenge a person’s right to hold a public office have been authorized by statute in Texas since 1879.¹⁰ While a quo warranto action may be brought at the instance of, and for the benefit of, a private individual with a special interest, it is the State, acting to protect itself and the public good, which is the real plaintiff in a quo warranto suit.¹¹ In plain English, that means that someone who doesn’t like you may ask for a quo warranto suit to be brought against you, but an official who is actually authorized to represent the State of Texas will have to bring and pursue the case.¹²

The relevant purpose of a quo warranto proceeding is to challenge a person’s right to hold a public office.¹³ In fact, it is the “exclusive remedy afforded to the public to protect itself against the usurpation or unlawful occupancy of a public office by an illegal occupant.”¹⁴ Likewise, quo warranto is the exclusive means to declare that an official is no longer qualified to occupy his or her elected office.¹⁵ It also is the sole available procedure to determine the issue of whether a public officer has forfeited or vacated his or her office.¹⁶ What all this basically means is that quo warranto suits are properly concerned with the legal qualifications for office; the question being whether you met all

of the qualifications to take office or whether you have done what is necessary to satisfy any continuing qualification requirements while in office. Quo warranto is not a procedure concerned with misbehavior while in office. That is the province of removal.

II. Removal

Doing bad or really stupid things while in office usually will not affect the qualifications necessary to take or maintain that office, with the notable exception of being convicted of a felony. Hence, a quo warranto suit generally will not be the proper means to rid the office of a villain. That doesn't mean county officers are bulletproof if they make bad choices that don't concern their qualifications. It simply makes a different proceeding appropriate to deal with those choices if they are serious enough. For the majority of cases involving county officers, that proceeding will be a removal suit. As the Texas Supreme Court has explained the purpose of removal actions:

It reasonably appears from the constitutional and statutory provisions authorizing [a removal] proceeding that the object is not to punish the officer for his derelictions or for the violation of a criminal statute but to protect the public in removing from office by speedy and adequate means those who have been faithless or corrupt and have violated their trust.¹⁷

What do we take from this, then? Overall, it seems to be a pointed reminder to all of us within Texas government that it is the public office and its integrity, not the welfare of or consequences to the occupant, that are the primary focus here. Recall that removal suits are — first and foremost — constitutional creations provided for in the judiciary article, not in any “bill of rights.” They are intended for the benefit of society, rather than for the involved individuals.¹⁸ At the same time, it cannot be forgotten that the stakes in this kind of controversy are extremely high in a democracy. A removal suit seeks to undo the results of an election for reasons usually unrelated to the election itself. For that reason, the procedure cannot be invoked lightly. As one court has eloquently observed:

No division of our democracy, and no individual, be he judge or otherwise, has any monopoly on the knowledge of the route society must take to reach a better and more just way of life. When public officials manifestly violate their duty, courts must have the courage to remove them or negate their actions. But where in a discretionary decision, such as here, the most that can be said is that perhaps poor judgment was used; for the courts to fly in and substitute their judgment for that of elected officials would be to undermine the very foundation of our political system.¹⁹

These thoughts aren't offered to give you a civics or philosophy lesson. They should, instead, confirm for you that the circumstances giving rise to a removal suit are extraordinarily grave and should be considered accordingly. In practice, a savvy

prosecutor will approach a removal question with the same or greater gravity as is appropriate in deciding whether felony charges will be filed against someone.

Article 5, section 24 of the Constitution, which is the authority for removal suits, speaks in fairly generic terms. It provides precious little guidance about exactly when or how a removal suit should proceed. That relative silence and the provision's mention of removal for "other causes defined by law" put the burden to fill in these gaps on the shoulders of the Legislature.²⁰ The Legislature responded by enacting what is now chapter 87 of the Local Government Code.²¹ Courts have recognized the Legislature's work in this area by describing the removal provisions presently codified in chapter 87 as "enabling statutes" to carry forward the removal authority in article 5, section 24 of the Constitution.²² Since chapter 87 is authorized by the Constitution and it prescribes a method of procedure for removal of county officers, that method is deemed exclusive and other methods of removal are not permitted.²³

The correct procedures for removal under ultimate authority of article 5, section 24 of the Constitution are spelled out in chapter 87 of the Local Government Code.²⁴ As such, they serve as something of a roadmap for how a removal suit will proceed. But perhaps more importantly, careful study of those provisions can be a useful guide to the kinds of situations where a prosecutor might decide to pursue removal.²⁵ Because the same can be said of the quo warranto provisions, more in-depth analysis of each statutory scheme is the next order of business in understanding when and how a suit to evict an officeholder may arise and go forward.

III. Chapter 66, Civil Practice and Remedies Code: Kick 'Em When They're Down

As touched upon above, quo warranto is authorized in chapter 66 of the Civil Practice and Remedies Code. In its current form, quo warranto is available to determine disputed questions about the proper person entitled to hold public office and exercise its functions.²⁶

Among other circumstances, grounds exist for an action in the nature of quo warranto under chapter 66 if:

- a person usurps, intrudes into, or unlawfully holds or executes a franchise or an office;²⁷ or
- a public officer does an act or allows an act that by law causes a forfeiture of his office.²⁸

What is meant by "usurps" is not clarified in chapter 66. Common usage of the term, however, indicates that to usurp is to take possession of without legal claim or to seize and hold in possession by force or without right.²⁹ Similarly, in legal terminology,

“usurpation” generally means the unlawful seizure and assumption of another’s position, office or authority.³⁰ By way of example, where an officer becomes disqualified to hold his or her office, he or she becomes a usurper of the office and the cause of action for ouster by quo warranto becomes appropriate.³¹ In this context, courts take the qualifications for office quite seriously and literally. Whether a candidate is qualified for office is determined as of the date of the election, and where there is a length of practice or licensure requirement, a deficiency of even a few short days may not be disregarded by a court as legally inconsequential.³² Another qualification — residency — generally is a matter to be judicially decided in a quo warranto suit, not by a political party’s executive committee.³³ Also, quo warranto is the proper remedy when a question arises about whether a candidate for office who received the majority of votes in the general election is eligible to be certified as winner of the election.³⁴ It may apply on the back end of a term, as well. Quo warranto is the proper remedy to oust a “holdover”³⁵ officer who fails to qualify for a successive term of office, but refuses to vacate the office because of his or her “holdover” status.³⁶ Similarly, a quo warranto suit against a “holdover” officer may be maintained even if the officer resigns, since the “holdover” provision operates to keep the officer in place until his or her successor is elected or appointed, qualifies and takes office.³⁷ Importantly, though, a “holdover” officer who does not refuse to leave office is not considered to be a usurper.³⁸ This can be significant if judgment is entered, since a fine can be imposed on an officer for usurping, intruding into or unlawfully holding and executing an office.³⁹ That an officer may escape “usurper” status doesn’t necessarily mean he or she gets a pass to stay put, though. Quo warranto is available when a public officer forfeits or vacates his or her office.⁴⁰ Those situations usually arise when an officer fails to comply with a self-executing constitutional or statutory provision, such as a residency or licensing requirement.⁴¹

But remember that a quo warranto suit is not a removal action. Claims that an officer abused his or her office by unlawful acts will not support a judgment in a quo warranto proceeding.⁴² In other words, quo warranto is the correct method to test whether an individual has the proper authority to hold an office, not to test the validity of the individual’s actions once in office.⁴³

Although it is a different remedy than removal, quo warranto is not entirely divorced from its Local Government Code counterpart. Indeed, the Texas Supreme Court has suggested that quo warranto may relate to removal suits as a subsequent enforcement remedy. Specifically, an officer who has been removed through a chapter 87 proceeding, but has not vacated the office, may be ousted by quo warranto. Under those circumstances, a showing that the officer was lawfully removed under chapter 87 will be an element of the quo warranto action to show that the officer was usurping or unlawfully occupying the office.⁴⁴

Not just anyone can file a quo warranto suit. Chapter 66 makes quite clear who is authorized to do so. If grounds for quo warranto exist, the suit may be brought by the

attorney general or the county or district attorney of the “proper county.”⁴⁵ It is true that the attorney general or the local prosecutor may file the suit at the request of an individual, as well as on his or her own motion.⁴⁶ Either way, however, only the attorney general or a county or district attorney is authorized to file and litigate a quo warranto lawsuit.⁴⁷

Where grounds exist and the appropriate lawyer decides to file suit, the initial step is to file a petition in the district court of the “proper county” seeking leave to file an information in the nature of quo warranto.⁴⁸ The “proper county” is determined by Texas’ general venue statute,⁴⁹ meaning that the “proper county” most often will either be the county in which all or a substantial part of the events or omissions giving rise to the claim occurred or the county of the defendant’s residence at the time the cause of action accrued.⁵⁰ The petition must state that the information is sought in the name of the State of Texas, and it may — but does not have to — be filed at the request of an individual relator.⁵¹ Unlike removal suits, there is no requirement that a petition in quo warranto be sworn to or verified.⁵² As in removal suits, the district court has some discretion to deny leave to file the information, which can effectively end the litigation.⁵³ Where no appeal of a decision to deny leave in a removal action is available, however, denial of leave to file an information in the nature of quo warranto is reviewable on appeal.⁵⁴ On appeal, the reviewing court will take as true the allegations of the petition and information for purposes of determining whether probable grounds for the proceeding exist.⁵⁵

On the other hand, if the trial court grants leave to file the information, citation and service upon the defendant proceed as in any other civil case.⁵⁶ In fact, the entire proceeding from service forward is the same as in a more orthodox civil suit.⁵⁷ Why is that relevant? Aside from the involvement of lawyers, it also means that there will be discovery. It isn’t unheard of for information to come out in discovery that one or more of the parties would rather not see become a part of a public record. That’s something to think about if you’re unfortunate enough to find yourself mired in one of these suits and the issue of settlement comes up. In any event, when the case is ripe for judgment or disposition, another difference between a quo warranto action and a removal suit becomes relevant. Recall that a removal suit is addressed in the Constitution, and the constitutional provision specifically requires a trial by jury.⁵⁸ By contrast, there is no explicit requirement in the constitution or chapter 66 that a quo warranto action must be heard by a jury.⁵⁹ Thus, while a jury trial may be demanded by the defendant as in any other civil case,⁶⁰ a jury may be waived voluntarily or by failure to make a jury demand.⁶¹ In that instance, the case will be tried by the judge.

If the defendant is “found guilty as charged,” the court must enter judgment removing the person from office and awarding costs of the action to the relator.⁶² Further, as mentioned earlier, the court may fine the defendant for usurping, intruding into or unlawfully holding and executing the office.⁶³ Whether to impose a fine, and the amount of the fine, are matters left to the discretion of the trial court.⁶⁴ Thus, a court has

upheld a fine of \$2,500 apparently based on the inconvenience caused by the defendant's refusal to vacate the office at issue.⁶⁵ On the other hand, a simple forfeiture of office, without additional execution of the office's authority, will not support issuance of a fine.⁶⁶ Courts interpret the statutory remedies in a quo warranto suit as being exclusive.⁶⁷ With that said, however, the rule doesn't seem to be entirely ironclad. The court may grant other and different relief than what is requested by the State.⁶⁸ Similarly, it has long been the law that, in a quo warranto judgment, the court may enter any order necessary to give effect to the general judgment.⁶⁹ As a result, courts have affirmed judgments that not only ousted the defendant officer, but also declared the office at issue to be vacant.⁷⁰

One last procedural issue should be considered. If a quo warranto judgment is going to be challenged on appeal, the challenger had best be ready to move quickly. Appeal of a quo warranto judgment is accelerated.⁷¹ Consequently, a notice of appeal must be filed within 20 days after the judgment is signed.⁷² And while a motion for new trial may be granted by the trial court within 50 days after the judgment is signed, the new trial motion will not extend the deadline to file a notice of appeal.⁷³

IV. Chapter 87, Local Government Code: Kick 'Em When They're Up

Consistent with the Constitution, elected officials who have been "faithless and corrupt" may be kicked out of office under the provisions of chapter 87 of the Local Government Code. Those who may be removed under chapter 87 include the following officers:

- District attorney;
- County attorney;
- County judge;
- County commissioner;
- County clerk;
- District clerk;
- District and county clerk;
- County treasurer;
- Sheriff;
- County surveyor;
- County tax assessor-collector;
- Constable;
- Inspector of hides and animals;
- Justice of the Peace; and
- any other county officer whose office is created under the constitution or laws of Texas.⁷⁴

Although county auditors are not included in this list, they are not immune from removal. The official who pursues the ouster simply changes. In particular, if a “due investigation” by the district judge(s) who appointed the auditor results in proof that the auditor has committed official misconduct or is incompetent to faithfully discharge the duties of office, the auditor may be removed.⁷⁵ And there is another possibility that should be considered. The listing of officers subject to chapter 87 removal contains a “dragnet” provision sweeping in “any other county officer whose office is created under the ... laws of Texas.”⁷⁶ Of course, the office of county auditor is created under the Local Government Code.⁷⁷ At the same time, the Local Government Code chapter concerning auditors arguably contemplates the possibility that a conventional removal suit might be brought against an auditor. Specifically, it provides — within its requirement of continuing education — that “[f]or purposes of removal for incompetency under another law, ‘incompetency’ in the case of a county auditor includes the failure to complete the courses in accordance with this section.”⁷⁸

Chapter 87 actually encompasses two methods of removal. One is by conviction of an officer for certain offenses.⁷⁹ That prospect is discussed more fully below. The other means of removal is by a civil lawsuit for removal. Under the civil scheme for removal, a county officer may only be removed for one of the enumerated grounds after trial by jury.⁸⁰ In a civil action, county, district and precinct officers may be removed for:

- incompetency;
- official misconduct; or
- intoxication on or off duty caused by drinking an alcoholic beverage.⁸¹

Failure of an officer to execute a required bond in the time prescribed by law, or to give a new bond or additional security if required by law to do so, also may support removal.⁸² For those who enjoy an occasional (or more than occasional) adult beverage, an unusual defense to removal is available. That is, if a licensed Texas physician prescribed drinking the alcoholic beverage at issue, it is a defense to removal from office.⁸³ Some things from school days, such as doctor’s notes as an excuse, follow us all the way to our professional lives. In any case, the much more common grounds for removal are official misconduct and incompetency. Hence, those grounds will be the primary focus here.

A. Official Misconduct

While there may be a close relationship between “removal official misconduct” and “criminal official misconduct,” the two concepts are not one and the same.⁸⁴ Among other differences, the main one is that “criminal official misconduct” applies to all public servants, not just elected officials.⁸⁵ In a civil removal suit, “official misconduct” means:

intentional, unlawful behavior relating to official duties by an officer entrusted with the administration of justice or the execution of the law. The

term includes an intentional or corrupt failure, refusal, or neglect of an officer to perform a duty imposed on the officer by law.⁸⁶

Under this definition of “official misconduct,” an elected officer or county auditor⁸⁷ can only be removed for official misconduct if he or she violates a specific statutory duty that amounts to unlawful conduct.⁸⁸ Certain conflict of interest statutes provide that a violation of their provisions is official misconduct.⁸⁹ Overall, however, the term generally will include a violation of a criminal law, at least as far as it relates to the duties of office.⁹⁰ For example, official misconduct is made out where a law enforcement officer such as a sheriff or constable attempts to coerce a present or prospective witness in an official to testify falsely or withhold testimony or other information.⁹¹ Jailing someone without charges or colorable argument that the individual violated the law, which would constitute false imprisonment, or keeping an individual in jail until he or she pleads guilty, and jailing anyone who arrives to post bail for him or her, similarly constitute official misconduct.⁹² Willfully using county vehicles and fuel for private benefit constitutes misapplication or misappropriation, even though the same activity accomplishes legitimate public functions, and therefore stands as official misconduct.⁹³

Criminal violations aren’t the only breed of official misconduct, though. Commissioners may commit official misconduct by setting a tax rate that they know is wholly insufficient to operate the county.⁹⁴ For judges, an official misconduct claim is supportable where a judge issues arrest warrants without a complaint, assesses impermissible fees, or issues an arrest warrant where the underlying affidavit is unsigned and fails to state facts demonstrating probable cause.⁹⁵ Presenting false reimbursement claims, collecting illegal fees⁹⁶ and having recurring shortfalls in money for which an officer is responsible⁹⁷ also constitute arguable official misconduct. By contrast, however, failure to satisfy the constitutional residency requirement is not properly addressed by removal; instead, it is correctly the subject of a quo warranto action.⁹⁸

The fact that other officials may have acted similarly, but were not removed, is not a valid defense. A court directly addressing that argument flatly said that it is nothing more than “two wrongs make right,” and as such it lacks merit.⁹⁹ Nor is an argument that co-conspirators have yet to be held accountable likely to be particularly successful. A removal suit may properly be maintained against any member of a conspiracy to commit acts that fall within the definition of official misconduct, even if others are not sued successfully.¹⁰⁰ And if more than one act of official misconduct is charged, a true finding with respect to any one of them is sufficient to support a judgment of removal.¹⁰¹ Blaming one’s subordinates is no more effective. An official’s ability to delegate responsibility to others or rely on others for the performance of their duties does not relieve the official from his or her responsibility to supervise and control at least in a general way and in a reasonably efficient manner all affairs of his or her office.¹⁰² Maybe the most important false defense to be aware of is that of good faith. In a removal action,

the relevant inquiry is whether the elected official intentionally and knowingly engaged in conduct which constituted a violation of law, not whether he acted in good faith.¹⁰³

B. Incompetency

Unlike official misconduct, no showing of a statutory violation is required to sustain a claim of incompetency.¹⁰⁴ In the removal statute, “incompetency” doesn’t necessarily carry the same meaning as it does in common usage. It does not mean that an officer lacks ability and intelligence sufficient to perform his or her official duties of office.¹⁰⁵ Instead, “incompetency” for removal purposes means gross ignorance of official duties, gross carelessness in the discharge of official duties or unfitness or inability to promptly and properly discharge official duties because of a serious physical or mental defect which did not exist at the time of the officer’s election.¹⁰⁶ To be sure, a finding of incompetency requires more than a mere error in judgment.¹⁰⁷ But it is not enough to assert that the error was one made in good faith. “[A]n act may clearly be done honestly and in good faith, but still be grossly careless”¹⁰⁸

Incompetency sometimes is viewed essentially as a “catch-all” for conduct that is seen as worthy of formal condemnation, but which may be an uncertain basis of support for a finding of official misconduct. For example, a recent case involved a county commissioner’s use of county funds to refurbish his personal spray rig, which he informally discussed donating to the county during a subsequent private discussion with another commissioner.¹⁰⁹ The court found such evidence sufficient to support a finding of either “gross ignorance of official duties” or “gross carelessness in the discharge of those duties,” thereby eliminating the need to review whether the evidence was adequate to support a finding of official misconduct.¹¹⁰ Similarly, a sheriff’s mishandling of title paperwork relating to sales of vehicles held by the sheriff’s department was found sufficient to support a finding of incompetency.¹¹¹ Likewise, in addition to finding that the conduct constituted official misconduct, the court in *Stern v. State ex rel. Ansel* concluded that a district attorney’s release of grand jury testimony transcripts to the public was grossly careless, such that the judgment could be supported on an incompetency theory.¹¹² The fact that the district attorney also repeatedly subpoenaed an exotic dancer to appear before the grand jury despite having knowledge that she would invoke her Fifth Amendment privilege against self-incrimination, then asked her questions of a “highly personal and embarrassing nature”, further shored up the evidence of gross carelessness, in the court’s view.¹¹³

Certain failures are statutorily established as constituting “incompetency.” Primarily, these statutes focus upon failure to complete required training. For instance, incompetency includes a justice of the peace’s failure to successfully complete an 80-hour course on performance of the justice’s duties within the first year of office or a 20-hour course on that subject each following year.¹¹⁴ County commissioners also generally

are required to complete at least 16 hours of training in their duties each year to avoid the incompetency tag.¹¹⁵ The concept of incompetency includes a county treasurer who fails to complete an introductory course on the duties of that office during the first year of office or 20 hours of continuing education on those duties each year after the first year in office.¹¹⁶ Incompetency includes a county auditor's failure to complete during each term of office at least 40 classroom hours of coursework on the duties of office.¹¹⁷ Sheriffs must complete a 40-hour course on law enforcement not more than four years after taking office or fall within the incompetency trap.¹¹⁸ In the same vein, an elected law enforcement officer — specifically a sheriff — who fails to obtain a license from the Texas Commission on Law Enforcement Standards and Education not later than the second anniversary of the date the officer takes office is incompetent and subject to removal.¹¹⁹ A final significant potential for a finding of incompetency has been suggested by the attorney general. Though there is no direct statutory basis for the conclusion, the attorney general has opined that an officer's personnel policies may evidence incompetency, particularly if those policies clearly fail to serve the ends of ultimate performance of the officer's legal duties.¹²⁰

C. Procedure in Removal Suits

Another important aspect of removal to bear in mind is its time sensitivity. An act that occurred prior to the officer's election to office may not be used as the basis for a removal suit.¹²¹ This concept is sometimes referred to by courts as the "forgiveness doctrine."¹²² In the past, this rule was extended in all removal contexts and even to acts committed by an officer during a previous term of office before re-election.¹²³ That is not completely so anymore. The Texas Supreme Court has overruled its previous view that the "forgiveness doctrine" applied to prohibit removal based on a criminal conviction occurring before an officer's election. Instead, the court held that the statutory bar to removal for conduct pre-dating an officer's election applies only to civil removal suits and not to removal based on criminal prosecution.¹²⁴

1. Representation of State, Filing and Service

If grounds for removal exist, a chapter 87 proceeding is commenced by filing a written petition for removal in the district court of the county in which the officer resides, unless the officer is a district attorney. Where the defendant is a district attorney, the suit may be filed in the county in which the district attorney resides or the county where the alleged ground for removal occurred if that county is within the prosecutor's district.¹²⁵ The petition may be filed by any person who has resided in the county for at least six months and who is not presently under indictment.¹²⁶ At least one of the persons filing the petition must swear to it.¹²⁷ Swearing to the petition is no mere formality; it is a jurisdictional requirement to the suit going forward.¹²⁸ However, defects in the verification may be cured by amendment of the petition without the need for dismissing and re-filing the suit.¹²⁹

The petition must set forth the grounds for removal in plain and intelligible language, including specification of the time and place of each act alleged as a ground for removal with as much certainty as the nature of the case permits.¹³⁰ Based on a requirement of the Government Code, the petition probably will include a request that the judge of the court in which the suit is filed seek assignment of an out-of-county judge to dispose of the case.¹³¹

While a removal suit may initially be filed by a private party, maintaining the suit requires the participation of either the district or county attorney for the county in which the action is pending.¹³² As a general matter, the county attorney is the first-line representative of the state.¹³³ If the county attorney is the defendant, though, the district attorney represents the state.¹³⁴ Where no district attorney is available, the commissioners court of the county of suit must select the county attorney of an adjoining county, who then represents the state.¹³⁵

After the petition is filed, an application must be filed seeking an order requiring issuance and service of citation.¹³⁶ The trial court judge has discretion to refuse to order citation, in which case the suit is dismissed with costs charged to the party who filed the suit.¹³⁷ No appeal may be taken from that decision.¹³⁸ On the other hand, if the judge grants the order, the clerk must issue citation along with a certified copy of the petition.¹³⁹ In that instance, the judge must require the person filing the petition to post security for costs as in other civil cases.¹⁴⁰ Note, however, that if the person filing the petition is the county or district attorney, security for costs should not be required since the attorney brings the action in his or her capacity as the attorney for the state, which is exempt from any requirement of a cost bond.¹⁴¹ The order must include a deadline for the defendant to file an answer, which date must be at least five days after citation is served.¹⁴²

2. Suspension

The real hardship of a removal suit for the defendant can begin almost as soon as the order for issuance and service of citation is entered. Any time after the order for citation is issued, the judge may suspend the officer and appoint another person to perform the duties of office.¹⁴³ Suspension cannot take effect until the person appointed to serve during the suspension executes a bond with at least two sureties. Conditions and the amount of the bond are determined by the judge.¹⁴⁴ While a hearing probably is the preferred method of determining suspension, chapter 87 of the Local Government Code does not explicitly guarantee any hearing prior to suspension.¹⁴⁵ In any event, if the suspended officer wins at trial, the county must pay the officer from its general fund an amount equal to the compensation received by the temporary appointee.¹⁴⁶ While this may seem benevolent to the defendant officer, it actually suggests fairly convincingly that a chapter 87 suspension is without pay.¹⁴⁷ Simply put, if the officer is drawing a salary during suspension, what is the point of an after-the-fact payment of the substitute

officer's salary? In something of a double whammy, a chapter 87 suspension remains in effect during appeal of a removal judgment, regardless of whether the officer files a bond to delay execution of the judgment (referred to as a "supersedeas bond").¹⁴⁸

3. Trial and Judgment

Removal suits are to be conducted, to the extent possible, in accordance with the Texas Rules of Civil Procedure and practice applicable to civil cases in general.¹⁴⁹ Thus, a removal defendant can anticipate being served with discovery which has potential to reveal unflattering information to the State's lawyers and, potentially, to the whole world if the information is placed into the public domain of the court's records or introduced at trial. Although the potential embarrassment associated with disclosure of unflattering facts may be outweighed by the traumatic prospect of losing one's job, it is important to remember that the officer's reputation hangs in the balance in a removal scenario. To be candid, severe damage to the officer's name and standing often is done when the suit is filed or made public, regardless of the ultimate outcome. Consequently, whether to compound that damage through release of unpleasant information in the course of the proceedings is a significant factor to consider in deciding whether and how to defend the lawsuit.

If removal is to be the final result of the action, it must be reached through a jury trial.¹⁵⁰ Often, the State will demand a jury in its petition as provided by the constitution and chapter 87. Nonetheless, if the officer wants to avail himself or herself of that right, caution dictates consideration of the general rule that failure to make a timely jury demand results in waiver of the right to a jury.¹⁵¹ Moreover, since the right to trial by jury in a removal suit is not a jurisdictional issue, the failure to object in the trial court to entry of judgment without a jury (for example, by summary judgment) waives the ability to appeal on that basis.¹⁵²

As noted above, the case is required to be conducted as much like other civil cases as is possible.¹⁵³ For that reason, the defendant officer may be called to testify even if it is anticipated that he or she will invoke the right against self-incrimination and refuse to answer questions. In a removal suit, the right against self-incrimination may not be asserted as a blanket immunity from testifying; instead it is properly asserted on a question-by-question basis in response to each specific question asked.¹⁵⁴ There is another, related dilemma presented to an officer defending against a removal suit where the conduct in question may also give rise to criminal charges. No question of double jeopardy is involved in a chapter 87 civil proceeding, so the officer may be prosecuted criminally on the same charges either before or after the removal suit.¹⁵⁵ Nor is the State required to shoulder the heavy burden of proof applicable in criminal cases. Because the suit is civil, the standard of proof to sustain a removal judgment is preponderance of the evidence rather than "beyond a reasonable doubt."¹⁵⁶

After trial, either party may appeal a removal judgment.¹⁵⁷ While appeal of a removal judgment is not accelerated, it is to be given “precedence over the ordinary business of the court of appeals” and it “shall be decided with all convenient dispatch.” Consistent with this approach, the appellate mandate must issue within five days after the court renders judgment unless the trial court judgment was set aside or a supersedeas bond has been filed.¹⁵⁸

V. Criminal Conviction as Removal: Jobless in the Jailhouse

If one of the officers subject to chapter 87 is convicted by a jury of any felony or any misdemeanor involving official misconduct, the conviction operates as an immediate removal from office.¹⁵⁹ Though a jury trial is a matter of right for a defendant officer, that right may be waived by pleading guilty.¹⁶⁰ Thus, a judgment of conviction resulting from a guilty plea may validly operate to remove an officer.¹⁶¹ Where an official misconduct conviction occurs, the convicting court must order in the judgment that the officer be removed.¹⁶² Removal is required even if probation is granted.¹⁶³ In a case of removal by conviction, the requirement of a judgment is no procedural technicality. Unless there is a written judgment, there is no “conviction” for removal purposes.¹⁶⁴ Appeal of the conviction supersedes the removal order, but the trial court judge may suspend the officer pending appeal if the court finds that the public interest requires suspension.¹⁶⁵

The more elusive question is what, exactly, constitutes an offense “involving official misconduct.” The Code of Criminal Procedure defines “official misconduct” as “an offense that is an intentional or knowing violation of a law committed by a public servant while acting in an official capacity as a public servant.”¹⁶⁶ Prior to enactment of that provision, the Court of Criminal Appeals noted that “in a given situation there may be a close relationship between ‘removal official misconduct’ and ‘criminal official misconduct.’”¹⁶⁷ If the Code of Criminal Procedure definition applies, its reach is broad; it sweeps into its reach an official’s conduct committed while acting in an official capacity as a public servant, and is not limited to offenses that are willful and related to the duties of office.¹⁶⁸ How useful the definition may be for removal purposes certainly is not free from doubt, though, since the provision itself limits its application by stating the definition applies “[i]n this code”.¹⁶⁹ Thus, the provision appears intended to define a district court’s statutory jurisdiction over a misdemeanor involving “official misconduct,” rather than serving as a source of definition for Local Government Code section 87.031.¹⁷⁰

Unfortunately, very few statutes provide simple answers by expressly stating that violations of their provisions constitute official misconduct.¹⁷¹ Certainly, the Constitution itself provides some indication by declaring that commission of bribery, perjury or forgery renders a person ineligible to hold public office.¹⁷² And it shouldn’t be forgotten that conviction of any felony operates to remove an officer, regardless of

whether the conviction occurs before or after the officer's election.¹⁷³ Beyond that, however, the water gets a good bit murkier. Yet, some guidance is available.

The Texas Court of Criminal Appeals' apparently accepts that a violation of section 39.02 of the Penal Code, entitled "Abuse of Official Capacity," constitutes official misconduct so that a conviction under that provision operates as a removal from office.¹⁷⁴ That offense is committed by a public servant¹⁷⁵ if, with intent to obtain a benefit or with intent to harm or defraud another, the officer intentionally or knowingly:

- violates a law relating to the public servant's office or employment; or
- misuses government property, services, personnel, or any other thing of value belonging to the government that has come into the public servant's custody or possession by virtue of the public servant's office or employment.¹⁷⁶

For purposes of this provision, "misuse" is defined as dealing with property contrary to: an agreement under which the public servant holds the property; a contract of employment or oath of office of a public servant; a law, including provisions of the General Appropriations Act relating to government property, that prescribes the manner of custody or disposition of the property; or a limited purpose for which the property is delivered or received.¹⁷⁷ The term "law relating to a public servant's office or employment" also is specifically defined concerning the context of this crime. It means a law that specifically applies to a person acting in the capacity of a public servant and that directly or indirectly imposes a duty on the public servant or governs the conduct of the public servant.¹⁷⁸ A broad scope is read into the statute. Consequently, the required intent to benefit may extend to other individuals besides the officer.¹⁷⁹ At the same time, the required intent to benefit and to misuse government property, services, personnel or other thing of value can arise at the outset, during the course of or after misusing the pertinent item of value.¹⁸⁰ Moreover, the fact that a governmental purpose was served in addition to the private benefit will not insulate the defendant, at least if the private benefit results in government expenditure exceeding the amount related to the purely public purpose.¹⁸¹

Beyond that provision, it should be remembered that the state's highest criminal court recognizes a "close relationship" may exist between "removal official misconduct" and "criminal official misconduct."¹⁸² Based on this interpretation, a prudent county officer who is entrusted with the administration of justice or execution of the law should anticipate that any criminal offense with an intent element that relates to the officer's duties, or would involve an intentional or corrupt failure, refusal or neglect of the officer to perform a duty imposed by law, may constitute official misconduct such that a conviction of the offense will result in removal.¹⁸³ The critical issue in this context is whether the penal statute relates to the officer's duties. If it does, the probability that a crime under that provision will be considered "official misconduct" increases substantially.¹⁸⁴

VI. Other Problem Areas

Quo warranto under chapter 66 of the Civil Practice and Remedies Code and removal under chapter 87 of the Local Government Code are probably the most prominent of the laws that implicate loss of employment as an elected official. But they're certainly not the only ones that can cause discomfort, anxiety or even unemployment. While the potential for running into trouble by doing something that might be seen as unethical is much too broad to be covered in anything less than a multi-volume treatise, some of the statutory minefields county officers must avoid or navigate seem to present recurring difficulties. They are examined here.

A. Nepotism: Don't Pick Employees from the Family Tree

Chapter 573 of the Government Code defines "public official" to include an officer of a district, county, precinct or other political subdivision of the State, an officer or member of a board of a district, county or other political subdivision of the state or a judge of a court created by or under a Texas statute.¹⁸⁵ Just about any imaginable officer within county government fits somewhere in this broad description. That means the whole array of district, county and precinct officers are subject to the Government Code's regulation of nepotism.

Understanding nepotism requires a familiarity with certain terms of art in chapter 573. Of course, the generic idea of nepotism isn't that hard to comprehend. An official shouldn't use a position of authority to hire a family member, directly or indirectly. But the statute uses certain terms to describe the boundaries of that prohibition. Regrettably, the statutory definition of those terms is a bit complicated. The key concepts in the nepotism statute are "consanguinity" and "affinity," along with the degree of relationship under each. The concepts are important because the nepotism law limits its application to relationships within the third degree of consanguinity or within the second degree of affinity.¹⁸⁶

1. Consanguinity

Two individuals are related to each other by consanguinity if one is a descendant of the other or they share a common ancestor.¹⁸⁷ In other words, consanguinity is relation by blood. One notable exception to the simple explanation is adopted children. An adopted child is considered to be a child of the adoptive parent for nepotism purposes.¹⁸⁸ Computing the degree of relation by consanguinity can be mind-numbingly confusing. At first glance, it may seem simple enough: the degree of relationship by consanguinity between an individual and the individual's descendant is determined by the number of generations that separate them.¹⁸⁹ Thus, a parent and child are related in the first degree, a grandparent and grandchild in the second degree, a great-grandparent and great-

grandchild in the third degree and so on.¹⁹⁰ Confusion creeps into the mix when two individuals are related by blood, but neither is a descendant of the other. In that case, the degree of relation is calculated by adding:

- the number of generations between the individual and the nearest common ancestor of the individual and the individual's relative; and
- the number of generations between the relative and the nearest common ancestor.¹⁹¹

If you do the math, you discover that this calculation scheme doesn't exactly square with common notions of relation. For example, a person's "first" cousin would be the child of the person's aunt or uncle. But using the statutory calculation method, a person's first cousin is related to the person in the fourth degree. That's so because the nearest common ancestor between the person and the first cousin would be the grandparents. There are two generations between the person and the person's grandparents, as well as two degrees between the first cousin and the grandparents.¹⁹² Add those generations together and you get four, which is the degree of relation for nepotism purposes.¹⁹³ Fortunately, the statute provides a listing of the first three degrees of relation. As described by the statute, an individual's relatives within the third degree of consanguinity are the individual's:

- parent or child (relatives in the first degree);
- brother, sister, grandparent or grandchild (relatives in the second degree); and
- great-grandparent, great-grandchild, aunt who is a sister of a parent of the individual, uncle who is a brother of a parent of the individual, nephew who is a child of a brother or sister of the individual, or niece who is a child of a brother or sister of the individual (relatives in the third degree).¹⁹⁴

2. Affinity

Relation by affinity exists if two individuals:

- are married to each other; or
- the spouse of one of the individuals is related by consanguinity to the other individual.¹⁹⁵

Thus, in everyday language, affinity is relation by marriage or the commonly-understood relation of "in-laws." As one might guess, relation by affinity — as created by a marriage — ends upon divorce or death of a spouse.¹⁹⁶ But an important exception exists here, too. If a child of the marriage is living, the marriage is considered to continue for affinity purposes as long as the child of the marriage lives.¹⁹⁷ Computing degrees of affinity is fairly straightforward, at least initially. A husband and wife are related in the first degree of affinity.¹⁹⁸ After that, the degree of relationship is the same as the degree

of underlying relationship by consanguinity.¹⁹⁹ So, if two individuals are related to each other in the second degree of consanguinity, the spouse of one of the individuals also is related to the other individual in the second degree by affinity.²⁰⁰ From this, we may reason that individuals within the second degree of affinity include:

- the parent or child (*e.g.*, a stepchild) of a spouse (relatives in the first degree by affinity);
- the brother, sister, grandparent or grandchild of a spouse (relatives in the second degree by affinity);
- the spouse of an individual's parent (*e.g.*, a stepparent) or child (relatives in the first degree by affinity); and
- the spouse of an individual's brother, sister, grandparent (*e.g.*, step-grandparent) or grandchild (relatives in the second degree by affinity).²⁰¹

3. Impact of Relation by Consanguinity or Affinity

So why does all this genealogical gymnastic work matter? The answer is that employment decisions about people within the third degree of consanguinity or the second degree of affinity to an elected officer have to be viewed through the lens of the statutory nepotism prohibition. That states:

A public official may not appoint, confirm the appointment of, or vote for the appointment or confirmation of the appointment of an individual to a position that is to be directly or indirectly compensated from public funds or fees of office if:

- (1) the individual is related to the public official within [the third degree of consanguinity or the second degree of affinity]; or
- (2) the public official holds the appointment or confirmation authority as a member of a state or local board, the legislature, or a court and the individual is related to another member of that board, legislature or court within [the third degree of consanguinity or the second degree of affinity].²⁰²

Similarly, a candidate for office is prohibited from acting to influence an employee of the office to which the candidate seeks election or an employee or another officer of the governmental body to which the candidate seeks election, if the position sought is an office on a multi-member governmental body, regarding the employment of another individual related to the candidate within the third degree of consanguinity or the second degree of affinity.²⁰³ Action concerning a specific employee or prospective employee is required to implicate this provision. The prohibition does not apply to a candidate's actions taken regarding a legitimate class or category of employees or prospective employees.²⁰⁴ The nepotism prohibition also extends to "trading"; that is, appointing,

confirming the appointment or voting to appoint or confirm the appointment of another public official's relative within the prohibited degrees of relation in consideration for the other public official doing the same for the first public official.²⁰⁵ Delegating hiring authority to an employee in a particular case will not avoid these prohibitions.²⁰⁶

There is an exception to the main nepotism prohibition that periodically presents itself. If a relative within the degrees covered by the nepotism law is employed in a position immediately before the election or appointment of the public official to whom the person is related and that prior employment is continuous for at least 30 days (if the public official is appointed), six months (if the public official is elected at an election other than the general election for state and county officers) or one year (if the public official is elected at the general election for state and county officers), the prohibition under section 573.041 does not apply.²⁰⁷ Where a relative remains employed under this exception, the public official to whom the employee is related may not participate in any deliberation or voting on the appointment, reappointment, confirmation of the appointment or reappointment, employment, reemployment, change in status, compensation or dismissal of the individual unless the decision will apply to a legitimate class or category of employees.²⁰⁸

The Legislature is serious about this subject. A public officer who violates the nepotism prohibitions or fails to strictly comply with the requirements of the continuous employment exception "shall be removed from the individual's position."²⁰⁹ Furthermore, violation of the nepotism prohibitions, the abstention requirements of the continuous employment exception or the prohibition against paying compensation to an employee whose employment violates the nepotism prohibitions²¹⁰ is an offense involving official misconduct.²¹¹ In addition to removal upon conviction, the officer may be punished by a fine of not less than \$100 or more than \$1,000.²¹²

B. Conflict of Interest: Dipping into More than One Cookie Jar

Another area of constraint that should be considered in county government is any direct or collateral interests the commissioners have in the subject of commissioners court action. Given that whoever performs the duties of the county clerk is the clerk of the commissioners court,²¹³ the matter may be of some relevance to that person. So it may be useful to be at least sort of familiar with the need the requirements commissioners need to fulfill, including filing requirements.²¹⁴ The topic receives scrutiny under three separate chapters of the Local Government Code.

1. Chapters 81 and 171

Initially, section 81.002 of the Local Government Code provides, in pertinent part:

Before undertaking the duties of the county judge or a county commissioner, a person must take the official oath and swear in writing that the person will not be interested, directly or indirectly, in a contract with or claim against the county except:

- (1) a contract or claim expressly authorized by law; or
- (2) a warrant issued to the judge or commissioner as a fee of office.²¹⁵

As the attorney general sees it, section 81.002 creates a strict rule against conflicts of interest, but it has been partially repealed by chapter 171 of the Local Government Code.²¹⁶ Chapter 171 addresses the question of conflict of interest by stating that a county judge or county commissioner who has a substantial interest in a business entity or in real property must file an affidavit stating the nature and extent of his or her interest and abstain from voting or participating in any matter affecting the judge's or commissioner's interest.²¹⁷ If any budget item is specifically dedicated to a contract with a business entity in which a commissioner or the county judge has a substantial interest, the commissioners court must take a separate vote on that item.²¹⁸ So long as the contract item is voted upon separately, the interested commissioner or judge may vote on the final budget.²¹⁹ Similarly, if a majority of the other members of the commissioners court are required to and do file affidavits disclosing similar interests, the commissioner or judge is not required to abstain from further participation in the matter requiring the affidavit.²²⁰

The filing and abstention requirements are triggered if, in the case of a substantial interest in a business entity, the proposed action will have a special economic effect on the business entity that is distinguishable from the effect on the public.²²¹ Likewise, the interested commissioner or judge must file the affidavit and abstain from voting or participating if his or her interest in real property will be the reasonably foreseeable recipient of a special economic effect on the value of the property.²²² In the case of a business entity, a commissioner has a "substantial interest in a business entity" if the commissioner or anyone related within the first degree by consanguinity or affinity to the official:

- (1) ... owns 10 percent or more of the voting stock or shares of the business entity or owns either 10 percent or more or \$15,000 or more of the fair market value of the business entity; or
- (2) ... received [funds] ... from the business entity [totaling more than] 10 percent of the person's gross income for the previous year.²²³

The relatives contemplated by this statute include the parent, child, parent's or child's spouse, spouse and spouse's parent or child with regard to the commissioner or judge.²²⁴

A commissioner or judge, or relative of the commissioner or judge as described above, has a substantial interest in real property if the interest is an equitable or legal ownership with a fair market value of \$2,500 or more.²²⁵

Failure to abide by the restrictions of the chapter 171 does not void the action of the commissioners court unless the measure at issue would not have passed without the vote of the person who violated chapter 171.²²⁶ Enforcement instead focuses upon punishing the particular offender. Specifically, a commissioner or county judge who knowingly violates section 171.004, acts as a surety for a business entity that has work, business or a contract with the county or acts as a surety on any official bond required of an officer of the county commits a class A misdemeanor.²²⁷ A red flag should go up here. Since an offense under chapter 171 pretty clearly relates to the commissioner's or the judge's duties of office, it may be seen to constitute "official misconduct" which could subject the commissioner or judge to removal upon conviction.²²⁸

2. Chapter 176

Perhaps no bigger headache for officers of county government has emerged from the Legislature in recent years than chapter 176 of the Local Government Code. Chapter 176 applies certain disclosure requirements to a "local government officer." That term means a member of the governing body of a local governmental entity or a director, administrator, president or other person designated as the executive officer of a local governmental entity.²²⁹ A "local governmental entity" includes a county, but may also be any other political subdivision of the State, including a local government corporation, board, commission, district or authority to which a member is appointed by the commissioners court of a county.²³⁰

To try and simplify the matter to the extent possible, this discussion will focus on counties and commissioners courts. It should be remembered, though, that other governmental entities are included within chapter 176's requirements. In substance, chapter 176 requires a commissioners court member to file a conflicts disclosure statement regarding any person or agent of that person who seeks to contract for the sale or purchase of property, goods or services with the county if:

- the person has contracted with the county or the county is considering doing business with the person; and
- the person has an employment or other business relationship with the commissioners court member or a family member of the officer that results in the officer or family member receiving taxable income; or
- has given to the commissioners court member or a family member of the officer one or more gifts, other than food, lodging, transportation or entertainment accepted as a guest, that have an aggregate value of more than \$250 within the 12-month period before the date the officer becomes aware that a contract between

the county and the person has been executed or the county considers doing business with the person.²³¹

Again, the family members contemplated here include a parent, child, parent's or child's spouse, spouse and spouse's parent or child of a commissioners court member.²³² The term "business relationship" means "a connection between two or more parties based on commercial activity of one of the parties."²³³ If the business relationship results in receipt of taxable income, other than investment income — which includes funds generated by a personal or business checking or savings account, share draft or share account or other similar account, a personal or business investment or a personal or business loan — then a conflicts disclosure statement must be filed.²³⁴ A cautious approach is appropriate in light of the statute's specific reliance on the concept of receiving taxable income from the person at issue. Thus, the relevant business relationship could include, for example, employment or a consulting contract.

Upon becoming aware of the facts triggering the requirement to file the conflicts disclosure statement, the commissioners court member has until 5 p.m. on the seventh business day after gaining that knowledge to file the statement with the records administrator of the county.²³⁵ The statute requires the Texas Ethics Commission to generate the form of the disclosure statement,²³⁶ and that form may be found on the commission's website, at http://www.ethics.state.tx.us/whatsnew/conflict_forms.htm. The form requires:

- disclosure of the employment or business relationship, including the nature and extent of the relationship; and
- disclosure of gifts received by the commissioners court member or a family member of the officer from the person at issue within the relevant 12-month period if the aggregate value of the gift or gifts is more than \$250;
- acknowledgment by the commissioners court member that the disclosure applies to each relevant family member of the officer and it covers the relevant 12-month period; and
- the signature of the commissioners court member acknowledging that the statement is made under oath under penalty of perjury.²³⁷

A knowing violation of the requirement to file the conflicts disclosure statement is a class C misdemeanor.²³⁸ However, a defense is available if, within seven days of being notified of a violation, the commissioners court member files the required conflicts disclosure statement.²³⁹

But, wait, you say. You're not a member of the commissioners court. Why is any of this even slightly relevant to you? Aside from any recordkeeping implications, the answer is that some leeway is given to the commissioners court to allow other county officers and employees to share in the fun. The statute authorizes the commissioners

court to extend the conflicts disclosure statement requirements to any employee of the county who has the authority to approve contracts on behalf of the county.²⁴⁰ Under this authority, the commissioners court may reprimand, suspend, or terminate the employment of an employee who fails to comply with the requirement if required to do so by the commissioners court.²⁴¹ That a commissioners court could take such disciplinary action against an employee of a department under direct control of the court seems logical enough. However, this provision creates some conflict with the historic rules that elected county officers control the employment decisions over their staff and the commissioners court may not attempt to influence the appointment of any person to a position of employment authorized by the court.²⁴² Likewise, some positions — such as the county auditor — are expressly removed from the control of the commissioners court.²⁴³ This tension is underscored by decisions that have interpreted these provisions as prohibiting the commissioners court from terminating an elected official’s employee or otherwise dictating the terms of employment for employees within the official’s office,²⁴⁴ although the new provision could be argued to represent the express authority that the commissioners court lacked in those cases. How that tension will be resolved remains to be seen.

Another aspect of the disclosure law should be considered in conducting county business. Vendors who may have the relevant relationship with a commissioners court member are required to file a conflict of interest questionnaire with the county records administrator within a timeframe similar to that applicable to a commissioner court member.²⁴⁵ Common sense counsels that requiring vendors to reveal their business relationships may chill their desire to do business with the county and thereby reduce the available pool of contractors from whom the county can obtain its necessary goods and services. Whether that proves to be true also remains to be seen. Either way, the disclosure requirements of chapter 176 do not replace those imposed by chapter 171.²⁴⁶

VII. Talk Isn’t Always Cheap: Ethics Advisory Op. 484

In August of last year, the Texas Ethics Commission dropped a little bomb on Texas elected officials which may cause substantial fallout. Specifically, on August 6, the Ethics Commission issued Ethics Advisory Opinion No. 484. The question addressed was:

May an elected officeholder accept transportation, meals, and lodging from a corporation or labor organization in return for addressing an audience or participating in a seminar when the reason they are asked to participate is their public position or duties and the service is more than perfunctory?²⁴⁷

The opinion initially noted that such payments potentially were “honoraria” within the reach of section 36.07 of the Penal Code.²⁴⁸ However, the opinion further observed that such “honoraria” would be exempted from the Penal Code provision as long as the event

in question was a conference or similar event in which the services provided by the officeholder were more than perfunctory.²⁴⁹ The opinion then analyzed whether such expenditures on behalf of an officeholder might run afoul of the lobby law restrictions in the Government Code, but again concluded that they would be exempt if the officeholder's services at the event were more than perfunctory and the lobbyist providing the payment was present at the event.²⁵⁰ Then came the disturbing part of the missive.

After reviewing the Penal Code and Government Code implications of the question, the Ethics Commission turned to whether the facts presented a potential violation of the campaign finance laws within the Election Code. Under the Election Code, a "contribution" is a direct or indirect transfer of money, goods, services, or any other thing of value and includes an agreement to make such a transfer.²⁵¹ A "political contribution" includes a campaign contribution or an officeholder contribution.²⁵² In turn, an "officeholder contribution" is a contribution to an officeholder that is offered or given with the intent that it be used to defray expenses that are incurred by the officeholder in performing a duty or engaging in an activity in connection with the office and are not reimbursable with public money.²⁵³ At the same time, the commission noted, the Election Code prohibits a corporation or labor organization from making a political contribution to a candidate or officeholder, as well as a candidate or officeholder from knowingly accepting a contribution he or she knows to be prohibited.²⁵⁴ Significantly, the corporations covered by the Election Code include both standard profit-oriented corporations and nonprofit corporations.²⁵⁵ With all this in mind, the commission concluded:

Anytime an officeholder benefits from money spent by a corporation or labor organization, a fact question arises as to whether the corporation has given a thing of value to the officeholder for purposes of one of the laws under the Ethics Commission's jurisdiction. Pursuant to Title 15 of the Election Code, an elected officeholder may not accept transportation, meals, and lodging from a corporation or labor organization in return for addressing an audience or participating in a seminar if the officeholder's services are in connection with his or her duties or activities as an officeholder. This advisory opinion is intended to provide guidance for future activity and not intended to criminalize past activity.²⁵⁶

The "criminalize" aspect of the opinion shouldn't be casually overlooked. If, as the opinion suggests, accepting reimbursement from a nonprofit corporation for speaking at its event violates the Election Code, that violation is a third-degree felony as to both the officeholder and the corporation.²⁵⁷ Seeing as how a number of seminars and conferences at which elected officeholders speak are put on by associations that are organized as nonprofit corporations, and how the Ethics Commission sees an officeholder's speaking services at those events as fairly uniformly standing "in

connection with his or her duties or activities as an officeholder”, the potential criminal implications are ominous. So, the question becomes whether there is any way to lawfully speak at a wide range of civic and professional functions without paying for the opportunity out of the officeholder’s own pocket in order to avoid a felony rap.

Most significantly, the answer seems to lie in the county’s interest in the officeholder’s participation at the event. Specifically, in Ethics Advisory Op. No. 368 (1997), the Ethics Commission was asked “[w]hether a judge may accept an offer from the sponsor of a legal seminar to allow the judge to attend the seminar at no cost.” The Commission assumed that a legal seminar is related to the judge’s performance of his or her legal duties. But the judge requesting the opinion informed the Commission that, if he had paid a fee to attend the seminar in question, the fee would have been reimbursable with county funds. Since it was offered at no cost to the judge, however, county reimbursement never occurred. Under those circumstances, the Commission found that, because the seminar “would be reimbursable with public funds,” it was not an officeholder contribution to the judge.

Advisory Op. 368 has not been overruled, modified or superseded.

The significance of the reasoning in Op. No. 368 is its conclusion that provision of a benefit to an officeholder is removed from the realm of being an “officeholder contribution” not only where the expenditure is *actually* charged and reimbursed from public funds, but where it *would properly be* reimbursable with public funds. In the opinion, it was expressly represented that no fee actually was to be charged. Regardless, because the non-assessed fee could have been reimbursed from public funds if it had, in fact, been assessed, the benefit was not an officeholder contribution in the eyes of the Ethics Commission.

At the same time, there is no language in Elec. Code § 251.001(4) or Op. 368 that would limit that rationale to simple attendance at a seminar. If it is accepted for the sake of argument that speaking to a group’s members is a duty or activity in connection with the office, reimbursement of expenses for that speaking engagement still would not seem to be an “officeholder contribution” if those expenses could have properly been reimbursed from public funds, even if that didn’t actually happen.

VIII. Conclusion (Finally!)

A paper can’t even scratch the surface of the particular ways a county official can wind up on hot water. But understanding the general problem areas, and the consequences when those problems arise, can help point you in the right direction toward staying out of court and the unemployment line. In the end, a bit of practical advice may be useful, too. No one rightly expects every county official to know every nook and cranny of the laws that may pave the road out of elected office. But your district or

county attorney is likely to be more familiar with them than many folks. When in doubt, ask them for an opinion about your duties and issues that arise in connection with performing them. They're required to give it to you.²⁵⁸ Just be sure you do it before they come knocking on your door to ask you about the matter. Everyone will be happier that way.

ENDNOTES

¹ TEX. CONST. art. V, § 24.

² TEX. CONST. art. XV, § 7.

³ See *Meyer v. Tunks*, 360 S.W.2d 518, 520 (Tex. 1962) (county officers, specifically including sheriffs); *State ex rel. White v. Bradley*, 956 S.W.2d 725, 736 (Tex. App.—Fort Worth 1997), *rev'd on other grounds*, 990 S.W.2d 245 (Tex. 1999) (officers of general-law municipality).

⁴ TEX. CONST. art. XVI, § 2.

⁵ See *In re Bazan*, 251 S.W.3d 39, 43 (Tex. 2008) (stating that, by virtue of TEX. CONST. art. XVI, § 2, TEX. ELEC. CODE ANN. § 141.001(a)(4) (Vernon 2010) and TEX. LOC. GOV'T CODE ANN. § 87.031(a) (Vernon 2008), “[a]n individual convicted of a felony is thus ineligible to hold public office whether the conviction comes before or after the individual’s election to office.”); *Perez v. State*, 11 S.W.3d 218, 221 (Tex. Crim. App. 2000) (holding that felony driving while intoxicated conviction was not “high crime” so as to disqualify juror).

⁶ See *Dorenfeld v. State ex rel. Allred*, 123 Tex. 467, 73 S.W.2d 83, 86-87 (1934) (where Constitution speaks to removal and disqualification, Legislature is unauthorized to provide for removal by other modes); *Childress County v. Sachse*, 310 S.W.2d 414, 419 (Tex. Civ. App.—Amarillo 1958), writ *ref'd n.r.e.*, 158 Tex. 371, 312 S.W.2d 380 (1958) (same).

⁷ As will be seen, two of those procedures are related by virtue of their common concern with “official misconduct.” Compare TEX. LOC. GOV'T CODE ANN. § 87.013(a)(2) (Vernon 2008) (including official misconduct as ground for removal in civil proceeding), with TEX. LOC. GOV'T CODE ANN. § 87.031(a) (Vernon 2008) (conviction of county officer by petit jury for felony or misdemeanor involving official misconduct operates as immediate removal from office).

⁸ Logically, as indicated by the subject matter of these provisions, this mode of removal applies only to judges.

⁹ *Save Our Springs Alliance, Inc. v. Lazy Nine Mun. Util. Dist.*, 198 S.W.3d 300, 310 (Tex. App.—Texarkana 2006, *pet. denied*) (quoting *State ex rel. Colleyville v. City of Hurst*, 519 S.W.2d 698, 700 (Tex. Civ. App.—Fort Worth 1975, writ *ref'd n.r.e.*)).

¹⁰ *Cox v. Perry*, 138 S.W.3d 515, 517 (Tex. App.—Fort Worth 2004, no *pet.*).

¹¹ *Robinson v. Neeley*, 192 S.W.3d 904, 909 (Tex. App.—Dallas 2006, no *pet.*); *accord Newsom v. State*, 922 S.W.2d 274, 277 (Tex. App.—Austin 1996, writ *denied*) (State of Texas is real plaintiff in quo warranto proceeding).

¹² See *Reed v. Prince*, 194 S.W.3d 101, 105 (Tex. App.—Texarkana 2006, *pet. denied*) (since only attorney general or county or district attorney of appropriate county may bring quo warranto action, private individual lacked standing to bring quo warranto action for removal of sheriff), *cert. denied*, 127 S.Ct. 1882 (U.S. 2007); *cf.* TEX. CONST. art. V, § 21 (State of Texas is represented in trial courts by county attorney or district attorney).

¹³ *Rivera v. City of Laredo*, 948 S.W.2d 787, 790 (Tex. App.—San Antonio 1997, writ *denied*).

¹⁴ *Cox*, 138 S.W.3d at 517; *Toyah Indep. Sch. Dist. v. Pecos-Barstow Consol. Indep. Sch. Dist.*, 497 S.W.2d 455, 456-57 (Tex. Civ. App.—El Paso 1973, writ *ref'd n.r.e.*), *cert. denied*, 415 U.S. 991, 94 S.Ct. 1590, 39 L.Ed.2d 887 (1974).

¹⁵ *Hunt v. City of Longview*, 932 F.Supp. 828, 834-35 (E.D. Tex. 1995) (applying Texas law), *aff'd*, 95 F.3d 49 (5th Cir. 1996).

¹⁶ *Rosell v. Central W. Motor Stages, Inc.*, 89 S.W.3d 643, 651 (Tex. App.—Dallas 2002, *pet. denied*); *Lewis v. Drake*, 641 S.W.2d 392, 395 (Tex. App.—Dallas 1982, orig. proceeding).

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- ¹⁷ *Meyer*, 360 S.W.2d at 520.
- ¹⁸ *State ex rel. Kelly v. Baker*, 580 S.W.2d 611, 613 (Tex. Civ. App.—Amarillo 1979, no writ).
- ¹⁹ *Harper v. Taylor*, 490 S.W.2d 227, 230 (Tex. Civ. App.—Beaumont 1972, no writ).
- ²⁰ *See also* TEX. CONST. art. XV, § 7 (requiring Legislature to provide for trial and removal from office).
- ²¹ *See State ex rel. Dishman v. Gary*, 163 Tex. 565, 359 S.W.2d 456, 458 (1962) (explaining that article 5, section 24 and statutory predecessors to chapter 87 “relate to the removal of certain officers”); *see also State ex rel. Russell v. Knorpp*, 575 S.W.2d 401, 403 (Tex. Civ. App.—Amarillo 1978, writ ref’d n.r.e.) (legislature enacted statutory predecessors to chapter 87 pursuant to direction of article 5, section 24 and article 15, section 7); *cf.* Act of May 1, 1987, 70th Leg., R.S., ch. 149, §§ 1, 49, 51, 1987 Tex. Gen. Laws 707, 805-08, 1307-08 (repealing TEX. REV. CIV. STAT. arts. 5968-73, 5975-83, 5987, recodifying same without substantive change in law at TEX. LOC. GOV’T CODE ANN. §§ 87.001, 87.011-.019 (Vernon 2008)).
- ²² *Reyna v. State*, 319 S.W.2d 28, 29 (Tex. Civ. App.—San Antonio 1958), *aff’d*, 160 Tex. 404, 333 S.W.2d 832 (1960).
- ²³ *Baker*, 580 S.W.2d at 614.
- ²⁴ *See State ex rel. Downs v. Harney*, 164 S.W.2d 55, 57 (Tex. Civ. App.—San Antonio 1942, writ ref’d w.o.m.) (“Procedure for suits for removal under § 24, Art. 5, of the Constitution, and Art. 5970, including definitions of “incompetency” and “official misconduct,” are prescribed in detail in Arts. 5971 through 5983.”).
- ²⁵ Generally, the county attorney must represent the State of Texas in a removal action. *See* TEX. LOC. GOV’T CODE ANN. § 87.018(d) (Vernon 2008). Under some circumstances, a district attorney may represent the State instead. *See id.* at (e), (f) (district attorney represents State in suit to remove county attorney, or may represent State in suit to remove county or district attorney in neighboring county).
- ²⁶ *State ex rel. Angelini v. Hardberger*, 932 S.W.2d 489, 490 (Tex. 1996).
- ²⁷ TEX. CIV. PRAC. & REM. CODE ANN. § 66.001(1) (Vernon 2008).
- ²⁸ *Id.* at (2).
- ²⁹ MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 1302 (10th Ed. 1996).
- ³⁰ BLACK’S LAW DICTIONARY 1543 (7th Ed. 1999).
- ³¹ *See Phagan v. State ex rel. Eyssen*, 510 S.W.2d 655, 662 (Tex. Civ. App.—Fort Worth 1974, writ ref’d n.r.e.).
- ³² *Scolaro v. State ex rel. Jones*, 1 S.W.3d 749, 756 (Tex. App.—Amarillo 1999, no pet.).
- ³³ *State v. Fischer*, 769 S.W.2d 619, 621 (Tex. App.—Corpus Christi 1989, writ dism’d w.o.j.).
- ³⁴ *Cox*, 138 S.W.3d at 518.
- ³⁵ *See* TEX. CONST. art. XVI, § 17 (providing that officer continues in office until successor qualifies for and takes office).
- ³⁶ *See Robinson v. State ex rel. Eubank*, 28 S.W. 566, 567 (Tex. Civ. App. 1894), *writ dism’d*, 87 Tex. 562, 29 S.W. 649 (1895).
- ³⁷ *Crawford v. State*, 153 S.W.3d 497, 505 (Tex. App.—Amarillo 2004, no pet.).
- ³⁸ *See Crawford*, 153 S.W.3d at 506.
- ³⁹ *See* TEX. CIV. PRAC. & REM. CODE ANN. § 66.003(3) (Vernon 2008).
- ⁴⁰ *State ex rel. La Crosse v. Averill*, 110 S.W.2d 1173, 1176 (Tex. Civ. App.—San Antonio 1937, writ ref’d); *accord Rosell*, 89 S.W.3d at 651; *Lewis*, 641 S.W.2d at 395.

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- ⁴¹ See, e.g., TEX. CONST. art. XVI, § 14 (requiring district and county officers to reside in their respective district or county; providing that officer who fails to comply with requirement vacates office); TEX. LOC. GOV'T CODE ANN. § 86.0021(b) (Vernon 2008) (constable who fails to present evidence to commissioners court within 270 days of taking office that he or she has peace officer license, or to maintain such license, forfeits office). These provisions are indicative of provisions that prescribe forfeiture of office as the result of noncompliance, in that they do so expressly.
- ⁴² *Shields v. State*, 936 S.W.2d 711, 713 (Tex. App.—Austin 1996, no writ).
- ⁴³ *Newsom*, 922 S.W.2d at 278.
- ⁴⁴ See *Bradley v. State ex rel. White*, 990 S.W.2d 245, 250 (Tex. 1999) (officer's showing that he was not lawfully removed from office "conclusively negated an element of the State's quo warranto action").
- ⁴⁵ TEX. CIV. PRAC. & REM. CODE ANN. § 66.002(a) (Vernon 2008).
- ⁴⁶ *Id.* at (c).
- ⁴⁷ *Save Our Springs Alliance*, 198 S.W.3d at 311; *Reed*, 194 S.W.3d at 105.
- ⁴⁸ TEX. CIV. PRAC. & REM. CODE ANN. § 66.002(a) (Vernon 2008).
- ⁴⁹ *Woodson Indep. Sch. Dist. v. State ex rel. Cox*, 130 S.W.2d 1038, 1039 (Tex. Civ. App.—Eastland 1939, writ dismissed judgment corrected).
- ⁵⁰ See TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a)(1), (2) (Vernon 2002).
- ⁵¹ TEX. CIV. PRAC. & REM. CODE ANN. § 66.002(b), (c) (Vernon 2008).
- ⁵² *Gifford v. State ex rel. Lilly*, 525 S.W.2d 250, 252 (Tex. Civ. App.—Waco 1975, writ dismissed by agreement).
- ⁵³ See TEX. CIV. PRAC. & REM. CODE ANN. § 66.002(d) (Vernon 2008) ("If there is probable ground for the proceeding, the judge shall grant leave to file the information, order the information to be filed, and order process to be issued.") (emphasis added).
- ⁵⁴ Compare TEX. LOC. GOV'T CODE ANN. § 87.016(c) (Vernon 2008) (if judge refuses to order citation, no appeal or writ of error may be taken concerning judge's decision), with *State ex rel. Manchac v. City of Orange*, 274 S.W.2d 886, 888 (Tex. Civ. App.—Beaumont 1955, no writ) (trial judge's refusal to grant leave to file information in quo warranto is reviewable on appeal); *State ex rel. Thornhill v. Huntsaker*, 17 S.W.2d 63, 65 (Tex. Civ. App.—Amarillo 1929, no writ) (same).
- ⁵⁵ *Huntsaker*, 17 S.W.2d at 65.
- ⁵⁶ TEX. CIV. PRAC. & REM. CODE ANN. § 66.002(d) (Vernon 2008); see also *Gifford*, 525 S.W.2d at 252 (quo warranto suit is civil proceeding governed by rules applicable to all civil actions).
- ⁵⁷ See *Gifford*, 525 S.W.2d at 252.
- ⁵⁸ See TEX. CONST. art. V, § 24.
- ⁵⁹ Compare TEX. LOC. GOV'T CODE ANN. § 87.018(a) (Vernon 2008), with TEX. CIV. PRAC. & REM. CODE ANN. § 66.003 (Vernon 2008).
- ⁶⁰ See TEX. CONST. art. I, § 15 (generally guaranteeing availability of jury trial), art. V, § 10 (providing for jury trial in all "causes").
- ⁶¹ See TEX. R. CIV. P. 276 ("No jury trial shall be had in any civil suit, unless a written request for a jury trial is filed with the clerk of the court a reasonable time before the date set for trial of the cause on the non-jury docket, but not less than thirty days in advance."); accord *State v. Landry*, 793 S.W.2d 281, 284 (Tex. App.—Houston [14th Dist.] 1990, no writ) (failure to demand jury waives right to jury trial).
- ⁶² TEX. CIV. PRAC. & REM. CODE ANN. § 66.003(1), (2) (Vernon 2008).

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- ⁶³ *Id.* at (3).
- ⁶⁴ *Scolaro*, 1 S.W.3d at 753.
- ⁶⁵ *Id.*
- ⁶⁶ *Crawford*, 153 S.W.3d at 506.
- ⁶⁷ *Scolaro*, 1 S.W.3d at 753; *Newsom*, 922 S.W.2d at 278.
- ⁶⁸ *Crain v. Adams*, 120 S.W.2d 290, 293 (Tex. Civ. App.—Amarillo 1938, no writ).
- ⁶⁹ *Tex. Trunk R. Co. v. State ex rel. Hogg*, 83 Tex. 1, 18 S.W. 199, 200 (1892), *overruled in part on other grounds*, *Scurlock Oil Co. v. Smithwick*, 724 S.W.2d 1 (Tex. 1987).
- ⁷⁰ *See, e.g., Crawford*, 153 S.W.3d at 506; *McMullen v. State*, 626 S.W.2d 146, 147 (Tex. App.—Beaumont 1981, writ ref'd n.r.e.); *Phagan*, 510 S.W.2d at 657.
- ⁷¹ TEX. R. APP. P. 28.2.
- ⁷² TEX. R. APP. P. 26.1(b).
- ⁷³ TEX. R. APP. P. 28.2.
- ⁷⁴ TEX. LOC. GOV'T CODE ANN. § 87.012(1)-(15) (Vernon 2008).
- ⁷⁵ TEX. LOC. GOV'T CODE ANN. § 84.009(a) (Vernon 2008).
- ⁷⁶ TEX. LOC. GOV'T CODE ANN. § 87.012(15) (Vernon 2008).
- ⁷⁷ *See, generally*, TEX. LOC. GOV'T CODE ANN. ch. 84 (Vernon 2008); *see also Guerrero v. Refugio County*, 946 S.W.2d 558, 567 (Tex. App.—Corpus Christi 1997, no writ) (citing Act of Apr. 22, 1905, 29th Leg., R.S., ch. 161, § 2, 1905 Tex. Gen. Laws 381, 381 (current version codified at TEX. LOC. GOV'T CODE ANN. § 84.002 (Vernon 2008)), *disapproved in part on other grounds*, *NME Hosps., Inc. v. Rennels*, 994 S.W.2d 142 (Tex. 1999).
- ⁷⁸ TEX. LOC. GOV'T CODE ANN. § 84.0085(b) (Vernon 2008).
- ⁷⁹ *See* TEX. LOC. GOV'T CODE ANN. § 87.031 (Vernon 2008).
- ⁸⁰ *State ex rel. Eidson v. Edwards*, 793 S.W.2d 1, 5 (Tex. Crim. App. 1990) (orig. proceeding).
- ⁸¹ TEX. LOC. GOV'T CODE ANN. § 87.013(a) (Vernon 2008).
- ⁸² TEX. LOC. GOV'T CODE ANN. § 87.014(1), (2) (Vernon 2008).
- ⁸³ *Id.* at (b).
- ⁸⁴ *See Talamantez v. State*, 829 S.W.2d 174, 180 (Tex. Crim. App. 1992).
- ⁸⁵ *See* TEX. CODE CRIM. PROC. ANN. art. 3.04 (Vernon 2005).
- ⁸⁶ TEX. LOC. GOV'T CODE ANN. § 87.87.011(3) (Vernon 2008).
- ⁸⁷ *See* Op. Tex. Att'y Gen. No. GA-0442 (2006), at 2 (county auditor is “officer entrusted with the execution of the law,” making Local Government Code chapter 87 definition of “official misconduct” applicable).
- ⁸⁸ *Stern v. State ex rel. Ansel*, 869 S.W.2d 614, 619 (Tex. App.—Houston [14th Dist.] 1994, writ denied).
- ⁸⁹ *See* TEX. LOC. GOV'T CODE ANN. § 232.034(g) (Vernon 2005) (failure of commissioner in border area county to file disclosure affidavit and abstain from voting on approval of subdivided tract if commissioner has interest in tract at issue constitutes official misconduct and is grounds for removal from office); *Id.* § 232.078(g) (same for commissioner of county that

is financially unable to provide water and sewer services and has applied for state assistance to provide such services); *Id.* § 291.006 (officer who operates private business on county property without filing report of receipts and disbursements for year, or falsifies such report, commits official misconduct and is subject to removal).

⁹⁰ See *Smith v. State ex rel. Letson*, No. 07-04-0038-CV, 2004 WL 20229609, at *2 (Tex. App.—Amarillo Sept. 9, 2004, no pet.) (mem. op.); *Jones v. State*, 109 S.W.2d 244, 249 (Tex. Civ. App.—Texarkana 1937, no writ).

⁹¹ *Smith*, 2004 WL 20229609, at *2.

⁹² *Jones*, 109 S.W.2d at 248-49.

⁹³ *State ex rel. Hightower, v. Smith*, 671 S.W.2d 32, 35 (Tex. 1984).

⁹⁴ See *Tautenhahn v. State ex rel. Nichols*, 334 S.W.2d 574, 583 (Tex. Civ. App.—Waco 1960, writ ref'd n.r.e.) (finding similar conduct to be official misconduct when committed by school board trustees).

⁹⁵ See *Lewis v. State*, 773 S.W.2d 716, 716-17 (Tex. App.—Corpus Christi 1989, writ denied).

⁹⁶ *McDaniel v. State*, 9 S.W.2d 478, 480-81 (Tex. Civ. App.—Texarkana 1928, writ ref'd).

⁹⁷ *Huntress v. State ex rel. Todd*, 88 S.W.2d 636, 645 (Tex. Civ. App.—San Antonio 1935, writ dismissed).

⁹⁸ *Lamb v. State ex rel. Johnson*, 267 S.W.2d 285, 286 (Tex. Civ. App.—San Antonio 1954, no writ).

⁹⁹ *Stern*, 869 S.W.2d at 629.

¹⁰⁰ *Eberstadt v. State*, 49 S.W. 654, 655-56 (Tex. Civ. App. 1898, writ ref'd).

¹⁰¹ *Poe v. State*, 72 Tex. 625, 10 S.W. 737, 740 (1889).

¹⁰² *De Anda v. State*, 131 S.W.3d 198, 202 (Tex. App.—San Antonio 2004, no pet.) (quoting *Huntress*, 88 S.W.2d at 646).

¹⁰³ *Stern*, 869 S.W.2d at 627; *Lewis*, 773 S.W.2d at 717.

¹⁰⁴ *Stern*, 869 S.W.2d at 623.

¹⁰⁵ *Bradley*, 956 S.W.2d at 732.

¹⁰⁶ TEX. LOC. GOV'T CODE ANN. § 87.011(2)(A)-(C) (Vernon 2008).

¹⁰⁷ *De Anda*, 131 S.W.3d at 202.

¹⁰⁸ *Id.* (quoting *Lewis*, 773 S.W.2d at 717); see also *Stern*, 869 S.W.2d at 623.

¹⁰⁹ *Teal v. State*, 230 S.W.3d 427, 430-31 (Tex. App.—San Antonio 2007, pet. denied).

¹¹⁰ *Id.* at 431.

¹¹¹ *De Anda*, 131 S.W.3d at 202-03. It was pointedly noted by the court in *De Anda* that some of the vehicles were transferred to the sheriff's brother-in-law, a girlfriend of a deputy sheriff, a relative of a tax assessor-collector's office employee and to the sheriff himself. See *id.* at 200.

¹¹² 869 S.W.2d at 623.

¹¹³ *Id.*

¹¹⁴ TEX. GOV'T CODE ANN. § 27.005(a) (Vernon 2008).

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- ¹¹⁵ See TEX. LOC. GOV'T CODE ANN. § 81.005(d) (Vernon 2008). Commissioners in counties with populations of 1.3 million or more are given alternative means to satisfy the continuing education requirement. *Id.* at (e).
- ¹¹⁶ TEX. LOC. GOV'T CODE ANN. § 83.003(a), (b), (e) (Vernon 2008).
- ¹¹⁷ TEX. LOC. GOV'T CODE ANN. § 84.0085(a), (b) (Vernon 2008).
- ¹¹⁸ TEX. LOC. GOV'T CODE ANN. § 85.0025(a), (e) (Vernon 2008). A sheriff may request a waiver of the training requirement on the basis of hardship. *Id.* at (f).
- ¹¹⁹ TEX. OCC. CODE ANN. § 1701.302(a), (c) (Vernon 2004).
- ¹²⁰ Op. Tex. Att'y Gen. No. JC-0239 (2000), at 6.
- ¹²¹ TEX. LOC. GOV'T CODE ANN. § 87.001 (Vernon 2008).
- ¹²² See *Bazan*, 251 S.W.3d at 42.
- ¹²³ See *Talamantez v. Strauss*, 774 S.W.2d 661, 662 (Tex. 1989) (orig. proceeding); see also *Knorpp*, 575 S.W.2d at 402.
- ¹²⁴ See *Bazan*, 251 S.W.3d at 43 (“The history of [section 87.001] reveals that the Legislature intended it only as a limitation on a civil removal proceeding under subchapter B; it is not a limitation on the removal of a county officer incident to a criminal prosecution.”).
- ¹²⁵ TEX. LOC. GOV'T CODE ANN. § 87.015(a) (Vernon 2008).
- ¹²⁶ TEX. LOC. GOV'T CODE ANN. § 87.015(b) (Vernon 2008).
- ¹²⁷ *Id.*
- ¹²⁸ *Baker*, 580 S.W.2d at 613.
- ¹²⁹ See *State ex rel. Driscoll v. Lindsay*, 877 S.W.2d 856, 857 (Tex. App.—Houston [14th Dist.] 1992, no writ); accord *Huntress*, 88 S.W.2d at 644 (plaintiff in removal suit is authorized to amend petition).
- ¹³⁰ TEX. LOC. GOV'T CODE ANN. § 87.015(c) (Vernon 2008).
- ¹³¹ See TEX. GOV'T CODE ANN. § 74.059(c)(4) (Vernon 2005) (assignment of out-of-county judge required in removal suit).
- ¹³² *Garcia v. Laughlin*, 155 Tex. 261, 285 S.W.2d 191, 195 (1955).
- ¹³³ TEX. LOC. GOV'T CODE ANN. § 87.018(d) (Vernon 2008).
- ¹³⁴ *Id.* at (e).
- ¹³⁵ *Id.*
- ¹³⁶ TEX. LOC. GOV'T CODE ANN. § 87.016(a) (Vernon 2008).
- ¹³⁷ *Id.* at (b).
- ¹³⁸ *Id.*
- ¹³⁹ *Id.* at (c).
- ¹⁴⁰ *Id.*
- ¹⁴¹ See TEX. CIV. PRAC. & REM. CODE ANN. § 6.001(b)(1) (Vernon 2002); cf. *Garcia*, 285 S.W.2d at 194 (individual citizens have no right to maintain removal suit without being joined by proper state official, meaning the county or district attorney).
- ¹⁴² TEX. LOC. GOV'T CODE ANN. § 87.016(d) (Vernon 2008).

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- ¹⁴³ TEX. LOC. GOV'T CODE ANN. § 87.017(a) (Vernon 2008).
- ¹⁴⁴ *Id.* at (b).
- ¹⁴⁵ *See In re Guerra*, 235 S.W.3d 392, 422 (Tex. App.—Corpus Christi 2007, orig. proceeding).
- ¹⁴⁶ *Id.* at (c).
- ¹⁴⁷ *See De Anda*, 131 S.W.3d at 200-01 (denying State's motion to dismiss appeal because decision could affect defendant's right to recoup salary during suspension period).
- ¹⁴⁸ *Poe*, 10 S.W. at 741.
- ¹⁴⁹ TEX. LOC. GOV'T CODE ANN. § 87.018(b) (Vernon 2008); *Smith*, 2004 WL 2029609, at *1.
- ¹⁵⁰ TEX. CONST. art. V, § 24; TEX. LOC. GOV'T CODE ANN. § 87.018(a) (Vernon 2008).
- ¹⁵¹ *See* TEX. R. CIV. P. 216(a).
- ¹⁵² *Lewis*, 773 S.W.2d at 718.
- ¹⁵³ TEX. LOC. GOV'T CODE ANN. § 87.018(b) (Vernon 2008); *Smith*, 2004 WL 2029609, at *1.
- ¹⁵⁴ *See Meyer*, 360 S.W.2d at 522-23.
- ¹⁵⁵ *Id.* at 520.
- ¹⁵⁶ *Id.*
- ¹⁵⁷ TEX. LOC. GOV'T CODE ANN. § 87.019(a) (Vernon 2008).
- ¹⁵⁸ *Id.* at (b).
- ¹⁵⁹ TEX. LOC. GOV'T CODE ANN. § 87.031(a) (Vernon 2008).
- ¹⁶⁰ *Sullivan v. State*, 572 S.W.2d 778, 781 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.).
- ¹⁶¹ *Id.* at 781-82.
- ¹⁶² TEX. LOC. GOV'T CODE ANN. § 87.031(b) (Vernon 2008).
- ¹⁶³ *Welch v. State ex rel. Long*, 880 S.W.2d 79, 81 (Tex. App.—Tyler 1994, writ denied).
- ¹⁶⁴ *Eckels v. Gist*, 743 S.W.2d 330, 332 (Tex. App.—Houston [1st Dist.] 1987, orig. proceeding).
- ¹⁶⁵ TEX. LOC. GOV'T CODE ANN. § 87.032 (Vernon 2008).
- ¹⁶⁶ TEX. CODE CRIM. PROC. ANN. art. 3.04(1) (Vernon 2005).
- ¹⁶⁷ *Talamantez*, 829 S.W.2d at 180.
- ¹⁶⁸ *See Durham v. State*, 234 S.W.3d 723, 726 (Tex. App.—Eastland 2007, pet. ref'd) (noting argument that offense must be willful and relate to official duties relied on authorities predating enactment of article 3.04(1)).
- ¹⁶⁹ TEX. CODE CRIM. PROC. ANN. art. 3.04 (Vernon 2005).
- ¹⁷⁰ *See Durham*, 234 S.W.3d at 726 (applying article 3.04(1) to uphold district court jurisdiction over misdemeanor conviction of public servant [specifically, a police officer]); *cf.* TEX. CODE CRIM. PROC. ANN. art. 4.05 (Vernon 2005) (providing district courts have original jurisdiction of all misdemeanors involving official misconduct).

¹⁷¹ For examples of statutes that do expressly declare a violation of their provisions to be official misconduct, *see, e.g.*, TEX. LOC. GOV'T CODE ANN. §§ 232.034(g), .078(g), 291.006(d) (Vernon 2005).

¹⁷² TEX. CONST. art. XVI, § 2.

¹⁷³ TEX. LOC. GOV'T CODE ANN. § 87.031(a) (Vernon 2008); *accord Bazan*, 251 S.W.3d at 42.

¹⁷⁴ *See Talamantez v. State*, 829 S.W.2d at 180-82 (applying reasoning to statute which, at that time, was entitled “Official Misconduct” and was found at section 39.01); *cf.* TEX. PEN. CODE ANN. § 39.02(a) (Vernon 2003) (offense currently entitled “Abuse of Official Capacity”).

¹⁷⁵ The term “public servant” means a person elected, selected, appointed, employed, or otherwise designated as — among other things — an officer, employee or agent of government, a candidate for nomination or election to public office or a person who is performing a governmental function under a claim of right although he is not legally qualified to do so, even if the person has not yet qualified for office or assumed the office’s duties. TEX. PEN. CODE ANN. § 1.07(a)(41)(A), (E), (F) (Vernon Supp. 2008). Thus, a county elected officer clearly is included within the term, although the term is not limited to elected officials.

¹⁷⁶ TEX. PEN. CODE ANN. § 39.02(a)(1)-(2) (Vernon 2003).

¹⁷⁷ TEX. PEN. CODE ANN. § 39.01(2)(A)-(D) (Vernon 2003).

¹⁷⁸ *Id.* at (1)(A)-(B).

¹⁷⁹ *Talamantez v. State*, 829 S.W.2d at 183.

¹⁸⁰ *Id.* at 181.

¹⁸¹ *See Margraves v. State*, 34 S.W.3d 912, 915-16 (Tex. Crim. App. 2000), *abrogated in part on other grounds, Laster v. State*, 275 S.W.3d 512 (Tex. Crim. App. 2009).

¹⁸² *Id.* at 180.

¹⁸³ *Cf.* TEX. LOC. GOV'T CODE ANN. § 87.011(3) (Vernon 2008).

¹⁸⁴ *See Smith*, 2004 WL 2029609, at *2 (presuming that tampering with witness by constable would constitute official misconduct); *Jones*, 109 S.W.2d at 248-49 (finding that false imprisonment by constable is unlawful behavior relating to constable’s duties of office); *Gallagher v. State*, 690 S.W.2d 587, 590, 593 (Tex. Crim. App. 1985 (deputy constable, charged with official oppression under what is now section 39.03 of Penal Code, who detained woman and forced her to expose herself under threat of arrest committed official misconduct); *Bolton v. State*, 69 Tex. Crim. 582, 154 S.W. 1197 (1913) (tax assessor-collector’s failure to file report showing fees collected during fiscal year constituted official misconduct); *but see Hall v. State*, 736 S.W.2d 818, 820 (Tex. App.—Houston [14th Dist.] 1987, pet. ref’d) (deputy sheriff charged with criminally negligent homicide based on automobile accident did not commit official misconduct because offense did not relate to deputy’s duties; any person could have committed same offense in private vehicle).

¹⁸⁵ TEX. GOV'T CODE ANN. § 573.001(3)(A)-(C) (Vernon 2004).

¹⁸⁶ TEX. GOV'T CODE ANN. § 573.002 (Vernon 2004).

¹⁸⁷ TEX. GOV'T CODE ANN. § 573.022(a)(1)-(2) (Vernon 2004).

¹⁸⁸ *Id.* at (b).

¹⁸⁹ TEX. GOV'T CODE ANN. § 573.023(a) (Vernon 2004).

¹⁹⁰ *Id.*

¹⁹¹ *Id.* at (b)(1)-(2).

¹⁹² *See id.* at (a).

¹⁹³ See *id.* at (b)(1)-(2); accord *Ex parte Fierro*, 79 S.W.3d 54, 56 n. 1 (Tex. Crim. App. 2002) (“Cousins of any variety do not fall within the proscribed degree of consanguinity.”). *But cf.* Op. Tex. Att’y Gen. No. JM-741 (1987), at 2 (“First cousins are related within the second degree by consanguinity.”) (quoting Op. Tex. Att’y Gen. No. JM-253 (1984)). The attorney general’s conclusion is inconsistent with the calculation method of section 571.021 and the conclusion of the Court of Criminal Appeals, making it of dubious authoritative value at present.

¹⁹⁴ *Id.* at (c)(1)-(3).

¹⁹⁵ TEX. GOV’T CODE ANN. § 573.024(a)(1)-(2) (Vernon 2004).

¹⁹⁶ *Id.* at (b).

¹⁹⁷ *Id.*

¹⁹⁸ TEX. LOC. GOV’T CODE ANN. § 573.025(a) (Vernon 2004).

¹⁹⁹ *Id.*

²⁰⁰ *Id.*

²⁰¹ See *id.* at (a), (b)(1)-(2); cf. TEX. GOV’T CODE ANN. § 573.023(c)(1)-(2).

²⁰² TEX. GOV’T CODE ANN. § 573.041 (Vernon 2004).

²⁰³ TEX. GOV’T CODE ANN. § 573.042(a) (Vernon 2004).

²⁰⁴ *Id.* at (b).

²⁰⁵ See TEX. GOV’T CODE ANN. § 573.044 (Vernon 2004).

²⁰⁶ Op. Tex. Att’y Gen. Nos. GA-0419 (2006), GA-0226 (2004).

²⁰⁷ TEX. GOV’T CODE ANN. § 573.062(a)(1)-(2) (Vernon 2004).

²⁰⁸ *Id.* at (b).

²⁰⁹ TEX. GOV’T CODE ANN. § 573.081(a) (Vernon 2004).

²¹⁰ See TEX. GOV’T CODE ANN. § 573.083 (Vernon 2004).

²¹¹ TEX. GOV’T CODE ANN. § 573.084(a) (Vernon 2004).

²¹² *Id.* at (b).

²¹³ TEX. LOC. GOV’T CODE ANN. § 81.003(a) (Vernon 2008).

²¹⁴ See TEX. LOC. GOV’T CODE ANN. § 81.003(b), (c) (Vernon 2008) (clerk shall record court’s authorized proceedings during each term of court and between terms and attest to accuracy of records).

²¹⁵ TEX. LOC. GOV’T CODE ANN. § 81.002(a) (Vernon 2008).

²¹⁶ Op. Tex. Att’y Gen. No. JC-0121 (1999), at 2.

²¹⁷ TEX. LOC. GOV’T CODE ANN. § 171.004(a) (Vernon 2008).

²¹⁸ TEX. LOC. GOV’T CODE ANN. § 171.005(a) (Vernon 2008).

²¹⁹ See *id.* at (b).

²²⁰ TEX. LOC. GOV’T CODE ANN. § 171.004(c) (Vernon 2008).

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- ²²¹ TEX. LOC. GOV'T CODE ANN. § 171.004(a)(1) (Vernon 2008).
- ²²² *Id.* at (a)(2).
- ²²³ TEX. LOC. GOV'T CODE ANN. 171.002(a) (Vernon 2008); Op. Tex. Att'y Gen. No. JC-0100 (1999), at 3.
- ²²⁴ Op. Tex. Att'y Gen. No. GA-0337 (2005), at 4.
- ²²⁵ TEX. LOC. GOV'T CODE ANN. § 171.002(b) (Vernon 2008).
- ²²⁶ TEX. LOC. GOV'T CODE ANN. § 171.006 (Vernon 2008).
- ²²⁷ TEX. LOC. GOV'T CODE ANN. § 171.003(a), (b) (Vernon 2008).
- ²²⁸ *See* n. 161-165, *supra*.
- ²²⁹ TEX. LOC. GOV'T CODE ANN. § 176.001(4) (Vernon 2008).
- ²³⁰ TEX. LOC. GOV'T CODE ANN. § 176.001(3) (Vernon 2008).
- ²³¹ TEX. LOC. GOV'T CODE ANN. § 176.003(a)(1)-(2) (Vernon 2008).
- ²³² *See* TEX. LOC. GOV'T CODE ANN. § 176.001(2) (Vernon 2008); *accord* TEX. GOV'T CODE ANN. §§ 573.023, .024 (Vernon 2004), Op. Tex. Att'y Gen. No. GA-0337 (2005), at 4.
- ²³³ TEX. LOC. GOV'T CODE ANN. § 176.001(1-a) (Vernon 2008).
- ²³⁴ TEX. LOC. GOV'T CODE ANN. § 176.003(2)(A) (Vernon 2008); *see also* TEX. LOC. GOV'T CODE ANN. § 176.001(2-b) (Vernon 2008) (defining "investment income").
- ²³⁵ TEX. LOC. GOV'T CODE ANN. § 176.003(b) (Vernon 2008).
- ²³⁶ *See* TEX. LOC. GOV'T CODE ANN. § 176.004 (Vernon 2008).
- ²³⁷ *Id.* at (1)-(3).
- ²³⁸ TEX. LOC. GOV'T CODE ANN. § 176.003(c) (Vernon 2008).
- ²³⁹ *Id.* at (d).
- ²⁴⁰ Tex. Loc. Gov't Code Ann. § 176.005(a) (Vernon 2008).
- ²⁴¹ *Id.* at (b).
- ²⁴² TEX. LOC. GOV'T CODE ANN. §§ 151.003, .004 (Vernon 2008).
- ²⁴³ *See* TEX. LOC. GOV'T CODE ANN. § 84.002-.003 (Vernon 2008); *cf.* TEX. LOC. GOV'T CODE ANN. § 262.011 (Vernon 2008) (selection of purchasing agent by district judges or board including district judges and commissioners court representatives).
- ²⁴⁴ *See, e.g., Abbott v. Pollock*, 946 S.W.2d 514, 517 (Tex. App.—Austin 1997, writ denied) (commissioners court has no authority to appoint, terminate or otherwise dictate terms of employment of sheriff's employee); *Comm'rs Ct. of Shelby County v. Ross*, 809 S.W.2d 754, 756 (Tex. App.—Tyler 1991, no writ) (commissioners court had no authority to suspend sheriff's employees for violation of overtime policy); *Renken v. Harris County*, 808 S.W.2d 202, 226 (Tex. App.—Houston [14th Dist.] 1991, no writ) (commissioners court had no authority to appoint or terminate deputies of constable).
- ²⁴⁵ *See* TEX. LOC. GOV'T CODE ANN. § 176.006(a) (Vernon 2008).
- ²⁴⁶ *See* TEX. LOC. GOV'T CODE ANN. § 176.010 (Vernon 2008) (requirements of chapter 176 are in addition to any other disclosure required by law).
- ²⁴⁷ Tex. Ethics Comm., Ethics Advisory Op. No. 484 (2009), at 1.

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- ²⁴⁸ See TEX. PEN. CODE ANN. § 36.07 (Vernon 2003).
- ²⁴⁹ Ethics Advisory Op. No. 484, at 1; *see also* TEX. PEN. CODE ANN. § 36.07(b) (Vernon 2003).
- ²⁵⁰ Ethics Advisory Op. No. 484; *see also* TEX. GOV'T CODE ANN. §§ 305.006(f), 305.025(4) (Vernon Supp. 2010).
- ²⁵¹ TEX. ELEC. CODE ANN. § 251.001(2) (Vernon 2010).
- ²⁵² TEX. ELEC. CODE ANN. § 251.001(5) (Vernon 2010).
- ²⁵³ TEX. ELEC. CODE ANN. § 251.001(4) (Vernon 2010).
- ²⁵⁴ Ethics Advisory Op. No. 484; *see also* TEX. ELEC. CODE ANN. §§ 253.003, 253.094 (Vernon 2010).
- ²⁵⁵ TEX. ELEC. CODE ANN. § 253.091 (Vernon 2010).
- ²⁵⁶ Ethics Advisory Op. No. 484.
- ²⁵⁷ TEX. ELEC. CODE ANN. §§ 253.003(b), (e), 253.094(a), (c) (Vernon 2010).
- ²⁵⁸ TEX. GOV'T CODE ANN. § 41.007 (Vernon 2004).