State Bar
Section Report
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Greetings from the State Bar of Texas School Law Section!

Your Board of Directors has been busy planning some exciting opportunities for you in the coming months. Please mark your calendars now and plan to attend two outstanding activities for attorneys interested in school law.

At the State Bar of Texas annual meeting in San Antonio June 24-25, 2004, we have a number of unique opportunities to highlight the impact of school law on our society. First, May 2004 marks the 50th Anniversary of the *Brown v. Board of Education* Supreme Court decision, which ruled that racially segregated schools are "inherently inequal" and which ordered desegregation "with all deliberate speed." The State Bar of Texas School Law Section has been working with a number of other State Bar of Texas sections to co-sponsor programs highlighting this important decision. Current plans call for CLE with nationally-known speakers, the showing of an excellent PBS video of the Kansas struggle that triggered the *Brown* decision, a display of the Brown Foundation's traveling exhibit regarding the history of the desegregation struggle and the significance of the decision, a video highlighting the history and progress of desegregation in Texas, a breakfast honoring minority lawyers who were Texas "trailblazers," and a luncheon with a nationally-known keynote speaker. We are very excited to be a part of this dynamic and important program and urge you to attend. Second, we will have the wonderful opportunity to welcome one of our own, Mr. Kelly Frels, who will take the oath as State Bar President, becoming the first school attorney to be elected to that role. Finally, the School Law Section will conduct a business meeting on Friday, June 25, 2004, where we will elect next year's officers. Elneita Hutchins-Taylor and Ann Manning have graciously agreed to assist me in coordinating these events at the Bar Convention.

In July, we will hold our always-popular State Bar of Texas School Law Section Retreat, to be held at the San Luis in Galveston on July 16-17, 2004. Joy Baskin and Miles Bradshaw are already hard at work developing an excellent program. The Retreat provides excellent CLE opportunities. It also gives all school attorneys many chances to get to know each other better and to spend some quality vacation time with their own families.

Please feel free to contact me or any of the School Law Section Directors or Officers if you have suggestions on how we can better meet your needs.

Lynn Rossi Scott
Chair
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SOVEREIGN IMMUNITY IN A BREACH OF CONTRACT CASE: "THE KING CAN DO NO WRONG" AND SCHOOL AND COMMUNITY COLLEGE DISTRICTS MAY BE CROWNED "KING FOR A DAY"

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Introduction

When Satterfield & Pontikes Construction Inc. signed a multi-million dollar construction contract with the Irving Independent School District to build a new middle school, it expected an arms-length transaction and a reasonable profit. Instead, after the Dallas Court of Appeals was finished with them, Satterfield & Pontikes had both arms cut off by a sword forged by the school district and offered up as the tool to inflict the King's punishment. Lest ye ever forget, as generated from common law, "The King can do no wrong." [1] For now at least, in an unpublished opinion, the Dallas Court of Appeals has crowned school and community college districts[2] "King for a Day."[3]

While school districts in the Dallas area have likely already begun to rely on *Satterfield* as authority for the sovereign immunity shield in defense of breach of contract claims, the San Antonio Court of Appeals recently declined to follow *Satterfield* in another unpublished decision, *Alamo Community College District v. Browning Construction Company*.[4] The court in Browning Construction upheld a jury award against the community college for over $3,000,000. The San Antonio court reasoned that the Dallas court got it wrong in *Satterfield*, and the San Antonio court was instead bound by the Texas Supreme Court's 1970 ruling in *Missouri Pacific Railroad Co. v. Brownsville Navigation District* in which similar "sue and be sued" statutory language was held to be a waiver of immunity from suit.[5] *Satterfield* and *Browning Construction* are in direct conflict on an identical issue:

> **Whether the "sue and be sued" language contained in section 11.151 of the Texas Education Code is a clear and unambiguous waiver of immunity from suit. [6]**

It seems likely the Supreme Court will grant the petition for review to resolve the conflict between *Satterfield* and *Browning Construction*.[7] This article is intended to articulate both sides of this dispute and offer guidance primarily from the perspective of school and community college districts.[8]

History of Sovereign Immunity in Texas

Under English common law, the King could do no wrong and enjoyed absolute immunity from suit and liability. This common law doctrine is known as sovereign immunity. Under modern Texas law, the state and its agencies and political subdivisions are sovereign, and may not be sued without the state's consent. As political subdivisions of the state, school and community college districts enjoy sovereign immunity. Sovereign immunity encompasses two principles – immunity from suit and immunity from liability. These dual principles are particularly important in breach of contract claims. When the state contracts with private citizens or entities, it waives immunity from *liability*, while retaining immunity from *suit* unless waived by the legislature.[9] As a result, immunity from suit is the first line of defense for school and community college districts in their effort to have a case dismissed for lack of subject matter jurisdiction.

For many years there were inconsistent court opinions confusing the dual principles of sovereign immunity. Finally, in 1997, the Texas Supreme Court used the landmark case *Federal Sign v. Texas Southern University* to put to rest this longstanding debate of whether the state waived both immunity from liability and immunity from suit when it contracted with a private party. In *Federal* Sign, the court held that when the state contracted with another party, it waived *only* immunity from *liability*. The state, as a sovereign, had to specifically waive immunity from suit either by statute or by a specific resolution from the Legislature.[10] Any attempted waiver of immunity by the legislature must be stated in clear and unambiguous language. The phrase "clear and unambiguous" was not adopted by the Texas Supreme Court until 1981 in *Duhart v. State.*[11] In 2001, section 311.034 was added to the Texas Government Code ("Code Construction Act") to codify the court-imposed "clear and unambiguous" requirement.[12] When determining whether the waiver is clear and unambiguous, a court will generally resolve any ambiguity in favor of retaining immunity.[13]

There are numerous examples in existing statutes indicating that the legislature knows how to waive immunity from suit in "clear and unambiguous" language:

- Texas Tort Claims Act: "Sovereign immunity to suit is waived and abolished to the extent of liability created by this Chapter"[14]
- Texas Treasury Safekeeping Trust Company's statute regarding authority to enter into contracts and trust agreements: ". . .and the State expressly waives all defenses of governmental immunity . . . "[15]
- Whistleblower Act: "Sovereign immunity is waived and abolished to the extent of liability for the relief allowed under this chapter. . . "[16]
- Private Real Property Preservation Rights Act: "Sovereign immunity to suit and liability is waived and abolished to the extent liability created by this chapter"[17]
- Statute regarding certain agreements between the state and federal government: "The State waives its right to claim sovereign immunity in any action commenced against the State for unauthorized disclosure of the confidential information obtained from the Department of the Interior. . . "[18]
- Statute regarding suit against the University of Texas at Tyler: "The board may sue and be sued in the name of the institution. . . . and legislative consent to suits against the institution is granted."[19]
- Statute regarding suing the University of Houston: "The board has the power to sue and be sued in the

> name of the University of Houston . . .[but] [n]othing in this section shall be construed as granting legislative consent for suits against the board, the University of Houston System, or its component institutions and entities except as authorized by law."[20]

Another more recent example is found in the 2003 legislative enactment of senate bill 1017. Senate bill 1017 added section 262.007 to the Local Government Code to provide for a clear and unambiguous waiver of immunity from suit against counties in certain breach of contract claims. Senate bill 1017 begins in Subsection (a) with the "sue and be sued" language and subsequently adds "plead or be impleaded, or defend or be defended in a claim arising under the contract." Subsection (d) contains even stronger and clearer waiver language: "This section does not waive a defense or a limitation on damages available to a party to a contract, *other than a bar against suit based on sovereign immunity*."[21] Interestingly, in this statute, as well as the statutes regarding suits against UT-Tyler and the University of Houston, the legislature used the "sue and be sued" language at the beginning of the statute and apparently felt the need to then include an additional statement on whether sovereign immunity was in fact waived. This additional language tends to show that "sue and be sued" alone may not amount to a clear and unambiguous waiver of immunity from suit. Hence, the confusion with statutes such as TEC 11.151, which contain only language stating that the entity may "sue and be sued." Within this confusion is hidden the secret door used by Irving ISD to slip into the royal palace.

The Split in the Courts

Since the *Missouri Pacific* decision in 1970, courts have issued eight decisions interpreting the "sue and be sued" language in various contexts that support a waiver of immunity from suit, just as the San Antonio court held in *Browning Construction*.[22] These decisions come from courts of appeal in San Antonio,[23] Austin, El Paso, Waco, Forth Worth, Houston (14th Dist.), and the Fifth Circuit. On the other hand, there are five post-*Missouri Pacific* decisions holding that the "sue and be sued" language is *not* a waiver of immunity from suit, just as the Dallas court held in *Satterfield*.[24] These decisions are from Dallas, Houston (1st and 14th),[25] Corpus Christi,[26] and Texarkana. As for courts specifically interpreting the "sue and be sued" language in TEC 11.151, there are only four - three finding waiver of immunity, and one finding no waiver of immunity. The three cases include two from San Antonio and one from Austin.[27] *Satterfield* stands alone as the only case to rule that the "sue and be sued" language in TEC 11.51 is not a waiver of immunity from suit.

All Hail the ISD King! – "Sue and be Sued" Is Not a Waiver of Immunity from Suit

Satterfield & Pontikes Construction, Inc. v. Irving Independent School District

In *Satterfield*, the Dallas Court of Appeals affirmed (2-1) the lower court's decision granting the school district's plea to the jurisdiction based on sovereign immunity. The majority held that TEC 11.151, which provides that trustees of an independent school district could "sue and be sued," does not clearly and unambiguously waive a public school district's immunity from suit, and thus, the trial court lacked subject matter jurisdiction. The majority began by recognizing that a recent commentator suggested that because the "sue and be sued" language originated in the corporate law context, it could easily be read to do nothing more than give a particular entity a legal existence in the courts.[28] The court also relied on one of its recent rulings in which it held that a city could not be sued under either the "plead and be impleaded language" or a charter provision that included the "sue and be sued" language.[29] In the court's opinion, such language merely "speak[s] to the City's capacity to sue and its capacity to be sued when immunity has been waived."[30] At a minimum, the court said, "we conclude section 11.151(a) is ambiguous…[and we are therefore]…required to construe the statute in a manner that retains the District's immunity." [31]

The *Satterfield* court distinguished the *Missouri Pacific* decision, noting it was the first and only time the Texas Supreme Court had directly addressed the issue of whether "sue and be sued" language was a waiver of immunity from suit. Additionally, the court stated, the supreme court has "since departed from the logic of *Missouri Pacific*" over the past three decades.[32] Further, the court reasoned that the "clear and unambiguous" requirement was not adopted by the Texas Supreme Court until its 1981 decision in *Duhart v. State*, many years after *Missouri Pacific*,[33] and that the standard had been consistently reaffirmed.[34] The court recognized that numerous lower courts had held the "sue or be sued" language was a waiver of immunity from suit. Nonetheless, it summarily distinguished those opinions by stating that none of them acknowledged the changes in the law relating to waiver of immunity since the *Missouri Pacific* decision.[35] Finally, the court recognized that the legislature has repeatedly demonstrated that it knows how to waive sovereign immunity in clear and unambiguous language, and TEC 11.151 was no waiver.[36]

The ISD King is Dead! – "Sue and Be Sued" Is a Waiver of Immunity from Suit

Alamo Community College District v. Browning Construction Company

In *Browning Construction*, the San Antonio Court of Appeals quickly reminded Alamo Community College that a mere six years earlier, the court had denied a similar claim of sovereign immunity in another breach of contract action against the college in *Alamo Community College District v. Obayashi Corp*.[37] As if to say, "What part of 'No!' did you not understand the first time?" the court followed its reasoning in *Obayashi*, essentially recognizing that it could not ignore the existing binding authority of the Texas Supreme Court's *Missouri Pacific* decision.[38] In discussing *Missouri Pacific*, the court stated that the issue before the court was "whether a 1925 statute *clearly and unambiguously* waived immunity from suit."[39] Interestingly, however, the supreme court's opinion is devoid of reference to the "clear and unambiguous" language[40] and, in fact, the "clear and unambiguous" standard was not approved as the law in this State by the supreme court until ten years later in *Duhart v. State*.

While the San Antonio Court of Appeals relied on the *Missouri Pacific* precedent, there may be room to argue that comparing the interpretation of the 1925 navigation district

statute and TEC 11.151 is mixing the proverbial apple and orange. The navigation district statute speaks of no other power of the district, except to say the navigation district may sue and be sued in all courts of the State. The school district statute is titled "Powers and Duties of Trustees." After noting the trustees collectively constitute a "body corporate," it gives the trustees the power to "acquire and hold real and personal property," "receive bequests and donations," and "receive other moneys or funds coming legally into their hands." These powers are what school attorneys often refer to as "non-delegable" duties. In other words, in addition to establishing the trustees' capacity to sue and be sued (but only if immunity is otherwise waived), a second purpose of this statute is to make clear that no other representative of the school district, other than the trustees, has the power to carry out these acts on behalf of the school district. Thus, for school districts it seems plausible that TEC 11.151 is meant to recognize that suing and being sued in the name of the school district is a non-delegable power and the statute is speaking merely to the school district's legal capacity as a body corporate – not to signify a waiver of immunity.

Missouri Pacific Railroad Company v. Brownsville Navigation District

Just what did the Texas Supreme Court hold in *Missouri Pacific*? In the underlying suit, Missouri Pacific filed a third-party action against the navigation district for damages resulting from the death of a railroad brakeman. The parties had entered into a written track agreement that prohibited the district from constructing or placing any object in the vicinity of the tracks that would violate any law. According to Missouri Pacific, the district violated this contractual provision thereby causing the death of the brakeman. The contract did not contain indemnity language. Nonetheless, Missouri Pacific was seeking indemnity based on a breach of the contract. The Corpus Christi Court of Appeals had affirmed the lower court's granting of governmental immunity to the navigation district because Missouri Pacific failed to specifically allege a statute or other consent to suit granted by the legislature.[41] The language at issue stated that a navigation district could "sue and be sued" in the courts.[42] The Texas Supreme Court reversed and held that the railroad was not required to allege or prove a statute permitting suits to be brought against the navigation district because "[the] district is a political subdivision that is always subject to suit by virtue of a general statute."[43] The *Missouri Pacific* court relied on an 1884 decision which held that suits against counties have been authorized by statutes that simply require the filing of a claim before institution of suit, commonly referred to as presentment statutes.[44] However, in *Travis County v. Pelzel & Associates, Inc.*, the supreme court specifically overruled other cases that had held that a presentment statute constitutes a waiver of immunity from suit.[45] Additionally, the 1884 case relied upon by the *Missouri Pacific* court was interpreting a statute that specifically bestowed upon a landowner the right to compensation against a county when land was taken or injuriously invaded by a county's exercise of its power of eminent domain.[46]

Despite the distinguishing characteristics of the *Missouri Pacific* decision, it contains potentially troubling *dicta* for school districts. Near the conclusion, the court notes that part of Missouri Pacific's argument was that "navigation districts are suable in the same manner as counties *and school districts*." In considering this argument, the court stated, "Since this argument led us to [the 1925 statute] and the other statutes mentioned above, we regard it as sufficient to present the contention that the Legislature had, *as in the case of counties and school districts*, given general consent to suits against [the navigation district]."[47] At first blush, it seems the court is acknowledging that counties and school districts are not immune from suit. However, upon a closer reading and a consideration of the context, it seems more likely that the court was merely restating Missouri Pacific's contention in holding that even though waiver of immunity was raised for the first time on appeal, the court would still consider the argument since it was jurisdictional in nature. When one closely analyzes the *Missouri Pacific* decision, as noted above, it does appear that the decision has been eclipsed by the line of cases considering sovereign immunity since 1970. Thus, using *Missouri Pacific* to support the proposition that the "sue and be sued" language in TEC 11.151 is a clear and unambiguous waiver of immunity is questionable.

Practical Considerations

Of course, as an attorney on either side of this issue, the first question to consider is in which jurisdiction your client would likely appear in the event of a lawsuit. In pre-suit settlement discussions, argue the cases that support your position, particularly those from your jurisdiction. As counsel for a contractor or vendor, before filing suit for breach of contract, consider other methods of recovery. Did the school or community college district by chance fail to strike the arbitration clause in the contract documents? Is there any chance of diversity jurisdiction in federal court where a court would likely follow the Fifth Circuit opinion, *Webb v. City of Dallas*, which followed *Missouri Pacific* and held that immunity from suit was waived by "sue and be sued" language? Can you afford to delay filing suit until either the supreme court or the legislature resolves the issue, presumably in your favor?

Other considerations arise in the negotiation and formation of the contract. With the uncertainty in the law, contractors are pushing harder than usual for an arbitration clause. On the other hand, school districts, especially those in favorable jurisdictions, should be careful not to allow an arbitration clause into contracts. With case law support for the proposition that no legal duty exists to pay contractors and vendors in contract disputes, allowing a binding arbitration clause into the contract may arguably be considered an illegal gift of public funds. Another consideration includes contractors and other vendors potentially raising prices against schools and community colleges to account for uncertainty in recovery when contractual relationships go south. If parties already have pending claims, their attorneys may wait to file suit until the last possible moment in hopes that the Texas Supreme Court or the Texas Legislature will have remedied the situation.

Until either the supreme court or the legislature resolves the issue, contractors and other vendors with so-called "contracts" best beware, especially if contracting within the jurisdictions of the courts of appeal in Dallas,[48] Houston,[49] Corpus Christi,[50] or Texarkana.[51] On the other hand, courts in Austin,[52] San Antonio,[53] El Paso,[54] Waco,[55] and Forth Worth,[56] appear to agree that immunity from suit for school districts has been

waived by TEC 11.151. In every breach of contract claim, regardless of venue, school and community college districts should assert sovereign immunity from suit as a jurisdictional King's X and seek immediate dismissal. This law firm successfully obtained dismissal of a breach of contract case against a school district client in January 2004 in a Houston county court at law based primarily on *Satterfield* and *Jackson v. City of Galveston*.[57]

Conclusion

With conflicting opinions on an identical legal issue, it seems likely the Texas Supreme Court will grant a petition in *Satterfield* or *Browning Construction*.[58] If school districts and community colleges get their way, the Texas Supreme Court will either affirm *Satterfield* or reverse *Browning Construction*, thereby bringing school districts and community colleges statewide into the royal family at the right hand of the State itself. Either way, contractors are not without a remedy. They will sharpen their swords and draw their checkbooks in a lobbying duel against their school and community college district foes in the 2005 Texas legislative session. Contractors will seek to convince the legislature to decree once and for all, in clear and unambiguous language, that the ISD kingdom was nothing more than a short-lived dream of superintendents, chancellors, and school and community college financial officers.

In the meantime, battles will continue to be waged in the courts. Blood will be shed in the form of dismissal orders in and around Dallas,[59] and tears of pain and fear of juries will be seen in the eyes of school trustees in the San Antonio area.[60] But whether the ISD kingdom will reach all ends of the state or be crushed by the state's high court or the legislature may not be known for at least several months, if not longer. Lawyers defending a school or community college district against breach of contract claims in certain jurisdictions may be able to politely inform opposing counsel that, as fate would have it, his client's "day in court" has fallen on the particular day that your school or community college district client happens to be "King for a Day."

ENDNOTES

1 *See Hosner v. DeYoung*, 1 Tex. 764, 769 (1847); see also *City of Amarillo v. Martin*, 971 S.W.2d 426, 427 (Tex. 1998).

2 This article applies equally to school and community college districts. *See* TEX. EDUC. CODE ANN. § 130.084 (Vernon 2002) (a community college district's establishment, management and control is governed by general law applicable to school districts); TEX. EDUC. CODE ANN. § 11.151 (Vernon Supp. 2004) (on behalf of the school district, trustees may "sue and be sued.")

3 *Satterfield & Pontikes Constr., Inc. v. Irving Indep. Sch. Dist.*, No. 05-03-00004-CV, 2003 WL 22221024 (Tex. App.–Dallas Sept. 26, 2003, rehearing overruled Jan. 12, 2004) (unpublished opinion).

4 *Alamo Cmty. Coll. Dist. v. Browning Constr. Co.*, No. 04-02-00808-CV, 2004 WL 60975 (Tex. App.–San Antonio January 14, 2004, no pet. h.) (unpublished opinion).

5 *Missouri Pacific Railroad Co. v. Brownsville Navigation Dist.*, 453 S.W.2d 812, 813 (Tex. 1970).

6 TEX. EDUC. CODE ANN. §11.151(a) is located under a subchapter entitled "Powers and Duties of Board of Trustees of Independent School District," and provides: §11.151 In General

(a) The trustees of an independent school district constitute a body corporate and in the name of the district may acquire and hold real and personal property, *sue and be sued*, and receive bequests and donations or other moneys or funds coming legally into their hands (emphasis added).

7 Based on a reliable source, Satterfield & Pontikes will file a petition for review (and will have done so by the time this article is published).

8 For a detailed discussion of the "sue and be sued" language and waiver of immunity, see Carter, C., "Is Sue and be Sued Language Clear and Unambiguous Waiver of Immunity," 35 St. Mary's L.J. 275 (2004).

9 *See Catalina Dev., Inc. v. County of El Paso*, 121 S.W.3d 704, 705 (Tex. 2003); s*ee also, Gen Serv.'s Comm'n v. Little-Tex Insulation Co*., 39 S.W.3d 591, 594 (Tex. 2001); Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 408 (Tex. 1997).

10 TEX. GOV'T CODE ANN. § 107.001 (Vernon 1986) (such resolutions are not available for persons seeking recovery against school or community college districts).

11 *Duhart v. State*, 610 S.W.2d 740 (Tex. 1981).

12 TEX. GOV'T CODE ANN. § 311.034 (Vernon Supp. 2003); *see Travis County v. Pelzel & Assocs. Inc*., 77 S.W.3d 246, 248 (Tex. 2002).

13 *See Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003).

14 TEX. CIV. PRAC. & REM. CODE ANN. § 101.025(a) (Vernon 1986).

15 TEX. GOV'T CODE ANN. § 404.103(b) (Vernon 1998).

16 TEX. GOV'T CODE ANN. § 554.035 (Vernon 2001).

17 TEX. GOV'T CODE ANN. § 2007.004 (Vernon 2000).

18 TEX. NAT. RES. CODE ANN. § 52.035(c) (Vernon Supp. 2003).

19 TEX. EDUC. CODE ANN. § 76.04 (Vernon 2002).

20 TEX. EDUC. CODE ANN. § 111.33 (Vernon 2002).

21 SB 1017 codified at LOC. GOV'T CODE § 262.007 (Vernon Supp. 2003) provides: "A county that is a party to a written contract for engineering, architectural, or construction services may sue or be sued, plead or be impleaded, or defend or be defended on a claim arising under the contract. . .(d) This section does not waive a defense or a limitation on damages available to a party to a contract, *other than a bar against suit based on sovereign immunity* . . . (e) This section does not waive sovereign immunity to suit in federal court." (emphasis added).

22 *Alamo Cmty. Coll. Dist. v. Obayashi Corp*., 980 S.W.2d 745 (Tex. App.—San Antonio 1998, pet. denied); *Dillard v. Austin Indep. Sch. Dist.*, 806 S.W.2d 589 (Tex. App.—Austin 1991, writ denied); *Goerlitz v. City of Midland*, 101 S.W.3d 573 (Tex. App.—El Paso 2003, pet. filed Feb. 24, 2003); *City of Mexia v. Tooke*, 115 S.W.3d 618 (Tex. App.—Waco 2003, pet filed Sept. 24, 2003); *Bates v. Texas State Tech. Coll*., 983 S.W.2d 821 (Tex. App.—Waco 1998, pet. denied); *Tarrant County Hosp. Dist. v. Henry*, 52 S.W.3d 434 (Tex. App.—Fort Worth 2001, no pet. h.); *Webb v. City of Dallas*, 314 F.3d 787 (5th Cir. 2002) (following *Missouri Pacific* as controlling Texas law); *City of Houston v. Clear Channel Outdoor, Inc.*, No. 14-03-00022-CV, 2004 WL 63561 (Tex. App.—Houston [14th Dist.] January 15, 2004, no pet. h.) (unpublished opinion); *see also Pelzel*, 77 S.W.3d at 249-50 (*dicta* stating "sue and be sued" language "arguably" waives immunity from suit); *Fed. Sign v. Tex S. Univ.*, 951 S.W.2d 401, 408 (Tex. 1997) (dicta recognizing its decision in *Missouri Pacific*).

23 *But see City of San Antonio v. Butler*, No. 04-02-00811-CV, 2004 WL 119336 at *4 (Tex. App.–San Antonio January 14, 2004, no pet. h.) (unpublished opinion) (acknowledging that in the context of tort claims, "sue and be sued" and "plead and be impleaded" language in Loc. Gov't Code 51.075 and city charter "does not purport to waive sovereign immunity, rather it outlines the authority of the City as a corporate body." *Citing* Kraehe, "There's Something About Cities: Understanding Proprietary Functions of Texas Municipalities and Governmental Immunity," 32 Tex. Tech. L.Rev. at 35-36 (2003).

24 *City of Dallas v. Reata Constr. Corp*., 83 S.W.3d 392 (Tex. App.—Dallas 2002, pet. filed Nov. 1, 2002); *Jackson v. City of Galveston*, 837 S.W.2d 868 (Tex. App.—Houston [14th Dist.] 1992, writ denied); *Taub v. Harris County Flood Control Dist*., 76 S.W.3d 406 (Tex.App.—Houston [1st Dist.] 2002, Rule 57(f) motion filed July 22, 2002); *Townsend v. Memorial Med. Ctr*., 529 S.W.2d 264 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.); *Childs v. Greenville Hosp. Auth*., 479 S.W.2d 399 (Tex. Civ. App.—Texarkana 1972, writ ref'd n.r.e.) (considering tort immunity and "sue and be sued" language); *see also Pelzel*, 77 S.W.3d at 251 (calling *Missouri Pacific* into question because no other cases supported assertion that county's immunity from suit could be waived by a presentment statute).

25 *But see Harris County Mun. Utility Dist. No. 48 v. Mitchell*, 915 S.W.2d 859, 862 n.1 (Tex. App.—Houston [1st Dist.] 1995, writ denied) (footnote stating M.U.D. immunity from suit was waived by "sue and be sued" language in Tex. Water Code § 54.119 (statute repealed in 1995)); *see also City of Houston v. Clear Channel Outdoor, Inc*., No. 14-03-00022-CV, 2004 WL 63561 (Tex. App.—Houston [14th Dist.] January 15, 2004, no pet. h.) (unpublished opinion) (declining to follow its own previous ruling in *Jackson v. City of Galveston*).

26 *But see Engelman Irr. Dist. v. Shields Bros., Inc*., 960 S.W.2d 343 (Tex. App.—Corpus Christi 1997, pet. denied) (holding "sue and be sued" language in Texas Water Code § 58.098 was a waiver of immunity from suit (statute repealed in 1995, 74th Leg., Ch. 715, § 47, eff. Sept. 1, 1995)).

27 *Browning Constr. Co*., 2004 WL 60975, at *4; *Obayashi*, 980 S.W.2d at 748; *Dillard*, 806 S.W.2d at 594 (interpreting identical language in former TEC 23.26, predecessor statute to TEC 11.151). In *Dillard*, the real issue seemed to be whether AISD was immune from liability from a claim based on estoppel. Nonetheless, the court stated, arguably in *dicta*, that the legislature had waived the school district's immunity by enacting TEC 23.26, and therefore, it was only concerned with immunity from liability in considering a claim of estoppel. *Dillard* is an odd opinion in many respects and has been called into doubt by *Texas Tech Univ. Health Sciences Center v. Rao*, 105 S.W.3d 763 (Tex. App.–Amarillo May 12 2003, pet. filed June 26, 2003) as well as directly disagreed with by *Satterfield*.

28 *See* Kraehe, "There's Something About Cities: Understanding Proprietary Functions of Texas Municipalities and Governmental Immunity," 32 Tex. Tech. L.Rev. at 35-36 (2003).

29 *See City of Dallas v. Reata Constr. Corp*., 83 S.W.3d at 399.

30 *Satterfield*, at *2.

31 *Satterfield* at *3, citing *Wichita Falls State Hosp. v. Taylor*, 106 S.W.3d 692, 697 (Tex. 2003).

32 *Id*. at *3.

33 *Duhart v. State*, 610 S.W.2d 740, 742 (Tex. 1981). The "clear and unambiguous" requirement was also codified effective June 15, 2001 in TEX. GOV'T CODE ANN. § 311.034 (Vernon Supp. 2003).

34 *Satterfield* at *3, *citing Taylor*, 106 S.W.3d at 696; *Pelzel*, 77 S.W.3d at 248; *IT-Davy*, 74 S.W.3d at 854; *Fed. Sign*, 951 S.W.2d at 405; *City of La Porte v. Barfield*, 898 S.W.2d 288, 291 (Tex. 1995).

35 *Satterfield* at *4.

36 *See Taub v. Harris Co. Flood Control Dist*., 76 S.W.2d 406, 410 (Tex. App.–Houston [1st Dist.] 2001, no pet.).

37 *See Alamo Cmty. Coll. Dist.v. Obayashi Corp*., 980 S.W.2d 745 (Tex. App. – San Antonio 1998, pet. denied).

38 *Id*. at *5 (stating, "We are bound by the authority of *Missouri Pacific* unless the supreme court overrules it.").

39 *Browning Constr*., 2004 WL 60975 at *2. In *Missouri Pacific*, the 1925 statute Section 46 of Article 8263h provided:

> "All navigation districts established under this Act may, by and through the navigation and canal commissioners, *sue and be sued* in all courts of this State in the name of such navigation district, and all courts of this State shall take judicial notice of the establishment of all districts." (emphasis added.)

40 The *Browning Construction* court appears to be referring to the statement on page 813 in *Missouri Pacific* (the page cited in its decision) that the 1925 statute is "quite plain."

41 *See Missouri Pacific Railroad Co. v. Brownsville Navigation Dist*., 445 S.W.2d 818, 821 (Tex. Civ. App.—Corpus Christi 1969) *rev'd by Missouri Pacific Railroad Co. v. Brownsville Navigation Dist*., 453 S.W.2d 812 (Tex. 1970).

42 The 1925 statute, Section 46 of Article 8263h provided:

> "All navigation districts established under this Act may, by and through the navigation and canal commissioners, *sue and be sued* in all courts of this state in the name of such navigation district, and all courts of this state shall take judicial notice of the establishment of all districts." (emphasis added).

43 *Missouri Pacific*, 453 S.W.2d at 814.

44 *Missouri Pacific*, 453 S.W.2d at 813, *citing Hamilton County v. Garrett*, 62 Tex. 602 (1884).

45 *See Travis County v. Pelzel & Assoc., Inc*., 77 S.W.3d 246 (Tex. 2002).

46 *See Hamilton County*, 1884 WL 8971 at *3.

47 *Missouri Pacific*, 453 S.W.2d at 814. (emphasis added).

48 *The Fifth District Court of Appeals* (Dallas) hears appeals from the District and County Courts of the following counties: Collin; Dallas; Grayson; Hunt; Kaufman; Rockwall; and Van Zandt. TEX. PRAC. GUIDE, Ch. 1.II (2003).

49 *The First District Court of Appeals* (Houston) hears appeals from the District or County Courts of the following counties: Austin; Brazoria; Brazos; Burleson; Chambers; Colorado; Fort Bend; Galveston; Grimes; Harris; Trinity; Walker; Waller and Washington. TEX. PRAC. GUIDE, Ch. 1.II (2003).

50 *The Thirteenth District Court of Appeals* (Corpus Christi) hears appeals from the District and County Courts of the following counties: Aransas; Bee Calhoun; Cameron; De Witt; Goliad; Gonzales; Hidalgo; Jackson; Kenedy; Kleberg; Lavaca; Live Oak; Matagorda; Nueces; Refugio; San Patricio; Victoria; Wharton; and Willacy. TEX. PRAC. GUIDE, Ch. 1.II (2003).

51 *The Sixth District Court of Appeals* (Texarkana) hears appeals from the District and County Courts of the following counties: Bowie; Camp; Cass; Delta; Fann; Franklin; Gregg; Harrison; Hopkins; Hunt; Lamar; Marion; Morris; Panola; Red River; Rusk; Titus; Upshur and Wood. TEX. PRAC. GUIDE, Ch. 1.II (2003).

52 *The Third District Court of Appeals* (Austin) hears appeals from the District and County Courts of the following counties: Bastrop; Bell; Blanco; Burnet; Caldwell; Coke; Comal; Concho; Fayette; Hays; Irion; Lampasas; Lee; Llano; McCulloch; Milam; Mills; Runnels; San Saba; Schleicher; Sterling; Tom Green; Travis and Williamson. TEX. PRAC. GUIDE, Ch. 1.II (2003).

53 *The Fourth District Court of Appeals* (San Antonio) hears appeals from the District and County Courts of the following counties: Atascosa; Bandera; Bexar; Brooks; Dimmit; Duval; Edwards; Frio; Gillespie; Guadalupe; Jim Hogg; Jim Wells; Karnes; Kendall; Kerr; Kimble; Kinney; LaSalle; Mason; Maverick; McMullen; Medina; Menard; Real; Starr; Sutton; Uvalde; Val Verde; Webb; Wilson; Zapata and Zavala. TEX. PRAC. GUIDE, Ch. 1.II (2003).

54 *The Eighth District Court of Appeals* (El Paso) hears appeals from the District and County Courts of the following counties: Andrews; Brewster; Crane; Crockett; Culbertson; Ector; El Paso; Gaines; Glasscock; Hudspeth; Jeff Davis; Loving; Martin; Midland; Pecos; Presidio; Reagan; Reeves; Terrell; Upton; Ward and Winkler. TEX. PRAC. GUIDE, Ch. 1.II (2003).

55 *The Tenth District Court of Appeals* (Waco) hears appeals from the District and County Courts of the following counties: Bosque; Brazos; Coryell; Ellis; Falls; Freestone; Hamilton; Hill; Johnson; Leon; Limestone, McLennan, Madison; Navarro; Robertson and Sommervell. TEX. PRAC. GUIDE, Ch. 1.II (2003).

56 *The Second District Court of Appeals* (Fort Worth) hears appeals from the District and County Courts of the following counties: Archer, Clay; Cooke; Denton; Hood; Jack; Montague; Parker; Tarrant; Wichita; Wise and Young. TEX. PRAC. GUIDE, Ch. 1.II (2003).

57 The author would like to thank Robert M. Dunn, Jr., associate with Feldman & Rogers, L.L.P., for providing assistance in obtaining the dismissal order and for providing assistance in the writing of this article.

58 As of January 28, 2004, neither Satterfield & Pontikes nor Alamo CCD has filed a petition for review. However, a reliable source indicates Satterfield & Pontikes will file a petition for review now that their motion for rehearing has been denied.

59 *The Fifth District Court of Appeals* (Dallas) hears appeals from the District and County Courts of the following counties: Collin; Dallas; Grayson; Hunt; Kaufman; Rockwall; and Van Zandt. TEX. PRAC. GUIDE, Ch. 1.II (2003).

60 *The Fourth District Court of Appeals* (San Antonio) hears appeals from the District and County Courts of the following counties: Atascosa; Bandera; Bexar; Brooks; Dimmit; Duval; Edwards; Frio; Gillespie; Guadalupe; Jim Hogg; Jim Wells; Karnes; Kendall; Kerr; Kimble; Kinney; LaSalle; Mason; Maverick; McMullen; Medina; Menard. TEX. PRAC. GUIDE, Ch. 1.II (2003).

THE CHANGING LANDSCAPE OF THE ATTORNEY-CLIENT RELATIONSHIP: WHAT IS THE IMPACT OF THE ATTORNEY GENERAL'S OPEN RECORDS DECISIONS NOS. 676 AND 677?[1]

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I. INTRODUCTION

On November 30, 2002, U.S. Senator-Elect John Cornyn, as two of his last acts as attorney general of Texas, issued Open Records Decisions Nos. 676 and 677. Although the attorney general's office issued thousands of Open Records letter rulings during 2002, these were the only two formal Open Records Decisions issued that year, yet their significance continues to this day. ORD-676 examines the attorney-client privilege, and ORD-677 examines the work product privilege, as both privileges apply to the Public Information Act.[3]

The attorney general did not issue either decision in response to a specific request for a decision from a governmental body. In each case, he cited section 552.011 of the Government Code as authority to issue the decision. The legislature added this section to the Public Information Act in 1999. It is captioned simply "Uniformity." It directs the attorney general to "maintain uniformity in the application, operation, and interpretation" of Chapter 552 of the Government Code, and authorizes the attorney general, in the performance of this duty, to "publish any materials, including detailed and comprehensive written decisions and opinions, that relate to or are based on this chapter."

These two Open Records Decisions do not represent the first instance in which the attorney general's office has issued a *sua sponte* opinion on the authority of section 552.011.[4] Specifically, they were preceded in this regard by ORD-673 (2001), dealing with what constitutes a "previous determination" under section 552.301(a), which will excuse a governmental body from seeking an AG decision as to whether requested information is excepted from public disclosure.

This article will examine both decisions, utilizing the same section headings as used in the decisions themselves.

II. OPEN RECORDS DECISION NO. 676 – THE ATTORNEY-CLIENT PRIVILEGE

A. The Proper Exception for the Attorney-Client Privilege

Section 552.101 excepts from public disclosure information "considered to be confidential by law, either constitutional, statutory, or by judicial decision." Section 552.107(1) excepts from public disclosure "information that the attorney general or an attorney of a political subdivision is prohibited from disclosing because of a duty to the client under the Texas Rules of Civil Evidence, the Texas Rules of Criminal Evidence, or the Texas Disciplinary Rules of Professional Conduct."

Prior to 1990, the attorney general's office had held that both sections 552.101 and 552.107(1) incorporated the attorney-client privilege. That year, however, in ORD-575, the attorney general wrote that evidentiary privileges included in the Rules of Civil Procedure or the Rules of Evidence did not fall within section 552.101. According to the AG, these privileges are not "constitutional law, statutory law, or judicial decisions." The AG adheres to this view in ORD-676. Whether this hair-splitting distinction between statutes and rules makes sense is questionable, given that the Texas Supreme Court has held that the "Texas Rules of Civil Procedure have the same force and effect as statutes." *In re City of Georgetown*, 53 S.W.3d 328, 332 (Tex. 2001) *quoting from Missouri Pacific R.R. v. Cross*, 501 S.W.2d 868, 872 (Tex. 1973).

Since 1990, however, courts, including the Texas Supreme Court, have continued to write that section 552.101 "exempts information considered confidential by law, including information falling under the attorney-client privilege." *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 360 n. 5 (Tex. 2000). The AG dismisses this language as a "suggestion" by the Court, that lacks supporting "analysis," and that was merely "ancillary to the actual issues addressed" in the case. ORD-676 at 1. The AG then goes on to write that section 552.101 refers to information that a governmental body is *prohibited* by applicable constitutional, statutory or judicial law from releasing. Because the attorney-client privilege may be waived by the client, it does not fit into the AG's construct.

The AG cites no prior AG decisions and cites no case authority for this narrow reading of section 552.101. The AG writes that "confidential by law," as used in section 552.101, and "confidential under law," as used in section 552.007(a)

(prohibiting voluntary disclosure by a governmental body if the disclosure "is expressly prohibited by law or the information is confidential under law"), refer only to information that a governmental body is legally prohibited from releasing. Yet the AG recognizes that the Texas Supreme Court has held that the phrase "confidential under other law," as used in section 552.022 (which provides examples of items that are "public information"), includes information that is privileged under the Rules of Evidence and the Rules of Civil Procedure, and thus is information that may be voluntarily released if the governmental body chooses to do so. *In re City of Georgetown*, 53 S.W.3d 328, 336 (Tex. 2001).

Query: Is the AG's disagreement with the Texas Supreme Court's statement that section 552.101 includes "information falling under the attorney-client privilege" calculated to "maintain uniformity in the application . . . and interpretation" of the Act, as required by section 552.111?

Practice Pointer: The exception under which the attorney-client privilege rests is significant under section 552.301(b), which requires that when a governmental body wishes to withhold requested information from public disclosure, it must "ask for the attorney general's decision and state the exceptions that apply." In light of this decision, a governmental body asserting the attorney-client privilege could conceivably waive it, if section 552.101 (confidential under law), but not section 552.107(1) (allowing a governmental entity to claim information is attorney-client privileged), were cited. Nonetheless, the AG concludes this section of the Decision by writing that if the "attorney-client privilege is asserted under section 552.101, this office shall consider it an assertion of the more specific section 552.107(1) exception." The careful school lawyer, however, should cite both exceptions.

B. The Scope of the Section 552.107(1) Exception

The AG writes unequivocally that if information meets the requirements of the attorney-client privilege as stated in Texas Rule of Evidence 503, the information is protected under section 552.107(1).

Note, however, that this section cites not only the Rules of Evidence, but also the Texas Disciplinary Rules of Professional Conduct (Article X, Section 9 of the State Bar of Texas Rules). Disciplinary Rule 1.05, captioned "Confidentiality of Information," provides, as a general rule, that a lawyer is prohibited from releasing not only information that comes within the attorney-client privilege, but also "unprivileged client information," which is included within the rule's definition of "confidential information." The "unprivileged client information" means "all information relating to a client or furnished by the client, other than privileged information, acquired by the lawyer during the course of or by reason of the representation of the client." Obviously, unprivileged client information covers a great deal of information the lawyer must generally keep confidential. The rule does contemplate that the lawyer may reveal this type of information when expressly or impliedly authorized to do so in order to carry out the lawyer's representation, when the client consents, when the lawyer has reason to believe it is necessary to do so in order to comply with court order, the disciplinary rules, other law, etc.

The AG rules that confidential but unprivileged client information does *not* fall within the protection of section 552.107(1). In response to a "plain language" argument that section 552.107(1) necessarily includes unprivileged client information, the AG counters that such information is releasable by the attorney when necessary to comply with "other law" and it would defeat the purposes of the Act to protect from public disclosure all such unprivileged client information, particularly where "the release of information in compliance with the Act is made by the governmental body through its officer for public information," not its attorney. ORD-676 at 4.

Practice Pointer: A careful school lawyer will ensure that any actual release of confidential but unprivileged client information is made by the officer for public information, and not by the attorney, unless the attorney has express consent from the client. Recall that the officer for public information is the "chief administrative officer of a governmental body," or in the case of a school district, the superintendent, but that a school district "client" normally speaks through the board of trustees.

On the other hand, the AG reverses prior practice, and states, in conformity with the approach normally used by the courts, that section 552.107(1) "generally excepts an **entire communication** that is demonstrated to be protected by the attorney-client privilege" as defined in Tex. R. Ev. 503 (emphasis added). In reaching this conclusion, the AG may have been making an effort to achieve uniformity with the decision in the case of *Harlandale I.S.D. v. Cornyn*, 25 S.W.3d 328 (Tex. App. - Austin 2000, pet. denied), wherein the Austin court had held that an entire report prepared by an attorney, including factual information, was protected from disclosure. In reaching this conclusion, the AG also utilized language that represents a refreshing change from the approach in recent years to attack the attorney-client privilege in situations involving a governmental entity:

> A governmental body has as much right as a private individual to consult with its attorney without risking the disclosure of communications protected by the attorney-client privilege.

ORD-676 at 5, citing *Markowski v. City of Marlin*, 940 S.W.2d 720, 726 (Tex. App. - Waco 1997, writ denied).

C. Section 552.022 Information, Including Attorney Fee Bills

Section 552.022 lists eighteen categories of information that are considered public information, "unless they are expressly confidential under other law," that is, law outside of the Act itself. Item No. 16 on this list is "information that is in a bill for attorney's fees and that is not privileged under the attorney-client privilege." Note that this item incorporates, within itself, the attorney-client privilege as an exception to disclosure. Other items in the list of eighteen do not expressly include this exception. The AG goes out of his way in ORD-676 to state that if an item of information is listed in section 552.022, in order to withhold such information from public disclosure, the governmental body must cite "other law," such as Texas Rule of Evidence 503. On the other hand, if the requested information is not identified within section

552.022, then to invoke the attorney-client privilege, the governmental body must invoke section 552.107(1) because, in that case, section 552.006 requires that a section of the Act itself authorize withholding the information.

Practice Pointer: As a general rule, if information is described in section 552.022, the governmental body to withhold the information must cite "other law," such as the attorney-client privilege as described in Texas Rule of Evidence 503. If, on the other hand, the information that the governmental body seeks to withhold is not described within section 552.022, then to withhold the information, it should cite the specific exception contained within the Act itself, such as 552.107(1).

D. Demonstrating the Attorney-Client Privilege

The AG goes to considerable lengths to explain how a governmental body seeking to invoke the attorney-client privilege must convince the AG of the propriety of doing so. A substantial amount of information, in addition to the privileged information itself, must be provided in order to invoke the privilege. The governmental body must establish all of the elements of Rule 503 to the satisfaction of the AG, including:

- the information constitutes or documents a communication
- the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body
- the attorney must be acting as professional legal counsel in making or receiving the communication, and not in another capacity, *e.g.*, administrator, investigator or manager
- the governing body must describe the nature of the professional legal services to which each communication pertains, and how such legal services were being rendered for the client governmental body
- the governmental body must advise the AG of the identities and capacities of all individuals to whom each communication was made
- client representatives who provide or receive the communication must meet the definition of Rule 503, *i.e.*, they must be a member of the client "control group," *or* the subject matter of the communication must pertain to the performance by each client representative of the duties of his or her employment.
- the governmental body must demonstrate that the communication was intended to be kept confidential
- the governmental body should explain to the AG that the confidentiality of the communication has been maintained, especially if there are any indications of disclosure.

If the governmental body intends to rely on the "common interest" or "joint defense" privilege, again, the governmental body must explain all elements of this aspect of the privilege. ORD-676 at 10.

Practice Pointer: The AG is putting governmental bodies on notice that he will expect any request to use the attorney-client privilege to withhold information to include background information that clearly establishes every element of Rule 503 of the Texas Rules of Evidence, and that the AG will not indulge in any inferences or presumptions in favor of the existence of the privilege.

E. Claiming the Attorney-Client Privilege Under the Act

Section 552.301(a) requires that a governmental body that wishes to withhold information from public disclosure "must ask for a decision from the attorney general about whether the information is within that exception if there has not been a previous determination about whether the information falls within one of the exceptions." Section 552.302 provides that if the governmental body does not request an attorney general decision, when required by section 552.301, then the information at issue "is presumed to be subject to required public disclosure and must be released unless there is a compelling reason to withhold the information."

According to the AG, a "compelling reason" is demonstrated only if the information is the type of confidential information that the governmental body is prohibited from disclosing.[5] The only other basis for demonstrating a "compelling reason" is that if the release of the information would implicate the interest of a third party. The AG states that because a governmental body is not prohibited from releasing its attorney-client privileged information, it does not have a "compelling reason" to withhold it if it does not comply with section 552.301. The AG does hold open the possibility, however, that a compelling reason could be demonstrated if release of the attorney-client privileged communication would harm a third party.

The AG then cites ORD-673 (2001) for the proposition that a governmental body cannot rely on any previous AG determination concerning the attorney-client privilege. In that decision, the AG recognized only two types of decisions that could constitute a "previous determination" within the meaning of section 552.301(a). The first type would involve a previous determination concerning "precisely the same records or information" that are currently at issue, in possession of the same governmental body, with no applicable change in law, facts or other circumstances. The second type of previous determination would be one dealing with a specific, clearly-delineated category of information involving similar circumstances, if the previous decision explicitly provides that the "type of governmental body from which the information is requested, in response to future requests, is not required to seek a decision from the attorney general in order to withhold the information." ORD-673 at 10.[6]

On both counts, the AG parts company with the case of *Hart v. Gossum*, 995 S.W.2d 958 (Tex. App. - Fort Worth 1999, no pet.), implicitly with respect to the "compelling reason" issue, but explicitly with respect to the "previous determination" issue. The *Hart v. Gossum* court dealt with a letter written by an attorney in private practice to the county judge, containing opinions and legal advice about trial strategy. The county judge did not request an attorney general's opinion under section 552.301, and the requestors argued that the failure to seek a timely decision from the AG constituted a waiver of the attorney-client privilege. The requestor also argued that the county judge had not satisfied the "compelling reason" test, which was not added to section 552.302 until 1999, but was already being utilized by the attorney general without an explicit statutory basis.

The *Hart* court wrote that the attorney-client privilege was "the oldest of the privileges for confidential communications known to the common law." 995 S.W.2d at 962. The court rejected the "compelling demonstration" test urged by the AG, but this holding clearly has been legislatively overruled by the 1999 amendment to section 552.302. The court went on to hold in the alternative, however, that even if the "compelling demonstration" test were to apply, "evidence that documents contain confidential attorney-client communications regarding trial strategy is compelling evidence against disclosure." 995 S.W.2d at 962-63. The court rejected ORD-630 (1994) to the effect that failure to request an AG decision constituted a waiver of the attorney-client privilege, on the basis that this decision was "not supported by any case law directly on point." *Id*. at 963. The court went further and held that because the AG had previously determined that "attorney communications of legal advice and opinions are excepted from disclosure under the Act," there was no need for the "governmental entity wishing to withhold such information from public disclosure . . . to request another decision from the attorney general before withholding the information," because it is "entitled to rely on the attorney general's previous determination." Id. The AG in ORD-676 dismisses this language in Hart v. Gossum as having been issued "without analysis, guidance or discussion." *Id*. at 12.

Practice Pointer: The cautious school lawyer will normally submit items that are attorney-client privileged to the AG's office within the required time frame, unless perhaps the information is clearly covered by a "previous determination" as defined in ORD-673. The legislature weakened *Hart v. Gossum* by codifying the "compelling reason" test into section 552.302 in 1999, and other courts will be less likely to follow it in light of this amendment and ORD-673 and ORD-676.

II. OPEN RECORDS DECISION NO. 677 – THE WORK PRODUCT PRIVILEGE

A. Background

Effective January 1, 1999, the discovery portions of the Texas Rules of Civil Procedure were completely rewritten by the Supreme Court. The old "attorney work product" and "party communication" privileges under former Rule 166(b) were replaced with the concepts of "core work product" and "other work product" under Rule 192.5. The AG stated that the purpose for issuing ORD-677 was to analyze the role of work product under the Act in light of the new discovery rules, and to examine the interplay of the exceptions to disclosure contained in sections 552.103 (litigation exception) and 552.111 (agency memoranda exception).

B. Section 552.103

Section 552.103 excepts from public disclosure "information relating to litigation of a civil or criminal nature to which the state or a political subdivision is or may be a party . . . only if the litigation is pending or reasonably anticipated on the date that the requestor applies to the officer for public information for access or duplication of the information." ORD-677 reiterates the critical nature of the timing of the request: the governmental body must "demonstrate reasonable anticipation of litigation under circumstances that existed *on the date of the request*" (original emphasis). *Id.* at 2-3.

If litigation is actually pending or reasonably anticipated, then the exception covers all information "relating to" the pending or reasonably anticipated litigation, **whether or not the information is privileged or discoverable**. *Id*. at 3. If litigation is pending or reasonably anticipated, section 552.103 clearly provides protection for information "relating to" the litigation that is broader in scope than either the attorney-client or work product privileges. If litigation is neither pending nor reasonably anticipated, however, then the governmental body may not avail itself of the section 552.103 exception.

C. Section 552.111

This section excepts an "interagency or intra-agency memorandum or letter that would not be available by law to a party in litigation with the agency." "Unlike section 552.103," according to ORD-677, "section 552.111 is limited to information that would be privileged from civil discovery." ORD-677 at 4. This exception has often involved the "deliberative process privilege." *See City of Garland v. Dallas Morning News*, 22 S.W.3d 351 (Tex. 2000). It also encompasses, however, other information that is privileged from discovery in civil litigation, such as attorney work product.

Rule 192.5 defines "work product" generally as (1) "material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents" or (2) a "communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents." It defines "core work product" as "the work product of an attorney or an attorney's representative that contains the attorney's or the attorney's representative's mental impressions, opinions, conclusions, or legal theories."

The AG notes that the privilege for core work product "is absolute and perpetual in duration." ORD-677 at 5. The AG further notes that the protection of core work product generally would not extend to purely factual information, but a request made for an attorney's entire file is objectionable as requesting core work product. The AG clearly writes that section 552.111 encompasses core work product, but does not expressly address whether "other work product" would be excepted under 552.111.

D. Demonstrating Work Product Under Section 552.111

The AG provides several directions to those who would invoke the work product privilege in requests for decisions. These are based on the requirement that work product be made or developed "in anticipation of litigation or for trial," and that courts, in applying this requirement, require both objective evidence that the circumstances are such that a reasonable person would believe that there is a "substantial chance of litigation," and that the party asserting the privilege actually had a subjective "good faith belief that litigation would ensue." Thus, to claim this privilege:

- The governmental body "should explain the relevant facts and circumstances that existed *at the time the*

specific records at issue were created or acquired" (original emphasis).

- The governmental body should explain whether the person "that created or obtained the information believed that litigation would ensue, *at the time the information was created or acquired*" (original emphasis).
- If the information was created in the ordinary course of business, the governmental body must explain to the AG that the "primary motivating purpose for the routine practice that gave rise to the information" was to prepare the information in anticipation of litigation.
- The governmental body must identify the parties or potential parties to the litigation.
- The governmental body must inform the AG of the identity and role of each person or entity that prepared the information as well as with whom the information has been shared.

The AG also notes that Rule 192.5(c) lists five types of information that are *not* work product protected from discovery, even if made or prepared in anticipation of litigation. These items include "witness statements." If any information is submitted to the AG that on its face appears to fall into any of these categories, the governmental body must provide detailed information of how the information is nevertheless privileged.

E. Section 552.022

Section 552.022 sets forth a list of items that are generally considered public unless expressly made confidential by "other law." The AG notes that section 552.111 is not "other law" for purpose of section 552.022, but that Rule 192.5 is "other law." Accordingly, section 552.111 should be cited to withhold information that is not subject to section 552.022, but Rule 192.5 should be cited to withhold information that is subject to section 552.022.

With respect to information covered by section 552.022, however, the AG distinguishes between core work product and other work product. The AG writes that only core work product under Rule 192.5 will constitute "other law" that will suffice to withhold information that is otherwise public under section 552.022. To support this distinction, the AG seizes on the requirement in that section that the "other law" provide that the information is "expressly confidential," and that "other" work product is discoverable under Rule 192.5(b)(2) under certain special circumstances.[7] The AG rejects the argument that other work product should be excepted from disclosure unless the requestor demonstrates the special circumstances permitting disclosure under Rule 192.5(b)(2), based primarily on the provision of section 552.222 preventing a governmental body from inquiring of the requestor "the purpose for which information will be used." The AG concludes that information that is "other work product and subject to section 552.022 may not be withheld on the basis of Rule 192.5."

The AG cites *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001) in support of his position, but it actually appears that his reliance on *Georgetown* is misplaced. At issue in the case was a completed consulting expert's report prepared in connection with pending or anticipated litigation. The City attorney had retained an engineer as a consulting expert to prepare a written assessment of certain parts of a wastewater treatment plant. The parties agreed that it was a "completed report," within the meaning of section 552.022(a)(1). The City contended that it was confidential, however, under other law, Texas Rules of Civil Procedure 192.3(e) and 192.5. Rule 192.3(e) makes confidential and nondiscoverable, without exception, the identity, mental impressions and opinions of a consulting expert whose mental impressions and opinions have not been reviewed by a testifying expert.

The Supreme Court held that the City did not have to release the report to the requestor under the Act. It wrote that if documents are "privileged or confidential" under the Rules of Civil Procedure or Evidence, they are "confidential under other law" as required by § 552.022. No party contended that the report was core work product. The Supreme Court made no effort to distinguish between core work product and other work product or between the consulting expert privilege and other work product. One would think, therefore, that the AG would be willing – if not compelled – to protect *all* work product, including an expert report.

Note that Rule 192.5(a) provides that "an assertion that material or information is work product is an assertion of privilege." The AG seized, however, on the Supreme Court's language in the *Georgetown* case that "certain types of work product do not have to be disclosed, which means they are confidential." ORD-677 at 9, *quoting from* 53 S.W.3d at 334. These "certain types" of work product include, however, "other work product," unless the party seeking discovery establishes the extraordinary circumstances set out in Rule 192.5(b)(2).

The AG's edict that other work product does not qualify as "other law" for purposes of section 552.022 appears to conflict with the Supreme Court's holding in the *Georgetown* case. If applied, it would allow a party to obtain information in response to a PIA request that would be privileged from discovery in a lawsuit. Query whether this portion of the AG's Decision will stand up when challenged in court.

F. Section 552.302

The AG here adopts the same rationale and position as he did with respect to the attorney-client privilege in ORD-676: the fact that information is work product – either core work product or other work product – does not constitute a "compelling reason" to withhold it under section 552.302, if the governmental body has failed to meet the deadline for submission to the AG set by section 552.301. A compelling reason may still be shown if the release of the information would harm a third party. According to the AG, harm to the governmental entity does not suffice.

As noted above, in 1999, the legislature amended sections 552.302 and 552.303 of the Act in order to require that the governmental body show a "compelling reason" to withhold information where the governmental body has failed to submit required information to the AG on a timely basis. The legislature did not, however, define "compelling reason." Thus, it will remain for the courts to determine whether to accept the AG's position, or whether to determine that preservation of the confidential and privileged nature of attorney-

client information, and of work product that would not be discoverable in litigation, constitutes a "compelling reason."

G. Applying the Privilege

The AG here writes that "generally, where a document is demonstrated to contain work product that may be withheld under the standards discussed in this decision, this office in the open records ruling process may authorize the governmental body to withhold the entire document." *Id*. at 11. This language intimates that withholding of the entire document – as opposed to redacting only certain portions – on the basis of work product may not be as automatic as in the case of attorney-client privilege.

IV. CONCLUSION

These ORDs, on the one hand, facilitate the understanding of the Public Information Act as it relates to the attorney-client and work product privileges. The decisions that, generally, an entire document that is protected by the attorney-client or work product privilege is excepted from disclosure will bring the AG position into uniformity with court decisions in the discovery context. They will also make it easier to comply with the Public Information Act, and should result in less sentence-by-sentence redacting of documents that are otherwise privileged. Moreover, the decisions that attorney-client privileged materials, and "core" work product materials, are excepted from disclosure, even if otherwise meeting the description of "public information" under section 552.022, helps to preserve these important privileges, and is consistent with positions taken by the courts.

On the other hand, the AG's opinion that non-core or "other" work product is not protected, if listed under section 552.022, appears to be inconsistent with existing case law, and is inconsistent with the concept that such work product is not discoverable, absent a demonstration of extraordinary circumstances. Likewise, the AG's opinion that material is protected by the attorney-client and work product privileges is not a "compelling reason" to withhold it from public information if the governmental body fails to meet the ten-business-day deadline for submission to the AG is also inconsistent with prior judicial authority. The AG thus denigrates these significant privileges, in spite of his own statement that a "governmental body has as much right as a private individual to consult with its attorney without risking the disclosure of communications protected by the attorney-client privilege." In these aspects of the opinions, the AG failed to promote the important purposes underlying the attorney-client and work product privileges, and also marked a significant departure from judicial interpretation of the TPIA. Whether the AG's analysis will prevail in the end remains to be seen.

ENDNOTES

1 Based on a paper presented at the 17th Annual State Bar of Texas School Law Section Retreat; Galveston, Texas; July 19, 2003.

2 The author gratefully acknowledges the valuable editing assistance provided by Carolyn Hanahan.

3 The Texas Public Information Act is codified at Chapter 552 of the Texas Government Code. It will sometimes be referred to in this paper as the "Act" or as the "TPIA." Statutory citations in this paper, unless otherwise indicated, are to the Act.

4 The AG's Office had assigned both issues "Open Records Question" (ORQ) numbers, even though the requests evidently had been generated internally. The attorney general's web site, under Open Government, includes an area that describes pending ORQ's, and solicits comments.

5 The AG decision also opines that the section 552.352 penal offense applies only to the disclosure of information that is confidential in the sense that its disclosure is prohibited by law.

6 As an example of the second type of previous determination, ORD-673 cited ORD-634 (1995), which concluded that educational agencies or institutions may withhold from public disclosure information that is protected by FERPA and therefore excepted from public disclosure by section 552.101 "without the necessity of requesting an attorney general decision as to that exception."

7 Rule 192.5(b)(2) provides that other work product "is discoverable only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the material by other means."

THE ATTORNEY GENERAL'S NEW RELEASE ON NEPOTISM LAW

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Now playing in Texas school districts everywhere is one of the latest dramas, or comedies depending on your view, in school law. Attorney General Opinion GA-0123 was released November 18, 2003 and has been drawing criticism ever since. The Attorney General's new variation on the application of the nepotism statutes in Texas Government Code Chapter 573 turns the spotlight away from trustees and toward superintendents with respect to the hiring and reassigning of close relatives when the superintendent is in charge of those decisions.

The Way We Were

Before November 18, 2003, school districts probably gave nary a thought as to whether the state's nepotism laws would apply to a superintendent and *not* apply to a school board trustee. They could count on any number of school lawyers, as well as the Texas Education Agency[1] and the Texas Association of School Boards,[2] to tell them that only school board trustees were subject to the nepotism laws. This was the common understanding based primarily on a 1981 Court of Civil Appeals decision out of Eastland called *Pena v. Rio Grande City Consolidated Independent School District*.[3]

The *Pena* court's task was to determine whether the superintendent was an officer of the school district subject to the nepotism laws. Specifically, Eduardo Pena claimed that the school district unlawfully employed the superintendent's wife as a teacher. After reviewing the nepotism statutes then in effect,[4] as well as Education Code provisions that gave exclusive power to the trustees to manage and govern the district, and further gave them authority to employ a superintendent, the court concluded that a superintendent was not subject to the nepotism statutes. The court reasoned that the school board retained the exclusive right and sole legal authority to appoint or employ teachers, and the board did not abdicate its

authority by delegating functions to the superintendent, who was merely an employee or agent of the district. The court expressly disagreed with a 1979 Attorney General Opinion that found a superintendent was an officer for purposes of the nepotism statutes and that a case-by-case analysis was necessary to determine whether a particular superintendent's personnel recommendation would rise to the level of actual control over hiring.[5]

Since *Pena*, most school districts have evaluated their compliance with the nepotism statutes by examining trustees' relationships with current or potential employees. This was true whether or not the school board had delegated hiring authority to the superintendent to any extent. Thus, the nepotism provisions were not an obstacle to the employment or promotion of a superintendent's relative. In fact, it has been a common practice in some school districts to employ a superintendent's relative, such as when bringing on a new superintendent whose spouse also happens to be a certified educator.

The Attorney General's recent opinion has sent many superintendents and school boards scrambling to reexamine their hiring practices – in a hurry.

Back to the Future

Through the Commissioner of Education, Aldine Independent School District posed questions about the application of nepotism prohibitions to relatives of trustees when the school board has delegated hiring authority to the superintendent.[6]

Part I

Aldine I.S.D. asked a question involving the employment and compensation of a bus driver related to a trustee within a prohibited degree.[7] The Attorney General first addressed the school district's assumption that a trustee was the relevant public official to whom the prohibitions apply in this situation.[8] Contrary to the common understanding since *Pena*, the Attorney General announced that the *superintendent* is the relevant public official under the nepotism statutes where a board has delegated final hiring authority to the superintendent.[9] Furthermore, trustees who have delegated hiring authority to the superintendent are *not* public officials under the nepotism statutes because "they have no vestigial authority to select district personnel."[10] The Attorney General considered Education Code provisions giving the trustees exclusive authority to govern and oversee the management of a school district,[11] conferring power to adopt rules and bylaws to execute board powers,[12] authorizing the employment of a superintendent as the chief executive officer,[13] and requiring a school board to adopt a personnel policy.[14] The Attorney General focused on Education Code Section 11.163(a)(1), which requires a board's personnel policy to provide that "the superintendent has sole authority to make recommendations to the board regarding the selection of all personnel other than the superintendent, *except that the board may delegate final authority for those decisions to the superintendent*."[15] The opinion cites a 1955 Texas Supreme Court decision also involving Aldine I.S.D. for the proposition that an officer is a person who has been granted a sovereign function of government and exercises it for the public's benefit largely independent of the control of others.[16] Then, the Attorney General stated that selecting personnel is a sovereign function, citing other Attorney General opinions for support.[17]

Under this new interpretation, a superintendent with hiring authority cannot hire his or her own relatives, but *can* hire relatives of trustees.[18] In the case of Aldine I.S.D., it was permissible for the superintendent with hiring authority to employ a trustee's daughter-in-law as a bus driver and to pay her for work she performed.[19]

The Attorney General carefully drew a distinction between his opinion and the Court of Appeals decision in *Pena* primarily by explaining that the Education Code in effect when *Pena* was decided did not authorize school boards to delegate final hiring authority to the superintendent.[20] According to the Attorney General, school boards back then were not able to abdicate their authority to appoint or confirm personnel selections; whereas, under the current Education Code, a school board "no longer has 'the exclusive right and sole legal authority to appoint' or confirm personnel selections" when it delegates final authority for hiring decisions to the superintendent.[21]

Part II

Aldine I.S.D. asked next whether the superintendent could promote a teacher related to a trustee to a departmental chair position without board action.[22] The Attorney General distinguished this question from the first on the basis that reassignment is not selection of personnel governed by Education Code Section 11.163(a)(1).[23] The Attorney General turned to Section 11.201(d)(2) of the Education Code giving superintendents the duty of "assuming administrative authority and responsibility for the assignment and evaluation of all personnel of the district other than the superintendent,"[24] and deduced that the "school board has no authority to assign personnel" and its trustees are therefore not public officials for purposes of the nepotism statutes.[25] The Attorney General concluded that the Aldine I.S.D. superintendent could reassign the trustee's relative and the board would not be authorized to act on the reassignment.[26]

Part III

The Texas Education Agency weighed in on the Attorney General's opinion in response to numerous inquiries. TEA issued a letter to school administrators explaining its views about the opinion and urging school districts to strictly and immediately comply.[27] TEA summarized the Attorney General's conclusion by explaining that "when final hiring authority for a position has been delegated to an employee of the district" that employee is subject to the nepotism statutes and the trustees are not.[28] TEA acknowledged that the opinion "represents a significant change" in the common understanding of existing law and warned districts not to enact policy changes that appear solely an attempt to avoid the consequences of the statutes.[29] TEA plans to prospectively apply the opinion "but will not penalize any district or individual" for having acted on the prior understanding of the law before the opinion was issued.[30] TEA has no direct enforcement authority over the nepotism laws, so the statement could be an indication that TEA intends to monitor districts' compliance with the new opinion along with other school laws in its role of overseeing school governance issues. Also, the letter could be an indirect suggestion to other enforcement entities to apply the opinion prospectively.

Analyze This

After GA-0123, some unwitting districts found their common hiring practices in the limelight. Many questions arose as those districts and their attorneys grappled with the application and import of the opinion, including whether the opinion is legally binding and the consequences of non-compliance.

The Attorney General's office is authorized to issue written opinions on questions affecting the public interest.[31] The Government Code explains that an "'opinion' means advice or a judgment or decision and the legal reasons and principles on which it is based."[32] Attorney General opinions are not binding on the courts and are not conclusive, but are entitled to great weight.[33] The Attorney General intends for his opinions to clarify the meaning of existing law and considers his opinions to have the weight and force of law until they are modified or overruled by statute, case law or later Attorney General opinions.[34]

Serious consequences face public officials found to be in violation of the nepotism law. Public officials who violate the nepotism prohibitions[35] or improperly participate in employment decisions involving their relatives[36] are subject to removal from their positions in accordance with the constitution, or if inapplicable, by a quo warranto proceeding.[37] The Attorney General, with the help of local district or county attorneys, is charged with removal of public officials who violate certain nepotism statutes by bringing quo warranto proceedings where the state constitution does not govern the removal.[38] It is a misdemeanor criminal offense to violate the nepotism prohibitions, improperly participate in employment decisions involving relatives, or authorize compensation of an ineligible relative.[39] In the event of a criminal conviction, a public official is subject to a fine between $100 and $1,000, and the original appointing authority is to summarily and immediately remove the public official.[40]

Many school districts are taking swift steps to comply with the new opinion in light of the serious statutory consequences of non-compliance, even if they question the precedential value of the opinion and the role of TEA in monitoring compliance.

The opinion should only apply to the extent that a board has delegated final hiring authority to the superintendent. If a school board has not delegated any hiring authority, then the nepotism laws apply to trustees only, as was the general practice before GA-0123. Also unaffected by the opinion is the exemption for substitute teacher positions. Appointment or employment of a substitute teacher is among the general exceptions to the limits placed on public officers in hiring their relatives.[41] A superintendent or trustee has been and is free to hire a relative in a substitute teaching position, although a 1988 Attorney General opinion determined that service as a substitute teacher cannot count toward the continuous employment exception.[42]

If a school board has only delegated final authority to the superintendent to hire at-will employees, then GA-0123 should only hinder the superintendent's hiring of his or her relatives in at-will positions, and should only permit the hiring of trustees' relatives to at-will positions. Likewise, if the board has delegated final authority to hire contract employees, then the opinion should limit the ability of the superintendent to hire his or her relatives in contract positions, and free the superintendent to hire trustees' relatives in those positions.

Be warned, however, that when the Attorney General's opinion applies to a superintendent, there may be a new dimension to the prohibition applicable to "trading" in Government Code Section 573.044. To strictly comply with the opinion, a superintendent and trustee cannot agree to hire each others' relatives to positions within their respective hiring authority.[43] For example, in a school district in which the board has delegated final hiring authority to the superintendent for at-will positions only, and has retained authority for contract positions, the superintendent cannot agree to hire a trustee's son as a cafeteria worker in exchange for the board hiring the superintendent's spouse as a teacher.

Analyze That

School districts are finding that it is one thing to choose to comply with the new opinion and yet another to effect compliance in the face of unanswered questions.

For starters, school districts that employ individuals affected by the opinion must make quick decisions about the status of employees now considered ineligible for their positions, and whether those employees can be compensated for their work. The nepotism statutes prohibit a public official from authorizing compensation of an ineligible individual once the public official knows of the ineligibility.[44]

Some districts elected to terminate at-will employees immediately or at the end of the current pay period when they learned of the Attorney General opinion. Also, some districts compensated at-will employees for all work through the date of termination. As for contract employees, school districts seem inclined to honor contracts through the end of the school year, treating the Attorney General's opinion as a ground for nonrenewal of one-year contracts or for termination of multiple-year contracts. However, the Attorney General's interpretation of existing law is that the nepotism prohibitions have applied to superintendents with final hiring authority since the 1995 changes to the Education Code.[45] Therefore, the opinion can be read to mean that all impermissible employment contracts entered into by a superintendent are invalid because there was never any authority to enter into the contracts in the first place. An invalid contract would be subject to immediate termination, in contrast to a situation in which an employee can serve out the term of a contract that was valid when entered into then subsequently became subject to the nepotism laws, such as by the employee's marriage to a public official.[46] Education Code Chapter 21 procedures would be inapplicable to an invalid contract. As a practical matter, however, districts may find that the superintendent's relatives are willing to simply resign.

The continuous employment exception to the nepotism statutes creates particular difficulty. The nepotism prohibitions in Section 573.041 do not apply if the relative was hired "immediately before the election or appointment" of the public official and the employment is continuous for 30 days, six months, or one year, depending on the way the public official

came to office.[47] Determining the date of election or appointment of a trustee is easy enough, as is determining the date that a superintendent was employed.

However, imagine a scenario where the school board did not delegate final authority to hire to the superintendent on the exact date of employment, such as where the superintendent has been with a fast-growing district for a number of years and the board delegated final hiring authority only in the last year for administrative convenience. If that superintendent's spouse has been employed in the district for the same number of years as the superintendent, applying the date of the superintendent's employment to the continuous employment exception would mean that the spouse's numerous years of employment would not count. Situations like this illustrate why it might make more sense to analyze the continuous employment exception in relation to the date of delegation.

Yet another variation is being advocated by school districts facing particular hardship in immediately applying the new opinion, such as where a rural district has a limited applicant pool. These districts are in favor of calculating continuous employment from the date the Attorney General's opinion was issued.

Another aspect of the continuous employment exception that raises questions about the practical application of GA-0123 is the restriction on a public official's participation in employment decisions affecting his or her permissibly employed relative. Public officials are not to deliberate or vote on their relative's appointment, employment, change in status, compensation or dismissal unless such action is taken in relation to a bona fide class or category of employees.[48] If the superintendent's relative is continuously employed in a position within the superintendent's hiring authority, then in accordance with the Attorney General opinion the statute would prohibit the superintendent from making employment-related decisions specifically aimed at his or her relative. Simple enough, but who *is* to make those decisions? Recall that the Attorney General concluded the school board has "no vestigial authority to select district personnel"[49] and "no authority to assign personnel."[50]

The Attorney General's conclusions that the board lacks authority to select and assign personnel raises concern among school districts. Under the logic of *Pena*, the board does not necessarily abdicate its own authority by delegating functions to the superintendent.[51] Indeed, decisions of the Commissioner of Education support the idea that the board maintains authority over personnel matters unless *sole* authority is granted to the superintendent by statute.[52] If the board does not maintain any authority over hiring or assignments, one might question the board's authority to act on employee grievances or to override the superintendent's decisions, such as to prevent civil rights violations. If the board *does* maintain authority despite delegation, the Attorney General's additional conclusion that trustees are not public officials for purposes of the nepotism statutes becomes suspect.[53] Whether the Attorney General properly removed trustees from the reach of the nepotism statutes or properly extended the prohibitions to the superintendent in the first place remain the subject of much debate in the school law community.

The Attorney General's pronouncement that a superintendent can be a public official raises additional issues not addressed in the opinion. The Attorney General limited his conclusion to the nepotism laws and specifically avoided a superintendent's status as an officer for other purposes.[54] Even so, the superintendent's new status could potentially require the superintendent to take an oath of office like other public officers[55] and call into doubt the validity of actions taken by the superintendent without taking such an oath. Other questions come to mind in trying to apply the nepotism laws' enforcement provisions to the superintendent, such as whether a superintendent is subject to complete removal or only removal of delegated hiring authority.

To Be Continued...

Districts continue to wrestle with how to, and whether to, amend their policies in light of the new opinion. Most school board policies in effect at the time of the opinion were developed under the assumption that only the trustees were subject to the nepotism prohibitions,[56] and many school boards likely delegated final authority to the superintendent under that assumption. Knowing how the nepotism statutes are now interpreted by the Attorney General, some school boards might desire changes in order to carry out their original intentions with respect to superintendents' relatives or to take advantage of the opportunity for trustees' relatives to be hired. TEA warned against enacting policy changes that appear solely an attempt to avoid the consequences of the statutes,[57] but nearly any change along these lines could be interpreted as avoidance. To escape the appearance of impropriety, school districts might do well to gauge community reaction before making policy changes, especially considering that the opinion will only apply to a handful of employees in each affected district.

As of the date of this article, the Commissioner of Education has submitted a written request for clarification to the Attorney General on two issues: the effective date to be used in calculating the period of employment under the continuous employment exception, and the effect of the opinion on written employment contracts for the current school year.

School districts that have not delegated any hiring authority to the superintendent can by and large watch the plot unfold around GA-0123. As for the rest, the camera continues to roll and the public is watching.

ENDNOTES

1. *See* TEA Correspondence to the Administrator Addressed, dated December 3, 2003 ("[T]his agency has previously responded to nepotism inquiries by stating that only the board of trustees is subject to the nepotism statute.").

2. *See, e.g.*, TASB Model Board Policy DBE(Legal)-A ("Except as provided by this policy, no person shall be employed by the District who is related to a member of the Board by blood (consanguinity) within the third degree, or by marriage (affinity) within the second degree.") (citing Tex. Gov't Code §§ 573.002, 573.041).

3. *Pena v. Rio Grande City Consol. Indep. Sch. Dist.*, 616 S.W.2d 658 (Tex.Civ.App.–Eastland 1981, no writ).

4. Now, the law is codified at Chapter 573 of the Texas Government Code.

5. *See* Op. Tex. Att'y Gen. No. MW-56 (1979).

6. *See* Request Letter RQ-0060-GA, May 30, 2003 from Felipe Alanis, Commissioner of Education.

7. *See id.*

8. *See* Op. Tex. Att'y Gen. No. GA-0123 (2003) at 2.

9. *See id*. at 3.

10. *Id*.

11. *See* TEX. EDUC. CODE ANN. § 11.151(b) (West 2004).

12. *See* TEX. EDUC. CODE ANN. § 11.151(d) (West 2004).

13. *See* TEX. EDUC. CODE ANN. § 11.201(a), (b) (West 2004).

14. *See* TEX. EDUC. CODE ANN. § 11.163(a) (West 2004).

15. Op. Tex. Att'y Gen. No. GA-0123 (2003) at 2 (quoting TEX. EDUC. CODE § 11.163(a)(1)) (emphasis in original).

16. *See id*. at 2-3 (citing *Aldine Indep. Sch. Dist. v. Standley*, 280 S.W.2d 578 (Tex. 1955)).

17. *See id.* at 3 (citing Op. Tex. Att'y Gen. Nos. JM-72 (1983) and JM-91 (1983)).

18. *See id*. at 3.

19. *See id.*

20. *See id.* at 3-4.

21. *Id.* at 4.

22. *See* Request Letter RQ-0060-GA, May 30, 2003 from Felipe Alanis, Commissioner of Education.

23. *See* Op. Tex. Att'y Gen. No. GA-0123 (2003) at 4.

24. TEX. EDUC. CODE ANN. § 11.201(d)(2) (West 2004).

25. Op. Tex. Att'y Gen. No. GA-0123 (2003) at 4.

26. *Id*.

27. TEA Correspondence to the Administrator Addressed, dated December 3, 2003.

28. *Id*.

29. *Id*.

30. *Id*.

31. TEX. GOV'T CODE ANN. § 402.042 (West 2004); Tex. Const. art. IV, § 22.

32. TEX. GOV'T CODE ANN. § 402.041 (West 2004).

33. *See Gaynor Constr. Co. v. Bd. of Trustees, Ector County Indep. Sch. Dist*., 233 S.W.2d 472, 478 (Tex.Civ.App.–El Paso 1950, writ ref'd); *see also* Op. Tex. Att'y Gen. No. O-7234-A (1946) at 2 ("The opinions of the Attorney General have not the force of law and are legally binding on no one. They may be 'highly persuasive' to the courts, but apparently only in those cases where they coincide with the courts' view of the law.").

34. *See* Texas Attorney General official website, Opinions home page, www.oag.state.tx.us/opinopen/opinhome.shtml.

35. TEX. GOV'T CODE ANN. Chapter 573, Subchapter C (West 2004).

36. TEX. GOV'T CODE ANN. § 573.062(b) (West 2004).

37. TEX. GOV'T CODE ANN. § 573.081(a) (West 2004).

38. TEX. GOV'T CODE ANN. §§ 573.081, 573.082 (West 2004).

39. TEX. GOV'T CODE ANN. §§ 573.084, 573.083 (West 2004).

40. TEX. GOV'T CODE ANN. §§ 573.084(b), 573.081(b) (West 2004).

41. TEX. GOV'T CODE ANN. § 573.061(6) (West 2004).

42. *See* Op. Tex. Att'y Gen. No. JM-861 (1988); TEX. GOV'T CODE ANN. § 573.062 (West 2004) (continuous employment exception).

43. *See* TEX. GOV'T CODE ANN. § 573.044 (West 2004).

44. TEX. GOV'T CODE ANN. § 573.083 (West 2004).

45. *See* Op. Tex. Att'y Gen No. GA-0123 (2003).

46. *See* Op. Tex. Att'y Gen. No. DM-132 at 5 (1992) (citing prior Attorney General opinions in which contract employees were allowed to serve out their terms if the contracts were valid when entered into and the employees came under the purview of the nepotism statute after the contract began, such as through later election of a relative or marriage).

47. TEX. GOV'T CODE ANN. § 573.062 (West 2004).

48. TEX. GOV'T CODE ANN. § 573.062(b) (West 2004).

49. Op. Tex. Att'y Gen No. GA-0123 (2003) at 3.

50. *Id*. at 4.

51. *See Pena*, 616 S.W.2d at 660.

52. *Cf.* Tex. Comm'r of Educ. Dec. No. 180-R1-597 (1998) (finding that a teacher's contract could be properly terminated even without the superintendent's recommendation because the superintendent does not have sole authority to recommend terminations); Tex. Comm'r Educ. Dec. No. 103-R10-600 (2001) (finding that the superintendent does not have sole authority to initiate terminations in the absence of specific language to that effect in the Education Code).

53. *See* Op. Tex. Att'y Gen No. GA-0123 (2003) at 3, 4.

54. *See* Op. Tex. Att'y Gen. No. GA-0123 (2003) at 3.

55. *See* TEX. CONST. art. XVI, § 1.

56. *See, e.g.*, TASB Model Board Policy DBE (Legal)-A .

57. TEA Correspondence to the Administrator Addressed, dated December 3, 2003.

GAY STUDENTS IN PUBLIC SCHOOLS: AN ANALYSIS OF LEGAL TRENDS

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Recent studies suggest that gay, lesbian, bisexual and transgendered ("GLBT") students are increasingly choosing to make their sexual orientation public during their teen years, while still in junior high or high school.[1] With the rise in numbers of GLBT students, numerous national advocacy groups have mobilized, seeking to help these students fight for tolerance and acceptance on school campuses.[2] The result of these efforts has been a rapid increase in litigation involving issues of sexual orientation, including lawsuits over the formation of gay-friendly student groups and lawsuits attempting to hold school districts liable for harassment of GLBT students. At the same time, school districts that aggressively protect GLBT students are also being sued for violating the First Amendment rights of students who speak out against homosexuality. This article will provide a brief review of recent case law addressing these three litigation trends, including a November 2003 summary judgment ruling in *Caudillo v. Lubbock Independent School District*, currently pending in the Northern District of Texas.

Gay-Friendly Student Clubs

The most common sexual orientation issue arising in public schools so far has been the formation of gay-friendly student groups on school campuses. Groups of homosexual students and sympathetic heterosexual classmates have, with the assistance of national advocacy groups, formed "Gay-Straight Alliances" to serve as support groups for GLBT students. In some communities, school officials have resisted requests to sanction these groups as official school clubs. Public school districts, however, are bound by the federal Equal Access Act,[3] which requires districts to provide all non-curriculum related student groups an equal opportunity to meet on campus, regardless of the group's religious, political, or philosophical beliefs.

When a gay/straight alliance organized at a Salt Lake City, Utah high school, the district refused to recognize the club, sparking a four-year legal battle. Since the Equal Access Act only applies to school districts that open a "limited public forum" by allowing non-curriculum related student groups to meet on campus, the Salt Lake City school disbanded more than 46 other non-curriculum related student clubs, attempting to close its public forum. However, the trial court noted that the district had not disbanded all of its non-curriculum related clubs, as the Future Business Leaders of America, Future Homemakers of America, and the Key Club were still meeting. The court ruled that the district had violated the Equal Access Act by sanctioning some non-curriculum related groups, but denying recognition to the gay/straight alliance because of the group's beliefs. The court issued an injunction allowing the club to meet and ordering the District to pay the students' attorneys fees.[4]

Having lost round one, the Salt Lake City school board renewed its stance the following school year, this time completely disbanding all non-curriculum related groups, effectively closing its limited public forum. The gay-friendly club, however, still sought recognition, describing itself as a curriculum-based club devoted to American history, government, law, and sociology, that will focus its discussions on democracy, civil rights, equality, discrimination, and diversity. When the club's application was rejected, a second round of litigation ensued based upon pure First Amendment grounds. Again, the school district lost. The district argued that it rejected the club because it did not recognize any clubs that engaged in a "narrowing" of the curriculum, but the court dismissed this argument because the "no narrowing" rule was not found in the district's written policies and because the district had not applied that rule when it approved a Polynesian studies club. The court issued an injunction allowing the club to meet, and again ordered the district to pay attorneys' fees.[5]

A California school district also faced an Equal Access Act lawsuit after it denied official recognition to a gay-friendly club. In its defense, the school district cited a provision of the Equal Access Act which denies the Act's protections to student groups if non-school persons "direct, conduct, control, or regularly attend" the student meetings.[6] The school district argued that the national "Gay Lesbian & Straight Education Network" was controlling the group that was forming on its campus, noting that a GLSEN official had advised students about how to start the group, and that the group's name, "Gay/Straight Alliance," was suggested by GLSEN. The court rejected this argument, acknowledging that GLSEN provided assistance to the student organizers, but ultimately found that the group was controlled by the students, not by GLSEN. The court also rejected the district's claim that it had not denied the club's application, but had offered it "conditional" approval, provided the club agreed to choose a less provocative name, such as "The Tolerance Club." The court determined that the school district had no right to insist upon a name change and issued an injunction allowing the club to meet.[7]

Most recently, however, a Texas court ruled in favor of school administrators who refused to grant official club status to a gay-straight alliance. In *Caudillo v. Lubbock Independent School District*, the student plaintiffs who tried to organize the club sued the school district and school administrators under Section 1983 (alleging First Amendment violations) and the Equal Access Act. The administrators argued that they were entitled to qualified immunity against the students' claims. The court acknowledged that six U.S. District Courts had previously ruled in favor of gay-friendly student groups, but found that these six district court cases, all outside the Fifth Circuit, were not sufficient to "clearly establish" the rights of the plaintiffs so as to defeat the administrators' claim of qualified immunity. The court noted that the administrators reasonably believed they were acting to "maintain order and discipline" and to uphold the district's "abstinence only" policy regarding sex education, since the club's application stated that the members planned to "educate willing youth about safe sex, AIDS, hatred, etc." and since the club's web-site included direct links to sites that contained explicit sexual material and discussions.[8] The Caudillo case is ongoing. The court has yet to rule on the plaintiff's claims against the district.

School District Liability for Harassment of Gay Students

Lawsuits holding school districts liable for student-on-student harassment of GLBT students have also emerged as a litigation trend. Some school districts, faced with incidents of harassment against GLBT students, have failed to discipline the harassing students or intervene to stop the harassment, even in cases involving serious threats and actual violence. Needless to say GLBT students (and their parents) have not accepted this failure to respond. Lawsuits have been brought challenging inaction by school officials as violations of the Constitution or of federal civil rights laws.

The first lawsuits challenged school district indifference to harassment of GLBT students as a violation of the Equal Protection clause. Homosexuals are, according to the U.S. Supreme Court's decision in *Romer v. Evans*, not members of a protected class that would entitle them to strict scrutiny under the Equal Protection Clause.[9] Consequently, a school district need not have a compelling interest to treat homosexuals differently from other individuals: a rational basis will suffice. In *Nabozny v. Podlesny*, faced with a fact scenario where school administrators ignored harassment and violence that violated the general student code of conduct simply because the victims were gay, Judge Posner of the Seventh Circuit opined that no rational basis could possibly exist for such inaction.[10]

More recently, in *Flores v. Morgan Hill Unified School District*, the Ninth Circuit Court of Appeals determined that school officials who ignored harassment of gay students were not entitled to qualified immunity to insulate them from personal liability.[11] The Ninth Circuit found that the Equal Protection rights of gay students had been clearly established in that Circuit, and that administrators could be held personally liable for their indifference to harassment. In January of 2004, the District settled the claims of the six GLBT students who had brought the *Flores* litigation, agreeing to pay $1.1 million dollars in damages and legal fees, and to adopt tolerance training that would include issues of sexual orientation.[12]

In addition to Equal Protection claims, students have brought lawsuits under Title IX of the Educational Amendments of 1973 (20 U.S.C. § 1681(a)). Title IX was passed to prevent discrimination "on the basis of sex" in public schools, and was, for years, applied mainly to insure female students equal access to athletic opportunities. In 1999, the U.S. Supreme Court determined in *Davis v. Monroe County Board of Education*, that students can seek money damages under Title IX against school districts that are deliberately indifferent to known incidents of severe student-on-student sexual harassment.[13]

GLBT students that have suffered harassment from peers are now bringing suits under *Davis*, so that courts are now faced with the question: does Title IX's prohibition of discrimination the basis of sex also apply to discrimination on the basis of sexual orientation? A handful of district court cases have recently addressed the issue, as has the U.S. Department of Education's Office for Civil Rights ("OCR").

The OCR's guidance on the subject accepts that Title IX only applies to "sex" discrimination, and not "sexual orientation" discrimination, but makes clear that, in many cases, harassment of GLBT students can be considered a form of sex discrimination actionable under Title IX.[14] The OCR concluded that harassment which is not sexual in nature (e.g.—classmates yelling: "no gays allowed at this lunch table") cannot support a Title IX action. However, deliberate indifference to harassment that is sexual in nature (e.g., sexual solicitations and comments, inappropriate touching, etc.) could establish a Title IX violation. Moreover, the OCR opined that harassment based upon an individual's failure to measure up to gender stereotypes (e.g., harassing a male who joins the drill team, or a female that wants to play varsity football) could serve as the basis for a Title IX claim, if a district was deliberately indifferent to severe harassment. As federal courts have addressed Title IX claims by GLBT students, the results have been unpredictable.

A federal district court in California, for example, completely ignored any distinction between sex and sexual orientation.[15] The student plaintiff in *Ray v. Antioch Unified School District* had been violently harassed by fellow students because he was believed to be gay. The court admitted that the plaintiff made no "specific characterization of the harassing conduct as 'sexual' in nature," but still found that "it is reasonable to infer that the basis of the attacks was a perceived belief about Plaintiff's sexuality, i.e. that Plaintiff was harassed *on the basis of sex*." The court, therefore, found that the school's indifference to the harassment violated Title IX.

In *Montgomery v Independent School District 709*, a Minnesota district court considered the claims of a student who, since kindergarten, had been harassed by fellow students because he was effeminate and believed to be gay.[16] The court noted that the harassers did not appear to have been motivated by any sexual desire toward the plaintiff, but found that he had been targeted because of his "failure to meet masculine stereotypes." The court allowed the student's claim to proceed past summary judgment for factual determinations about whether the harassment was severe enough to meet the *Davis* standard for student-on-student harassment, and whether the school's responses were adequate.

Respecting the Rights of Dissenters

While school districts have been instructed by courts that they must insure a safe learning environment for GLBT students, they are, at the same time, being warned not to violate the First Amendment rights of students who challenge the moral acceptability of homosexuality. For example, in C*hambers v. Babbitt*, a Minnesota school district was held to have violated a student's First Amendment rights by refusing to let him wear a sweatshirt advertising his "Straight Pride."[17] The school principal prohibited the student from wearing the sweatshirt after other students complained that the slogan offended them. To establish that the sweatshirt truly presented a substantial disruption of the educational environment sufficient to pass the *Tinker* test,[18] the principal testified that a "gay bashing" incident had occurred at a religious club meeting earlier that school year, and that a homosexual student's car had been urinated on and keyed. The court, however, found that, since those two incidents occurred months before, they could not establish a substantial disruption. The court issued an injunction, allowing the student to wear the sweatshirt at school.

Similarly, the U.S. Court of Appeals for the Third Circuit in *Saxe v. State College Area School District*, struck down a school district's "hate speech code" because it violated the First Amendment rights of Christian students to "speak out against the sinful nature and harmful effects of homosexuality." The hate speech code in the *Saxe* case prohibited any speech based upon "race, religion, color, national origin, gender, sexual orientation, disability, or other personal characteristics, and which has the purpose or effect of substantially interfering with a student's educational performance or creating an intimidating, hostile or offensive environment."[19] The Third Circuit made clear that, while the District could prevent speech that truly had the effects described in the policy, it could not prohibit speech just because it was meant to do so. Such a speech code would fail *Tinker's* substantial disruption test. The court pointed out that "[t]here is no categorical 'harassment exception' to the First Amendment's free speech clause," and that, "[n]ot all speech that we might call 'harassment' will necessarily cause 'actual, material disruption.'" Although there have been numerous similar rulings striking down hate speech codes on public college campuses, Saxe is the first case to do so on a secondary school campus.

Conclusion

Clearly, school districts are being placed in difficult position in which they must, on the one hand, embrace tolerance for GLBT students, but, at the same time, respect the rights of students who believe the demand for tolerance is an unacceptable byproduct of society's moral degradation. As issues of sexual orientation continue to become more prevalent, school districts will have to step very carefully if they want to remain out of the courthouse.

ENDNOTES

1 A Cornell University study found that the average homosexual male's coming out age has changed from age 20 in 1979 to age 13 in 1998. *See* "I Don't Feel Safe Here Anymore: Your Legal Duty to Protect Gay Kids" in *American School Boards Journal*, November 1999. Similarly, a 1998 survey of 2,000 GLBT youth found that the average participant realized his sexual orientation at age 12, and first told someone else at age 16. *See* Survey of National Coalition for Gay, Lesbian, Bisexual and Transgendered Youth, available online at http://www.glaad.org/org/publications/lines/?record=159.

2 Examples include Parents, Friends & Families of Lesbians & Gays ("PFLAG"), the Lambda Legal Defense Fund, and the Gay Lesbian & Straight Education Network ("GLSEN").

3 20 U.S.C. §4071, *et seq*.

4 *East High Gay/Straight Alliance v. Bd. of Educ. of Salt Lake City*, 81 F.Supp.2d 1199 (D. Utah 1998).

5 *East High Prism Club v. Seidel*, 95 F.Supp.2d 1239 (D. Utah 2000).

6 20 U.S.C. §4071(c).

7 *Collin v. Orange Unified Sch. Dist*., 83 F.Supp.2d 1135 (C.D. Cal. 2000).

8 *Caudillo v. Lubbock Indep. Sch. Dist*., Dkt. No. 5:03-CV-165-C (Nov. 10, 2003).

9 *Romer v. Evans*, 116 S.Ct. 1620 (1996). The Supreme Court's 2003 decision in *Lawrence v. Texas*, No 02-102, 539 U.S. _____ (2003), while suggesting a dramatic shift in the Court's view of gay rights, did not overturn *Romer* on this point. The Court did not find homosexuals to be members of a protected class in *Lawrence*.

10 *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996).

11 *Flores v. Morgan Hill Unified Sch. Dist*., 324 F.3d 1130 (9th Cir. 2003).

12 Stacy Finz, *Settlement in Gay Suit: Ex-Students Claimed Harassment*, S.F. Chron., January 7, 2004.

13 *Davis v. Monroe County Bd. of Educ*., 526 U.S. 629 (1999).

14 *Revised Sexual Harassment Guidance: Harassment of Student by School Employees, Other Students, or Third Parties*. Published by OCR on 1/16/2001, and available on-line at http://www.ed.gov/offices/OCR/shguide/index.html.

15 *Ray v. Antioch Unified Sch. Dist*., 107 F.Supp.2d 1165 (N.D. Cal. 2000).

16 *Montgomery v. Indep. Sch. Dist. No. 709*, 109 F.Supp.2d 1081 (D. Minn. 2000).

17 *Chambers v. Babbitt*, 145 F.Supp.2d 1068 (D.Minn 2001).

18 *Tinker v. Des Moines Indep. Comm. School Dist*., 393 U.S. 503 (1969).

19 *Saxe v. State College Area Sch. Dist*., 240 F.3d 200, 202 (3rd Cir. 2001) (emphasis added).

FUNDING WHAT MATTERS: ADEQUACY, EQUITY, EXCELLENCE

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In a few weeks, the Legislature likely will meet to take up its most difficult and complex challenge: school finance.

School districts have challenged the constitutionality of the current system, and a Travis County district court in July will hear that claim. The districts say that the current system forces them to tax at a particular tax rate – in effect, that the statutory cap on property tax rates has become a floor. Because they have lost meaningful discretion in setting the local tax rate, the districts say, the system creates an unconstitutional statewide property tax.

Unless the Legislature changes the contours of the Texas Constitution, the Legislature will start in a constitutional box: The system must be "adequate" (provide a "general diffusion of knowledge") and "efficient" (districts must have substantially equivalent access to similar revenues per pupil at similar levels of tax effort to the point of achieving adequacy), and the Legislature cannot use either a statewide property tax or forced redistribution of local revenue.

The Legislature can choose to live within the box (by changing the tax-rate ceiling or buying down the floor or changing statutory requirements for adequacy or equity) or reshape its constitutional contours entirely (via constitutional amendment).

"Funding What Matters" examines in depth the options available if the Legislature takes either, or both, routes. The paper also explores potential reforms to the school funding distribution system, the taxing structure that pays for it, and the "excellence" incentive rewards being discussed by leadership.

Editor's Note – The article titled "Funding What Matters: Adequacy, Equity, Excellence", described in summary form above, is published and may be accessed on the website of the School Law Section of the State Bar of Texas, at the following address: www.schoollawsection.org/. Once you access the home page of the website, just click on the link for the Newsletter on the navigation bar and select the article.

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