

So You Think You Can't Be Sued?

A Primer on Immunity for Clerks

Pop Quiz

1. Fast Freddie is ticketed for speeding by the city police officer. Fast Freddie believes he was not speeding and should not have received the ticket. He decided not to appear for arraignment because he did nothing wrong. After his failure to appear, Attentive Anna, a municipal court clerk prepares an affidavit and complaint for Fast Freddie's failure to appear. Attentive Anna swears to her complaint and affidavit before Hang-em Henrietta, another municipal court clerk. Based upon the complaint and affidavit, the judge issues an arrest warrant for Fast Freddie. One day, while fast Freddie was running late to school, he was stopped by a police officer and arrested on the outstanding warrant. Fast Freddie posts bond for his release and was ultimately acquitted for the underlying speeding charge.

Fast Freddie is upset for the arrest and sues Attentive Anna and Hang-em Henrietta for false imprisonment and malicious prosecution. He is seeking money damages. Are the municipal court clerks entitled to immunity?

2. As Fast Freddie was preparing for his trial for speeding, he thought it was necessary to request a subpoena for the local police chief to inquire on police policies and procedures for police officers in matters regarding speeding offenses. He filed his request for subpoena of the police chief with Attentive Ana the municipal court clerk. Being attentive to the situation, the clerk inquired with the judge whether it was necessary for her to issue the subpoena because the police chief did not witness the alleged violation and could not provide relevant testimony. The judge agreed and instructed Attentive Ana not to issue the subpoena. The judge stated that he would only allow relevant testimony to be presented at trial and the police chief testimony on policies and procedures regarding speeding violations were not relevant to this particular case.

Fearing a set-up, Fast Freddie sued Attentive Ana to compel her to issue the subpoena and for money damages. Is Attentive Ana, the municipal court clerk entitled to immunity?

3. Fast Freddie was running late for school again and was caught speeding through a school zone. He completely forgot about his citation and missed his appearance date. Attentive Ana the court clerk and Judge Elder have been working together for years. Judge Elder trusts Ana immensely, appreciates her attention to detail and reviews her work weekly when he attends court. Judge Elder allows Attentive Ana to use a rubber stamp to affix his signature on arrest warrants. Attentive Ana prepares an arrest warrant for Fast Freddie and affixes Judge Elders stamp signature. When Judge Elder appears for court the following week, he reviewed Attentive Ana's work, including Fast Freddie's arrest warrant. Weeks go by, when Fast Freddie is stopped by a police officer and arrested on the outstanding warrant. Once again, Fast Freddie is upset with his arrest and sues Judge Elder and Attentive Ana for violating his civil rights.

Is Attentive Ana immune from liability?

4. The City entered into a contract with Pay-Up Collection Services for collection of outstanding fines and fees owed to the city. The contract gave the sole discretion for renewal of the contract to the "Chief Clerk" of the Municipal Court. Chief Clerk Clare decided not to renew the contract, but instead give the collections efforts to the firm We-Collect Collection Services, who employs her brother. Pay-Up Collections Services sues the City and Clare the Chief Clerk for breach of contract, tortious interference of a contract, common law fraud and breach of the duty of good faith and fair dealings.

Chief Clerk Claire claims she is immune from liability because her actions were part of her duties as chief clerk and she was entitled to derived judicial immunity. Additionally, the collection of fines and fees is a normal function of the chief clerk.

Is Claire the Chief Clerk entitled to immunity?

5. Bad-Luck Betty was issued a single traffic citation, which included two separate chargeable offenses, speeding and failure to maintain financial responsibility. The ticket ordered Bad-Luck Betty to appear before Big City Municipal Court no. 4, if she wished to respond to the charges. Bad-Luck Betty appeared before Big City Municipal Court no. 4 as instructed by the ticket and paid her fine.

Unbeknownst to Bad-Luck Betty, Newbie Nelson, the newest Big City municipal court clerk, made a mistake when she entered Bad-Luck Betty's citation information into the system causing her speeding offense to be assigned to Big City Municipal Court no. 4, and her failure to maintain financial responsibility offense to Big City Municipal Court no. 5, on the same day, at the same time. Bad-Luck Betty did not appear before Big City Municipal Court no. 5, the erroneously assigned court, because she did not have notice. An arrest warrant was issued soon thereafter for her failure to appear in Big City Municipal Court no. 5. Bad-Luck Betty received notice of the arrest warrant and attempted to contact the city by phone. Each time, she was told that it often takes some time for fines to be posted and, in time, the error would be corrected.

Two years after receiving the original citation, another officer stopped Bad-Luck Betty and arrested her pursuant to the outstanding arrest warrant. After spending six hours in jail, Bad-Luck Betty appeared before a court, explained the situation, and all charges were dropped.

Bad-Luck Betty sued Newbie Nelson alleging her arrest resulted from the negligent use of the Big City's computer system by Newbie Nelson. Is Newbie Nelson entitled to immunity?

6. Municipal Judge Scatterbrain was late for court and forgot to pick up his robe from the drycleaners. When he arrived at the Court he asked Responsible Rhonda, the Deputy Court Clerk, to run to the drycleaners and grab his robe real quick.

Rushing back to the court in time for the 9AM jury trial Clerk Rhonda uncharacteristically runs a red light and hits Travis T-bone causing a horrible collision. Travis incurs tremendous medical damages and decides to sue Responsible Rhonda for her negligence in order to recover money damages.

Is Responsible Rhonda entitled to immunity?

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What is Immunity?

“The King Can Do No Wrong.”

In 1847, it was held that “no State can be sued in her own courts without her consent, and then only in the manner indicated by that consent.”

Immunity embraces two principles: 1) immunity from suit and 2) immunity from liability.

Immunity from suit bars an action against the state unless the state expressly consents to the suit.

Immunity from liability, on the other hand, protects the state from judgment even if the legislature has expressly consented to the suit.

What are the Different Types of Immunity Available?

Sovereign Immunity

Official Immunity

Absolute Derived Judicial Immunity

Was I sued in my Official Capacity or my Personal Capacity?

A suit against a government official in his personal capacity seeks to impose personal liability upon a governmental employee and collect damages against the official's personal assets.

Official-capacity suits seek to impose liability upon the governmental entity and any judgment is only collectible against the governmental entity.

What if I'm sued in my official capacity?

An individual sued in his official capacity may enjoy the protections of sovereign immunity to the extent those protections are available to his employer.

What is Sovereign Immunity?

Sovereign immunity is the doctrine under which the government is not answerable to suit or to damages unless it consents to be sued.

This immunity is incident to the power and the right to govern and may only be invoked by a governmental unit of the State.

A suit against a government employee in his official capacity is a suit against his government employer and has the same governmental immunity, derivatively, as his government employer.

What if I'm sued in my personal capacity?

A government employee sued in their personal capacity may be entitled to official immunity.

Additionally, as an employee that judges delegate their authority to you may also be entitled to absolute derived judicial immunity.

What is Official Immunity?

Official immunity shields governmental employees from personal liability so that they are encouraged to vigorously perform their official duties.

A governmental employee is entitled to official immunity for (1) the performance of discretionary duties (2) that are within the scope of the employee's authority, (3) provided that the employee acts in good faith.

An act is discretionary if it requires personal deliberation, decision, and judgment.

A public official or employee is acting within the scope of his or her authority if the official is discharging the duties generally assigned to him or her, even if they are performed wrongly or negligently.

Example of Discretionary Court Clerk Acts?

What is Absolute Derived Judicial Immunity?

Judges enjoy absolute judicial immunity from liability for judicial acts, no matter how erroneous the act or how evil the motive, unless the act is performed in the clear absence of all jurisdiction.

The waiver of immunity under the Texas Tort Claims Act does not apply to: [A] claim based on an act or omission of a court of this state or any member of a court of this state acting in his official capacity or to a judicial function of a governmental unit. "Official capacity" means all duties of office and includes administrative decisions or actions.

When judges delegate their authority or appoint others to perform services for the court, the judge's judicial immunity may follow the delegation or appointment.

Courts use the federally conceived "functional approach" to determine if a particular person enjoys derived judicial immunity. The question is whether the activities of the

party invoking immunity are “intimately associated with the judicial process,” i.e., whether the party is functioning as an integral part of the judicial system or as an “arm of the court.” An act is determined to be “judicial” in nature by its character, not by the character of the agent performing it.

The key consideration in determining whether an officer is entitled to judicial immunity is whether the officer's conduct is a normal function of the delegating or appointing judge.

What kinds of clerk tasks are derived from the Judge?

Knowing the Scope and Limits of Immunity Will Set You Free!

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What is Governmental Immunity?

Governmental immunity acts as a bar to recovery and protects the state and state actors from liability for negligent conduct. The general rule with regard to governmental immunity in Texas is that the state and its officers are immune from liability unless the state consents to be sued or otherwise waives its immunity.

Governmental immunity is not just immunity from liability but immunity from suit.

What are the different types of Governmental Immunity?

- Official Immunity
- Sovereign Immunity
- Derived Judicial Immunity

The type of immunity that applies depends on whether you were sued in your official or personal capacity.

What's the difference between being sued in my official capacity and my personal capacity?

A suit against a government official in his personal capacity seeks to impose personal liability upon a governmental employee and collect damages against the official's personal assets.

Official-capacity suits seek to impose liability upon the governmental entity and any judgment is only collectible against the governmental entity.

What is Sovereign Immunity?

If an officer is sued only in his official capacity, the suit is treated as one against the state, and the public employee is entitled to raise the sovereign immunity defense.

Sovereign immunity protects the State from lawsuits for money damages. Sovereign immunity encompasses immunity from suit, which bars a suit unless the state has consented, and immunity from liability, which protects the state from judgments even if it has consented to the suit.

What is Official Immunity?

If a public officer is sued in his individual or personal capacity, official immunity applies and can protect the official from liability. “Official immunity,” “qualified immunity,” “quasi-judicial immunity,” “discretionary immunity,” and “good faith immunity” are all terms used interchangeably to refer to the same affirmative defense available to governmental employees sued in their individual capacities.

Government employees are entitled to official immunity from suit arising from the performance of their (1) discretionary duties in (2) good faith as long as they are (3) acting within the scope of their authority.

If an action involves personal deliberation, decision and judgment, it is discretionary; actions which require obedience to orders or the performance of a duty to which the actor has no choice, are ministerial.

The purpose of the doctrine of official immunity is to protect public officers from civil liability for conduct that would otherwise be actionable.

What is Absolute Derived Judicial immunity?

Judges enjoy absolute judicial immunity from liability for judicial acts, no matter how erroneous the act or how evil the motive, unless the act is performed in the clear absence of all jurisdiction. When judges delegate their authority or appoint others to perform services for the court, the judge's judicial immunity may follow the delegation or appointment.

The question to determine whether you have derived judicial immunity is whether the activities of the party invoking immunity are “intimately associated with the judicial process,” i.e., whether the party is functioning as an integral part of the judicial system or as an “arm of the court.” An act is determined to be “judicial” in nature by its character, not by the character of the agent performing it.

The key consideration in determining whether an officer is entitled to judicial immunity is whether the officer's conduct is a normal function of the delegating or appointing judge.

Real Life Example (Immunity Not Granted When Clerk Did Not Renew Contract):

A Chief Clerk of Houston's municipal courts, was responsible for administering a contract between the City of Houston and a financial services corporation. When the City did not renew its contract with the corporation, the corporation sued the Clerk and the City.

The Court acknowledged that the collection of fines and fees is a normal function of the chief clerk of the Houston municipal courts, the purpose of the contract was to collect fines and fees, and that the Clerk administered the contract in his official capacity as chief clerk and director of Houston's municipal courts administration.

The contract was authorized by Houston's city council and was countersigned by the mayor of Houston and the city controller. The presiding judge of Houston's municipal courts testified that the Clerk's administration of the contract between the City and the corporation was not under her direction or supervision.

The Court found that the administration of the corporation collections contract was not a "normal function of the delegating or appointing judge;" and therefore, it was not "judicial in nature" and derived judicial immunity was not extended to the Clerk in this situation. *City of Houston v. W. Capital Fin. Services Corp.*, 961 S.W.2d 687, 689 (Tex. App.—Hou [1st Dis.] 1998).

Real Life Example (Immunity Granted When Clerk Failed to File Pleadings):

Inmate brought § 1983 action against court clerks to recover for denial of access to courts by failing to file pleadings in suit against fellow prisoner.

Court clerks, acting in the course of their duties, are accorded judicial immunity because they function as an arm of the court. The clerks testified at trial that they were acting in the course of their duties at all times relevant to their handling of the inmate's pleadings.

The Court held that the clerks were not acting outside the course of their duties. Therefore, the clerks were entitled to judicial immunity.

Thompson v. Coleman, 01-01-00114-CV, 2002 WL 1340314 (Tex. App.—June 20, 2002).

Real Life Example (Immunity Granted When Clerk Made a Data Entry Mistake):

A Houston police officer stopped Ms. Swindall and issued her a single traffic citation, which included two separate chargeable offenses. The ticket ordered her to appear before court no. 4, if she wished to respond to the charges. She appeared before court no. 4 as instructed by the ticket and paid her fine.

Unbeknownst to her, a data entry error had occurred causing one of her offenses to be assigned to court no. 4, and the other to court no. 5, on the same day, at the same time. She did not appear before court no. 5, the erroneously assigned court, because she did not have notice. An arrest warrant was issued soon thereafter for her failure to appear in court no. 5.

Two and one-half years after receiving the citation, another officer stopped her and arrested her pursuant to the outstanding arrest warrant. After spending six hours in jail, she appeared before a court, explained the situation, and all charges were dropped.

Ms. Swindall sued the City of Houston and alleged her arrest resulted from the negligent use of the City's computer system by an unidentified municipal court data terminal operator (DTO). The City argued that it was immune from suit because the data entry clerk was protected by the doctrine of derived judicial immunity.

Ms. Swindall argued that a DTO is unlike court clerks that have been accorded judicial immunity, because a DTO is not a “deputized” clerk and has no discretion when inputting the information from citations into the City's computer system. Swindall also argues the DTO does not act under the order or authority of any court. But the Court disagreed.

The Court held that the input of docketing information into the court's computer system is a normal function of the court. Inputting ticket information into the computer system is an act within the course and scope of the DTO's employment with the City of Houston municipal court.

Additionally, the office of the presiding judge in the judicial department was responsible for setting the docket. The Court held that the fact that the DTOs are not deputized or do not have discretion in their acts does not detract from their intimate association with the judicial process. The efficient input of information in the scheduling of the municipal court's docket is an integral part of the functioning of the court. Thus, the Court concluded that the DTO acts as an arm of the court and enjoys derived judicial immunity.

City of Houston v. Swindall, 960 S.W.2d 413, 414 (Tex. App. 1998)

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Pop Quiz (answer key)

1. Fast Freddie is ticketed for speeding by the city police officer. Fast Freddie believes he was not speeding and should not have received the ticket. He decided not to appear for arraignment because he did nothing wrong. After his failure to appear, Attentive Anna, a municipal court clerk prepares an affidavit and complaint for Fast Freddie's failure to appear. Attentive Anna swears to her complaint and affidavit before Hang-em Henrietta, another municipal court clerk. Based upon the complaint and affidavit, the judge issues an arrest warrant for Fast Freddie. One day, while fast Freddie was running late to school, he was stopped by a police officer and arrested on the outstanding warrant. Fast Freddie posts bond for his release and was ultimately acquitted for the underlying speeding charge.

Fast Freddie is upset for the arrest and sues Attentive Anna and Hang-em Henrietta for false imprisonment and malicious prosecution. He is seeking money damages. Are the municipal court clerks entitled to immunity?

YES.

"Court clerks actions in the course of their duties have the same immunity as judges" *Spencer v. City of Seagoville*, 700 SW2d 953 (1985). The key consideration in deciding whether initiating a criminal prosecution is a judicial act is whether initiating such a prosecution is a "normal function of the judicial officer". In *Spencer*, the court stated that it was conceivable that signing and filing complaints may be a normal function of municipal court clerks.

2. As Fast Freddie was preparing for his trial for speeding, he thought it was necessary to request a subpoena for the local police chief to inquire on police policies and procedures for police officers in matters regarding speeding offenses. He filed his request for subpoena of the police chief with Attentive Ana the municipal court clerk. Being attentive to the situation, the clerk inquired with the judge whether it was necessary for her to issue the subpoena because the police chief did not witness the alleged violation and could not provide relevant testimony. The judge agreed and instructed Attentive Ana not to issue the subpoena. The judge stated that he would only allow relevant testimony to be presented at trial and the police chief testimony on policies and procedures regarding speeding violations were not relevant to this particular case.

Fearing a set-up, Fast Freddie sued Attentive Ana to compel her to issue the subpoena and for money damages. Is Attentive Ana, the municipal court clerk entitled to immunity?

NO

A clerk is generally subject to liability for negligently performing or failing to perform ministerial duties. In *Benge v. Foster*, 47 S.W.2d 862 (1932) a district court clerk was sued for failing to properly perform his official duties of determining the sufficiency of the sureties on a replevy bond. The court stated that this was an ordinary duty of a clerk of a court and was purely ministerial. Here, the clerk accepted the replevy bond from the sureties without performing his ministerial duty of inquiring in the county records whether or not the sureties owned property in the county.

In our scenario, issuing a subpoena is a ministerial duty of a municipal court clerk when requested to do so. There is no discretion regarding whether to issue a subpoena. *Edmondson v. State*, 43 Tex. 230 (1875). A defendant has the right to have some type of compulsory process (subpoena) for obtaining witnesses. Art. 1.05, C.C.P. Thus, a municipal court clerk must issue a subpoena if requested.

Other examples of required ministerial duties of a clerk:

<u>Conviction reporting to DPS-</u>	<u>Trans. Code § 543.203</u>
<u>Performing a Jury Shuffle-</u>	<u>Sections 62.107(c) and 62.108(a), G.C.; Article 35.11, C.C.P.</u>
<u>Providing copy of arrest warrant- and affidavit after execution</u>	<u>Article 15.26, C.C.P.</u>

3. Fast Freddie was running late for school again and was caught speeding through a school zone. He completely forgot about his citation and missed his appearance date. Attentive Ana the court clerk and Judge Elder have been working together for years. Judge Elder trusts Ana immensely, appreciates her attention to detail and reviews her work weekly when he attends court. Judge Elder allows Attentive Ana to use a rubber stamp to affix his signature on arrest warrants. Attentive Ana prepares an arrest warrant for Fast Freddie and affixes Judge Elders stamp signature. When Judge Elder appears for court the following week, he reviewed Attentive Ana's work, including Fast Freddie's arrest warrant. Weeks go by, when Fast Freddie is stopped by a police officer and arrested on the outstanding warrant. Once again, Fast Freddie is upset with his arrest and sues Judge Elder and Attentive Ana for violating his civil rights.

Is Attentive Ana immune from liability?

No.

There is authority to show that the use of a rubber signature stamp is permissible if used by "that person". Stork v. State, 23 S.W.2d 733 (1930). Additionally, another person may affix the signature of a judge only in the presence of the judge. "A judge may "sign" a document by allowing another person to place a mark on a document that constitutes the judge's approval of the document only if the other person does so in the presence of and under the direction of the judge." Op.Tx.Att'yGen. No.JM-373 (1985)

In Daniels v. Stovall, 660 F.Supp 301 (S.D.Tex 1987) the judge allowed his clerk to affix his facsimile signature on a mental health warrant, which he would "adopt" the next business day. The court stated there was no shield of judicial immunity. The court relied on 4 factors to determine if an act was "judicial": (1) whether the precise act complained of is a normal judicial function; (2) whether the acts occurred in the courtroom or appropriate adjunct spaces, such as the judge's chambers; (3) whether the controversy centered around a case pending before the court; and (4) whether the acts arose directly out of a visit with the judge in his official capacity. In Daniels the court found that judicial immunity did not arise because the action did not comply with the 4 factors and was done outside the presence of the judge and beyond the scope of his authority.

Similarly here, Judge Elder would not be able to avail himself judicial immunity because he allowed Attentive Ana to affix his signature on the arrest warrant, outside his presence. Consequently, the clerk Attentive Ana would not be entitled to "derived judicial immunity" since the judge did not have immunity.

4. The City entered into a contract with Pay-Up Collection Services for collection of outstanding fines and fees owed to the city. The contract gave the sole decretion for renewal of the contract to the "Chief Clerk" of the Municipal Court. Chief Clerk Clare decided not to renew the contract, but instead give the collections efforts to the firm We-Collect Collection Services, who employs her brother. Pay-Up Collections Services sues the City and Clare the Chief Clerk for breach of contract, tortious interference of a contract, common law fraud and breach of the duty of good faith and fair dealings.

Chief Clerk Clare claims she is immune from liability because her actions were part of her duties as chief clerk and she was entitled to derived judicial immunity. Additionally, the collection of fines and fees is a normal function of the chief clerk.

Is Claire the Chief Clerk entitled to immunity?

NO.

A Court Clerk is not immune from liability in connection with a job duty that is not related to a judicial function. Houston v. West Capital Financial Services, 961 S.W.2d 687 (1998). In WCFS the court states that courts have used a "functional approach" to determine if a particular person enjoys derived judicial immunity. Under the functional approach the determination is whether the activities of the party invoking immunity are "intimately associated" with the judicial process. Look at whether the party is functioning as an integral part of the judicial system or as an arm of the court. The determination whether an act is "judicial" in nature is by its character, not by the character of the agent performing it. The key consideration is whether the officer's conduct is a normal function of the delegating or appointing judge.

Here, judicial immunity does not arise merely through job title, but attaches only to "judicial functions". The contract was administered as part of the official duties of the chief clerk. The City Council authorizes the contract. Administration of a contract is not a judicial function.

5. Bad-Luck Betty was issued a single traffic citation, which included two separate chargeable offenses, speeding and failure to maintain financial responsibility. The ticket ordered Bad-Luck Betty to appear before Big City Municipal Court no. 4, if she wished to respond to the charges. Bad-Luck Betty appeared before Big City Municipal Court no. 4 as instructed by the ticket and paid her fine.

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Two years after receiving the original citation, another officer stopped Bad-Luck Betty and arrested her pursuant to the outstanding arrest warrant. After spending six hours in jail, Bad-Luck Betty appeared before a court, explained the situation, and all charges were dropped.

Bad-Luck Betty sued Newbie Nelson alleging her arrest resulted from the negligent use of the Big City's computer system by Newbie Nelson. Is Newbie Nelson entitled to immunity?

YES.

In City of Houston v. Swindall, 960 S.W.2d 413, 414 (Tex. App. 1998) the Court held that the input of docketing information into the court's computer system is a normal function of the court. Inputting ticket information into the computer system is an act within the course and scope of the clerk's employment with the municipal court.

Additionally, the office of the presiding judge in the judicial department was responsible for setting the docket. The Court held that the fact that the clerk's are not deputized or do not have discretion in their acts does not detract from their intimate association with the judicial process. The efficient input of information in the scheduling of the municipal court's docket is an integral part of the functioning of the court. Thus, the Court concluded that the DTO acts as an arm of the court and enjoys derived judicial immunity.

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