JUDICIAL IMMUNITY

TMCEC FY13 Regional Judges Program

Webster's Dictionary defines immunity as the quality or state of being immune, that is free, exempt, or marked by protection.

Black's Law Dictionary (8th ed.) defines immunity as any exemption from a duty, liability, or service of process, especially such an exemption granted to a public official.

ABSOLUTE JUDICIAL IMMUNITY

How it began: Judges are not responsible "to private parties in civil actions for their judicial acts, however injurious may be those acts, and however much they may deserve condemnation, unless perhaps where the acts are palpably in excess of the _____ of the judges, and are done maliciously or corruptly." *Randall v. Brigham*, 7 Wall. 523 (1869).

It is "[a] general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, [should] be free to act upon his own convictions, without apprehension of personal consequences to himself." *Bradley v. Fisher*, 13 Wall. 335 (1872).

"Few doctrines were more solidly established at common law than the immunity of judges from liability for damages for acts committed within their judicial jurisdiction…It is a judge's duty to decide all cases within his jurisdiction that are brought before him, including controversial cases that arouse the most intense feelings in the litigants. His errors may be corrected on appeal, but he should not have to fear that unsatisfied litigants may hound him with litigation charging malice or corruption. Imposing such a burden on judges would contribute not to principled and fearless decision-making but to intimidation." *Pierson v. Ray*, 386 U.S. 547 (1967).

Judges are _____ immune from liability for all

1) _____ acts that are performed

2) within the scope of their _____

Fact Pattern:

Judge Stump is a county judge. As county judge, he has original exclusive jurisdiction in all cases at law and in equity, over the settlement of estates and over guardianships, appellate jurisdiction as conferred by law, and over all other causes, matters and proceedings where exclusive jurisdiction thereof is not conferred by law upon some other court, board, or officer. One day, Judge Stump is presented with a "Petition to Have Tubal Ligation Performed on Minor and Indemnity Agreement," with which a promiscuous and "somewhat retarded" minor's mother stated that it was in the daughter's best interest to undergo a tubal ligation in order to prevent "unfortunate circumstances." Judge Stump approved the petition, and six days later, the minor was admitted to the hospital having been told she was to have her appendix removed. Two years later, the minor married and discovered she had been sterilized. She sued Judge Stump, along with her mother and the doctors.

Should Judge Stump be entitled to immunity from suit for damages?

☐ **Yes**

☐ **No**

"The scope of the judge's jurisdiction must be construed broadly where the issue is the immunity of the judge. A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he acted in the clear absence of all jurisdiction." *Stump v. Sparkman*, 435 U.S 349 (1978)

See cases of *Sparks v. Duval Ranch Co*., 604 F.2d 976 (5th Cir. 1979) and *Holloway v. Walker*, 765 F.2d 517 (5th Cir. 1985) ("It is irrelevant that Walker is alleged to have performed those acts pursuant to a bribe or conspiracy; they remain judicial acts.)

What is the clear absence of all jurisdiction?

Fact Pattern:

Turner and Hooch are neighbors who just can't get along. Hooch applies to Justice of the Peace Raynes for a peace bond, requiring Turner to post bond conditioned on his behaving himself peaceably. The sole remedy for violating the conditions of the bond is suit by the state to recover the penalty amount of the bond. But when Turner continues to behave UN-peaceably, Judge Raynes issues an arrest warrant for Turner for the charge of "Violation of Peace Bond." Turner is arrested, tried, and sentenced to a year and a day in jail. The problem: no such crime exists! Turner sues Judge Raynes.

Should Judge Raynes be entitled to immunity from suit for damages?

☐ **Yes**

☐ **No**

"If a probate judge, with jurisdiction over only wills and estates, should try a criminal case, he would be acting in the clear absence of jurisdiction and would not be immune from liability for his action; on the other hand, if a judge of a criminal court should convict a defendant of a nonexistent crime, he would merely be acting in excess of his jurisdiction and would be immune." *Turner v. Raynes*, 611 F.2d 92 (5th Cir. 1980), quoting *Stump*, quoting *Bradley*.

Case of *Mireles v. Waco*, 502 U.S. 9 (1991): Angry judge ordered bailiffs to remove an attorney who was not in his courtroom from another courtroom. "If Judge Mireles authorized and ratified the police officers' use of excessive force, he acted in excess of his authority. But such an action−taken in the very aid of the judges' jurisdiction over a matter before him−cannot be said to have been taken in the absence of jurisdiction."

What is a judicial act?

Case of *Ex Parte Virginia*, 100 U.S. 339 (1880): County judge was tasked with building the petit and grand jury lists. "Whether the act done by him was judicial or not is of no importance. The duty of selecting jurors might as well have been committed to a private person as to one holding the office of a judge…. It surely is not a judicial act… it is merely a _____ act."

But compare to *Turner v. Pruitt*, 342 S.W.2d 422 (Tex. 1961): Judicial immunity extended to judge's decision not to empanel a jury when defendant did not pay the jury fee, even though judge had a clear legal duty to provide a jury.

Two-prong test to determine whether an act is judicial:

1) **the act must be of the sort judges _____ perform and**
2) **the parties must have been dealing with the judge in his judicial _____**

Fact Pattern:

Judge Brown is a district judge who was about to preside over a criminal trial. That morning, the defendant's parents came to the courthouse to bring their son some decent clothes. They went to the judge's chambers to ask when the trial would start. The judge lost his temper and told them to get out. The defendant's father−an elderly man, a bit frightened and deaf−wasn't moving fast enough, and the judge went to get a bailiff. The judge ordered the bailiff to arrest the father, who was taken to jail and released later that day. Months later, Judge Brown entered a formal contempt order assessing punishment at the day the father already served. The parents sued Judge Brown.

Should Judge Brown be entitled to immunity from suit for damages?

☐ **Yes**

☐ **No**

"We note that the opening of any inroads weakening judicial immunity could have the gravest consequences to our system of justice. Every judicial act is done under color of law; absent the doctrine, every judicial error affecting a citizen's rights could thus ultimately subject the judge to section 1983 liability. To be sure, we can conjure converse chambers of horrors, but we cannot allow that to erode the necessary features of the immunity. That judicial immunity is sometimes used as an offensive dagger rather than a defensive shield must not justify derogating its inviolability. Even though there may be an occasional diabolical or venal judicial act, the independence of the judiciary must not be sacrificed one microscopic portion of a millimeter, lest the fears of section 1983 intrusions cow the judge from his duty." *McAlester v. Brown*, 469 F.2d 1280 (5th Cir. 1972)

Reasons for Judicial Immunity:

_____

_____

_____

_____

_____

_____

_____

_____

Four-factor test (5th Circuit) for determining if something is a judicial act:

1) **the act complained of is a _____ judicial function**
2) **the events occurred in the judge's court or _____**
3) **the controversy centered around a _____ then pending before the judge and**
4) **the confrontation arose directly and immediately out of a visit to the judge in his _____ capacity**

The case of *Brewer v. Blackwell*, 692 F.2d 387 (5th Cir. 1982)

Immunity for the arrest? _____

Immunity for the arrest warrant? _____

Fact Pattern:

Jack owes child support to his ex-wife Patricia, who is the court clerk for Judge Coe. One day, Jack goes to the courthouse to drop off the support check, but she is out, as is her judge. Jack asks Bryant, the clerk in the next office, is she can find Patricia. While on the phone, Bryant's judge, Judge Merckle, overhears the conversation and decides to get involved. Judge Merckle orders Bryant to get the file in Jack's divorce case. While talking to Jack, Judge Merckle asks Jack about where he lives and asks to see identification. Judge Merckle then attempts to put Jack under oath! When Jack refuses and tries to leave, Judge Merckle orders the bailiffs to chase after Jack and bring him to the court. Judge Merckle then begins a contempt proceeding, finds Jack in contempt, and remands him to jail for the weekend, after which he is brought back through the courthouse for sentencing. Jack sues Judge Merckle.

Should Judge Merckle be entitled to immunity from suit for damages?

☐ **Yes**

☐ **No**

"We hold only that when it is beyond reasonable dispute that a judge has acted out of personal motivation and has used his judicial office as an offensive weapon to vindicate personal objectives, and it further appears certain that no party has invoked the judicial machinery for any purpose at all, then the judge's actions do not amount to "_____." *Harper v. Merckle*, 638 F.2d 848 (5th Cir. 1981)

Case of *Holloway v. Walker*, 765 F.2d 517 (5th Cir. 1985): "Holloway argues that many of Walker's acts were not 'judicial' because they were performed outside the courtroom and that Walker eventually came to act more like the chief executive officer of the Humble corporation than like a judge. … As with jurisdiction, the term 'judicial act' must be _____ construed to realize the policies behind immunity; while the four-part *McAlester* test will often suffice to determine that an act is 'judicial,' it is not the only test, and each of its factors are not to be given equal weight in all cases."

Case of *Daniels v. Stovall*, 660 F. Supp. 301 (S.D. Tex. 1987): "While it is accepted that judicial immunity must be very broadly construed, a judge is not entitled to claim judicial immunity when he has not acted within the boundaries of the *McAlester* factors. The fourth of the *McAlester* factors…requires the judge's physical presence. Judge Wayland, in permitting the use of his rubber stamped signature outside of his presence, acted beyond the scope of his judicial authority and is thus not protected by judicial immunity."

Court Clerks May Have Derived Judicial Immunity

Texas uses a functional approach to determine if a particular person enjoys derived judicial immunity. Under the functional approach, the determinative issue 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 process or as an "arm of the court."

Case of *Spencer v. Seagoville*, 700 S.W.2d 953 (Tex. App.−Dallas 1985): complaints signed by the court clerks were complaints for failure to appear in court. "It is conceivable that signing and filing complaints of that kind may be a normal function of municipal court clerks. [The clerks' affidavit] confirms that they were acting as officers of the court in the normal course of the operation of the court. [It was] consequently established that all of the clerks' acts at issue were judicial acts. We therefore conclude that the clerks enjoyed judicial immunity with respect to them." Note: the judge, who was also sued, claimed absolute immunity for signing the warrants.

Fact Pattern:

The city mayor, who was also ex-officio judge, signed a criminal complaint against the university's president in the course of dispute concerning the construction by the city of a sewer line across the campus. Then, in his capacity as magistrate, the mayor issued a warrant for the president's arrest. The president sued the city and the city official. The president was arrested, and the mayor, acting as magistrate, set bond.

Should the mayor be immune from damages for issuing the warrant and setting bond?

- ☐ **Yes**
- ☐ **No**

Should the mayor be immune from damages for swearing out the complaint?

☐ **Yes**

☐ **No**

Thomas v. Sams, 734 F.2d 185 (5th Cir. 1984)

OFFICIAL IMMUNITY
(A/K/A/ QUALIFIED, QUASI-JUDICIAL, DISCRETIONARY, AND GOOD FAITH)

Government employees are entitled to official immunity from suit arising from the performance of their

1) _____ duties in

2) good _____ as long as they are

3) acting within the scope of their _____

"Suits for monetary damages are meant to compensate the victims of wrongful actions and to discourage conduct that may result in liability. Special problems arise, however, when government officials are exposed to liability for damages… when officials are threatened with personal liability for acts taken pursuant to their official duties, they may well be induced to act with an excess of caution or otherwise to skew their decisions in ways that result in less than full fidelity to the objective and independent criteria that ought to guide their conduct." *Forrester v. White*, 484 U.S. 219 (1988) (judge not absolutely immune from 1983 claim for demoting and discharging a probation officer, but Court declined to reach whether he would have official immunity)

"Government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person should have known." A public official may, however, be held liable if he violated constitutional or statutory rights that were clearly established at the time he acted such that a reasonably competent official should have then known the rules of law governing his conduct, unless the official pleads and proves in his defense extraordinary circumstances by virtue of which he neither knew nor should of known of the relevant legal standard. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982)

In other words…
To successfully assert official immunity, a judge must demonstrate that the conduct in question conformed to a standard of _____ legal reasonableness. This immunity is available if the judge's conduct violates no clearly established constitutional right that a reasonable person would have known.

- Does not apply to ministerial actions, just discretionary ones
- Actions that require personal deliberation, decision, and judgment are discretionary
- Actions that require obedience to orders or the performance of a duty regarding which the actor has no choice are ministerial
- An act does not lose its discretionary status because it is wrongful
- Again, the emphasis is on the act, not the actor

- Not liable for acts performed in good faith within the scope of authority, even when the official violates or misinterprets the law, even if performed wrongfully or negligently

Fact Pattern:

Malina was driving home one night and passed a slow-moving vehicle driven by Judge Gonzales. Malina went around Gonzales and honked his horn and motioned for him to move out of the fast lane. Judge Gonzales, angry at the honking, put a red flashing light on his dashboard and pursued Malina until he pulled over. Judge Gonzales then went to Malina's car, demanded his license, and when Malina asked to see the judge's credentials, Malina drove off. Later, officers arrived at Malina's house to tell him he was to be in court the next morning and that if he did not show, Judge Gonzales could issue an arrest warrant for Malina. When Malina went to court the next day, it was anything but open court. The judge eventually gave Malina orders to appear in court at a later date to answer for traffic violations. When Malina told the judge he did not feel comfortable stopping for any car with flashing lights, the judge held Malina in contempt and sentenced him to five hours in jail. Malina sued the judge.

Should Judge Gonzales be immune from suit for damages?

☐ **Yes**

☐ **No**

"Judge Gonzales' actions of citing Malina with contempt and sentencing him to five hours in jail are judicial acts, and they were not taken in the clear absence of subject-matter jurisdiction. Thus, under no set of facts can Malina overcome Judge Gonzales' entitlement to immunity for the contempt citation and sentence. … We need only discuss whether the stop on the interstate and the summons into court are actions protected by qualified immunity. … Ultimately, Judge Gonzales is not entitled to make a claim of qualified immunity for he was not a peace officer authorized to stop Malina. Judge Gonzales is no different than any other person who purchases a red light and stops people on the interstate." *Malina v. Gonzales*, 994 F.2d 1121 (5th Cir. 1993)

If the official or employee is acting as a _____ individual, rather than as a government official or employee, he or she is not acting within the scope of his or her authority. *Wallace v. Moberly*, 947 S.W.2d 273 (Tex. App.−Fort Worth 1997) (fact issue as to whether game warden who approached several teenagers who cut in line ahead of him at fast food restaurant was acting within scope of authority as law enforcement officer or as an angry individual)

Public officials may be sued in their individual capacities for wrongful, unofficial acts that are not within the scope of their official duty or that _____ the legitimate bounds of their office. *Bagg v. University of Texas Medical Branch*, 726 S.W.2d 582 (Tex. App.−Houston [14th Dist.] 1987) (supervisor who terminated a state university employee did not have immunity for acts that could not have been within the scope of their official duties, such as ordering eavesdropping of telephone conversations)

SOVEREIGN IMMUNITY

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

Sovereign immunity protects the state from lawsuits for money damages. It is 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.

Judges are generally entitled to 11th Amendment immunity for claims asserted against them in their official capacities as _____ actors. *Davis v. Tarrant Co.*, 565 F. 3d 214 (5th Cir. 2009); *Warnock v. Pecos County, Tex.*, 88 F.3d 341 (5th Cir. 1996), *Holloway v. Walker*, 765 F.2d 517 (5th Cir. 1985)

Suit Under 42 U.S.C. § 1983

> *Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizens of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.*

Plaintiff must show at least two elements:

(1) a deprivation of a right, privilege, or immunity secured by the U.S. Constitution of laws of the U.S. has occurred (mere negligence or wrongful action is insufficient) and
(2) the defendant committed the deprivation while acting under color of a statute, ordinance, regulation, or usage of a state or political subdivision of a state

Four types of suits that can be filed against judges under § 1983:

(1) A suit for monetary damages for past wrongs in an official capacity
Immunities available: _____

- A judgment against a public servant in an official capacity imposes liability on the entity that the official represents as long as it is clear that the entity itself is a moving force behind the deprivation and the entity's policy or custom played a part in the violation of law
- Thus, municipal liability under § 1983 requires a policymaker, an official policy and, a violation of constitutional rights whose moving force is the policy or custom
- State, state agencies or departments, and state officials cannot be sued in their official capacities, but cities and counties and their officials have no 11th Amendment immunity
- State judges, when sued in their official capacity for money damages, can claim 11th Amendment immunity; local judges may (if invoking state law) or may not (if effectuating local policy), depending on the circumstances
- Generally, judges, acting in their judicial capacity are not considered local government officials whose actions are attributable to the local government

(2) A suit for monetary damages in an individual or personal capacity
Immunities available: _____
(3) A suit for injunctive or declaratory relief in an official capacity
Immunities available: _____

- Unless it is a suit challenging the constitutionality of a state official's act

(4) A suit for injunctive or declaratory relief in an individual or personal capacity
Immunities available? _____

Pulliam v. Allen, 466 U.S. 522 (1984): the doctrine of absolute immunity does not bar claims for attorney's fees and for prospective injunctive relief if preceded by a declaration or by showing that such declaratory relief is unavailable.

Absolute immunity, not just immunity from _____ but immunity from _____.

Judicial immunity is not overcome by allegations of bad faith or malice, the existence of which ordinarily cannot be resolved without engaging in discovery and eventual trial. *Mitchell v. Forsyth*, 472 U.S. 511 (1985)

TEXAS TORT CLAIMS ACT STATUTORY IMMUNITY

Texas Civil Practice and Remedies Code Chapter 101

Sec. 101.025. WAIVER OF GOVERNMENTAL IMMUNITY; PERMISSION TO SUE. (a) Sovereign immunity to suit is waived and abolished to the extent of liability created by this chapter.

(b) A person having a claim under this chapter may sue a governmental unit for damages allowed by this chapter.

Judicial Exception:

Sec. 101.053. JUDICIAL. (a) This chapter 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.

(b) This chapter does not apply to a claim based on an act or omission of an employee in the execution of a lawful order of any court.

Substitution:

Sec. 101.106. ELECTION OF REMEDIES. (a) The filing of a suit under this chapter against a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter.

(b) The filing of a suit against any employee of a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents.

(c) The settlement of a claim arising under this chapter shall immediately and forever bar the claimant from any suit against or recovery from any employee of the same governmental unit regarding the same subject matter.

(d) A judgment against an employee of a governmental unit shall immediately and forever bar the party obtaining the judgment from any suit against or recovery from the governmental unit.

(e) If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.

(f) If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.

You Got Served! A recap of immunities:

Jurisdictional immunity: sovereign and absolute (burden on plaintiff to overcome – motion for dismissal by defendant)

Defense immunity: official (burden on plaintiff before or after discovery)

If motion for dismissal denied, can be appealed interlocutory (prior to trial)

Immunities can then be raised again as defense

Additional Notes:

EXCERPT FROM THE TMCEC MUNICIPAL JUDGES BOOK (2012)

CHAPTER 2
ROLE OF THE JUDGE

III. Immunity

A. Judicial Immunity

While, as discussed in Chapter One, both judicial independence and separation of powers aim to ensure that judicial decision-making is unencumbered by other components of government, neither protects judges from lawsuits stemming from the exercise of such decision-making by the public. For a legal system to flourish, its judiciary must be able to make decisions without the menacing cloud of potential litigation lingering overhead. Fear and intimidation have no more of a place in just judicial decision-making than does bias or hatred. Ensuring principled and fearless decision-making forms the basis for judicial immunity.[1] Immunity is "freedom or exemption from penalty, burden, or duty."[2] Judicial immunity is "the absolute protection from civil liability arising out of the discharge of judicial functions… ."[3] Judicial immunity is the judge's "get out of civil court free card"; no answer, no trial, do not pass go, case dismissed. This very broad power gives the court the freedom from both baseless and meritorious lawsuits. It allows the court to make just decisions without fear of being second-guessed by civil judges or juries.

When making decisions authorized by state law, municipal judges, like other member of the state judiciary, are generally entitled to judicial immunity.[4] Courts, however, are hesitant to apply the doctrine of judicial immunity to areas outside the traditional role of the judge as decision maker. Judicial immunity for damages is granted only when such immunity is essential to protect the integrity of the judicial process.[5]

To have judicial immunity, a judge must be engaged in a judicial function. An Indiana county circuit judge approved a petition to sterilize a 15-year-old girl with border-line retardation.[6] Two years later, the girl was married and discovered that, rather than having had an appendectomy as she had been led to believe, she had been sterilized. She and her husband filed a Section 1983 suit for damages[7] against her mother, the physician, the hospital, and the judge. Only the issue of the judge's liability came before the U.S. Supreme Court. The court enunciated a two-part test for deciding whether or not a judge is absolutely immune from suit under the doctrine of judicial immunity.

> Part One: Was the act of the judge a "judicial act"? Was the act a function normally performed by a judge? Did the judge act in clear absence of all jurisdiction?
>
> Part Two: What was the expectation of the parties? Did the parties deal with the judge in an official capacity?

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1 *Pierson v. Ray*, 386 U.S. 547 (1967).
2 Black's Law Dictionary, 6th Edition (1990) at 751.
3 Black's Law Dictionary, 6th Edition (1990) at 848.
4 See generally, *Garza v. Morales*, 923 S.W.2d 800 (Tex. App.– Corpus Christi 1996); *Ellis v. City of Garland*, 1999 U.S. Dist. LEXIS 10856 (N.D. Tex. July 8, 1999), citing *Guedry v. Ford*, 431 F.2d 660 (5th Cir. 1970) overruled in part on other grounds, *Sparks v. Duval County Ranch Co.*, 604 F.2d 976 (5th Cir. 1979). Judicial immunity claims by municipal judges and prosecutors in response to suits seeking injunctive or declaratory relief have been unsuccessful. See, *Infra*, note 95.
5 *Briscoe v. LaHue*, 460 U.S. 325 (1983).
6 *Stump v. Sparkman*, 435 U.S. 349 (1978).
7 See, description of Section 1983 suits in Section III(C) of this chapter.

Not surprisingly, the question of what is a "judicial act" is raised in virtually every lawsuit seeking damages against a judge. The issue of jurisdiction is also raised in most cases. Cases reviewed here illustrate how these principles are applied to decide the questions.

A delay in the preparation of statements of facts due to the failure to hire a sufficient number of court reporters to avoid such delays, was found to be a judicial act.[8] Setting bond and supervising court reporters' actions during traditional adversarial proceedings were held to be judicial functions.[9] In another lawsuit, the reviewing court found that a state district judge acted in excess of his authority, but did not act in a clear absence of all jurisdiction. The judge's claim of judicial immunity from damages was sustained.[10] Judicial acts do not lose their character as judicial acts simply because they are done outside of the courtroom.

Another complaint alleged that a Texas justice of the peace tried and convicted a defendant for a nonexistent crime: violation of a peace bond. The defendant was sentenced to a year and a day in the county jail. The defendant then sued the judge. The court concluded that the judge had acted in excess of his jurisdiction, but not in the clear absence of all jurisdiction. The judge's claim of immunity was upheld.[11]

Still another case involved parents who came to the judge's office with clothes for their son to wear at his trial that day in the judge's court. The judge ordered them to leave. When they were slow to leave, the judge ordered the father placed in jail. The judge entered a contempt order almost two months later. The court found that the judge acted within his judicial jurisdiction when he ordered the man jailed and was, therefore, entitled to judicial immunity.[12] The court set out four criteria for deciding whether or not acts are within judicial jurisdiction:

- Was the act a normal judicial function?
- Did the act occur in court or close by?
- Did the controversy surround a case then pending before the judge?
- Did the acts arise directly and immediately out of a visit to the judge in his official capacity?

The court found that, although the judge had committed a serious procedural error with regard to the contempt matter, the judge was entitled to judicial immunity since his actions were judicial acts according to the four-part test earlier enunciated.[13] In very similar facts, a court held that a Louisiana justice of the peace was immune from finding a driver, who offended him on the highway, in contempt, but had no immunity for pulling him over. The court found that the unlawful order was a judicial act, the illegal arrest was not.[14]

Similarly, when a judge performs the acts of a prosecutor and also purports to act as a judge in the same case, such acts are not judicial acts. The judge is not entitled to judicial immunity because those actions compromise the ability to act as an impartial judge in the case. In one reported case, the judge decided to prosecute a particular defendant, decided what offense to charge, prepared the notice to appear, and prepared a guilty plea and a waiver of jury. Then the judge presented the plea papers himself. A

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8 *Rheuark v. Shaw*, 628 F.2d 297 (5th Cir. 1980), cert. denied, 450 U.S. 931 (1981).
9 *Slavin v. Curry*, 574 F.2d 1256 (5th Cir. 1978).
10 *Holloway v. Walker*, 765 F.2d 517 (5th Cir. 1985).
11 *Turner v. Raynes*, 611 F.2d 92 (5th Cir. 1980), cert. denied, 449 U.S. 900 (1980).
12 *McAlester v. Brown*, 469 F.2d 1280 (5th Cir. 1972).
13 *Id*.
14 *Malina v. Gonzales*, 994 F.2d 1121 (5th Cir. 1993).

prosecutor would normally have prepared those documents, and the prosecutor's office was never contacted. There was no way that the judge could act impartially on those papers.[15]

In another instance, a Texas justice of the peace had allowed his court clerk to rubber stamp his signature on mental health warrants and then issue them. He swore that he would review the warrants and "adopt" them the next business day. Noting that rubber-stamped signatures present possibilities for abusing due process of law, the appellate court held that the judge's signature may be stamped only in the judge's presence and under the judge's direction. Otherwise, no authority may be vested in the court clerk–or with anyone else–to affix the judge's signature. Because such conduct was beyond the authority of both the judge and clerk, neither the judge nor the clerk was entitled to claim judicial immunity.[16]

Depending on the circumstances, court personnel may be entitled to derived judicial immunity. Texas utilizes a functional approach to determine if a particular person enjoys derived judicial immunity. Under the functional approach, the determinative issue 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."[17] The key consideration in determining whether a person is entitled to derived judicial immunity is whether the person's conduct is "a normal function of the delegating or appointing judge."[18]

B. Qualified Derived or "Good Faith" Immunity

Pursuant to quasi-judicial immunity, prosecutors are immune from a Section 1983 suit for damages in initiating prosecutions and in presenting the State's case in court.[19] Peace officers and officers acting as bailiffs are also entitled to derived immunity.[20]

The U.S. Supreme Court has ruled that when judges act in an administrative or executive capacity, as opposed to a judicial capacity, they are not entitled to judicial immunity.[21] In one of the leading cases on that issue, a former probation officer filed a Section 1983 suit for damages against a state judge for wrongful demotion and discharge based on gender. The Court concluded that, although the judge had authority generally to hire and fire probation officers, personnel hiring and firing decisions were not within the court's jurisdiction, nor were they judicial acts. The Court did indicate that, although a judge does not have judicial immunity from damages where the acts performed are administrative, the judge might have a lesser grade of immunity known as qualified or "good faith" immunity.

To successfully assert qualified immunity, a judge must demonstrate that the conduct in question conformed to a standard of objective legal reasonableness. Qualified immunity is available if the judge's conduct violates no clearly established constitutional right that a reasonable person would have known.[22]

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15 *Lopez v. Vanderwater*, 620 F.2d 1229 (7th Cir. 1980).

16 *Daniels v. Stovall*, 660 F. Supp. 301 (S.D. Tex. 1987). Municipal court clerks, acting in the course of their duties, are accorded judicial immunity because they function as an arm of the court. *Spencer v. City of Seagoville*, 700 S.W.2d 953, 958-959 (Tex. App.–Dallas 1985, no writ).

17 *Briscoe, Supra*, note 62 at 335.

18 Thus, for example, a "chief court clerk" assigned to supervise a collection contract authorized by Houston's city council and countersigned by the mayor of Houston and the city controller was not entitled to derivative judicial immunity when the administration of the contract was not under the municipal judge's direction or supervision. *City of Houston v. West Capital Financial Services Corp.*, 961 S.W.2d 687, 689-690 (Tex. App.–Houston [1st Dist.] 1998).

19 *Imbler v. Pachtman*, 424 U.S. 409 (1976).

20 Attorney General Opinion No. GA-0146 (2004).

21 *Forrester v. White*,484 U.S. 219 (1988).

22 *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).

The U.S. Supreme Court explained: "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates the law."[23]

Therefore, it appears that a right will not be held to be clearly established unless it has been recognized in similar or analogous circumstances. Qualified

immunity will not be lost simply because the conduct violated some state statutory or administrative provision.[24]

The context in which a judge acts is of critical importance in determining whether judicial immunity exists. Administrative decisions–even those essential to the operation of a court–have not historically been regarded as judicial acts.[25] The matter is further complicated when a judge serves in a dual capacity.

Federal courts have held administrative orders enforced by contempt to be judicial acts entitled to judicial immunity. A judge ordering an arrest at a meeting he attended as a city alderman was found to be acting as an alderman rather than a municipal judge. Maintaining order at the meeting was the responsibility of the alderman, not the municipal judge, thus he was not entitled to judicial immunity. He was, however, entitled to qualified immunity. [26]

C. 1983 Actions for Violation of Civil Rights

Following the Civil War, the United States Congress enacted five statutes intended to create private causes of action to redress violations of constitutionally protected civil rights. The most often utilized and litigated of these statutes is now codified at Title 42 of the United States Code, Section 1983. Section 1983, as it will be referred to here, opened the federal courts to private citizens. It offers a federal remedy against incursions under the claimed authority of state law upon rights secured by the U.S. Constitution and laws.[27]

Section 1983, United States Code

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the U.S. Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress… .

Section 1983 creates no substantive rights.[28] It merely serves as a channel through which citizens may bring a civil action in court. In order to prevail, the plaintiff must show at least two elements: (1) that a deprivation of a right, privilege, or immunity secured by the U.S. Constitution or laws of the United States has occurred; and (2) that the defendant committed the deprivation while acting under color of a statute, ordinance, regulation, or usage of a state or a political subdivision of a state.[29]

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23 *Anderson v. Creighton*, 483 U.S. 635 (1987).
24 *Davis v. Scherer*, 468 U.S. 183 (1984).
25 *Forrester v. White*, 484 U.S. 219, 228 (1988).
26 *Crowe v. Lucas*, 595 F.2d 985 (5th Cir. 1979).
27 *Mitchum v. Foster*, 407 U.S. 225 (1972).
28 *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600 (1979).
29 *Gomez v. Toledo*, 446 U.S. 635 (1980).

Where the deprivation involves a right, privilege, or immunity guaranteed by the Due Process Clause of the 14th Amendment, the plaintiff must show that either a liberty interest of constitutional magnitude is involved,[30] or that a constitutionally significant property interest is involved.[31] Where the Equal Protection Clause of the 14th Amendment is relied upon, an invidious discriminatory purpose must be shown.[32]

On the surface, it might seem that Section 1983 encompasses virtually every act that contravenes the federal constitution or law. For there to be a valid claim, the deprivation of a federal constitutional or legal right must have resulted from the sort of abuse of government power that is necessary to raise an ordinary tort by a government agent to the stature of a constitutional violation.[33]

Where the Section 1983 claim is based upon procedural due process rights under the 14th Amendment and where state law also guarantees due process of law, a defendant's intentional or negligent tortious conduct is not enough to state a cause of action.[34] Even where substantive property or liberty rights are involved, the defendant's negligent conduct will not provide a basis for suit.[35] Mere negligence is insufficient for a valid Section 1983 claim based upon the 14th Amendment.[36] The deprivation of liberty or property must be based on an unsound statutory, administrative, or practical procedure, not simply on the wrongful or negligent action of a state agent.

Section 1983 allows lawsuits against officials and employees of states and their political subdivisions to be brought in either state or federal court.[37] By its terms, Section 1983 provides a cause of action in law or equity. Suits "in law" are most often lawsuits for retrospective relief, like money damages for past wrongs. Suits "in equity" are usually suits for prospective relief, like injunctions to prevent wrongs from occurring or declaratory judgments.

There are only four types of lawsuits under Section 1983 that can be filed against a judge or prosecutor:

1. A suit for money damages for past wrongs in an official capacity (retrospective official suits);
2. A suit for money damages in an individual or personal capacity (retrospective personal capacity suits);
3. A suit for injunctive or declaratory relief in an official capacity (prospective official suits);[38] and
4. A suit for injunctive or declaratory relief in an individual or personal capacity (prospective personal capacity suits).

The distinctions between official capacity suits and personal capacity suits must be clarified. In discussing the distinctions, it is also necessary to discuss the 11th Amendment to the U.S. Constitution.

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30 *Addington v. Texas*, 441 U.S. 418 (1979).
31 *Barry v. Barchi*, 443 U.S. 55 (1979).
32 *Loving v. Virginia*, 388 U.S. 1, 10 (1967); *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977).
33 *Williams v. Kelley*, 624 F.2d 695 (5th Cir. 1980); *Daniels v. Williams*, 474 U.S. 327 (1986); *Hudson v. Palmer*, 468 U.S. 517 (1984).
34 *Parratt v. Taylor*, 451 U.S. 527 (1981); *Hudson*, *Supra*, note 90; *Holloway v. Walker*, 790 F.2d 1170 (5th Cir. 1986).
35 *Davidson v. Cannon*, 474 U.S. 344 (1986); *Daniels*, *Supra*, note 90.
36 *Daniels*, *Supra*, note 90.
37 *Maine v. Thiboutot*, 448 U.S. 1 (1980).
38 *Reyna v. City of Weslaco*, 944 S.W.2d 657, 661 (Tex. App.–Corpus Christi 1997) (rejecting municipal judge and city attorney efforts to invoke immunity claims in response to suits for injunctive and declaratory relief).

Plaintiffs often attempt to posture their lawsuits by naming an official either in an official capacity or in an individual capacity. They sometimes sue the official in both capacities. Sometimes plaintiffs merely name the official and attempt no designation. In either event, courts designate the capacity (sometimes expressly and other times by implication only) according to the issues raised. It is not unusual for a court to change the designation from what is first claimed in the plaintiff's pleadings and interpose its own determination of capacity.[39]

Framing a suit as an official capacity suit represents one way of pleading an action against an entity of which an official is an agent.[40] A judgment against a public servant in an official capacity imposes liability on the entity that the official represents,[41] as long as it is clear that the entity itself is a moving force behind the deprivation.[42] The entity's policy or custom must have played a part in the violation of the law.[43] In the trial of an official capacity suit for damages, the only immunities that can be claimed are forms of sovereign immunity, such as that provided by the 11th Amendment. In a personal capacity action for damages, on the other hand, the official can assert only common law immunities, if any are available. Common law immunities include absolute judicial, quasi-judicial, or qualified immunity.[44]

Amendment XI, U.S. Constitution

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The 11th Amendment of the U.S. Constitution affords states absolute immunity from Section 1983 liability in actions for both equitable and legal relief.[45] State agencies and departments are likewise protected.[46] However, state officials and local officials enforcing state policy share the state's 11th Amendment immunity only in official lawsuits for prospective and retrospective relief.[47]

Section 1983 suits cannot be brought in either state or federal court against states, state agencies or departments, or state officials in their official capacities since they are not "persons" within the meaning of Section 1983.[48] Cities, counties, and their officials, when sued in an official capacity, are "persons," however, and may be sued.[49] Officials of cities, counties, or the state may be sued in their individual capacities and, where damages are sought, will possibly have the protection of common law immunities.[50]

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39 *Kentucky v. Graham*, 473 U.S. 159 (1985); *Crane v. Texas*, 759 F.2d 412 (5th Cir. 1985).
40 *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978).
41 *Brandon v. Holt*, 469 U.S. 464 (1985).
42 *Polk County v. Dodson*, 454 U.S. 312 (1981).
43 *Oklahoma City v. Tuttle*, 471 U.S. 808 (1985).
44 *Graham, Supra*, note 96.
45 *Edelman v. Jordan*, 415 U.S. 651 (1974).
46 *Pennhurst State School and Hospital v. Halderman*, 465 U.S. 89 (1984).
47 *Edelman, Supra*, note 102; *Cory v. White*, 457 U.S. 85 (1982).
48 *Will v. Michigan Department of State Police*, 491 U.S. 58 (1989).
49 *Monell, Supra*, note 97.
50 *Graham, Supra*, note 96.

State officials, counties, cities, and city and county employees have no 11th Amendment immunity in personal capacity suits for equitable relief.[51]

Lawsuits for money damages against state or local judges or prosecutors in their official capacities are rare. State judges and prosecutors, when sued for money damages in their official capacities, can avoid all liability by claiming 11th Amendment immunity. Local judges or prosecutors may or may not, depending on the circumstances, have 11th Amendment immunity when sued in their official capacities.

The case of *Familias Unidas v. Briscoe*[52] involved just such a question. In *Familas*, the county judge was sued in his official capacity for damages. An injunction and a declaratory judgment were also originally sought but dropped. The county judge had invoked state law (the Education Code) against the plaintiff at the request of the local school board. The court reasoned that, in this instance, the county judge was acting in the capacity of a state official rather than a county official. As a state official, the county judge was entitled to 11th Amendment immunity in his official capacity. Had the court found that the county judge implemented county policy rather than state law, the judge would have been treated as a county official and would have had no 11th Amendment immunity, since counties have no such immunity. The court then articulated a test for determining when a county judge effectuates county policy rather than state policy:

> …[A]t least in those areas in which he, alone, is the final authority or ultimate repository of county power, his official conduct and decisions must necessarily be considered those of one whose edicts or acts may fairly be said to represent official policy for which the county [not the state] may be held responsible under section 1983.

The rationale used in *Familias* was subsequently applied in a lawsuit against a Texas justice of the peace who was sued for damages in his official capacity for delaying the release of an impounded truck to its owner.[53] The plaintiff argued that the judge, in failing to timely release the truck, had affected county policy. The court held that the judge was merely applying state law[54] and was therefore not a county policymaker in this instance. Thus, the county was not liable for damages,[55] and the judge was entitled to 11th Amendment immunity in his official capacity.

In another Texas lawsuit, the plaintiff sought damages for conduct of the criminal district attorney, the county clerk, the county judge, the county itself, and others whom the plaintiff claimed had violated state and federal law. [56] The court found that the county's illegal capias procedure, which called for clerks rather than judges to sign and issue capias writs, had been instituted by the criminal district attorney. The court then had to determine whether the criminal district attorney in this matter acted as a state official or county official. If acting as a state official, the criminal district attorney could claim 11th Amendment immunity from damages in his official capacity. The court decided that the plaintiff was suing the various county officials in their official capacities and not in their personal capacities. Based upon the test in *Familias*, the court concluded that the criminal district attorney was effectuating county policy and not state policy. As a consequence, the county was held responsible for damages.[57]

D. Liability for Acts of Clerks

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51 *Quern v. Jordan*, 440 U.S. 332 (1979); *Halderman, Supra*, note 103; *Crane, Supra*, note 96.
52 619 F.2d 391 (5th Cir. 1980).
53 *Bigford v. Taylor*, 834 F.2d 1213 (5th Cir. 1988), cert. denied, 488 U.S. 851 (1988).
54 Article 47.01(a), Code of Criminal Procedure.
55 *Monell, Supra*, note 97.
56 *Crane, Supra*, note 96.
57 *Monell, Supra*, note 97.

In civil law, the theory called *respondeat superior* makes an employer vicariously liable for the non-intentional torts (a wrong or injury) of employees. The U.S. Supreme Court has concluded that this theory has no place in Section 1983 suits.[58] To hold a supervisor or controlling entity responsible for the actions of a subordinate under federal civil rights laws and specifically under Section 1983, there must be a causal connection between the acts of the supervisor and the violation of rights.[59]

Although no reported cases have been found involving a judge sued for negligent hiring or for failure to adequately train or supervise a court clerk, this theory is often used in suits against police chiefs and sheriffs.

The federal 5th Circuit Court of Appeals has outlined three elements that must be proved in order to hold a supervisor responsible for the acts of subordinates where failure to train or supervise is alleged as the cause of such acts. The plaintiff must show that: (1) the supervisor failed to supervise or train the subordinate officer; (2) a causal connection existed between the failure to supervise or train and the violation of the plaintiff's rights; and (3) such failure to train or supervise amounted to gross negligence or deliberate indifference.[60]

Case law holds that one method of proving liability for failure to supervise or train is to show that the supervisor failed to control the subordinate's known propensity for improper conduct.[61] Three previous incidents involving the subordinate officer may not prove a failure to supervise. Moreover, the mere fact that a supervisor, long before becoming a supervisor, had heard rumors that the subordinate officer had shot and injured another person while on duty was held to be insufficient to establish the supervisor's liability.[62] Usually, a failure to supervise gives rise to Section 1983 liability only in those situations in which there is a history of widespread abuse.[63]

E. Injunctions and Declaratory Relief

Suits seeking prospective relief such as an injunction or declaratory judgment are brought against state and county officials. However, the general rule is that a suit against state officials or local government officials who can be said to be effectuating state law in an official capacity is in fact a suit against a state.[64] Thus, the 11th Amendment bars such a suit whether it seeks damages for wrongs done or injunctive relief to prevent planned or anticipated wrongs.[65]

The U.S. Supreme Court, however, has recognized an important exception to this general rule. A suit challenging the constitutionality of a state official's action is not one against the state. In *Ex parte Young*,[66] the Court held that the 11th Amendment does not prohibit issuance of an injunction against a state attorney general to prevent threatened criminal prosecution under an unconstitutional state law. Since most suits for prospective relief are brought to prevent enforcement or effectuation of an allegedly unconstitutional state law or policy, it does not matter for 11th Amendment immunity purposes whether the state official is sued in an official or personal capacity. *Ex parte Young* precludes 11th Amendment immunity for state officials sued in their official capacity. Neither 11th Amendment immunity nor

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58 *Id; Rizzo v. Goode*, 432 U.S. 362 (1976).
59 *Dennis v. Warren*, 779 F.2d 245 (5th Cir. 1985).
60 *Hinshaw v. Doffer*, 785 F.2d 1260 (5th Cir. 1986).
61 *Sims v. Adams*, 537 F.2d 829 (5th Cir. 1976).
62 *Hinshaw, Supra*, note 117; *Chestnut v. City of Quincy*, 513 F.2d 91 (5th Cir. 1975).
63 *Bowen v. Watkins*, 669 F.2d 979 (5th Cir. 1982).
64 *Halderman, Supra*, note 103.
65 *Cory, Supra*, note 104.
66 209 U.S. 123 (1908).

common law immunities, such as judicial immunity, are available to state officials sued in a personal capacity because of the Court's decision.[67]
No immunities are available to counties or municipalities.[68] Naming a county official in an official capacity has the effect of ordering prospective relief against the entity for whom the official is an agent.[69] When officials are sued in their personal capacities, no common law immunity is available.[70]

As a practical matter, most suits for prospective relief name officials in both their official and personal capacities. Such suits usually seek injunctive relief to enjoin enforcement of a government law or policy that the plaintiff believes to be contrary to federal law. Sometimes a plaintiff will seek a declaratory judgment that a government law or policy is unconstitutional and then ask that an injunction be issued to keep governmental officials from enforcing that law or policy. In a few instances, however, the plaintiff will seek only a declaratory judgment. Of course, many suits seek both prospective relief and retrospective relief such as damages. When faced with such a suit, the portion of the lawsuit seeking damages should be analyzed according to the prior discussion dealing with retrospective relief.

While in *Pulliam v. Allen*,[71] the U.S. Supreme Court held that the doctrine of absolute immunity does not bar claims for attorney's fees and for prospective declaratory or injunctive relief, in 1996 Congress effectively reversed the Court's rulings with regard to injunctive relief with the enactment of the Federal Courts Improvement Act of 1996.[72] Thus, the doctrine of absolute judicial immunity now extends to cover suits against judges where the plaintiff seeks not only attorney's fees, but injunctive relief as well, unless preceded by a declaration, or by a showing that such declaratory relief is unavailable.

Other notable cases pertaining to injunctions and declaratory relief:

- *Dombrowski v. Pfister* – An injunction can be granted by a federal district court if needed to protect persons already charged with crimes for purported violations of an unconstitutional statute.[73]
- *Younger v. Harris* - Relying on the doctrines of comity and federalism, federal courts should not grant declaratory relief to a person already charged with a crime unless the plaintiff can demonstrate that there is no adequate remedy at law and that great and immediate irreparable injury will result if state action is not enjoined. Intervention would be permitted where bad faith or harassment by prosecutors is shown and where the state law to be applied flagrantly and patently violates express constitutional prohibitions. [74]
- *Pennhurst State School and Hospital v. Halderman* - Federal courts cannot enjoin state or county officials to obey state law.[75]

F. Practical Considerations

First and foremost, if you are sued, you should seek legal counsel. Secondly, by pleading the defense of immunity, whether judicial or qualified immunity, the defendant forces the plaintiff to plead allegations that would negate the immunity defense. If the plaintiff does not do so, the defendant is entitled to a

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67 *Halderman, Supra,* note 103.
68 *Owen v. City of Independence,* 445 U.S. 622 (1980).
69 *Brandon, Supra,* note 98.
70 *Tarter v. Hury,* 646 F.2d 1010 (5th Cir. 1981).
71 466 U.S. 522 (1984).
72 Pub. L. No. 104-317, 110 Stat. 3847 (1996) (amending 42 U.S.C. § 1983). As amended, Section 1983 now provides that "in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable."
73 380 U.S. 479 (1965).
74 401 U.S. 37 (1971).
75 *Supra,* note 103.

dismissal prior to trial.[76] In the case of qualified judicial immunity, the plaintiff would have to plead facts that show that the defendant violated clearly established law.[77] A prosecutor's assertion of immunity would compel the plaintiff to allege that the state's attorney violated a clearly established right.

Once the immunity defense is raised, the federal court must decide whether or not immunity applies before allowing depositions or other costly discovery procedures.[78] If the plaintiff fails to plead sufficient facts, the defendant is entitled to dismissal of the suit.[79] Only where the plaintiff successfully defeats the immunity defense by pleading sufficient facts should the judge allow discovery and other pre-trial matters to proceed.[80]

Where the defendant is unable to obtain a dismissal prior to trial based upon the immunity defense, the defendant will generally be able to re-assert the immunity defense during trial. Where the court denies the defendant's request for dismissal based upon the immunity defense, that order can be appealed prior to trial.[81]

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76 *Mitchell v. Forsyth*, 472 U.S. 511 (1985).
77 *Harlow*, *Supra*, note 79.
78 *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985).
79 *Mitchell*, *Supra*, note 133.
80 *Elliott*, *Supra*, note 135.
81 *Mitchell*, *Supra*, note 133.

IMMUNITY;

SO YOU THINK YOU CAN'T BE SUED?

Ryan Henry
Law Offices of Ryan Henry, PLLC.
1380 Pantheon Way, Suite 215
San Antonio, Texas 78232
210-257-6357 (phone)
210-569-6494 (fax)
Ryan.henry@rshlawfirm.com

I. A Balancing Act

It goes without saying that the judiciary is one of the three branches of our government, the other two being the legislative and executive branches. It has long been recognized that in order to proper facility the judiciary's role in our society, the judicial actors who make the branch function must feel free to exercise their discretion without the fear of civil reprisal. *Stump v. Sparkman*, 435 U.S. 349, 356-57, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978). Hence, judges are absolutely immune from liability for judicial acts that are performed within their jurisdictional power, no matter how erroneous the act or how evil the motive. *Johnson v. Kegans*, 870 F.2d 992, 995 (5th Cir.), cert. denied, 492 U.S. 921, 109 S. Ct. 3250, 106 L. Ed. 2d 596 (1989); *Turner v. Pruitt*, 161 Tex. 532, 342 S.W.2d 422, 423 (1961). Judges are granted this broad immunity because of the special nature of their responsibilities. *Kegans*, 870 F.2d at 995. Judicial immunity, which is firmly established at common law, protects not only the individual judges, but benefits the public "whose interest it is that the judges should be at liberty to exercise their functions with independence, and without fear of consequences." *Bradley v. Fisher*, 80 U.S. 335, 350, 20 L. Ed. 646 (13 Wall. 335) (1871) (citations omitted). In short, judicial immunity is an absolute immunity that protects judges and other judicial actors such as clerks and bailiffs.

However, not all judicial immunity is the same. Additionally, even if a judge or other actor steps outside the bounds of their judicial immunity, other immunities may still cover the judge or actor for their official acts. This paper is not intended to be an all-encompassing treaty on the subject, but it will touch on, and give general explanations on, the various different types of immunities the judge and other court actors may possess.

II. When is a Judge Entitled to Absolute Immunity?

Absolute Immunity is a tool designed specifically to allow judges the ability to effectively perform their job. A Judge acting in his or her official judicial capacity enjoys absolute immunity from liability for judicial acts performed within the scope of their jurisdiction. *Stump v. Sparkman*, 435 U.S. 349, 356-57, 98 S. Ct. 1099, 55 L. Ed. 2d 331 (1978); *Davis v. Tarrant County, Tex.*, 565 F.3d 214, 221 (5th Cir. 2009); *Turner v. Pruitt*, 161 Tex. 532, 342 S.W.2d 422, 423 (Tex. 1961). "**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.**" *Alpert v. Gerstner*, 232 S.W.3d 117, 127 (Tex. App.—Houston [1st Dist.] 2006, pet. denied) (quoting *City of Houston v. W. Capital Fin. Servs. Corp.*, 961 S.W.2d 687, 689 (Tex. App.—Houston [1st Dist.] 1998, pet. dism'd w.o.j.)). "A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the "clear absence of all jurisdictions.'" *Stump*, 435 U.S. at 356-57.

"Judicial immunity is immunity from suit, not just from ultimate assessment of damages." *Mireles v. Waco*, 502 U.S. 9, 112 S. Ct. 286, 116 L. Ed. 2d 9, 1991 (1991); *Bradt v. West*, 892 S.W.2d 56, 69 (Tex. App. Houston 1st Dist. 1994). Therefore, it makes no difference what specific causes of action are brought; the judge is immune from being sued at all. *Id* at 288. Despite the unfairness to litigants that sometimes results, the existence of the doctrine of judicial immunity is in the best interests of justice as a whole. *Stump*, 435 U.S. at 363, 98 S. Ct. at 1108. It allows a judge, in exercising the authority vested in him, to be free to act according to his best judgment, unencumbered by anxiety about being sued for acts he performs in discharging his duties. *Id*. The public has a right to expect the unfettered execution of those duties; this doctrine helps the judge fulfill those expectations. Thus, absolute judicial immunity "should not be denied where the denial carries the potential of raising more than a frivolous concern in a judge's mind that to take proper action might expose him to personal liability." *Malina v. Gonzales*, 994 F.2d 1121, 1124 (5thCir. 1993). "The fact that the issue before the judge is a controversial one is all the more reason that he should be able to act without fear of suit." *Stump*, 435 U.S. at 364, 98 S. Ct. at 1108.

In essence, as long as the judge acts 1) within his judicial capacity (not administrative capacity) and 2) within his jurisdiction, the judge is entitled to absolute judicial immunity. So, how does a judge establish these two elements?

Judicial Act: Courts around the country have followed the lead of the United States Supreme Court and adopted a "functional approach" in determining whether a party is entitled to absolute immunity. See *Gardner v. Parson*, 874 F.2d 131, 145-46 (3d Cir. 1989); *Hodorowski v. Ray*, 844 F.2d 1210, 1213-15 (5th Cir. 1988); *Meyers v. Contra Costa County Dep't of Social Serv.*, 812 F.2d 1154, 1157 (9th Cir.), cert. denied, 484 U.S. 829, 108 S. Ct. 98, 98 L. Ed. 2d 59 (1987); *Malachowski v. City of Keene*, 787 F.2d 704, 712 (1st Cir.), cert. denied, 479 U.S. 828, 107 S. Ct. 107, 93 L. Ed. 2d 56 (1986). Under the functional approach, courts determine whether the activities of the party seeking immunity are **"intimately associated with the judicial process."** *Imbler v. Pachtman*, 424 U.S. 409, 430-31, 96 S. Ct. 984, 994-96, 47 L. Ed. 2d 128 (1976). The question is whether the activities undertaken by the party are "functions to which the reasons for absolute immunity apply with full force." *Imbler v. Pachtaman*, 424 U.S. at 430, 96 S. Ct. at 995. In other words, a party is entitled to absolute immunity when the party is acting as an integral part of the judicial system or an "arm of the court". *Briscoe v. LaHue*, 460 U.S. 325, 335, 103 S. Ct. 1108, 1115, 75 L. Ed. 2d 96 (1983). **The focus is on the nature of the function performed, not the identity of the actor.** *Delcourt v. Silverman*, 919 S.W.2d 777, 782 (Tex. App. Houston 14th Dist. 1996); *Forrester v. White*, 484 U.S. 219, 230, 108 S. Ct. 538, 545-46, 98 L. Ed. 2d 555 (1988)).

Texas judges have absolute immunity for their judicial acts "unless such acts fall clearly outside the judge's subject-matter

jurisdiction." *Spencer v. City of Seagoville*, 700 S.W.2d 953, 957-58 (Tex. App.--Dallas 1985, no writ); see *Holloway v. Walker*, 765 F.2d 517, 523 (5th Cir.), cert. denied, 474 U.S. 1037, 106 S. Ct. 605, 88 L. Ed. 2d 583 (1985); *Adams v. McIlhany*, 764 F.2d 294, 297 (5th Cir. 1985), cert. denied, 474 U.S. 1101, 106 S. Ct. 883, 88 L. Ed. 2d 918 (1986). Thus, in determining whether absolute judicial immunity applies, courts look to a two-part inquiry: First, were the acts "judicial" ones? Second, were those acts "clearly outside" the judge's jurisdiction? *Bradt v. West*, 892 S.W.2d 56, 66-67 (Tex. App. Houston 1st Dist. 1994).

The factors considered in determining whether a judge's act is a "judicial" one are (1) whether the act complained of is one normally performed by a judge, (2) whether the act occurred in the courtroom or an appropriate adjunct such as the judge's chambers, (3) whether the controversy centered around a case pending before the judge, and (4) whether the act arose out of a visit to the judge in his judicial capacity. *Malina v. Gonzales*, 994 F.2d 1121, 1124 (5th Cir. 1993) (citing *McAlester v. Brown*, 469 F.2d 1280, 1282 (5th Cir. 1972). These factors should be broadly construed in favor of immunity. *Malina*, 994 F.2d at 1124; *Adams*, 764 F.2d at 297. Not all of the factors must be met for immunity to exist. *Malina*, 994 F.2d at 1124; *Harris v. Deveaux*, 780 F.2d 911, 915 (11th Cir. 1986). In some circumstances, immunity may exist even if three of the four factors are not met. *Adams*, 764 F.2d at 297 n.2. Nor are the factors to be given equal weight in all cases; rather, they should be weighted according to the facts of the particular case. *Id*. at 297.

Within Judge's Jurisdiction: In determining whether an act was clearly outside a judge's jurisdiction for judicial immunity purposes, the **focus is not on whether the judge's specific act was proper or improper, but on whether the judge had the jurisdiction necessary to perform an act of that kind in the case.** See *Mireles v. Waco*, 502 U.S. 9, 112 S. Ct. 286, 289, 116 L. Ed. 2d 9 (1991) (where judge was alleged to have authorized and ratified police officers' use of excessive force in bringing recalcitrant attorney to judge's courtroom, and thus to have acted in excess of his authority, his alleged actions were still not committed in the absence of jurisdiction where he had jurisdiction to secure attorney's presence before him); *Malina*, 994 F.2d at 1124 (because judge had power to cite for contempt and to sentence, where judge cited motorist for contempt and sentenced him to jail, these acts were within his jurisdiction, even though judge had acted improperly in stopping the motorist himself, privately using an officer to unofficially "summon" the motorist to court, and charging the motorist himself); *Sindram v. Suda*, 300 U.S. App. D.C. 110, 986 F.2d 1459, 1460 (D.C. Cir. 1993) (judge's prohibiting plaintiff from filing any new civil actions pro se before paying outstanding sanctions was "well within" judge's "jurisdiction" as term is used for judicial immunity test).

So, once a judge establishes he or she is entitled to absolute immunity, what is the next step? The case law is a little vague as

to the proper mechanism to utilize, but the result is the same. **A judge should file either a plea to the jurisdiction or a motion for summary judgment asserting absolute judicial immunity.**[1] If a trial court denies the assertion of immunity, the judge is entitled to an interlocutory appeal pursuant to Tex. Civ. Prac. Rem Code §51.014(5) (*Vernon* 2005). If the judge is entitled to such immunity, the judge should be dismissed with prejudice.

III. Judicial Immunity for Other Court Actors

Judicial Immunity protects actors of the court as well. When judges delegate their authority or appoint others to perform services for the court, the judicial immunity that attaches to the judge may follow the delegation or appointment. *Byrd v. Woodruff*, 891 S.W.2d 689, 707 (Tex. App. -- Dallas 1994, writ denied). Officers of the court who are integral parts of the judicial process, such as court clerks, law clerks, bailiffs, constables issuing writs, and court-appointed receivers and trustees are entitled to judicial immunity if they actually function as an arm of the court. *Id.* See also *Babcock v. Tyler*, 884 F.2d 497 (9th Cir. 1989), cert. denied, 493 U.S. 1072, 110 S. Ct. 1118, 107 L. Ed. 2d 1025 (1990) (holding social worker absolutely immune); *Demoran v. Witt*, 781 F.2d 155 (9th Cir. 1985) (holding probation officers absolutely immune); *Wiggins v. New Mexico State Supreme Court Clerk*, 664 F.2d 812 (10th Cir.)(Holding state Supreme Court justices and clerk absolutely immune), cert. denied, 459 U.S. 840, 103 S. Ct. 90, 74 L. Ed. 2d 83 (1982); *Ashbrook v. Hoffman*, 617 F.2d 474 (7th Cir. 1980) (holding partition commissioner absolutely immune). **This type of absolute immunity is referred to as "derived judicial immunity."** See *Clements v. Barnes*, 834 S.W.2d 45, 46 (Tex. 1992). The policy underlying derived judicial immunity that protects participants in judicial and other adjudicatory proceedings is well established. Not only does the policy guarantee an independent, disinterested decision-making process, these immunities prevent the harassment and intimidation that might otherwise result if disgruntled litigants could vent their anger by suing either the person who presented the decision maker with adverse information, or the person or persons who rendered an adverse opinion. *Johnson v. Kegans*, 870 F.2d 992, 996-97 (5th Cir.),

Again, the courts use a functional approach to determining derivative judicial immunity. *Delcourt v. Silverman*, 919 S.W.2d 777, 781-782 (Tex. App. Houston 14th Dist. 1996). Applying the functional approach, a psychologist who is appointed by the court is entitled to absolute immunity if he or she is appointed to fulfill quasi-judicial functions intimately related to the

[1] The reason the mechanism is grey is due to the contradictory holdings regarding judicial immunity. Judicial immunity, as an absolute immunity, is immunity from suit. This means there is no jurisdiction to bring the judge before another judicial tribunal and should be challenged through a plea to the jurisdiction. However, other courts have held that judicial immunity is an affirmative defense. Kassen v. Hatley, 887 S.W.2d 4, 8-9, 38 Tex. Sup. Ct. J. 73 (Tex. 1994) (official immunity is a common law affirmative defense); DeWitt v. Harris County, 904 S.W.2d 650, 653, 38 Tex. Sup. Ct. J. 916 (Tex. 1995) (discussing immunity from liability); Ballantyne v. Champion Builders, Inc., 144 S.W.3d 417, 422, 47 Tex. Sup. Ct. J. 852 (Tex. 2004) (discussing immunity from suit). Affirmative defenses are not jurisdictional. As a result, affirmative defenses should be raised in a motion for summary judgment.

judicial process. *Myers v. Morris*, 810 F.2d 1437, 1466-67 (8th Cir.). **The focus is on the nature of the function performed, not the identity of the actor.** *Forrester v. White*, 484 U.S. 219, 230, 108 S. Ct. 538, 545-46, 98 L. Ed. 2d 555 (1988). Numerous courts have extended absolute immunity to psychiatrists and other mental health experts assisting the court in criminal cases. See, e.g., *Moses v. Parwatikar*, 813 F.2d at 892 (holding psychiatrist entitled to absolute immunity when appointed in competency examination). The consistent reasoning given by the courts in these cases is that the psychiatrist or mental health professional performed a special task closely related to the judicial process pursuant to a court directive. *Lavit*, 839 P.2d at 1145.

However, in *Antoine v. Byers & Anderson, Inc*., 508 U.S. 429, 124 L. Ed. 2d 391, 113 S. Ct. 2167 (1993), the United States Supreme Court resolved a circuit conflict regarding the extent of judicial immunity granted to court reporters -- some circuits had extended absolute immunity to court reporters while others afforded them qualified immunity. *Id*. at 432 & 432 n.3 (citing cases). Although the circuit decisions involved various court-reporter functions, *Antoine* involved the court reporter's potential liability for the courtroom recording of judicial proceedings. In that context, the Court was unwilling to extend the protection of judicial immunity to court reporters and used the functional approach to determine that court reporters do not exercise discretion or engage in judicial decision making processes. *Id.* at 436-37. The Court characterized judicial immunity as extending only to officials whose "judgments are 'functionally comparable' to those of judges" and who "'exercise a discretionary judgment' as a part of their function." *Id*. at 436(citations omitted). The Court further noted that the application of the functional approach in granting judicial immunity does not hinge on the importance of the court officer's duty to the judicial process, but rather focuses on the amount of **subjective discretion** that the officer exercises in the performance of a particular job. *Id*. at 436-37. The Court framed its decision broadly and held that court reporters do not exercise the kind of judgment that is protected by the doctrine of judicial immunity. *Id.* at 437.

IV. If Not Absolute Immunity, Then What?

So, absolute judicial immunity extends only so far. But what of the official who, while trying to perform their job in good faith, still gets sued? Not to fear. If judicial immunity is not applicable, other immunities may kick-in to protect good faith actions. The subject of official immunity is one which can qualify for a paper unto itself, as it covers all forms of public officials, from elected officials, appointed officials, public employees and staff, and even certain contractors. However, for purposes of this paper, I'm simply going to focus on the immunity as it applies to judges and possibly clerks.

"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." *Baylor College of Med. v. Hernandez*, 208 S.W.3d 4, 11 n.7 (Tex. App.—Houston [14th Dist.] 2006, pet.

denied); see also *City of Houston v. Kilburn*, 849 S.W.2d 810, 812 n.1 (Tex. 1993).[2] In essence, if an official, including a judge or court clerk, is performing administrative tasks not integrally associated with the judicial process, but necessary nonetheless, official immunity may still apply.

Official immunity is a common law affirmative defense rendering individual officials immune from both liability and suit. See *Kassen v. Hatley*, 887 S.W.2d 4, 8-9, 38 Tex. Sup. Ct. J. 73 (Tex. 1994) (official immunity is a common law affirmative defense); *DeWitt v. Harris County*, 904 S.W.2d 650, 653, 38 Tex. Sup. Ct. J. 916 (Tex. 1995) (discussing immunity from liability); *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 422, 47 Tex. Sup. Ct. J. 852 (Tex. 2004) (discussing immunity from suit). Although official immunity applies only to individuals, an agency or institution may be shielded from respondent superior liability for its employee's negligence if the employee possesses official immunity. See *DeWitt*, 904 S.W.2d at 654.

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.** *Baylor College of Med. v. Hernandez*, 208 S.W.3d 4, 10-11 (Tex. App. Houston 14th Dist. 2006). Thus, a motion for summary judgment asserting official immunity will expressly list official immunity as a ground for judgment, or will move for summary judgment on the basis that the plaintiff's claims arise from the good faith performance of an official's discretionary duties within the scope of his authority--the elements of official immunity. See Tex. R. Civ. P. 166a(c) ("The motion for summary judgment shall state the specific grounds therefor."); see also *Cathey v. Booth*, 900 S.W.2d 339, 341, 38 Tex. Sup. Ct. J. 927 (Tex. 1995)(stating that a defendant "who conclusively establishes all of the elements of an affirmative defense is entitled to summary judgment.").

Under absolute judicial immunity, the motives or intent of a judge exercising judicial authority is immaterial. No matter how evil the motives, absolute immunity protects the judge. Unlike absolute immunity, official immunity turns heavily on the motives of the official. However, it's not as bad as it may appear. The U.S. Supreme Court has established an objective reasonableness test for determining whether a public official acted in good faith as a condition to the protection of federal qualified immunity. The Supreme Court stated bluntly: "[A] defense of qualified immunity may not be rebutted by evidence that the defendant's conduct was malicious or otherwise improperly [428] motivated. **Evidence concerning the defendant's subjective intent is simply irrelevant to that defense**." *Crawford-El v. Britton*, 523

[2] Federal courts recognize a qualified immunity for public officials, which is analogous although not identical to Texas official immunity. Qualified immunity protects governmental officers with discretionary authority from liability so long as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Crawford-El v. Britton*, 523 U.S. 574, 588, 140 L. Ed. 2d 759, 118 S. Ct. 1584 (1998); *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L. Ed. 2d 396, 102 S. Ct. 2727 (1982); *Ballantyne v. Champion Builders, Inc.*, 144 S.W.3d 417, 429 (Tex. 2004)

U.S. 574, 588, 140 L. Ed. 2d 759, 118 S. Ct. 1584 (1998).

Under Texas law, probative evidence on the issue of good faith is limited to objective evidence. See *Wadewitz,* 951 S.W.2d at 466 ("[A] court must measure good faith in official immunity cases against a standard of objective legal reasonableness, without regard to the officer's subjective state of mind."); *Ballantyne v. Champion Builders, Inc*., 144 S.W.3d 417, 427-428 (Tex. 2004)

The Texas Supreme Court has also been rather blunt in its rejection of a subjective intent to harm. It expressly stated in *Ballantyne,* in that reliance on subjective evidence in considering the good faith prong of the official immunity doctrine is improper. “It is not germane to the official immunity analysis.” 144 S.W.3d 427-428. Important reasons exist for allowing only objective evidence in consideration of good faith. An objective standard furthers the purpose of official immunity, which is “to permit decision making public officials to perform their jobs without hesitation or concern that their decisions will subject them individually to civil liability under state law.” *Id* at 428. Suits against government official’s exact costs against society, including "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Ballantyne v. Champion Builders, Inc*., 144 S.W.3d 417, 428 (Tex. 2004) (citing *Harlow v. Fitzgerald,* 457 U.S. 800, 814 (U.S. 1982). Employing a subjective standard of good faith significantly increases these societal costs. *Id.* at 816.

The Texas Supreme Court in *Ballantyne* adopted the U.S. Supreme Court explanation of the reasons for objective analysis:

> The judgments surrounding discretionary action almost inevitably are influenced by the decision maker's experiences, values, and emotions. These variables . . . frame a background in which there often is no clear end to the relevant evidence. Judicial inquiry into subjective motivation therefore may entail broad-ranging discovery and the deposing of numerous persons, including an official's professional colleagues. Inquiries of this kind can be peculiarly disruptive of effective government. Id. at 816-17. We likewise recognize a substantial public interest in shielding public officials from the costs associated with defending civil lawsuits instituted to challenge their judgment on public issues.
>
> *Ballantyne* 144 S.W.3d at 428.

So, in other words, **an official may be entitled to official immunity if they are performing their official discretionary actions in a way that is objectively reasonable for the official’s particular scope of work.** *Joe v. Two Thirty Nine J.V.*, 145 S.W.3d 150, 161 (Tex. 2004).

V. What other Immunities Are Out There?

I'm glad you asked. In addition to absolute and official/qualified immunity, public officials, including judges and clerks, have additional statutory protections from suit. Texas Civil Practice and Remedies Code states:

> a) The filing of a suit under this chapter against a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against any individual employee of the governmental unit regarding the same subject matter.
> (b) The filing of a suit against any employee of a governmental unit constitutes an irrevocable election by the plaintiff and immediately and forever bars any suit or recovery by the plaintiff against the governmental unit regarding the same subject matter unless the governmental unit consents.
> (c) The settlement of a claim arising under this chapter shall immediately and forever bar the claimant from any suit against or recovery from any employee of the same governmental unit regarding the same subject matter.
> (d) A judgment against an employee of a governmental unit shall immediately and forever bar the party obtaining the judgment from any suit against or recovery from the governmental unit.
> (e) If a suit is filed under this chapter against both a governmental unit and any of its employees, the employees shall immediately be dismissed on the filing of a motion by the governmental unit.
> (f) If a suit is filed against an employee of a governmental unit based on conduct within the general scope of that employee's employment and if it could have been brought under this chapter against the governmental unit, the suit is considered to be against the employee in the employee's official capacity only. On the employee's motion, the suit against the employee shall be dismissed unless the plaintiff files amended pleadings dismissing the employee and naming the governmental unit as defendant on or before the 30th day after the date the motion is filed.
>
> Tex. Civ. Prac. & Rem. Code § 101.106 (West 2011).

A common mistake many plaintiffs commit is to sue the individual official, judge, clerk, whoever, as well as the "deep pockets" of the city or county employing the official. Such a pleading automatically entities the judge to immediate dismissal, regardless of any other defenses or immunities he or she may possess. Further, if the plaintiff brings a claim simply against the judge, but the judge was acting within the scope of his or her employment, the employing entity can be substituted for the judge who is again entitled to immediate

dismissal. Now, there are potential ways around the statutory immunity, so do not rely on it as an ultimate defense to a claim.

VI. Illustrations

How does the interplay between absolute, official, and §101.106 immunity apply, you may ask. For illustration purposes, let's consider the case of Judge Hardin Nails. Judge Nails is a municipal court judge presiding over the City of Deep Pockets.

One day, Defendant Duey Suem appears before Judge Nails on a health and safety ordinance violation with a fine of up to $2,000. Not being particularly experienced or savvy in the ways of a court, Mr. Suem begins his defense by insulting the officer who wrote him the ticket, personally threatening the prosecutor with suit, and informs Judge Nails that if the Judge did not let him go immediately, he would "sue him for everything he's got."

Judge Nails allows the trial to go forward and Mr. Suem is convicted. Judge Nails sentences him to the full amount of $2,000 plus the cost of the officer's overtime for appearing in court. Mr. Suem storms out of the courtroom.

Later that day, Judge Nails is asked to go to a city council meeting to provide input to the council on ordinance enforcements. While backing out of the parking lot, Judge Nails is in an automobile accident. A minor fender/bender only; however, the driver of the other car is Mr. Suem. Mr. Suem learns of Judge Nails requested appearance at the council meeting later that day. As you may expect, Mr. Suem sues the Judge for 1) sentencing him to the max plus court costs on a "bogus" charge, 2) falsely and maliciously encouraging the city to develop code enforcement protocols for ordinance violations, and 3) "slamming" into him in the parking lot.

Result: Judge Nails has absolute immunity for his judicial sentencing of Mr. Suem. It is objectively reasonable for the judge to provide information to the City Council on the statistics of ordinance cases in the court. Administrative statistic collection and education may not qualify for absolute immunity given its administrative nature. However, Judge Nails would retain official immunity for such acts and so Mr. Suem's second cause of action should be dismissed against Judge Nails. Finally, Mr. Suem sued the City and Judge Nails for the car accident. Pursuant to §101.106(e), Judge Nails is entitled to immediate dismissal (but the City is still stuck in the case). Should any of Judge Nails' assertions of immunity be denied, he retains the ability to file an interlocutory appeal pursuant to Tex. Civ. Prac. & Rem. Code §51.014(5)(West 2011).

VII. So, What Can You be Sued For?

Judges acting in their official judicial capacity have immunity from liability and suit for judicial acts performed within the scope of their jurisdiction. See *Dallas*

County v. Halsey, 87 S.W.3d 552, 554, 46 Tex. Sup. Ct. J. 51 (Tex. 2002).

Whether an act is judicial (or nonjudicial) is determined by the nature of the act, i.e., whether it is a function normally performed by a judge, as contrasted from other administrative, legislative, or executive acts that simply happen to be done by judges. *Forrester v. White*, 484 U.S. 219, 227, 98 L. Ed. 2d 555, 108 S. Ct. 538 (1988). Nonjudicial acts include other tasks, even though essential to the functioning of courts and required by law to be performed by a judge, such as making personnel decisions regarding court employees and officers. *Twilligear v. Carrell*, 148 S.W.3d 502, 504-505 (Tex. App. Houston 14th Dist. 2004)

Sometimes the lines of whether or not an act is judicial are not clear cut. In the case of *Harper v. Merckle*, 638 F.2d 848, (5th Cir. 1981), the Fifth Circuit analyzed a situation which could blur some of the lines between judicial and non-judicial. In *Harper*, the Plaintiff went to the courthouse for the sole purpose of delivering a support payment to his ex-wife who worked with a Judge Coe. Finding both doors to Judge Coe's chambers closed, Harper entered an adjacent office, that of Judge Merckle. During a discussion with Judge Merckle's secretary, the Judge entered the room and asked for the divorce file (of which he was not assigned and had been closed). Judge Merckle ordered Harper to raise his hand to be sworn in to answer questions and Harper refused. Merckle held him in contempt and placed him in jail.[3] Harper filed suit under 42 U.S.C. §1983 for violations of his constitutional rights.

When analyzing Judge Merckle's claim of judicial immunity the Fifth Circuit held:

> Judge Merckle, in asking Harper to raise his right hand to be sworn in, and in later finding Harper in contempt, most assuredly was performing a "normal judicial function." And Judge Merckle's allegedly unconstitutional actions clearly took place "in the judge's chambers." But under the third and fourth factors of *McAlester*, Judge Merckle's position loses ground. The controversy that led to Harper's incarceration did not center around any matter "then pending before the judge"; rather, it centered around the domestic problems of one of the Judge's friends, Harper's former wife. These problems were brought to the Judge's attention in a social, not judicial, forum. Moreover, as the facts clearly establish, Harper did not visit Judge Merckle "in his official capacity." To the contrary, Harper sought only his former wife, whose office was adjacent to Judge Merckle's chambers, to settle his account with her. The emphasis that we place upon the third and fourth factors of *McAlester* is clearly warranted under the language of

[3] The full factual explanation is actually far more dramatic including a foot chase, dodging in and out of offices, and a mass of bailiffs pulling weapons.

> *Stump*. There Justice White distilled the relevant cases addressing the term "judicial act" and concluded that consideration must be given not only to "the nature of the act itself" but also "to the expectations of the parties." 435 U.S. at 362, 98 S. Ct. at 1107, see *Crowe v. Lucas*, supra, 595 F.2d at 990. While in *Stump* "both factors indicate(d) that … approval of the sterilization petition was a judicial act," 435 U.S. at 362, 98 S. Ct. at 1107 (footnote omitted), in the case before us they do not. We think it clearly unreasonable to conclude that Harper entertained the expectation that judicial matters were at hand when he entered Judge Merckle's office on nonjudicial business.
>
> *Harper v Merckle*, 638 F.2d 848, 858-59 (5th Cir. 1981).

As you can imagine, the end result was a denial of judicial immunity for the Judge. Even though parts of Judge Merckle's actions took place within his own chambers and were for powers he is authorized to perform, the totally of the circumstances swung against immunity.

Another aspect to keep in mind is that judicial immunity is not a bar to ***prospective injunctive*** relief against a judicial officer acting in a judicial capacity or to attorney's fees for obtaining such relief. *Twilligear v. Carrell*, 148 S.W.3d 502, 505 (Tex. App. Houston 14th Dist. 2004)(citing *Pulliam v. Allen*, 466 U.S. 522, 542-44, 80 L. Ed. 2d 565, 104 S. Ct. 1970 (1984). As a result, a judge can be sued via injunction to correct an error of law of judicial character or administrative character, and can be liable for attorney's fees.

VIII. Conclusion

Public Policy dictates that public officials be given the latitude to made discretionary calls in the performance of their official duties. Judges and other court staff possess absolute judicial immunity for certain acts, and other common law and statutory immunities for actions outside of the judicial realm. They are given these tools to allow them to perform their jobs in an efficient and effective manner. It is only when they act outside of their authority and official powers with some form of objectively malicious purpose does liability creep in.