



Judges *Struggle* with Liability Ruling

Off-Bench Activity Not Covered by Immunity Protection / By Jennifer Acosta Scott

The judge has always been a position of honor in American society. Clothed in somber black gowns and wielding oak gavels, most accept their jobs out of a sense of obligation to uphold the law and help the justice system sort right from wrong. So when a 2004 jury decision put Texas judges' economic security at risk, courtrooms across the state were understandably clouded with concern.

But oddly enough, the issue has little to do with judicial irresponsibility or missteps in the courtroom. Rather, the problem has the potential to kick in when judges shed their robes and step away from the bench. What once were the little recognized but routine duties of judges – overseeing the county probation department, serving on the juvenile board and the like – now have the potential to ruin their careers and personal lives.

The problem was brought to the fore in January 2001, when 18-year-old Bryan Alexander died at John Peter Smith Hospital in Fort Worth. Alexander had been incarcerated at a “boot camp” for probationers run by the privately-held Correctional Services Corp. in Tarrant County. Witnesses said that Alexander had been complaining for days of feeling weak and coughing up blood, but the on-staff nurse thought he was faking his symptoms and refused to seek additional medical attention for him. Alexander was found to have a rare lung infection and passed away two days after being admitted to the hospital.

The boot camp's nurse, Knyvett Reyes, was convicted of negligent homicide and sentenced to four years' community supervision for her role in Alexander's death. And in the eight-week wrongful death trial that followed in 2003, a Tarrant County jury ordered CSC and Reyes to pay Alexander's family \$38 million in damages. But amongst the hubbub over the large settlement, another lawsuit was filed – this time against Tarrant County and its 19 judges, whom the plaintiffs said acted as managers of the

correctional facility by approving policies and setting budgets. While the damages in the suit were unspecified, the potential for harm was just as great as the suit against CSC.

In petitioning for the lawsuit's dismissal, the judges cited “judicial immunity,” a protection that keeps judges from being sued while acting in their judicial capacity. But in August 2004, U.S. District Court Judge Terry Means ruled that the judicial immunity argument was invalid because the judges were acting as managers of the correctional facility.

Means' decision surprised judges, many of whom perceived that it effectively increased their legal liability, particularly when they are carrying out their administrative duties – non-judicial functions such as serving on the bail-bonds board, hiring county auditors and supervising the county's probation department. Even though Texas statutes require many judges to fulfill these responsibilities, many now fear that doing so could leave them at risk for high-stakes lawsuits. The problem is quickly gaining attention throughout the judicial community, said Harris County Court-at-law Judge Mark Atkinson, who is working with other county and state officials to devise solutions.

“If judges are not aware of it at this point, I think they are becoming aware of it now,” Atkinson said.

Constitutional county judges in all but the largest counties generally hold *ex officio* positions on the juvenile probation board, the CSCD board and other governing bodies in the county. This means the potential for legal liability is just as great for most county judges as for judges of other courts – perhaps even greater, because in addition to serving on boards, county judges often write annual budgets and take part in the county's investment decisions.

“[Tarrant County Judge] Tom Vandergriff doesn't have those [administrative] duties,” said Gene Terry, a former Marion County Judge and now judicial education project coordinator for the Texas

Association of Counties. "But in small counties where the judge has full-blown judicial responsibility, he has to serve on those boards. He would have the same stance on the board that any other court of record would."

District judges are also at risk. According to the Texas Government Code, district judges are required to establish a community supervision and corrections department to oversee the activities of recently-paroled individuals and those sentenced to community supervision programs. District judges must also serve on their local juvenile board, if one exists in their district, and at least one district judge must be a part of any county's bail bond board. The fact that the state mandates these responsibilities for district judges could be their saving grace, because the situation may entitle them to "qualified immunity" – a legal defense that protects public officials who were trying to carry out their duties in good faith.

"Folks who seem to know about immunity issues seem to think that ... you should be entitled to that immunity if you're required to perform the act," Atkinson said.

But nothing is certain anymore in light of the decision in the Tarrant County lawsuit. As it stands now, the decision on a judge's qualified immunity could very well rest in the hands of juries, which means anything could happen.

"No one ever knows what a jury is going to say," said Rusty Ladd, who heads Lubbock County's first court-at-law.

Immunity concerns are even greater among the state's county court-at-law judges, who traditionally perform administrative duties but aren't required to by statute. While current law says district judges are mandated to manage the probation departments, the law says court-at-law judges "may" participate in the programs' management. The fact that their duties are not required by law

rights may be enhanced only by a state law that minimizes all statutory administrative functions.

Tarrant County Juvenile-Court Judge Jean Boyd said she did not expect public criticism to arise from the proposed measure, because it is not a blanket legal defense.

"Of course, we are still governed by the Commission on Judicial Conduct," said Judge Boyd, who serves on the group that is composing the bill. "We still have to behave properly, or we're subject to being sanctioned."

Until the bill wends its way through the Legislature, Atkinson said, judges are probably safest performing only their assigned administrative duties and being careful not to micromanage the probation and juvenile probation departments.

"We're getting the message that the best policy is to do the duties mandated by law – selecting a [probation] director, appointing a budget," Atkinson said. "Let the director direct the department. It's probably best not to get into the day-to-day duties of the CSCD."

Purchasing liability insurance for the county's various governing boards is probably advisable as well, Terry said. Lemens, TAC's head lawyer, said the association's pool coverage generally covers county employees in case of lawsuits, including suits that arise from the fulfillment of administrative duties.

"We feel like we're probably providing them coverage," Lemens said. "But just like any policy or coverage document, we would have to look at the exact terms of the coverage purchased."

Insurance for public officials has become a hot topic since the advent of the case against the 19 Tarrant County judges, said TAC Associate General Counsel Rex Hall.

"The first thing that I picked up on around the state was that the judges, for the first time, began to consider whether they need-

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makes it harder for court-at-law judges to claim the same qualified immunity as their counterparts in the district courts.

"County courts-at-law in particular have some vulnerability in issues like that," Ladd said. "They are not represented by the Attorney General's office. The district judges are. There's a lot of concern among county court-at-law judges for a legislative, statutory fix of that issue so we can do our job without sacrificing our judicial immunity."

That fix may be on the way. As of press time, a group of state and local officials was crafting a bill that would:

- limit the administrative duties of judges (by re-stating references to judges "managing" probation departments for example);
- entitle both district and county court-at-law judges to representation by the Texas Attorney General; and
- provide judicial immunity from any mishaps arising from any residual involvement in administrative activities.

Ladd said such a measure would be a boon for county court-at-law judges, who often have the same responsibilities as district judges but not as much legal protection.

Even if the new proposal becomes law, Bob Lemens, general counsel of the Texas Association of Counties, noted that protection from federal lawsuits involving constitutionally-guaranteed

ed insurance," Hall said.

However, Terry said, insurance coverage isn't an ironclad guarantee against lawsuits.

"Plaintiffs' lawyers are very creative people," Terry said. "They can find liability where no one else can."

Ladd said while the increased risk of lawsuits has not made him reluctant to fulfill his administrative duties, he has become more aware of the activities in the county's various departments.

"It does make me pay close attention in the board of judges' meetings to exactly what we're doing," Ladd said.

Parker County court-at-law judge Debra Dupont said she is comfortable allowing the local CSCD and juvenile probation directors to manage most aspects of their facilities.

"Our responsibility is to make sure the people running [the departments] are qualified," Dupont said. "We've got to let them. They're the experts."

The risk of legal trouble is simply one of the downsides to being a public servant, she added.

"There is a risk," Dupont said. "I guess you accept that when you take on the honor of being a judge."

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