Senneff, Angie

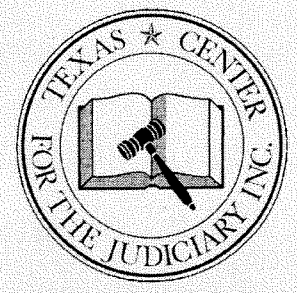
Subject: FW:

On Apr 11, 2012, at 5:04 PM, "Patricia Baca" <pbacalaw@gmail.com> wrote:

> Re: Order in Misc. Docket No. 11-9046; Supreme Court Uniform Forms
>
> To the Honorable Members of the Supreme Court Advisory Committee
>
> I object to the forms for many reasons, but will attempt to keep
> from repeating the objections of my learned colleagues and the learned
> judges that have written to you. The purposes of this letter to
> express only those concerns that I have not seen addressed. I stand
> in support of stances taken by the Honorable Judge Harris, The
> Honorable Judge Quisenberry, The Honorable Judge Warne, G. Thomas
> Vick, Timothy Belton, Tom Ausley, Bob Black and the many others that
> stand in opposition to these forms.
>
> I believe that the Justices of the Texas Supreme Court are acting
> outside their judicial immunity by promulgating these forms and
> subjecting themselves to malpractice claims. In Mireles v. Waco 502
> U.S. 9 at 11, the United States Supreme Court held that judicial
> immunity can only be overcome when (1) the judge engages in
> non-judicial actions and (2) when a judge acts in complete absence of
> jurisdiction. I have attached an article by Mr. David A. Harris
> entitled "The Judge Beyond Immunity: Countrywide and Statewide
> Perspective" that was presented at the 2010 Annual Judicial Education
> Conference for a more detailed discussion on what does and does not
> constitute judicial immunity.
>
> The promulgation of forms is neither judicial nor adjudicative.
> Forms can and are promulgated by private individuals and private
> agencies. As such they are not a necessary condition of the
> adjudicative system. There is no distinction of the act of the Texas
> Supreme Court promulgating forms than the act of Texas Law Help, Nolo
> Press or any individual attorney promulgating forms. As such it is
> not an adjudicative act and is not protected under judicial immunity.
> See Forrester v. White 484 U.S. 219 (1988). At best, the promulgation
> of forms is an administrative act which is clearly not protected by
> judicial immunity. At best, they Court could argue the forms are
> administrative in nature and, as such, may fall under qualified
> immunity.
>
> I would argue that the Texas Supreme Court is without jurisdiction
> to promulgate forms, as such no immunity applies. I have read the
> Constitution of the State of Texas that sets for the duties of the
> Texas Supreme Court. I find no reference that would even remotely
> support The Honorable Justice Wallace Jefferson's assertion that the
> Constitution requires the court to establish "a judicial climate in
> which people who lack money to hire a lawyer have a reasonable change
> to vindicate their rights in a court of law." Such a reading of the
> Texas Constitution would give rise to "Civil Gideon."
>
> It should be noted that many of the ABA leaders that support the
> movement towards promulgating forms have advocated the right of court
> appointed attorneys be expanded to child custody cases.
> http://www.pabar.org/public/committees/lspublic/resolutions/GrecoState
> ment.pdf Despite years of having uniform forms in California, or one
> may argue because of hears of having uniform forms in California,

> California is overrun with pro se litigants. California has recently
> signed into law the Sergeant Shriver Bill that provides for Court
> appointed attorneys in some custody cases and other civil cases.
> http://lawprofessors.typepad.com/files/ab590.pdf . Despite having
> forms, Wisconsin also has set aside funds for court appointed
> attorneys in divorces. http://civilrighttocounsel.org/pdfs/judges.pdf
> Wisconsin has had forms for six years, but the self-represented
> litigant problem is not getting better it is getting worse.
> http://www.wicourts.gov/publications/reports/docs/prosereport.pdf
>
> We can take one of two stances. The first is that such an act is
> outside the constitution and thus not protected by judicial immunity.
> If however, the administration of justice requires the court to
> provide assistance to those that cannot afford an attorney in divorces
> and custody, then the only logical step would be the right to court
> appointed counsel. Many of the poor do not have the capacity to read
> or write complex legal documents. If equal access to justice is
> required to all in civil cases, including divorces, we are on a
> slippery slope to civil Gideon. Please note, I am NOT advocating
> Civil Gideon. I am stating the stance that the Texas Constitution
> requires the Texas Supreme Court to provide Access to Justice for all
> Texans in civil cases will lead us there.
>
> I believe a careful reading of the Constitution of the State of
> Texas and the case law interpreting makes it clear that the courts are
> not required to provide legal assistance in civil cases such as divorces.
> I believe the Constitution is clear that the Texas Supreme Court has
> no mandate to create such forms. I do not believe there is even
> authority to create such forms. As such, I do not believe that the
> Justices of the Texas Supreme Court are not protected by either
> Judicial or Qualified Immunity in promulgating uniform forms.
>
> The forms do give detailed and incorrect legal advice. As I understand
> it, the Family Law Foundation has pointed out seventy deficiencies in
> the forms, so I will not go into each any every deficiency that I see
> with these forms, but I will hit the highlights that may cause
> problems in a malpractice suit against the justice of this court. The
> forms give more detailed legal advice on the Petition than they do on
> the Waiver and Answer. As such, the forms favor the Petitioner. This
> also calls into question judicial impartiality.
>
> Also the instruction sheet refers people to the Texas Law Help website
> that contains forms on a number of matters. None of these forms have
> been vetted by any committee and some of them are wrong. These forms
> deal with very complex legal issues that far exceed the no children,
> no property issues. The divorce forms purport not to divide
> retirements, when the form does, in fact, allocate retirements. There
> are actual cases where people have accidentally and forever divested
> themselves of valuable retirements by using these forms, which purport
> not to divide retirement. By referring people to the Texas Law Help
> webpage for further forms, is the Texas Supreme Court liable? I would
> argue "yes."
>
> If the Texas Supreme Court is mandated to help the "poor" (a term not
> defined under the Texas Constitution) in divorces, is the Texas
> Supreme Court mandated to help victims of auto accidents, medical
> malpractice, legal mal practice, tenants, land lords and people in
> contract disputes? This is clearly not a mandate of the Texas Supreme
> Court.
>
> There are two more brief issues I would like to address outside of the
> issue of judicial immunity.
>
> All of the forms direct people to seek an attorney from the State Bar

> of Texas Lawyer Referral Service. I question the authority of a
> State Governmental Agency, such as the Texas Supreme Court, referring
> potential clients to any one group. While any attorney may join the
> Texas Bar Lawyer Referral Service, he or she must agree to give that
> service a 10% referral fee. Attorneys that handle simple, lower
> priced divorces simply would not join the referral service. Again, to
> have a governmental body make such a referral is questionable at best.
>
> The concept that Family Law attorneys have a financial incentive to
> fight the do-it-yourself divorces is ludicrous at best. I can charge
> a client $1,000.00 to $1,500.00 for an uncontested divorce and ensure
> that all the paperwork is correct. I have charged clients who did
> their own divorce and pay me from $3,500.00 to $7,500.00 to correct
> the mess they made. In the first instance, I have happy clients that
> have paid me and obtained the desired result. In the second instance,
> I often have an unhappy client that pays me a good deal of money with
> no guarantee of a good result. In fact, the odds are often against a
> party attempting to set aside an agreed divorce. The only person who
> wins when a client uses a do-it-yourself divorce kit, is the attorney
> hired to clean up the mess.
>
> Consider this; over $500,000 was diverted from legal aid to create the
> Texas Law Help forms. If they were acceptable, why would the Supreme
> Court of Texas have appointed a commission to create a new set of
> forms? Why has it taken this commission a year to create forms the
> State Bar of Texas by does not find acceptable? I would suggest
> because divorces are never one size fits all. The forms manual the
> State Bar of Texas sells to Family Law attorneys is 5,186 pages for a
> reason. Even with these forms at my disposal, I still must draft
> custom language on a daily basis.
>
> Thank you for taking time to consider my positions.
>
> Sincerely,
>
> Patricia Baca
> Attorney at Law
>
> 5208 Airport Freeway
> Suite 214
> Fort Worth TX 76117
> (682)647-1904
> <Judicial Immunity Packet.pdf>



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2010 Annual Judicial Education Conference

September 21-24, 2010
Corpus Christi, Texas

The Judge Beyond Immunity: Countywide and Statewide Perspective

FACULTY: Mr. David A. Harris

COURSE DESCRIPTION

Decisions made when judges act in an administrative capacity instead of a judicial capacity continue to plague the judiciary. This session explores case law, explains the differences between "chosen" participation and "mandatory" participation, and provides practical hints and tips to determine whether an act is judicial for purposes of absolute judicial immunity.

[0.75 Ethics]

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ACTIONS BY JUDGES
IMMUNITY – LIABILITY – INDEMNITY

By: David A. Harris
Assistant Attorney General
Office of the Attorney General
for the State of Texas

DISCLAIMER

The purpose of this disclaimer is to clarify that although I am employed as an Assistant Attorney General, the opinions and arguments stated in this paper do not represent an opinion or official position taken by the Attorney General of the State of Texas. I am neither part of the Administration nor am I a member of the Opinions Committee. General Abbott has authorized me to give presentations and write this paper sharing with the judiciary my personal experience handling cases involving judicial liability as well as my research attempting to predict trends in that area.

ACTIONS BY JUDGES
IMMUNITY – LIABILITY – INDEMNITY

INTRODUCTION.

The term judge conjures up an image of an individual wearing a black robe sitting on a raised bench presiding over a trial. If this was the only function that a judge performed there would be little need for this paper. In addition to presiding over trials, your election to the bench will necessarily thrust you into various other roles. It is important for you to understand that not every action taken by a judge is a judicial action. The fact that the duty is mandated by the Legislature does not control whether or not the action is "judicial".

Recently, attorneys have been probing the limits of judicial immunity by bringing suits seeking to hold judges responsible for perceived wrongs. It would behoove you to have a functioning understanding of what constitutes a judicial act since only judicial acts are protected by judicial immunity. Other actions that you take may be protected by other immunities. You should understand the nature of those immunities as well as their limitations. Finally, you should understand that in the event you are found to have engaged in improper conduct which is not protected by any immunities, your indemnification is limited.

Judges, like any other defendant, can be sued in either state or federal court. The doctrine of judicial immunity is well established in state and federal law. The majority of suits against judges have been filed in federal court. For this reason, the main focus of this paper is judicial liability in federal rather than state court. As with every other area of the law, this subject matter is evolving. You should maintain an awareness of legislation and cases which impact judicial immunity during the time that you are on the bench.

TYPES OF IMMUNITIES.

It has long been recognized that public officials are often called upon to make difficult decisions. The doctrine of immunity has developed to facilitate the functioning of good government by providing government officials charged with making difficult discretionary decisions with protection from suit. The primary scope of this paper is judicial immunity. Judicial immunity is but one absolute immunity.

Absolute immunities are immunities from the judicial process as well as damages. The most commonly recognized absolute immunities are: (a) Eleventh Amendment immunity – the immunity from suit that states enjoy in federal court; (b) sovereign immunity – the immunity from suit that states enjoy in both federal and state court; (c) legislative immunity – the immunity enjoyed by federal and state legislators when enacting law; and (d) judicial immunity – the immunity enjoyed by judges when acting in a judicial capacity.

Absolute immunity is immunity from suit and damages. The defendant is entitled to have his immunity determined at the earliest possible time since this immunity is an immunity from the process itself (including discovery). If it is determined that the defendant has absolute immunity, the suit should be dismissed. Generally speaking, the defendant will have the right to take an interlocutory appeal in the event the absolute immunity issue is found against the defendant. Absolute immunities are limited to states, state agencies, state employees acting in their official capacity, persons performing legislative functions, and persons performing judicial functions.

Government officials are not entitled to assert absolute immunity if they are sued in an individual capacity. Rather, most state officials must rely upon official immunity when sued in state court or qualified immunity when sued in federal court. As noted in the preceding paragraphs, an official sued in their official capacity is entitled to raise the absolute immunities of sovereign immunity and Eleventh Amendment immunity. The Eleventh Amendment is an absolute bar to a suit for constitutional violation pursuant to 42 U.S.C. §1983 brought against a state actor. For this reason, civil rights suits will almost always be brought against the state actor in their individual capacity. Similarly, a suit brought against an actor in their official capacity could be barred by sovereign immunity. Recall that to establish a waiver of sovereign immunity it is incumbent upon the plaintiff to establish that their injury was caused by a government employee's use of motor driven equipment or tangible property. If the alleged negligence did not involve property or motor-driven equipment, the only avenue open to an aggrieved plaintiff is to bring suit against the employee in their individual capacity. It is not uncommon for a defendant to assert that they were acting in their official capacity at the time the complained of action arose. Both state and federal law have developed precedent that establishes the fact that the plaintiff is entitled to bring the suit against the defendant in their individual capacity. This theory of law has evolved to allow aggrieved plaintiffs to avoid the harsh result of sovereign and Eleventh Amendment immunity. Qualified and official immunities are immunities from damages, not suit.

If a defendant can establish their entitlement to qualified or official immunity as a matter of law, they may be successful in getting a suit dismissed prior to any discovery. However, it is not uncommon for courts to order limited discovery on the subject of immunity. It is important to remember that qualified and official immunity are immunities from damages rather than the judicial process.

JUDICIAL IMMUNITY.

It is hornbook law, settled in our jurisprudence for over a century, that a judge enjoys absolute immunity from liability for damages for judicial acts performed within his jurisdiction.[1] The doctrine of absolute judicial immunity protects judges from liability for all actions taken in their judicial capacities, so long as they do not act in a clear absence of <u>all</u> jurisdiction.[2] It is well settled that the

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[1] *Hale v. Harney*, 786 F.2d 688, 690 (5th Cir. 1986).

[2] See *Mireles v. Waco*, 502 U.S. 9, 1 1-12, 1 12 S.Ct. 286, 288, 116 L.Ed.2d 9 (1991); *Stump v. Sparkman*, 435 U.S. 349, 356-358, 98 S.Ct. 1099, 1104-1105, 55 L.Ed.2d 331 (1978).

doctrine of absolute judicial immunity protects a judicial officer not only from liability, but also from suit.[3]

In *Mireles v. Waco,*[4] the United States Supreme Court reiterated the long standing rule that absolute judicial immunity is overcome in only two rather narrow sets of circumstances: first, a judge is not immune from liability for non-judicial actions, i.e., actions not taken in the judge's judicial capacity; and second, a judge is not immune for actions, though judicial in nature, taken in a complete absence of all jurisdiction.[5] Examination of the cases cited by the Supreme Court in its opinion in *Mireles* to illustrate each such exception to the general rule is illuminating. As an example of the first exception (non-judicial actions), the Supreme Court cited to its opinion in *Forrester v. White,*[6] in which it held that a judge was not immune for liability for allegedly having engaged in illegal discrimination when firing a court employee. As an example of the second exception (actions taken in a complete absence of all jurisdiction), the Supreme Court cited to its prior opinion in *Bradley v. Fischer,*"[7] in which it discussed a hypothetical situation in which a judge in a Probate Court with limited statutory jurisdiction attempted to try parties for public criminal offenses.

Judges are absolutely immune against an action for damages for acts performed in their judicial capacity, even when such acts are alleged to have been done maliciously or corruptly.[8] Judicial immunity is not overcome by allegations of bad faith or malice.[9] A judge is absolutely immune for all judicial acts "not performed in a clear absence of all jurisdiction however erroneous the act and however evil the motive.[10] Absolute immunity is justified and defined by the governmental functions it protects and serves, not by the motives with which a particular officer performs those

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[3] See *Mireles v. Waco*, 502 U.S. at II, 112 S.Ct. at 288.

[4] 502 U.S. 9, 112 S.Ct. 286, 116 L.Ed.2d 9 (1991).

[5] See *Mireles v. Waco*, 502 U.S. at 11-12, 112 S.Ct. at 288.

[6] 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988).

[7] 13 Wall.335, 20 L.Ed. 646 (1972).

[8] See *Mireles v. Waco*, 502 U.S. I I, 112 S.Ct. at 288; *Stump v. Sparkman*, 435 U.S. at 356-358, 98 S.Ct. at 1104-1105.

[9] See *Mitchell v. McBryde*, 944 F.2d at 230 *Young v. Biggers,* 938 F.2d. at 569 (n.5); *Dayse v. Schuldt*, 894 F.2d at 172.

[10] See *Mitchell v. McBryde*, 944 F.2d at 230 *Brandley v. Keeshan*, 64 F.3d at 200-201; *Brummett v. Camble*, 946 F.2d 1178-1181

functions."[11] The alleged magnitude of the error or the mendacity of the acts is irrelevant."[12] The fact that it is alleged that the judge acted pursuant to a conspiracy and committed grave procedural errors is not sufficient to avoid absolute judicial immunity.[13] Grave procedural errors do not deprive a judge of all jurisdiction."[14]

In determining whether a judge's actions were "judicial in nature" the Federal Court is to consider whether (1) the precise act complained of is a normal judicial function; (2) the acts occurred in the courtroom or appropriate adjacent spaces such as the judge's chambers; (3) the controversy centered around a case pending before the court; and (4) the acts arose directly out of a visit to the judge in his official capacity.[15] A judge's acts are judicial in nature if they are normally performed by a judge and the parties affected "dealt with the judge in his judicial capacity.[16] These four factors are broadly construed in favor of immunity, and the absence of one or more factors does not prevent a determination that judicial immunity applies in a particular ease.[17] Where a court has some subject matter jurisdiction. there is sufficient jurisdiction for immunity purposes.[18] These factors should he construed broadly in favor of immunity, and should be construed generously to the holder of the immunity and in light of the policies underlying judicial immunity.[19]

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[11] *Young v. Biggers*, 938 F.2d. at 569.

[12] *Holloway v. Walker*, 765 F,2d 517, 522-523 (5th Cir. 1985), cert. denied, 474 U.S. 1037 (1985).

[13] See *Mitchell v. McBryde,* 944 F.2d at 230; *Stump v. Sparkman,* 435 U.S. at 359, 98 S.Ct. at 1106.

[14] See *Malina v. Gonzales*, 994 F.2d at 1125 and *Holloway v. Walker*, 765 F.2d at 522 (holding that mere allegations that a judge performed judicial acts pursuant to a bribe or conspiracy will not suffice to avoid absolute immunity).

[15] See *Malina v. Gonzales*, 994 F.2d at 1124 and *McAlester v. Brown*, 469 F.2d 1280, 1282 (5" Cir. 1972).

[16] *Boyd v. Biggers*, 31 F.3d at 285 quoting *Mireles v. Waco*, 502 U.S. at 12, 112 S.Ct. at 288, which in turn quoted *Stump v. Sparkman*, 435 U.S. at 362, 98 S.Ct. at 1107.

[17] *Molina v. Gonzales*, 994 F.2d at 1124 and *Adams v. Mcllhany*, 764 F.2d 294, 297 (5'" Cir. 1985), cert. denied, 474 U.S. 1101 (1986).

[18] See *Malina v. Gonzales,* 994 F.2d at 1125 and *Adams v. Mcllhany*, 764 F.2d 298.

[19] *Adams v. Mcllhany*, 764 F.2d 294, 297 (51" Cir. 1985).

There are two tests found in the above discussion of judicial immunity. When gauging your entitlement to judicial immunity you must first determine whether or not you are engaged in a judicial function (see Four Part Test) and if so, whether or not you are acting in an absence of jurisdiction.

When gauging their own conduct, most judges have a tendency to be overly generous in determining whether or not they are entitled to judicial immunity. For this reason, it would be wise for every judge to be familiar with *Forrester v. White.*

FORRESTER v. WHITE.[20]

Forrester v. White is a United States Supreme Court case that was decided in 1988. The defendant judge had hired, promoted, then demoted, and ultimately fired a female probation officer. The defendant judge was sued for sexual discrimination. Unfortunately, judicial immunity was not raised as a defense to this cause of action until after a jury had returned an adverse verdict at the conclusion of trial. Judicial immunity was raised for the first time on appeal.

The United States Supreme Court ultimately determined that the defendant judge was not entitled to judicial immunity. The Court noted that judges engage in judicial acts as well as acts that just happen to be done by judges. They noted that judges act in administrative, legislative, and executive functions. All of these functions could be legislatively assigned. They went on to discuss the various capacities that judges act in other than the judicial capacity. In discussing what constitutes an administrative decision, they noted that judicial immunity was not available to a county judge who had been charged in a criminal indictment for racial discrimination in the selection of trial jurors for the county courts. They noted the character of the act, not the agent, determines if the immunity applies. They specifically noted that the duty of selecting jurors could have been committed to a private person. In discussing legislative actions, they noted that even though Virginia law delegated adoption of the has code to the Virginia Court, the adoption of such a code was an act of "rule making" rather than "adjudication". They went on to say that in the event the Courts acted to enforce the bar code, such actions would not be judicial. They would be prosecutorial.

The Court then analyzed the facts before them. It opined that while the actions of supervising the Court ". . . may be important in providing the necessary conditions of a sound adjudicative system. The decisions at issue, however, were not themselves judicial or adjudicative." They noted that there was no reasonable distinction between the actions of this type taken by judges and any other governmental office. Finally, they determined that qualified immunity would he sufficient to provide the judge with sufficient safeguards to make a judge feel comfortable in discharging an incompetent employee.

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[20] 484 U.S. 219, 108 S.Ct. 538, 98 L.Ed.2d 555 (1988).

A strict reading of *Forrester* suggests that only actions taken in the narrow confines of the courtroom are protected by judicial immunity. This is the position pressed by plaintiff's attorneys seeking to subject judges to liability. They will always try to paint the "complained-of conduct" as an administrative act since it is undisputed that such actions are no longer protected by any type of judicial immunity. As a judge you will be required to participate in functions other than presiding over your court. The status or nature of most of these functions have yet to be determined by any court. In the time that I have represented judges, I have learned that these additional duties are commonly referred to as "administrative duties". I have encouraged judges to stop referring to these additional tasks in this manner since it strengthens the plaintiff's case that they are administrative, and therefore not protected by judicial immunity. A better way to characterize these actions is to refer to them as extra judicial actions.

Similarly, judges will commonly refer to themselves as a board or other type of identifiable body when discharging their legislatively-mandated duties in areas of adult probation supervision, etc. Again, the establishment of a board suggests something other than a judicial act.

The better practice would be to study the statute that creates the duty. If the statute recognizes that a board has been created, there is no harm to referring to yourself by that title. If the statute is silent, I recommend that you refer to yourselves as a collection of judges rather than a board which has administrative connotations.

JUDICIAL IMMUNITY LIMITATIONS.

Since 2000, there has been an increase in the number of suits filed against judges by attorneys in Texas. Fortunately, most of these cases have been disposed of at the trial court level, and no appeal has been taken. This section is included so that you are aware of the types of challenges that are being made to judicial immunity.

Alexander v. Tarrant County. A probationer being housed at a shock incarceration facility died from a rare staph infection. The parents of the deceased brought a civil rights suit against the Tarrant County Criminal judges asserting that they had breached their administrative duties to the deceased probationer by allowing a private sector contractor to operate the facility. The Texas Code of Criminal Procedure mandates that sole responsibility for the supervision of probationers rests with the judiciary. Moreover, Chapter 76 of the Texas Government Code mandates the establishment of Adult Probation Departments. The federal judge determined that the defendant judges were not entitled to judicial immunity. His rationale was that the statute entitled rather than mandated judicial participation in the Adult Probation Departments. This test was never reviewed by the Fifth Circuit. The case was subsequently dismissed due to Plaintiff's failure to state a claim against the judges sufficient to overcome an assertion of qualified immunity. Qualified immunity will be discussed below. Plaintiff agreed to forego the appeal of this dismissal as a part of a settlement of an ancillary case.

Davis v. Tarrant County. Plaintiff is a criminal defense attorney practicing law in Tarrant County, Texas. He applied to be placed on the felony appointment list mandated by the Fair Defense Act. The district judges voted to exclude Plaintiff from the list, and suit was brought against the district judges asserting that the passage of the Fair Defense Act changed the character of appointment of counsel from a judicial act to an administrative act. The federal judge dismissed this case based upon judicial immunity. On April 8, 2009, the Fifth Circuit affirmed the trial court's dismissal.[21] This case contains a good discussion of the "nature of the act" analysis. Ultimately, the Fifth Circuit determined that even though the creation of a list of attorneys has been determined to be an administrative act,[22] the creation of a list under the Fair Defense Act is judicial.

On Page 226, the Court noted:

> . . . the appointment process must be viewed holistically. In this case, the selection of applicants for inclusion on the list, and the actual appointment of attorneys in specific cases occur as part of an appointment process that cannot be divided in a principled way in judicial and administrative act. In light of the fact that the defendant judges have very limited discretion in deciding which attorney to appoint in a specific case - they may only deviate from the rotation system for good cause – decisions about which attorneys should be placed on the wheel functionally determine which attorney will actually be appointed in a particular case.

Arguably, this determination puts the Fifth Circuit in conflict with the Second Circuit.

Dunn v. Kennedy. This is another Fair Defense Act case brought by an attorney who was removed from the indigent counsel list. Suit was brought against the judge that recommended that he be removed as well as a court staff member. The federal judge dismissed this case based upon judicial immunity. An appeal was taken to the Fifth Circuit. The Fifth Circuit upheld the finding of judicial immunity, but determined that the case should not be published. Pursuant to Fifth Circuit rules, this case has no precedential value.

Durrance v. Gabriel. In this Fair Defense Act case, an attorney was removed from the felony appointment list by the district judges. Plaintiff asserts that the judges are acting in an administrative capacity when developing the county-wide plans, and that they are acting in a ministerial capacity when they place or remove attorneys on the list. Judge Shell dismissed this case on the basis of judicial immunity relying upon *Davis v. Tarrant County*.

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[21] 565 F.3d 214 (5th Cir. 2009)(writ denied), 130 S.Ct. 624 (2009).

[22] *Mitchell v. Fishbein*, 377 F.3d 157 (2nd Cir. 2004).

Richard v. Keller. The surviving spouse of an executed inmate sued the presiding judge of the Court of Criminal Appeals alleging that she had interfered with the offender's attempt to file a stay of execution. The Texas Rules of Appellate Procedure specifically provide that documents can be filed in an appellate court with the clerk or any judge willing to accept the filing. Accordingly, the federal judge determined that Plaintiff's suit was barred by judicial immunity.

Stagner v. Blake. The Plaintiff is an attorney that was taken into custody by the court bailiff after he refused an order from the Court to tender a document to the bench. After a short pause, he was returned to the courtroom and asked whether or not he had been held in contempt. The Court indicated that he had not. Plaintiff alleged that without having held him in contempt, the Court lacked jurisdiction to have him taken into custody. He alleged that the Court was guilty of false arrest and improper detainment. This state court case was dismissed based upon judicial immunity.

OTHER JURISDICTIONS.

McKnight v. Middleton.[23] Plaintiff was involved in a child custody case. He alleges that the judge racially discriminated against him. He also asserted that the trial judge exceeded her authority in approving a wire tap and recording his conversations. The Court held that while these decisions were not necessarily "legally sound" the discretion to order the wire tap was within the Court's authority, and protected by immunity.

Huminski v. Corsones,[24] The plaintiff was a harsh and frequent critic of the Vermont judges. Orders were issued excluding him from the courthouse. He was held in contempt and jailed. Judicial immunity was upheld because Vermont law vested responsibility for courthouse security in the judiciary. This opinion illustrates the confusion that can arise in determining "judicial capacity." This opinion appears to be at odds with *Forrester v. White.* Recall, the Supreme Court noted that just because the task is delegated to the judiciary, it is not necessarily "judicial or adjudicative." Courthouse security could have been delegated to the Sheriff's Department or several other Executive Branch officials. I would encourage you to keep that in mind if your county asks you to become involved in decisions involving courthouse security.

Jennings v. Patton.[25] Plaintiff sued the judge alleging that the judge had falsely accused him of bribery. Plaintiff alleged that he had hired an attorney to sue the judge for wrongful imprisonment. The attorney contacted the judge, and offered to settle the claim prior to filing suit. The judge accused both the plaintiff and his attorney of extortion, and caused plaintiff to be indicted. Defendant judge alleged that he was acting in a judicial capacity. In ruling against the defendant judge, the Court determined that at the summary judgment stage it must accept the plaintiff's facts as true. Under those facts, the Defendant judge was accused of making false statements to the grand

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[23] 2010 WL 1221431 (E.D.N.Y.).

[24] 396 F.3d 53 (2nd Cir. 2005).

[25] 2010 WL 706497 (S.D.Miss.).

jury and withholding exculpatory evidence. The visit of plaintiff's attorney to the judge was not in official capacity. Rather, plaintiff's counsel was exploring the possibility of settling a claim prior to bringing suit. Under these circumstances, the alleged actions of the defendant judge were not judicial or protected by judicial immunity.

QUALIFIED IMMUNITY.[26]

You will recall that when the United States Supreme Court decided *Forrester v. White*, they determined that depriving judges of judicial immunity in the employment context should not adversely impact the operation of the court. They specifically stated that the defenses available in the doctrine of qualified immunity should be sufficient to allow for the efficient operation of the court in personnel matters.

The doctrine of qualified immunity shields governmental officials from civil liability "to the extent that their conduct is objectively reasonable in light of clearly established law."[27] The burden of negating the defense of qualified immunity lies with the plaintiff.[28] When a motion for summary judgment is before the Court on qualified immunity, the district court must make two determinations: (1) whether the conduct at issue, as a matter of law, is unreasonable in light of clearly established law; and (2) whether there exists a genuine issue of material fact that the defendant actually engaged in such conduct.[29]

Qualified immunity protects a defendant from suits arising from the performance of their discretionary duties so long as they act in good faith in the exercise of duties that are within the scope of their authority.

This immunity attaches to an official's actions when his or her job requires the exercise of personal judgment and discretion. The purpose of such immunity is to insulate government employees from personal liability and from the harassment of litigation.[30] Moreover, it is also a prerequisite to

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[26] Official immunity is the state court counterpart to qualified immunity. These two immunities are very similar, but do have some minor differences which are beyond the scope of this paper. A good discussion of official immunity can be found in *City of Lancaster v. Chambers*, 883 S.W.2d 650 (Tex. 1994).

[27] *Kinney v. Weaver*, 367 F.3d 337, 346 (5th Cir. 2004)(*en banc*)(quoting *Harlow v. Fitzgerald*, 457 US. 800, 818 (1982).

[28] *Foster v. City of Lake Jackson*, 28 F.3d 425, 428 (5th Cir. 1994).

[29] *Kinney*, 367 F.3d at 346; *see also Conroe Creosothing Co. v. Montgomery County*, 249 F.3d 337, 350 (5th Cir. 2001).

[30] *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 102 S.Ct. 2727, 73 L.Ed.2d. 396 (1982). See also *Saucier v. Katz*, 533 U.S. 194, 202, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001).

liability that the law that the defendant allegedly violated was "clearly recognized" at the time of the violation.[31] The Supreme Court has encouraged trial courts to make the qualified immunity determination as early as possible. If the defendant can establish his entitlement to qualified immunity as a matter of law, it functionally can be as effective as judicial immunity.

Texas is in the Fifth Circuit. The Fifth Circuit has mandated that once a defendant raises qualified immunity in their answer, the plaintiff must overcome the assertion of qualified immunity with specific (non-conclusory) allegations sufficient to overcome the assertion of qualified immunity.[32]In the Alexander case, the defendant judges took the position that the plaintiffs had failed to allege that each of them had engaged in individual acts which both violated clearly established law and that were unreasonable. Judge Means agreed that the allegations against the defendant judges were conclusory in nature, and were not factually specific. He dismissed Plaintiffs' cause of action for failure to slate a claim.

The Fifth Circuit does not allow any discovery until the plaintiff has met this pleading threshold. Other circuits are not as rigid in their interpretation of qualified immunity. Many courts allow limited discovery on the subject of qualified immunity. In most instances, a denial of qualified immunity is immediately appealable. However, the plaintiff can successfully defeat an interlocutory appeal if they can establish that the analysis of qualified immunity rests in any part on a factual determination.

As a general rule, a defendant can only be held liable for a violation of 42 U.S.C. § 1983 if they were actually personally involved in the action that allegedly brought about a harm. The Fifth Circuit has held that lawsuits against supervisory personnel based on their positions of authority are claims of liability under the doctrine of respondent superior which generally does not apply in § 1983 cases.[33] A supervisor may be held liable if there is personal involvement in a constitutional deprivation, a causal connection between the supervisor's wrongful conduct and a constitutional deprivation, or if supervisory officials implement a policy so deficient that the policy itself is a repudiation of constitutional rights and is the moving force behind a constitutional deprivation.[34]

It should be noted at this juncture that qualified immunity does not attach to anything other than discretionary actions. If an action is ministerial (mandated by law or a rule), qualified immunity does not attach. An important distinction should be drawn between duties which are legislatively mandated, and those which allow the discretion in how the duty is to be performed to be left up to the actor.

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[31] *Will v. Hallock*, 129 S.Ct. 952, 163 L.Ed.2d 836 (2006).

[32] *Wicks v. Mississippi State Employment Servs.*, 41 F.3d 991 (5t Cir. 1995).

[33] *Williams v. Luna*, 909 F.2d 121 (5th Cir. 1990).

[34] *Thompkins v. Belt*, 828 F.2d 298 (5th Cir. 1987).

The clearest example of this type of distinction can be found in a suit against a law enforcement official for abuse of force. The rule or law may mandate that the official has an obligation to maintain order and discipline while leaving the means and methods of maintaining order to the discretion of the official.

REPRESENTATION.

Hopefully, you will make it through your entire judicial career without ever needing to be familiar with this section. However, recent trends indicate that it is less likely now than at any time in the past. When a judge is sued, he/she should immediately determine the appropriate contact person/agency. Generally speaking, state judges are entitled to representation from the Attorney General's office. As a general rule, county judges may be defended by the county attorney, district attorney, or a private insurance company.[35]

Obviously, being a defendant in a lawsuit can be a stressful situation. For this reason, I would recommend that you make the appropriate inquiries to determine the proper procedure for transmitting suit papers prior to being sued in a particular case. I recommend that state judges fax a letter requesting representation to the attention of the First Assistant in the Office of the Attorney General. The fax should include the citation and suit papers. The original of these documents should then be put in the mail so that the attorney that is ultimately assigned the case will have everything that was served. The judge should retain a copy of all documents for their own file, and to be used in the event the faxed and mailed documents are lost or mis-delivered. County judges should check with the appropriate county officials to determine who would represent them in the event that a lawsuit is filed. The county judge should become familiar with the process that is to be followed when the judge is sued. If the county provides an insurance policy,[36] it would be wise for the judge to stay familiar with the company providing coverage.

INDEMNIFICATION.

Most judges are surprised to learn that there are limits on the indemnification available to them. The state indemnification statute is found in §104.001 *et seq.* of the TEX. CIV. PRAC. & REM. CODE. State indemnification for state judges is limited to $100,000 per person and $300,000 per occurrence. Unfortunately, county judges do not have a statute analogous to §104.001 *et seq.* of the TEX. CIV. PRAC. & REM. CODE which clearly sets out their indemnification. This information is best obtained from the local officials in your county since there is apt to be variations from county to county. I would recommend county judges check with the appropriate county authorities to determine any limitations on their indemnification.

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[35] In 2005, Ch.76 of the TEX. GOV'T CODE was amended to give county judges the option of being represented by the Attorney General's office when the suit against them arises from actions they were taking pursuant to Ch.76 of the TEX. GOV'T CODE.

[36] Policies can also include district judges.

In the *Alexander v. Tarrant County* case discussed above, the plaintiffs had obtained a verdict against the private sector defendant in the amount of $40,000 (inclusive of punitive damages). Nineteen judges were defendants in the companion civil rights case. The $40 million verdict was an indication of the potential exposure facing the nineteen judges in the civil rights case. Understandably, few of the nineteen judges felt a great deal of comfort when they learned that the available indemnification was limited to $300,000. Judges should identify, and become familiar with, any statutes which provide for indemnification as well as any exceptions or limitations placed on the indemnification provided.

INSURANCE.

As referenced above, many counties purchase insurance policies for their judges. You should remember that an insurance policy is nothing more than a contract. If you are the beneficiary of such a contract, take care that it does not provide you with a false sense of security. The better practice would be to obtain a complete copy of the policy. Time should be spent determining what acts and/or omissions are actually covered by the policy. Equal time should be spent in the "exceptions" section to determine any limitations on the coverage discussed in the policy. Some policies cover liability arising from "judicial actions". Obviously, this type of policy is worthless since a judge has absolute immunity when performing these types of functions. If you are going to obtain an insurance policy, care should be taken to insure that the policy will coverage administrative and/or extra judicial capacity claims.

INJUNCTIVE/DECLARATORY RELIEF.

Be aware of the fact that judges are subject to injunctive and declaratory relief just like any other official. Such a suit on the equity side of the docket also avoids the bar of sovereign and Eleventh Amendment immunity. While there is no risk that a judge will be required to pay monetary damages, a prevailing plaintiff is entitled to recover court costs and attorney's fees.

RECUSAL AND COMPELLED TESTIMONY.

Normally, the Office of the Attorney General does not become involved in recusals. A recusal is not a suit against a judge, and generally, a judge should not be a participant in the recusal process once the matter has been referred to the presiding judge.

In the recent months, parties and attorneys have attempted to depose and/or subpoena judges to testify in the recusal process. Subpoenas have been served on the judge sought to be recused, judges that have decided previous recusal cases involving the judge to be recused, and the presiding judge of the judicial region who assigns judges to hear recusal matters. Judges have also been subpoenaed to testify in a criminal case where the defendant's attorney was attempting to disqualify the district attorney's office from handling the appeal.[37] In another instance, a state district judge was

[37] The trial judge had previously recused himself from handling any post-judgment motions.

subpoenaed to testify in federal court because he had signed a search warrant. The attorney for the criminal defendant advanced theory that the judge's campaign literature promising to "get tough on crime" evidenced a bias which predisposed the judge to favor law enforcement, and grant warrants even if probable cause was lacking.

This is actually one circumstance where it is better to be in federal court. The federal system has adopted the "Mental Processes Rule." The decision of judges are afforded strong protection by the Mental Processes Rule.[38] Federal courts have acknowledged that if judges were constantly subjected to the threat of being subpoenaed to explain their reasoning behind their decisions and acts it would adversely impact the integrity of the courts. Courts have refused to issue to subpoena for testimony of judges in all but the "most extreme and extraordinary circumstances."[39] Unfortunately, Texas courts have not actually embraced the Mental Processes Rule. This rule was discussed by the First District Houston Court of Appeals in *Tate v. State*, 834 S.W.2d 566, 570 (Tex.App.--Houston [1st Dist.] 1992). In discussing the Mental Processes Rule, the Court stated:

> Texas law has not established circumstances or conditions under which a judicial officer might properly be compelled to articulate his reasons for a decision in a particular case, <u>and we do not propose to state such a rule here</u>. However, we conclude that if such a rule were to established, the better rule would be to require, at the very least, a threshold showing of improper conduct on the part of the judge that would justify compelling him to testify. *(Emphasis added.)*

However, more recent opinions suggest that the Mental Processes Rule has been informally adopted. It was cited as the reason for quashing a judge's subpoena in *Thomas v. Walker*, 860 S.W.2d 579, 582 (Tex.App. Waco 1993). In *Sims v. Fitzpatrick*, 288 S.W.3d 93, 102 (Tex.Civ.App.--Houston [1st Dist.] 2009), the Court suggests in a footnote that the rule recommended in *Tate v. State* actually applies.

> . . . Had appellants preserved their general complaint that the assigned judges erred in quashing the subpoenas issued to the trial judge, appellants still were required to show extraordinary circumstances to justify compelling the trial judge to testify regarding her mental processes in arriving at her decisions. *Tate v. State*, 834 S.W.2d 566, 569-70 (Tex.App. Houston [1st Dist.] 1992, pet. ref'd); *Thomas v. Walker*, 860 S.W.2d 579, 582 (Tex.App. Waco 1993, no writ). Here appellants presented no evidence at the recusal hearings. In their "bill of exceptions," appellants referred to statements made

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[38] *United States v. Morgan*, 61 S.Ct. 999, 104 (1940).

[39] *Gary v. State of Louisiana Dept. of Health and Human Resources*, 861 F.2d 1366, 1368 (5th Cir. 1988)(quoting *U.S. v. Dowdy*, 440 F.Supp. 894, 896 (W.D.Va. 1977)).

> by the trial judge during various hearings. Thus, appellants failed to make a threshold showing of improper conduct on the part of the trial judge that would have justified compelling her to testify. *Tate*, 834 S.W.2d at 569-70.

The *Tate v. State* rule was also cited as authority in the unpublished opinion of *White v. State*, 202 WL 440795 (Tex.App. Amarillo).

The Mental Processes Rule is not the only restriction on judicial testimony. In *Joachim v. Chambers*, 815 S.W.2d 234 (Tex. 1991), the Texas Supreme Court engaged in an extensive discussion of the propriety of judicial testimony. In this original mandamus proceeding, the Court held that a retired district judge who continues to serve as a judicial officer by assignment could not testify as an expert witness. Obviously, this case was a little different than those discussed above. In this case, the judge was a willing participant in the judicial process. On at least two occasions, I have utilized this case to keep former judges from testifying.

Cannon Two of the Code of Judicial Conduct specifically restricts judges from testifying as a character witness. On Page 238, the Court also noted:

> There is yet another reason for restricting judges from testifying as witnesses. The appearance of a judge as a witness threatens, rather than promotes, "public confidence in the integrity and impartiality of the judiciary." A judge who testifies that one party to a case does or does not have good character seems, at least, to be taking sides in the litigation. This is inconsistent with the role of a judge. The risk of confusion of the roles of witness and judge when the same person acts as both can create an appearance of impropriety.

However, this same opinion makes it very clear that there are circumstances where it is appropriate for a judge to testify. The standards set out in Cannon Ten provide guidance when judicial testimony is appropriate. "Although these standards are invoked whenever a judge testifies, we do not hold that they prohibit judges from ever testifying in Court." Certainly, a judge must, like anyone else, testify to relevant facts when it is within his knowledge when summoned to do so.[40] Obviously, these concerns are diminished or dispensed with if a jury is not involved. Moreover, judicial testimony is allowed when a judicial witness is unavailable.

Texas Rule of Civil Evidence 605 provides another limitation on judicial testimony. See *Bradley v. State*, 990 S.W.2d 245, 248 (Tex. 1999) and the unpublished opinion of *Arafiles v. State*, 202 WL 27311 (Tex.App.–Corpus Christi).

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[40] *Joachim* at 239.

***Caperton v. Massey Coal Co., Inc.*, 129 S.Ct. 2252 (2009).**

I have included this opinion in the paper because it could represent a new area of potential liability. In a majority decision, the United States Supreme Court determined that a West Virginia Supreme Court Judge's failure to recuse himself constituted a violation of a party's right to due process.

The facts set in the opinion are fairly egregious. Plaintiffs had obtained a judgment against Massey Coal in the amount of $50 million. The West Virginia Supreme Court reversed this judgment. One of the Supreme Court judges who had been part of the majority had denied a recusal motion. The basis for the recusal motion was the fact that the CEO of Massey Coal had contributed $3 million to his election campaign. Justice Kennedy wrote the majority opinion. His reasoning is both persuasive and curious. The West Virginia judge determined that there was not actual bias and that he had acted impartially. On Page 2263, the Court states: "We do not question his subjective findings of impartiality and impropriety. Nor do we determine there was actual bias." On Page 2265, the Opinion states:

> . . . due process "may sometimes bar trial judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties." *Murchison*, 349 U.S. at 136, 75 S.Ct. 623. The failure to consider objective standards requiring recusal is not consistent with the imperatives of due process. We find that Blankenship's significant and disproportionate influence coupled with temporal relationship between the election and the pending case – " ' "offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." ' " *Lavoie*, 475 U.S., at 825, 106 S.Ct. 1580 (quoting *Monroeville,* 409 U.S., at 60, 93 S.Ct. 80, in turn quoting *Tumey*, 273 U.S., at 532, 47 S.Ct. 437). On these extreme facts the probability of actual bias rises to an unconstitutional level.

We have all heard the maxim, "hard facts make bad law." Assuming the facts set forth in the majority opinion are complete and accurate, it is difficult to argue that the West Virginia judge should not have recused himself. Unfortunately, this opinion was not written by a trial court or a lower appellate court. The problems with the <u>effect</u> this opinion is set forth in the dissent written by Chief Justice Roberts. On Page 2267, he begins by noting:

> Until today, we have recognized exactly two situations in which the Federal Due Process Clause requires disqualification of a judge: when the judge has a financial interest in the outcome of the case, and when the judge is trying a defendant for certain criminal contempts. Vaguer notions of bias or appearance of bias were never a bias for disqualification, either at common law or under our constitutional precedence. Those issues were instead addressed by legislation or court rules.

The majority opinion recognizes a "probability of bias" basis for recusal which can amount to a due process violation. On Page 2268, Justice Roberts notes:

> In any given case there are a number of facts that could give rise to a "probability" or "appearance" of bias: friendship with a party or lawyer, prior employment experience, membership in club or associations, prior speeches and writings, religious affiliation, and countless other considerations. We have never held that the Due Process Clause requires recusal for any of these reasons, even though they could be viewed as presenting a "probability of bias." Many state *statutes* require recusals based upon a probability or appearance of bias, but "that alone would not be a sufficient basis for imposing a *constitutional* requirement under the Due Process Clause." *Lavoie*, *supra* at 820, 106 S.Ct. 1580 (*emphasis added*).

On Pages 2269-2272, Justice Roberts lists 40 theoretical circumstances which could now require recusal based upon the constitutional due process violation of "probability of bias."

The opinion does not contain any discussion of any liability on the part of the judge that failed to recuse himself. Arguably, recusal is still a "judicial" action which should mean the judge would be insulated from paying a party monetary damages for the alleged constitutional violation. However, as discussed above, there is a possibility of finding that a litigant is entitled to equitable relief. In such circumstances, the judge could be responsible for paying the prevailing parties costs and attorney's fees. So long as the *Caperton* rules stays confined to these facts it should not create much of a problem for the judiciary. However, the judges should keep an eye on this area of the law to be aware if the due process violation is expanded into other areas.

CONCLUSION.

We have seen that all actions taken by judges are not judicial in nature. The character of the action determines whether or not an act taken by a judge will be protected by judicial immunity. Judges and other governmental officials can act in either an official or individual capacity. If a judge is engaged in a non-judicial function, he may be protected by legislative or prosecutorial immunity. If the action is administrative in nature, the judge is only protected by the defense of official immunity.

If a judge is found to be liable for an improper action for which no immunity attaches, he is personally responsible for any damages assessed against him in excess of any potential available indemnification limits afforded by state statute.

WHAT YOU CAN DO.

I would encourage every judge to become proactive in understanding the potential scope of their liability as well as the indemnification potentially available to protect them in the event of an adverse verdict. In addition to becoming acutely familiar with the test to be utilized in determining when actions are judicial, the judge should familiarize themselves with the interpretation of qualified immunity.

I would encourage judges to determine the appropriateness of their involvement in potentially dangerous situations by applying the same test that they would apply in determining whether or not they would allow expert testimony in their court. Specifically, if the judge, by education, training. or experience does not possess any greater expertise than a layperson in a particular subject area, they should he loathe to impose their judgment or opinion in any situation.

If employment decisions are being made in a department or agency over which the judge has supervisory control, the judge should be reluctant to interfere with such decisions unless the judge possesses professional knowledge or expertise which equips them to do so. Put another way, the judge's personal preferences and personality should not create, or be the basis of conflicts.

I would recommend that you create a notebook containing the statutes which impose any duties and/or obligations on you. Be familiar with the wording of the statute, and at the time you are performing the duties mandated by the statute be sensitive to the fact that you may be engaged in an administrative acts.

Keep in mind that if you are acting in an administrative capacity your only immunity may be qualified immunity. Qualified immunity only attaches to discretionary tasks. Put another way, if the statute mandates that you take a particular action, and you do not do so, you are <u>not</u> performing a discretionary task, and qualified immunity will <u>not</u> be available.

Finally, I would encourage you to start thinking and acting like judges. Obviously, each of you had to select a political party to reach the bench that you now hold. Political infighting in the judiciary will only inure to the benefit of those seeking to expand judicial exposure. As noted above, the litmus test in qualified immunity is a "reasonableness" standard. Put another way, consistency among the judiciary will inure to the benefit of all judges. Similarly, open communication on the proper way to handle challenges facing judges should lead to more consistency thereby strengthening the potential defense of qualified immunity.

You should also be aware of the fact that a matter has been handled in a particular way in the past is not a guarantee that there will not be future liability. Talk to more experienced judges, and benefit from their experience. You should also take the time to examine their recommendations in the new light of potential judicial immunity, and determine whether or not improvements can be made to existing systems.