The Role of the Board Attorney: Public Sector Issues

by Benjamin E. Griffith, Bolivar County Board Attorney

Introduction

This book started out five years ago as a chapter in County Government in Mississippi: A Handbook for Supervisors, in which I tried to give a practical overview of the job of the County Board Attorney. That same approach, with a focus on specific topics important to the operation of county government, has been used in this updated and somewhat expanded work.

Those topics consist of public sector issues ranging from the Open Meetings Act’s broadening requirements, the recent expansion of the Public Records Act, civil rights litigation and defense strategies, voting rights and reapportionment, sexual harassment litigation and other employment practices litigation as well as effective policies, prevention and affirmative defenses, statutory requirements applicable to expenditure of county funds, and Home Rule. Also included are segments on conflicts of interest, nepotism, separation of powers, the Ethics in Government Act, the mechanics and utility of seeking official opinions from the Attorney General and advisory ethics opinions from the Mississippi Ethics Commission, and recent caselaw in which the Mississippi Supreme Court has fleshed out and clarified the requirements, exemptions, and scope of the Mississippi Tort Claims Act. Finally, segments from the original chapter dealing with county insurance matters, interlocal cooperation agreements, road and bridge work, and work on private property, will be capped off with a few remarks about the Board Attorney’s role as the legal Jack-of-all-trades for the governing body of the county.

As the chief legal officer for the county, a Board Attorney is expected to provide competent legal representation and advice to County Supervisors and sometimes other elected officials concerning a wide variety of problems facing county government. As is true with just about any other attorney engaged in the practice of law, the Board Attorney has run the gauntlet of law school and is steeped in the Socratic method. He or she has endured an academic environment designed to train one to "think like a lawyer." It is that training in the law that carries with it an emphasis on process, objective analysis, detailed organization, facility with the written and spoken language or persuasion, clear and concise expression, appreciation of nuance, subtlety and compromise.

Unlike an attorney engaged in an exclusively private practice, however, a Board Attorney enjoys a practice, a clientele and what may often seem to be a total immersion in local government matters. As a troubleshooter and part of what some may perceive as an inner circle of grassroots government officials, a Board Attorney spends a lot of time and energy that revolves around meetings and decisions of the county board of supervisors. It is in this context, wherein a Board Attorney is often called upon for legal guidance with regard to county services, programs, functions, activities and responsibilities, that he or she is given an additional layer of ethical standards governing professional conduct in the public sector.

When the soundness of the Board Attorney’s legal advice spells the difference between a Supervisor’s personal liability or immunity, one can readily see that even the most competent Board Attorney has his or her hands full in providing proper legal guidance for the County Board of Supervisors and a host of other local government officials.

Regular, Special and Recess Meetings of the Board

The statutory requirements for regular meetings in counties having one court district are set forth in Miss. Code Ann. §19-3-11 (Supp. 1980), and for counties having two court districts, Miss. Code Ann. §19-3-13 (1972).

The statutory procedure for special and adjourned meetings is described in Miss. Code Ann. §19-3-19 (1972). At a regular meeting, the Board may adjourn to meet at any time it may determine upon by an Order on its minutes, which should set forth the purpose or agenda for the adjourned or recessed meeting. For special meetings, notice
is required to be given for at least five (5) days by advertisement posted at the courthouse door or published in a
newspaper of the county, which notice must be entered in full on the minutes of the special meeting.

In *Tally v. Board of Supervisors of Smith County*, 323 So. 2d 547, 548 (Miss. 1975), the Mississippi Supreme
Court held that §19-3-11 furnishes constructive notice to the general public as to all regular meetings of Boards of Supervisors
and no other notice is required, except where specifically required by statute or in unusual
circumstances, in order for the Boards to conduct their business.

*Tally* was followed in *Coast Materials Co. v. Harrison County Development Comm’n*, 730 So. 2d 1128, 1134
(Miss. 1998), where the Court held that the due process clause was not violated by providing a concrete
manufacturer only ten days in which to appeal a county board of supervisors’ decision to sell land in an industrial
district to a competitor. The Court found that since the board was a public body whose meetings were open to the
public, the challenger "was on constructive notice of public board meetings [and] the lower court correctly found
no due process violation stemming from lack of notice."

In this regard, it should be pointed out that a section of the Mississippi Open Meetings Law was amended
effective July 1, 1990, to provide the following requirements with reference to notice of recess, adjourned or

Any public body which holds its meetings at such times and places and by such procedures as are
specifically prescribed by statute shall continue to and no additional notice of such meetings shall be
required except that a notice of the place, date, hour and subject matter of any recess meeting,
adjourned meeting, interim meeting or any called special meeting shall be posted within one hour
after such meeting is called in a prominent place available to examination and inspection by the
general public in the building in which the public body normally meets. A copy of the notice shall be
made a part of the minutes or other permanent official records of the public body.

In *Shipman v. North Panola Consolidated School District*, 641 So. 2d 1106 (Miss. 1994), the Mississippi
Supreme Court held that a school board’s failure to record any notice of a special meeting, while a violation of
the Open Meeting Act, did not void the actions of the school board taken at that special meeting. The Court
stated:

While non-compliance may subject a Board to an injunction or a writ of mandamus, nowhere is it
written that the lack of recorded notice of a special meeting nullifies all the actions taken.

The rationale for this holding was that it would be overly harsh to allow a technical shortcoming of the Board
minutes to invalidate all of the Board’s actions at that special meeting. In doing so, it emphasized that while the
statutory rules governing Board minutes "are certainly not to be ignored, they do not require perfection."
*Shipman* was recently followed in *Citizens For Equal Property Rights v. Board of Sup’rs of Lowndes County*,
730 So. 2d 1141, 1144 (Miss. 1999) ("CEPR argues that strict compliance is required as to notice and hearings
for adoption of ordinances. However, in *Shipman v. North Panola Consolidated School District*, ... this Court
stated that failure to comply with the Open Meetings Act did not make actions taken at the meeting in question a
nullity. There was some mention at one of the meetings that CEPR had attempted to obtain relief in the chancery
court concerning these violations, as provided in the Open Meetings Act, but no orders from any chancery court
were made a part of this record. Under these circumstances we find no reversible error on this issue.")

**Quorum and Fine for Non-Attendance**

Three members of the Board constitute a quorum, and if that number does not attend on the first day of any
regular, adjourned or special meeting, the Sheriff may adjourn the meeting from day to day until a quorum is
present. Any member who fails to attend any meeting, having notice of it and without a sufficient excuse, is
required to be fined $5.00 for each day he is absent. Miss. Code Ann. §19-3-23 (Supp. 1990).
The Attorney General’s office has previously issued opinions that official acts of a Board can only be taken at an official meeting with a majority of the members present, and that in the absence of a statute providing otherwise, a quorum is a majority of the authorized membership of the body and that a quorum cannot be present by way of a proxy. See opinions to Skelton, September 26, 1990; Seals, August 22, 1990; Abide, May 14, 1987; O’Reilly-Evans, October 7, 1992; and Griffith, August 31, 1995.

Board Minutes

Under Mississippi law, a County Board of Supervisors speaks and can act only by and through its official minutes. As the Mississippi Supreme Court held in Smith v. State, 223 So. 2d 657, 659 (Miss. 1969), cert. denied, 397 U.S. 1030 (1970):

[w]hen these minutes are signed by the President of the Board at the end of the monthly meeting, they become the action of the whole Board and not of the individual members.

Our highest court has consistently emphasized that "in order to be valid, official acts of Boards of Supervisors must be evidenced by orders or resolutions entered upon their minutes and duly signed as required by law." Butler v. State, 241 So. 2d 832, 835 (Miss. 1970).

In Community Extended Care Centers, Inc. v. Board of Supervisors of Humphreys County, 1999 WL 508801 (Miss. App. 1999), the Mississippi Court of Appeals invoked equitable estoppel to hold that a technical omission by the Board and CECC in having a lease contract simultaneously spread across the minute book and filed in the land records would not invalidate the lease contract. In this case, the minutes of the Board throughout the thirteen year period the lease contract has been in effect revealed sufficient evidence of the Board’s intent to be bound by the lease contract. Those facts evidenced by the minutes included the following: (1) a resolution had been unanimously passed in 1983 authorizing the Board president to execute in duplicate the original of the lease, (2) the lease contract had been filed in the land records of the chancery clerk’s office, (3) the Board had subsequently approved an amendment to the lease contract in 1990, (4) the amendment had been filed in the land records of the chancery clerk’s office and (5) the amendment had been entered in the Board minutes. These acts, according to the Court of Appeals, were sufficient "to ensure that no individual member of the Board had bound the Board without the benefit of the consent of the Board as a whole by executing the lease contract between CECC and the Board of Supervisors of Humphreys County." Id. at *6. Moreover, the Court held that

the Board, after reaping the benefits of the lease for more than thirteen years, is not excused from its obligations under the lease contract because of CECC’s failure to have the lease contract filed simultaneously in the minute book and in the land records of the chancery clerk, and, applying the doctrine of equitable estoppel, the Board is barred from denying the validity and enforceability of the lease. Id.

The general law of Mississippi, up until recently at least, has been that a board of supervisors can act only through orders placed upon its minutes, and this requirement, referred to as the Minute Book Order Rule, has been characterized as "so stringent that an order actually entered upon the minutes is nevertheless void if the minutes are not signed by the president of the board, or, in his ability, by the vice president for the board, within the time prescribed by law." Warren County Port Commission v. Farrell Const. Co., 395 F.2d 901 (5th Cir. 1968).

Emergency Exception to Minute Book Order Rule

The Mississippi Supreme Court, however, recently carved out an emergency exception to the requirement that all valid official acts of a board of supervisors be evidenced by an order, resolution, ordinance or other entry on the board’s minutes. In Bolivar County v. Wal-Mart Stores, Inc., 1999 WL 960069 (Miss. 1999), the Court held that a county could be held monetarily liable for a town’s purchase of emergency supplies during the 1994 ice storm that paralyzed the Mississippi Delta, even though the county board of supervisors had never authorized or approved the purchase, either before or after the town purchased the supplies allegedly with written authorization from an assistant director of the Civil Defense. Faced with two separate statutes dealing with the subject matter of emergency purchases, one contained in the Public Purchase Law, §31-7-13(k), and the other in the Mississippi
Emergency Management Law, §33-15-17, the Court held that only the latter applied, and that under that statute there was no requirement for emergency purchases to be evidenced or authorized by a board order or other entry on the board minutes, whether before or after the purchase. In the lower court proceedings, the County Court had ruled in favor of the county, but the Circuit Court had reversed, and the Supreme Court affirmed the Circuit Court, reasoning that the two emergency purchase statutes would not be read in pari materia:

It is obvious from the language of the Emergency Management Law found at Miss. Code Ann. § 33-15-17, that it is the controlling statute in times of emergency. The specific language of the Law states that counties "shall have the power to enter into contracts and incur obligations necessary to combat such disaster, protecting the health and safety of persons and property and providing emergency assistance to the victims of such disaster." The statute states that these obligations may be incurred absent the formalities mandated elsewhere. Therefore, to require the Act to be read in pari materia with Miss. Code Ann. §31-7-13(k), which is found in Chapter 7 of the Mississippi Code entitled "Public Purchases," would be to defeat the purpose of the Act. Miss. Code Ann. §31-7-13(k) deals with emergency purchases and allows some leeway for those making the purchases when circumvention of the statutory procedures would be beneficial to the governing authority. That section requires that the statutorily mandated procedures be delayed instead of being forgiven as the Law allows. The Law recognizes that in emergency situations the statutorily mandated procedures need not be complied with because of the urgency of the situation. The "Public Purchases" section, Miss. Code Ann. §31-7-13(k), has been discussed by this Court in terms of purchases of commodities and repair contracts once the emergency situation threatening harm to persons and property has passed. For example, in State ex rel. Pittman v. Ladner, 512 So.2d 1271 (Miss.1987), a tornado struck a Hancock County elementary school. The Hancock County School Board met and declared an emergency. This Court discussed Miss. Code Ann. §31-7-13(k) in a footnote as the "emergency procedures provision." 512 So.2d at 1274-75 n.l. However, in Pittman, the elementary school building had been destroyed and the emergency was getting the children back into school so that their education would not be delayed. Whereas in the case sub judice, the emergency was getting food, water, blankets, electricity and other necessities to the citizens of Bolivar County—those in Winstonville, as well as those in surrounding areas. Although this Court has referred to the "Public Purchases" section of the Mississippi Code as the emergency purchases section, the Emergency Management Law deals specifically with emergency situations and it cannot be read in pari materia with other statutes, especially where it specifically disregards the governance of other statutes. See Miss. Code Ann. §33-15-17(b).

Publication of Proceedings

The Board is required to either publish its proceedings each month in a newspaper published in the county under Miss. Code Ann. §19-3-33 (1972), or a synopsis of the proceedings in the form of an abstract or summary of the minutes, under the cumulative method authorized by Miss. Code Ann. §19-3-35 (Supp. 1980).

Signing of Minutes

Miss. Code Ann. §19-3-27 (Supp. 1989) and Miss. Code Ann. §25-41-11 (Supp. 1981), both quoted below, should be read together. Cf. Shipman v. North Panola Consolidated School District, supra (While late signing of school board minutes was a violation of the statute, it was not such an error as to invalidate actions of the school board taken at that meeting. "Strictness of action, like strictness of verbiage, should also not be required.").

Section 19-3-27 prescribes the duties of the Clerk of the Board of Supervisors and provides for the signing of the minutes, as follows:

It shall be the duty of the Clerk of the Board of Supervisors to keep and preserve a complete and correct record of all the proceedings and orders of the Board. He shall enter on the minutes the names of the members who attend at each meeting, and the names of those who fail to attend. He shall safely keep and preserve all records, books and papers pertaining to his office, and deliver them to
his successor when required. The minutes of each day’s proceedings shall either (a) be read and signed by the President or Vice President, if the President is absent or disabled so as to prevent his signing of the minutes, on before the first Monday of the first Monday of the month following the day of adjournment of any term of the Board of Supervisors; or, (b) be adopted and approved by the Board of Supervisors as the first order of business on the first day of the next monthly meeting of the Board.

Section 25-41-11 is a section of the Open Meetings Law which makes the following provision with regard to minutes of meetings of a public body:

Minutes shall be kept of all meetings of a public body, whether in open or executive session, showing the members present and absent; the date, time and place of the meeting; an accurate recording of any final actions taken at such meeting; and a record, by individual member, of any votes taken; and any other information that the public body requests be included or reflected in the minutes. The minutes shall be recorded within a reasonable time not to exceed thirty (30) days after recess or adjournment and shall be open to public inspection during regular business hours.

Content of Minutes

Robert’s Rules of Order sheds just a little light on the matter of what should and should not be included in minutes. More helpful and to the point are these remarks in a seminar presentation several years ago by former Oktibbeha County Board Attorney William H. Ward regarding preparation of board minutes:

The Board Attorney has a professional responsibility for the content of the board minutes. While the statute provides that the clerk of the Board will prepare and handle the minutes of the Board, the content of the actual orders and resolutions constitute the only legal and audit protection that our five Board members have.

To some extent there is a difference in philosophy as to how full the minutes should properly be, both as to the detail contained in the orders and resolutions and as to what items that should go into the minutes. These questions are primarily legal and audit questions and are proper questions for the Board Attorney, subject to, of course, the direct instructions of the Board itself.

My personal view is that the Board Attorney should either draft the orders and resolutions or review them carefully before they go into the minutes. Since the auditors review the minutes at the beginning of each audit, it is not a bad idea to detail the statutory authority for what is being done by Code section number.

Reviewability of Factual Findings

The importance of the above observations cannot be over-emphasized. The factual findings and determinations of a Board of Supervisors are subject to limited judicial review and scrutiny under the same standard that applies in the case of other inferior tribunals whose actions have been appealed. That standard was described by the Mississippi Supreme Court in Cook v. Board of Supervisors of Lowndes County, 571 So. 2d 932, 936 (Miss. 1990):

Courts may interfere only where the action of the board is arbitrary or capricious and is without support in the substantial credible evidence.

Cook was construed in Newell v. Jones County, 731 So. 2d 580 (Miss. 1999), a challenge by county residents to the board’s decision to enter into garbage collection contract. The Court also was provided the opportunity to clarify just what is and is not "arbitrary" and "capricious," as set forth in Miss. Department of Health v. Southwest Mississippi Regional Medical Center, infra. Concluding that the statutory provision for appeal of decision by a county board of supervisors was both mandatory and jurisdictional, and there was no appellate jurisdiction since the challenge was untimely, the Court affirmed the lower court’s dismissal of the complaint. In their appeal, the Plaintiffs argued that where a complaint alleged that the actions of the Board failed to comport
with law, a different standard of review applied and the challenging party is thus entitled to a de novo proceeding. The Court rejected this argument:

In support of this argument the Plaintiffs cite Cook v. Board of Supervisors of Lowndes County, 571 So.2d 932 (Miss.1990). In Cook, this Court held that where a circuit court acts in its appellate capacity in reviewing the decisions of municipal authorities it is contemplated that the municipal authority conducted a hearing. Where municipal authorities fail to hold any kind of hearing, a party with standing is entitled to proceed de novo. Cook, 571 So.2d at 934. Allowing the parties to proceed de novo does not, however, mean that they are relieved from complying with the procedural prerequisites to appeal under the statute (emphasis added).

The party challenging the Board action in Cook filed a petition for writ of prohibition within the ten (10) days prescribed by the Statute. Cook, 571 So.2d at 934. This Court stated, "[i]n any event, Cook filed in Circuit Court within ten days and, if it were necessary, we could simply treat Cook’s petition ... as an appeal." Id. Substance should prevail over form regardless of the label placed on the documents filed with the circuit court. Id. The holding in Cook turned, not on the nature of the violation the Board is alleged to have committed, but rather on the fact that a timely challenge to the Board’s action had been filed. As discussed supra, Plaintiffs here failed to file any challenge to the Jones County Board’s action within the ten (10) days prescribed by Miss. Code Ann. §11-51-75. Therefore, the action was properly dismissed as untimely.

The terms "arbitrary" and "capricious." while not susceptible of a precise definition or mechanical application, were defined this way...:

"Arbitrary" means fixed or done capriciously or at pleasure. An act is arbitrary when it is done without adequately determining principle; not done according to reason or judgment, but depending upon the will alone,—absolute in power, tyrannical, despotic, non-rational,—implying either a lack of understanding of or a disregard for the fundamental nature of things.

"Capricious" means freakish, fickle, or arbitrary. An act is capricious when it is done without reason, in a whimsical manner, implying either a lack of understanding of or a disregard for the surrounding facts and settled controlling principles....

*Sliding Scale Appellate Review*

The courts have long recognized that the board of supervisors is a body which exercises judicial, legislative and executive powers, and that "an appellate court’s level of review of an action of a board of supervisors will differ depending upon the category of the power exercised in that action." Wilkinson County Board of Supervisors v. Quality Farms, Inc., 1999 WL 540894 (Miss. App.1999). In Wilkinson County, the Mississippi Court of Appeals put it this way:

It is clear that when a board of supervisors exercises a legislative power that is reviewed on appeal, the court to which the appeal is taken shall only inquire into whether or not the action is reasonable and proper according to the facts disclosed, that is, whether the decision is supported by substantial evidence or is arbitrary or capricious, or beyond the power of the board to make, or whether it violates any constitutional right of the complaining party. Ridgewood Land Company v. Simmons, 243 Miss. 236, 247, 137 So.2d 532, 536 (1962). Miller v. Board of Supervisors of Forrest County, 230 Miss. 849, 855, 94 So.2d 604, 606 (1957). The level of review swings to the other end of the spectrum for matters such as tax appeals, which are tried by the circuit court "de novo," Lenoir v. Madison County, 641 So.2d 1124, 1128 (Miss.1994). For cases adjudicative in nature, as is the case sub judice, the level of review is proof by a preponderance of the evidence. Barnes v. Board of Supervisors, De Soto County, 553 So.2d 508, 510-11 (1989).

*Nunc Pro Tunc Orders*
The purpose of a nunc pro tunc order is to correctly evidence a previous action by the Board which, either through mistake or neglect, was not accurately recorded in the minutes. See Oliphant v. Carthage Bank, 80 So. 2d 63,69 (Miss. 1955)("the object or purpose, and office, function, or province, of a nunc pro tunc entry are to make the record speak the truth by recording or correctly evidencing an act done or judgment rendered by the court at a former time and not carried into the record, or not properly or adequately recorded. It is not the object, office, or province or such an entry to alter a judgment actually rendered, or to correct an erroneous decision or judgment; and, generally speaking, the object or office of the entry is only to supply matters of evidence or to correct clerical misprisions, and not to supply omitted judicial action"); Board of Supervisors of Lafayette County v. Parks, 96 So. 466 (Miss. 1923). In these cases the Mississippi Supreme Court held that the Board of Supervisors has no authority to enter an Order Nunc Pro Tunc which attempts to give an order effect retroactively to a former term.

In Huey Stockstill, Inc. v. Hales, 730 So. 2d 539 (Miss. 1999), a disappointed bidder on bridge reconstruction project sued county board of supervisors and successful bidder, contending that the board had failed to comply with requirements of bid purchase statutes and that the bid-letting process was so defective as to render resulting contract void. The facts are somewhat involved, but reveal a proper application of the nunc pro tunc concept in the context of a hotly contested bidding war. The Board had advertised for bids to be submitted on a project to reconstruct a bridge, and eight bids were submitted. At the time the bids were submitted, a former county supervisor was employed by one of the bidders, Stockstill, as a bid estimator, and had assisted in preparing Stockstill’s bridge bid. The supervisor’s term as supervisor had expired just two months earlier, and thus he had been out of office for less than a year when the bid was prepared and submitted. To address possible conflicts of interest, the Board sought and obtained an advisory opinion from the Mississippi Ethics Commission addressing the propriety of the board accepting Stockstill’s bid in the event that Stockstill was the lowest bidder. The advisory opinion concluded that under Miss. Const. §109 and Miss. Code Ann. §25-4-105(2) (1991), a former county supervisor, as an employee of a corporation, had a prohibited interest in all contracts with the corporation authorized by the county during his term and for one year thereafter.

As fate would have it, when the bids were received, the lowest bid was that of Stockstill. Two days after submitting its lowest bid, Stockstill shifted the supervisor’s employment to a separate company and informed the county board attorney that the supervisor was no longer employed by Stockstill. The Board took all bids under advisement pending the result of a second advisory opinion request to the Ethics Commission. The second lowest bidder, moreover, informed the Board that "any award of the contract to Stockstill would violate the constitutional and statutory conflict of interest provisions, and that any contract made in violation of these provisions would be null and void." Id. at 541. The second opinion was received from the Ethics Commission, stating that whether or not the relation between the two companies was sufficient to cause the former supervisor to have a direct or indirect conflict of interest would require judicial review, but that "the former supervisor being employed by the company that has the same owners and the same physical and mailing addresses as [Stockstill] has the potential of creating suspicion among the public and reflecting unfavorably upon the county," id. at 541, especially since the bid was submitted while the former supervisor was still employed by Stockstill. According to the Court,

At a meeting on May 10, 1996, the Board voted to award the contract to Columbia, the second lowest bidder. After the meeting, the clerk of the Board drafted minutes explaining that "[t]he lowest bid submitted for said project was Huey Stockstill, Inc., Picayune, Mississippi, but was rejected by this Board because of a problem with the Ethics Commission." On May 14, 1996, Stockstill filed suit to enjoin the letting of the bridge contract to Columbia as the second lowest bidder. Stockstill sought a declaration by the court that the Board had violated Mississippi law by its "wilful refusal to award the subject contract to Plaintiff, Huey Stockstill, Inc." On June 6, 1996, the Board filed its Answer as well as a motion to dismiss. The Board alleged that because the action was an appeal of a decision by a board of supervisors, Miss.Code Ann. §11-51-75 (1972) required the plaintiff to file a bill of exceptions in order to vest the circuit court with subject matter jurisdiction. The Board also argued that Stockstill had failed to join Columbia as a necessary party under Miss. R. Civ. P. 19. On the same day, the Board also filed a separate motion for summary judgment, arguing that it was clearly barred by state ethics laws from awarding the contract to Stockstill. A hearing was held on the joinder issue on June 7, 1996, and Columbia was subsequently joined as a party.
On June 21, 1996, Stockstill moved to amend the complaint to include its Statement of Facts in Lieu of Bill of Exceptions. On July 30, 1996, the court entered an order granting leave to amend, and denying the Board’s motion to dismiss and motion for summary judgment. In denying summary judgment, the court heeded Stockstill’s contention that the Board had not complied with a provision in the state’s public purchases law which requires the Board, when accepting a bid other than the lowest bid actually submitted, to "place on its minutes detailed calculations and narrative summary showing that the accepted bid was determined to be the lowest and best bid." Miss. Code Ann. § 31-7-13(d)(i) (Supp.1996). The court remarked that "this requirement is no mere formality that can be ignored by the Court," and thus considered the issue one of disputed material fact precluding summary judgment. In response to the court’s statement, the Board, on August 21, 1996, entered a *nunc pro tunc* order amending its minutes to reflect the complete proceedings of its meeting on May 10, 1996 and to comply with §31-7-13.

The Board’s *nunc pro tunc* amendment of the meeting minutes in *Stockstill* was held by the trial court to be proper and related back to the date of the Board’s original meeting. Moreover, the lower court properly found that the actions of the Board granting the project to second lowest bidder based on ethical concerns were not arbitrary and capricious. The supervisors followed at least spirit of bid process requirements and adhered in most respects to the letter of the law. The Mississippi Supreme Court affirmed, reasoning that the Board’s amended minutes reflected the actual occurrences at the earlier meeting on May 10, 1996 in which it voted to award the contract to the second lowest bidder, as well as the Board’s original rationale for making that award. Both the trial court and the Mississippi Supreme Court not only concluded that actions of the county board of supervisors were not arbitrary and capricious, but that the board had "correctly balanced its responsibilities under the bid law and those under the law regarding ethics and conflicts of interest." *Id*. at 541. The Court had this to say about the *nunc pro tunc* order:

> Boards of supervisors have the general power to alter or amend their orders. *See* Miss. Code Ann. §19-3-40 (1995). In *Walters v. Validation of $3,750,000.00 School Bonds*, 364 So.2d 274, 276 (Miss.1978), this Court implicitly recognized that a governing body may, at a subsequent meeting, amend the minutes of the prior meeting to reflect what actually occurred on the first occasion. *Id*. at 544.

...The rule that a governing body may amend its minutes to speak the truth is in accord with other jurisdictions. The general rule as to the amendments of the minutes of council meetings is stated in *City of Guntersville v. Walls*, 252 Ala. 66, 39 So.2d 567 (1949):

> "A municipal council may, at a subsequent meeting, if no intervening rights of third persons have arisen, order the minutes or record of its own proceedings at a previous meeting to be corrected according to the facts, so as to make them speak the truth, although the record has once been approved. On the other hand, an erroneous record of the proceeding of a municipal council cannot be corrected or amended to the destruction of rights acquired under it in good faith, without notice of the error...."

*Id*. 39 So.2d at 569. *See also Estes v. City of Gadsden*, 266 Ala. 166, 94 So.2d 744, 747 (1957) (ordinance that is invalid because of noncompliance with statutory requirements when first enacted may be validated by subsequent amendments of the minutes). Thus, a governing body such as a board of supervisors or city council, with proper notice to any party who acquires rights under the original minutes, can amend those minutes to ensure that they speak original truth or further explain the original rationale of the action. Such amendments may not be used to invent new reasons for the governing body’s action or collaterally attack a particular vote.

In the present case, there is ample evidence that the amended minutes reflect the actual occurrences at the meeting on May 10, 1996 as well as the Board’s original rationale for awarding the bridge contract to Columbia. The Board’s request for two separate opinions from the Commission makes it
clear that ethical concerns were paramount in the Board’s decision-making process. The original minutes, while admittedly sparse, did recite the ethical "problem" as the reason for rejecting Stockstill’s bid. Finally, the only witness at trial—an employee of Stockstill who was present at the original meeting of the Board on May 10—admitted that "there was a great deal of discussion about this bridge project and about the ethic [sic] opinion."

We conclude, therefore, that the circuit court properly found that the nunc pro tunc amendment of August 21, 1996 was proper and that it related back to the date of the Board’s original meeting on May 10, 1996. Id. at 544.

The Attorney General’s office has also issued a number of opinions on the subject of nunc pro tunc orders:

· AG Op. No. 87-176 to Austin, April 30, 1987, stated that a County Board of Supervisors did not have authority to give the County Prosecutor back salary from the date of effectiveness of the statutory amendment which increased the salary, since this would constitute a nunc pro tunc order giving effect retroactively to actions which had not previously been authorized or taken. By contrast, an appropriate nunc pro tunc order would be one which states correctly the previous action taken by the Board which was not recorded accurately in the minutes, due to oversight or neglect.

· AG Opinion No. 95-0070 to Blackwell, March 2, 1995, stated that a Board of Supervisors may not retroactively approve actions through the use of an Order Nunc Pro Tunc, in this case formal approval of a claim for payment for road repairs performed by an independent contractor, where the employment and hourly compensation arrangement have been duly authorized in the Board’s minutes, but upon completion of the repair project a claim for payment for the work was submitted to the Board but not entered upon the docket.

· AG Opinion No. 92-0301 to Cauthen, May 7, 1992, stated that a Board of Supervisors cannot ratify actions of the Election Commission and authorize payment for legal services to the Election Commission after the fact, where the minutes of the Board of Supervisors do not reflect the prior authority given to the Election Commission to employ such attorney.

· AG Opinion No. 94-0066 to Parsons, February 16, 1994, stated that upon a proper finding of fact that an existing entry in the board minutes concerning the hourly pay rate for an E-911 employee was not an accurate reflection of the official action taken, an order nunc pro tunc to correct the error, correcting the parate to conform with the other E-911 employees’ pay rate would be lawful.

· AG Opinion No. 95-0234 to Wallace, April 13, 1995, stated that where a county board of education had previously discussed the matter of relocation of mobile classrooms and had agreed that the units should be moved and authorized the superintendent to have the work performed but merely failed to enter such agreement on the minutes of the board, then such approval may be given nunc pro tunc and entered on the minutes setting out what, in fact, was actually decided at that previous meeting but not entered on the minutes.

· AG Opinion No. 90-0382 to Haque, July 7, 1990, stated that if the county Economic Development District’s director’s employment terms, including but not limited to compensation, have not been fixed, duly approved and entered on the minutes of the District’s governing body, they can not now be added, but if, in fact the terms were fixed, formally considered, voted on and approved but by clerical error such action was inadvertently omitted from the minutes, a nunc pro tunc order may be appropriate.

**Home Rule**

Prior to the adoption of County Home Rule, Boards of Supervisors were held to the strictest limitations of their powers and could only exercise those powers which were expressly conferred by statute or which were necessarily implied. *Adams v. First National Bank of Greenwood*, 60 So. 770, 771 (Miss. 1913).

Home Rule was made applicable to county government by §60 of the County Government Reorganization Act of 1988, and is set forth in Miss. Code Ann. §19-3-40 (Supp. 1990):
The Board of Supervisors of any county shall have the power to adopt any orders, resolutions or ordinances with respect to county affairs, property and finances, for which no specific provision has been made by general law and which are not inconsistent with the Mississippi Constitution, the Mississippi Code of 1972, or any other statute or law of the State of Mississippi; and any such board shall likewise have the power to alter, modify and repeal such orders, resolutions or ordinances. Except as otherwise provided in subsection (2) of this section, the powers granted to Boards of Supervisors in this section are complete without the existence of or reference to any specific authority granted in any other statute or law of the State of Mississippi.

Such orders, resolutions or ordinances shall apply countywide except when the governing authorities of any municipality situated within a county shall adopt any order, resolution or ordinance governing the same general subject matter. In such case the municipal order, resolution or ordinance shall govern within the corporate limits of the municipality.

(2) This section shall not authorize the Board of Supervisors of a county to (a) levy taxes other than those authorized by statute or increase the levy of any authorized tax beyond statutorily established limits, (b) issue bonds of any kind, (c) change the requirements, practices or procedure for county elections or establish any new elective office, (d) use any public funds, equipment, supplies or materials for any private purpose, (e) regulate common carrier railroads, (f) grant any donation, or (g) without prior legislative approval, regulate, directly or indirectly, the amount of rent charged for leasing private residential property in which the county does not have a property interest; unless such actions are specifically authorized by another statute or law of the State of Mississippi.

The attorney General’s office has described home rule in terms of an expansion of local government powers:

"Traditionally the law has been that a county was authorized to do only that which the law specifically authorized or that which could be necessarily implied from the law. However that general law was amended legislatively by the passage and repassage of the "home rule" statutes. The term "home rule" is perhaps a misnomer for these statutes since it often refers to a form of government which allows an inferior political body to act as a mini-legislature over its geographical territory. What we have in Mississippi does not grant such broad powers but it does expand the powers of local governmental units from the traditional rule stated above." AG Opinion No. 92-0393 by Asst. Attorney General Larry Stroud to James Homer Best, June 24, 1992.

Broad Authority

The Mississippi Supreme Court’s first opportunity to address County Home Rule came in Harrison County v. City of Gulfport, Mississippi, 557 So. 2d 780 (Miss. 1990). At issue was whether Harrison County had the legal authority to oppose an annexation by the City of Gulfport. As an historical note, the Court observed that the rule in effect since 1876 had been that a County Board of Supervisors had authority to act only as provided by law, but that rule "has been moderately but significantly relaxed" by the Home Rule statute, §19-3-40. The Court concluded that the County was authorized to proceed in this matter by a combined reading of several statutes, which vested in the County, acting through its Board of Supervisors, the authority to employ counsel and participate fully in the annexation and confirmation proceedings, and that "any possible doubt of the matter has been removed by the enactment of §19-3-40."

As was once pointed out by P. L. Douglas, retired First Assistant Attorney General, the granting of Home Rule powers is really a distribution of existing governmental powers and is not an enlargement of the functions of government. In short, a County Board of Supervisors cannot enact orders or resolutions that the state legislature could not have enacted, nor may a County Board of Supervisors under Home Rule assume functions which are not public. County Home Rule contemplates that a local board may act on matters of local interest but may not
act on matters of statewide interest, at least to the extent that there is no specific provision made by general law
and to the extent that there is no inconsistency with the state constitution or any other statute or law of the state.

Home Rule is thus designed to give counties broad authority in matters of local concern. The following are
examples of the breadth and scope of Home Rule authority properly exercised by County Boards of Supervisors,
as set forth in applicable AG Opinions:

· Since there is no prohibition against a county allowing a local union to use its voting machines in exchange for
an opportunity to register voters and educate voters on the use of the voting devices, provided no tax dollars will
be utilized in this endeavor, and since the opportunity to educate a large number of people in the use of the voting
devices could be beneficial to the county and to the overall electoral process, if the Board of Supervisors finds,
pursuant to home rule, that allowing a local union to utilize the voting machines is beneficial to the county, they

· A board of supervisors, pursuant to county home rule, its police power and jurisdiction over roads and bridges
and Sections 63-23-1 , et seq., of the Mississippi Code of 1972, relating to the removal of abandoned motor
vehicles from public property, may remove unsaleable, abandoned vehicles constituting a safety hazard located
on the public right-of-way, and subsequently dispose of or sale such vehicles. AG Opinion No.1999-0174 to
Sherard, April 9, 1999.

· Although the boards of supervisors of beat system counties are not required to adopt a
countywide personnel system as described in Section 19-2-9, they may, in their discretion, do so, pursuant to
Section 19-3-40, the County Home Rule statute. AG Opinion No. 1999-0481 to Entrekin, October 8, 1999.

· By virtue of county home rule and the powers over roads granted by Section 19-3-41,
a board of supervisors may defray the cost of relocation of a sewer line owned by a utility district which is
presently located upon county road right of way. AG Opinion No. 98-0745 to Hollimon, December 18, 1998.

· Pursuant to the county home rule statute, the board of supervisors may, in its discretion, fund an administrative

· Based on an earlier AG opinion construing the Municipal Home Rule statute to the effect that there is no
authority for a municipality to give financial assistance to nursing students to enable these students to come back
to the municipality after graduation to work as nurses or nurse practitioners, since there is no specific statute
authorizing a board of supervisors to pay for educational training for persons not yet in the employ of the county
ambulance service, a board of supervisors may not pay for the educational training of a non-employee in return
for a promise, written or otherwise, to work for the county for a specified period of time following completion of
the education for which the county has paid. AG Opinion No. 98-0667 to Lamar, October 30, 1998.

· A county has the right to develop for its own use a computer program for use in its
courts pursuant to County Home Rule, may enter into a contract with a computer company to develop a computer
program, as an incident to development of a product with a legitimate county or governmental purpose, and may
sell its rights to such program pursuant to Section 19-7-5 or Section 31-7-13(m)(iv) of the Code, although it
cannot develop computer programs solely for the purpose of sale for profit. AG Opinion No. 97-0767 to

· A county does not have authority under county home rule to pay credit card service charges associated with the
payment of ad valorem taxes and other payments made through the use of a credit card, in view of the
constitutional prohibition of Ms. Const. Section 100 (1890) that prohibits a county or municipality from accepting
a discounted amount or from paying a percentage of the charge; however, while a county board of supervisors
may not accept a discounted amount on debts due to them which are paid by credit card, it may, in its discretion,
if it finds it to be in the public interest, enter into an agreement with a bank or credit card company whereby the
bank or company is paid a specified regular fee out of the general fund of the county. AG Opinion NO. 97-0572 to Hall, October 3, 1997.

·Since a purchase of uninsured motorist bodily insurance is within the term "county affairs" and such a purchase is not inconsistent with the Mississippi Constitution, the Mississippi Code of 1972, or any other statute or law of the State of Mississippi, and does not fall within the prohibition of Section 19-3-40(2), a board of supervisors may purchase uninsured motorist coverage when some of the benefit of such insurance would inure to the employee who is exposed to risk because of his employment. AG Opinion No. 97-0618 to Hardy, October 3, 1997.

·County Home Rule would authorize a county to establish a first responder entity, i.e., an entity other than an ambulance service which commonly responds to medical emergencies and whose employees possess some degree of training which might aid in the emergency. A first responder system may be established through either a fire and rescue unit or police unit or civil defense unit that works within the framework of the fire, police or civil defense departments. AG Opinion No. 97-0371 to Lamar, July 11, 1997.

·Provided the statutory procedures are followed, a county board of supervisors is authorized to borrow funds from the Economic Development Revolving Loan Fund of a city, would be required to give notice as set forth in Section 19-9-11, and the amount of the loan from the city's Economic Development Revolving Loan Fund would be computed in the limitation of indebtedness as set forth in Section 19-9-5. AG Opinion No.96-0880 to McKenzie, January 10, 1997.

·A county board of supervisors may take steps deemed necessary to prevent the running at large of wild animals such as lions, tigers, and cougars, some of which are potentially dangerous, including regulating the housing of such animals and exercising control over any premises on which such animals are kept. The county home rule statute enables the board of supervisors to regulate the housing of these animals; however, before prohibiting such activities, per se, the board must find that they constitute a nuisance. AG Opinion No. 96-0397 to Spragins, August 9, 1996.

·County home rule would authorize a county to acquire properties which would be suitable for use in wetlands mitigation of future road projects. AG Opinion No. 96-0847 to Mullins, January 10, 1997.

·A county may, pursuant County Home Rule, contract for and use such telephone services as are necessary in the handling of county business, provided that payment for telephone services conform with the requirements of Section 19-13-25 which requires that all claims to be paid by the board of supervisors "shall be sufficiently itemized to show in detail the kind, quantity and the price of the articles sold." AG Opinion No. 96-0231 to Bradley. May 3, 1996.

·A county may grant a non-exclusive cable television franchise, which is properly a matter of governmental concern and is a county affair. AG Opinion No. 90-0001 to McKenzie, January 10, 1990.

·A County Board of Supervisors is authorized under County Home Rule to purchase special items that may be required for plain clothes or undercover operations, other than normal street apparel. AG Opinion No. 90-0006 to Grimmett, January 24, 1990.

·A county may contract with a private corporation to provide necessary equipment and monitoring services in order to operate a home confinement program. AG Opinion No. 90-0084 to Haque, January 31, 1990.

·A county has authority under Home Rule to adopt misdemeanor leash laws and to impose such misdemeanor penalties for violations which they deem appropriate, which regulations are required to be applied countywide. AG Opinion No. 90-0073 to Gex, February 8, 1990.
· A County Board of Supervisors may entertain an ordinance to provide for the handling of abandoned property, to the extent that such is not addressed elsewhere under the law and provided such ordinance comports with due process and otherwise passes constitutional muster. AG Opinion No. 92-0393 to Best, June 24, 1992.

· A County Board of Supervisors may enact, pursuant to County Home Rule, reasonable zoning restrictions touching on bingo operations and/or may enact reasonable ordinances relating to bingo hours of operation. AG Opinion No. 93-0014 to Scott, January 20, 1993.

· A County Board of Supervisors is authorized under Home Rule authority to provide itself with offices and may, in its discretion, employ a part-time secretary, if such is determined to be reasonable and necessary to accomplish the needs of the county. AG Opinion No. 92-0982 to McKenzie, February 1, 1993.

· A Board of Supervisors has authority under County Home Rule to contract with a phone company for provision of pay telephone service to prisoners. AG Opinion No. 93-0090 to Jackson, February 25, 1993.

· A County Board of Supervisors may entertain a lease of private property for the purpose of providing additional public parking spaces for county buildings and county business if the Board makes a factual determination that there is such a need. AG Opinion No. 93-0733 to Gex, November 22, 1993.

Open Meetings Act

Mississippi’s Open Meetings Act, statutorily set forth in Miss. Code Ann. §§25-41-1, et seq. (1975), as amended, has been given a very broad interpretation by our State Supreme Court.

The policy of the Open Meetings Act is set forth in §25-41-1:

It being essential to the fundamental philosophy of the American constitutional form of representative government and to the maintenance of a democratic society that public business be performed in an open and public manner, and that citizens be advised of and be aware of the performance of public officials and the deliberations and decisions that go into the making of public policy, it is hereby declared to be the policy of the State of Mississippi that the formation and determination of public policy is public business and shall be conducted at open meetings except as otherwise provided herein.

Public Policy

In Mayor and Aldermen of City of Vicksburg v. Vicksburg Printing & Publishing Co., 434 So. 2d 1333 (Miss. 1983), the Mississippi Supreme Court said:

Our Legislature has decreed that its acts ought be conceived in the open air.... Openness in government is the public policy of this state. It is conducive to good government and heroic deeds.

We are acutely aware that we live in an age when secrecy in government generates suspicion and mistrust on the part of our citizenry. Government which does not have the confidence of the people can never govern effectively. However inconvenient openness may be to some, it is the legislatively decreed public policy of this state.

Deliberative Stages Open to Public

In reliance on this same broad statement of public policy, the Mississippi Supreme Court emphasized in Board of Trustees of State Institutions of Higher Learning v. Mississippi Publishers Corporation, 478 So. 2d 269 (Miss. 1985):

[A]ll the deliberative stages of the decision-making process that lead to "formation and determination of public policy" are required to be open to the public.... Official acts include actions relating to formation and determination of public policy.
Executive Sessions

A public body, which includes a Board of Supervisors, may hold an executive session for one or more of the following reasons, set forth in §25-41-7(4):

(a) Transaction of business and discussion of personnel matters relating to the job performance, character, professional competence, or physical or mental health of a person holding a specific position.

(b) Strategy sessions or negotiations with respect to prospective litigation, litigation or issuance of an appealable order when an open meeting would have a detrimental effect on the litigation position of the public body.

(c) Transaction of business and discussion regarding the report, development or course of action regarding security personnel, plans or devices.

(d) Investigative proceedings by any public body regarding allegations of misconduct or violation of law.

(e) Any body of the Legislature which is meeting on matters within the jurisdiction of such body.

(f) Cases of extraordinary emergency which would pose immediate or irrevocable harm or damage to persons and/or property within the jurisdiction of such public body.

(g) Transaction of business and discussion regarding the prospective purchase, sale or leasing of lands.

(h) Discussion between a school board and individual students which attend a school within the jurisdiction of such school board or the parents or teachers of such students regarding problems of such students or their parents or teachers.

(i) Transaction of business and discussion concerning the preparation of tests for admission to practice in recognized professions.

(j) Transaction of business and discussions or negotiations regarding the location, relocation or expansion of a business or an industry.

(k) Transactions of business and discussions regarding employment or job performance of a person in a specific position or determination of an employee holding a specific position. The exemption provided by this paragraph includes the right to enter into executive session concerning a line item in a budget which might affect the termination of an employee or employees. All other budget items shall be considered in open meetings and final budgetary adoption shall not be taken in executive session.

Procedure for Executive Session

In Hinds County Board of Supervisors v. Common Cause of Mississippi, 551 So. 2d 107 (Miss. 1989), the Court put some teeth in the Open Meetings Act and clarified the procedure for going into executive session:
When a member of the board believes the board needs to go into executive session, he may very well not know the precise reason or how it should be stated, or in fact that the board will agree with him, or the board attorney may advise that the matter is not a proper subject for executive session. Therefore, he is not required to give any reason for asking that the meeting be temporarily closed to determine the need for executive session. In a short, temporarily closed meeting, however, the board can determine the precise matter to be discussed and considered, and whether or not an executive session is appropriate. If by a three-fifths vote it is decided to go into executive session, the chairman must reopen the meeting and announce publicly that the board is going into executive session, and state the reason for doing so. The chairman then knows precisely why the board is going into executive session. He must publicly state the reason with sufficient specificity for the audience to know in fact that there is an actual, specific matter which is to be discussed and considered in executive session.

When a board chairman tells a citizen he may not hear the board discuss certain business, he is taking liberties with the rights of that citizen, and the reason given for this interference must be genuine and meaningful, and one the citizen can understand. To permit generalized fluff would frustrate the very purpose of the Act.

Litigation Exception

The litigation exception, §25-41-7(4)(b), was at the heart of the Mississippi Supreme Court’s decision in Vicksburg v. Vicksburg Printing & Publishing, 434 So. 2d 1333 (Miss. 1983). In this case, the City’s Planning Commission, while subject to the Open Meetings Law, properly went into executive session to discuss certain matters which were important subjects of proof in an annexation confirmation proceeding, including police and fire protection, ad valorem taxes, health hazards, sewage plans, population growth and recreational facilities. As the Court noted, "it was in a very real sense a strategy session in which plans for successful annexation confirmation litigation were discussed."

In Vicksburg, the lower court had held that the litigation exception did not apply because no attorneys were present at the meeting. The Mississippi Supreme Court disagreed:

Strategy sessions or negotiations with respect to prospective litigation may be, and no doubt frequently are, held by public bodies in the absence of attorneys. Conversely, the mere presence of an attorney in no way insulates from public disclosure and openness meetings which are not strategy sessions related to litigation. No doubt in many cases the role of an attorney may be a factor to be considered in determining whether the litigation exception applies. It is not, however, outcome-determinative. The question must ultimately and always be answered by reference to the statute.

The Mississippi Supreme Court also rejected the lower court’s construction of the phrase "prospective litigation" as used in §25-41-7(4)(b) to mean "imminent litigation." Finding this construction too restrictive, the Mississippi Supreme Court emphasized that "prospective litigation" means "litigation reasonably likely to occur in the reasonably foreseeable future." (Emphasis added.)

Personnel Matters Exception

One of the specified reasons for a public body to enter into an executive session is to discuss personnel matters. The specific language of the personnel matters exception appears in §25-41-7(4)(a). In the 1985 case of Board of Trustees v. Mississippi Publishers Corp., 478 So. 2d 269 (Miss. 1985), the Court was dealing with a former statutory definition of "personnel," which at the time of that appeal allowed a public body to transact business and discuss personnel matters relating to the job performance, character, professional competence, or physical or mental health "of a person." Under this former statutory definition, the lower court in Board of Trustees had to find "personnel" matters as dealing with the hiring, promotion, demotion, dismissal, assignment or resignation of any individual public employee. The Board of Trustees of Institutions of Higher Learning, supported by an amicus curiae brief submitted on behalf of Mississippi Association of Supervisors, asked the Supreme Court to define the word "personnel" to include more than one person and to authorize discussion of matters concerning groups of personnel. The Supreme Court reversed the lower court on its definition of personnel, stating:
This Court agrees that the term "personnel" cannot be interpreted to rob the Open Meetings Act of its meaning. However, to state that "all board discussions with institutional executive officers do not involve 'personnel matters'" is to narrow the verbiage of the Act. The term "personnel" is not defined within the Act. When a word is statutorily undefined, its use is of its common and ordinary acceptance and meaning.... It appears that this Court can only adopt the ordinary definition of the term "personnel," in the absence of a statutory definition.

Any further definition must be addressed by this Court on a case-by-case development guided by our general rules of statutory definition together with the legislative intent of the Act and its declared policy. To the extent that the Chancellor’s comments are inconsistent with this opinion, he is reversed on the definition of personnel. This Court adopts the verbiage of the Act regarding "personnel" matters.

In *Hinds County Board of Supervisors v. Common Cause of Miss.*, *infra*, the Court placed substantial restrictions on the definition of "personnel matters," stating:

We have no difficulty holding that the words "personnel matters" are restricted to matters dealing with employees hired and supervised by the board, not those employees of some other county official, and not other county officials themselves. Nor, would a member of the board of supervisors be classified "personnel".... Moreover, an independent contractor such as an accountant, lawyer or architect is not an employee of the board and would not come under "personnel."

The Court also emphasized that not all "personnel matters" are an appropriate basis for executive session, such as "commendations, need to work overtime upon occasion, shifts in hours of employment, increase in life insurance...."

Finally, the Court made it clear that hiring persons or firms who are independent contractors will almost never be "personnel matters":

In the first place, retaining architects or any other professional firm to do public work is not a personnel matter.... Moreover, it is in the public interest that discussions with architect applicants, or any other applicant proposing to render public services or engage in a public contract, be entirely open.

The definition of "personnel matters" was amended by Laws of 1990, Chap. 541, §1, which added the qualifying words "holding a specific position," so that the statutory definition now reads:

Transaction of business and discussion of personnel matters relating to the job performance, character, professional competence, or physical or mental health of a person holding a specific position.

It thus appears that the Mississippi Legislature has amended the statute to reflect a more restrictive definition of "personnel matters" as was defined by the lower court in *Board of Trustees v. Mississippi Publishers Corp.*, *infra*.

*Substantial Compliance*

The Mississippi Supreme Court recently held in *CEPR v. Board of Sup's of Lowndes County*, 730 So. 2d 1141 (Miss. 1999), that substantial compliance with the requirements of the Open Meetings Act was sufficient. In *CEPR*, the Court declined to invalidate the actions of a zoning commission regarding a zoning ordinance to help keep the Columbus Air Force Base open. Although the zoning commission’s meetings and actions were not in strict adherence with the Act, the Mississippi Court of Appeals upheld the zoning ordinance and found that there was substantial compliance with the Open Meetings Act, which was sufficient in the absence of prejudice resulting from the lack of compliance. Affirming, the Mississippi Supreme Court found no reversible error, citing *Shipman v. North Panola Consolidated School District*, 641 So.2d 1106 (Miss. 1994), for the proposition that failure to comply with the Open Meetings Act did not make actions taken at the meeting in question a nullity.
Summary of Requirements

The following is a summary of the technical requirements for a Board of Supervisors to go into executive session, based on the Court’s holding in *Hinds County Board of Supervisors v. Common Cause of Mississippi*, supra:

1. The meeting must begin as an open meeting.

2. A member must make a motion in open meeting for the meeting to be closed in order to determine whether or not the Board should declare an executive session. The statute does not require a second to this motion, but the vote on this motion must be taken in open meeting. If a majority votes to close the meeting to make a determination on the question of executive session, the meeting is closed for this purpose.

3. No other business during this closed interim shall be considered until the vote has been taken on whether or not to declare an executive session. In order to go into executive session, a three-fifths majority of the Board must vote in favor of it.

4. The President of the Board must then reopen the meeting and announce publicly that the Board is going into executive session and give the reason for doing so, and this reason and the total vote on it must thereafter be recorded on the minutes of the meeting.

5. The vote to go into executive session applies only to that particular meeting on that particular day, and no other matter may be discussed at the executive session than the announced subject.

The Attorney General’s office has helped clarify the procedural requirements of the Open Meetings Law in several opinions issued since *Common Cause* was decided, summarized as follows:

- Where there is no quorum of any governing body at meetings of a Council of Governments, organized to provide a forum for the exchange of ideas between the local municipal entities and the county board of supervisors, and therefore no "official acts may be taken upon a matter over which the public body has supervision", the coming together of individuals who are members of the governing boards of municipalities and of the county, without a quorum being present so as to not constitute a meeting of that public body, is not strictly within the purview of the Public Meetings Act; however, it is strongly advised that the individuals who attend the meeting of the Council of Governments consider the admonitions of the Mississippi Supreme Court in *Common Cause*, supra at 109. AG Opinion No. 1999-0126 to Chamberlin, April 9, 1999.

- A Council of Governments, a voluntary association of local governments and governmental officials formed for the purpose of promoting free and open discussion, "brainstorming" without fear of being quoted in the media, and seeking innovative solutions to public matters is not a "public body" as that term is defined by the Open Meetings Act; therefore, meetings of the Council of Governments would not be subject to the Open Meetings Act. It should be noted, however, that attendance by members of the local governing boards at Council of Governments meetings may fall under the purview of the Open Meetings Act. See *Hinds County v. Common Cause*, 551 So.2d 107 (Miss. 1989), for guidance. Accord, MS AG Op., Cochran (February 24, 1994).

- Based on the by-laws of the Council of Governments, the Council is merely a voluntary association of local governments, does not appear to have any corporate existence, and as such, it does not appear to fall within the purview of the Open Meetings Act. Note, however, that attendance by members of the local governing boards at Council of Governments meetings may fall under the purview of the Act. See *Hinds Co. v. Common Cause*, 551 So. 2d 107 (Miss. 1989) for guidance.

"It should be noted that the legislative policy behind the open meetings act as is clearly set out in Section 25-41-1 is that public business be performed in an open and public manner, and that citizens be advised of the deliberations and decisions that go into the making of public policy. The Council of Governments is therefore
strongly encouraged to conduct its deliberations in such a manner as if it were subject to the open meetings act."


· When an executive session is properly convened by the board of supervisors, the question of who may attend the executive session is a matter entirely within the discretion of the board. Generally, those persons who are not members of the board are automatically excluded from executive session unless they are requested by the board to attend. AG Opinion No. 95-0183 to Ross, April 12, 1995.

· A governing authority holding a public meeting may enter into an executive session to discuss more than one topic at a time if the governing authority complies with the statutory procedures for entering into executive session and spreads upon the minutes the specific reasons for entering into executive session as required by Hinds County Board of Supervisors v. Common Cause, supra. AG Opinion No. 91-0541 to Stewart, August 22, 1991.

· When the governing authorities decide in an executive session to make an offer of settlement of a lawsuit or to authorize the attorney to negotiate within a certain range, the governing authority should state in the minutes only that the attorney is authorized to negotiate with the respective individuals to settle the lawsuit. When the governing authorities finally approve an amount which has been accepted for settlement of the lawsuit, then the governing authorities should state in the minutes the amount which they have approved for settlement of the lawsuit. AG Opinion No. 92-0767 to Donald, November 18, 1992.

· When the governing authorities agree in executive session to make an offer to a prospective employee for a certain salary or to authorize an official of the governing body to negotiate within a certain salary range, the minutes should state that the appropriate official is authorized to negotiate an employment contract with the individual. When the governing authorities reach an agreement with the prospective employee, the governing authorities should state in the minutes the salary approved for the position. AG Opinion No. 92-0767, supra.

· Local emergency management agencies created pursuant to §33-15-17 are public bodies governed by the Open Meetings Act, and must employ a procedure of notification reasonably calculated to ensure that a person could find out when and where a special meeting will be held. In an emergency the local emergency management organization may call a special meeting provided the required notice is posted within one hour and the procedure of notification is reasonably calculated to ensure that a person could find out when and where the special meeting will be held. AG Opinion No. 92-0004 to Maher, February 20, 1992.

· A private citizen may tape record all discussions taking place at an open meeting of any public body, subject to such reasonable rules and regulations which the public body may enact pursuant to §25-41-9. A public body cannot flatly prohibit such a practice. AG Opinion No. 93-0340 to Warren, May 12, 1993.

· Unless the Board finds, consistent with fact, that the presence and use of a camera or several cameras would be disruptive, then the Board cannot prohibit cameras at a public meeting. The determination of the disruptiveness of cameras is one of fact in each case which must be made by each governmental entity. AG Opinion No. 93-0484 to Lee, August 11, 1993. [See generally Woods v. Township of West Whiteland, No. 97-1944 (3d Cir. 1999) (holding that there is no federal constitutional right to videotape public meetings of a planning commission when other effective means of recording proceedings are available. "The First Amendment does not require [the governing body] to accommodate every potential method of recording its proceedings, particularly where the public is granted alternative means of compiling a comprehensive record.")]

· Although there is no statutory requirement that the Sheriff of the county remain or be excused during a closed executive session, it is within the discretion of the Board of Supervisors to determine whether the Sheriff should be present during any executive session. AG Opinion No. 93-0992 to Davis, January 20, 1994.

· While a public body may hold an executive session in cases of extraordinary emergency posing immediate or irreparable harm or damage to persons or property within the jurisdiction of the public body, such a finding would need to be made and declared in open session, and it would be entirely within the discretion of the public body conducting the meeting to determine who is allowed to remain during an executive session. AG Opinion No. 95-0163 to Bradshaw, April 20, 1995.
When an executive session is properly convened by the Board of Supervisors, the question of who may attend the executive session is a matter entirely within the discretion of the Board, and generally those persons who are not members of the Board are automatically excluded from executive session unless they are requested by the Board to attend. AG Opinion No. 95-0183 to Ross, April 12, 1995.

Liberal Construction

It is also helpful to keep in mind that the Open Meetings Act was enacted for the benefit of the public and is to be construed liberally in favor of the public, and the philosophy of the Open Meetings Act, which is to make open to the public "all deliberations, decisions and business of all governmental boards and commissions, unless specifically excluded by statute," has been broadly and liberally adhered to by our Mississippi Supreme Court. As the Court in Hinds County stated:

Every member of every public board and commission in this state should always bear in mind that the spirit of the Act is that a citizen spectator, including any representative of the press, has just as much right to attend the meeting and see and hear everything that is going on as has any member of the board or commission.

Dealing With the Media

As an attorney representing elected officials on the grassroots level of government, it is sometimes difficult to know exactly when to say "no comment," or whether and to what extent a discussion with the media can or should be "off the record."

Perhaps former MAS Information Director Clifton Lusk’s article in the October 1991 The Mississippi Supervisor, entitled "Relationships With the Press Are Nothing More Than Common Sense Approaches," sums it up best:

Most everyone is familiar with the watchdog role the press has in our political system. Categorized as an adversarial role, the press as a watchdog is critical of government--and critical of those who hold power within the government. It is important to note that this role is not one of an enemy of government, rather it is one of critical review.... An open-door policy with the media, and a personal friendship with the people who comprise the media, is almost the only way the watchdog can be tamed. Keep in mind that I’m not saying the watchdog will up and run away, but such an approach can minimize its attack. By approaching the press with a team-player attitude--that is, both of you are on the same team--many miscommunications and misunderstandings can be foregone. It’s all just common sense. Be nice to the reporters and editors, and they’ll be nice to you--most of the time.

Clifton also drove this point home in a June 1991 article in The Mississippi Supervisor, quoting President Carter’s Attorney General Griffin Bell, who learned to approach the press with common sense:

I found that one of the most useful skills to develop was to be able to put myself in the place of a reporter and see how a particular set of facts or statements would look to one who was observing, not participating.

Clearly, there are times when the board members will need to handle sensitive matters which deal with a person’s character or some investigation which for the time being should not be publicly discussed, and on these occasions there are certainly valid and legitimate reasons to decline to comment publicly on such sensitive matters. See, e.g., Maxey v. Smith, infra. We have to recognize, however, that when a newspaper or TV reporter’s inquiry is met with "no comment," just as when a board goes into executive session to discuss a matter, this may very well excite the curiosity of the media who may get more interested in determining what the real scoop might be, and all the rest of the business of the board openly discussed at the meeting may become secondary. In short, there is no hard and fast rule on dealing with the media, but only a flexible rule of common sense, fairness and practicality.

Conflicts of Interest
The matter of conflicts of interest with regard to the office of County Supervisor is principally governed by Section 109 of the Mississippi Constitution of 1890 and the Mississippi Ethics in Government Act, Miss. Code Ann. §§25-4-1 through 25-4-119 (Supp. 1990), as amended, as well as the separation of powers provisions set forth in Sections 1 and 2 of the Mississippi Constitution of 1890.

Section 109

Section 109 of the Mississippi Constitution of 1890 provides:

No public officer or member of the Legislature shall be interested, directly or indirectly, in any contract with the state, or any district, county, city or town thereof, authorized by any law passed or order made by any board of which he may be or may have been a member, during the term for which he shall have been chosen, or within one year after the expiration of such term.

Mississippi Ethics in Government Act

It was pursuant to this constitutional provision that the Mississippi Legislature enacted the Ethics in Government Act, key sections of which are discussed below.

Statements of Economic Interest

All Supervisors are required to file statements of economic interest as provided by Miss. Code Ann. §25-4-25 (Supp. 1990), including among other information the following:

· All other occupations of such person and his spouse during the preceding calendar year and up to the date of filing.

· The positions held by such person or his spouse during the preceding calendar year and up to the date of filing in any business, partnership or corporation organized for profit, listed by name and address.

· The names and addresses of all business or corporations in which such person or his spouse has or had an interest during the preceding calendar year and up to the date of filing which is equal to ten (10%) percent or more of all interests in any such business.

· Types of the gross income sources of such person or his spouse for the preceding calendar year in excess of Twenty-Five Hundred ($2500.00) Dollars, including the name of the general type of business or enterprise and the nature of income, whether salary, fees, dividends, interest, profit, commissions, royalty, rent or other.

· All retainers listed by type, but not amount, received by each person or his spouse during the preceding calendar year and up to the date of filing.

· A listing of all public bodies for which he or his spouse received compensation in excess of One Thousand ($1,000.00) Dollars during the preceding calendar year.

Prohibited Acts, Relationships and Interests

Miss. Code Ann. §25-4-105 (Supp. 1994) describes the actions, activities and business relationships which are prohibited or authorized by the Ethics in Government Act, as follows:

1. No public servant shall use his official position to obtain pecuniary benefit for himself other than that compensation provided for by law, or to obtain pecuniary benefit for any relative or any business with which he is associated.

2. No public servant shall be interested, directly or indirectly, during the term for which he shall have been chosen, or within one (1) year after the expiration of such term, in any contract with the state, or any district, county, city or town thereof, authorized by any law passed or order made by any board of which he may be or may have been a member.
3. No public servant shall:

(a) Be a contractor, subcontractor or vendor with the governmental entity of which he is a member, other than in his contract of employment, or have a material financial interest in any business which is a contractor, subcontractor or vendor with the governmental entity of which he is a member.

(b) Be a purchaser, direct or indirect, at any sale made by him in his official capacity or by the governmental entity of which he is an officer or employee, except in respect of the sale of goods or services when provided as public utilities or offered to the general public on a uniform price schedule.

(c) Be a purchaser, direct or indirect, of any claim, certificate, warrant or other security issued by or to be paid out of the treasury of the governmental entity of which he is an officer or employee.

(d) Perform any service for any compensation during his term of office or employment by which he attempts to influence a decision of the authority of the governmental entity of which he is a member.

(e) Perform any service for any compensation for any person or business after termination of his office or employment in relation to any case, decision, proceeding or application with respect to which he was directly concerned or in which he personally participated during the period of his service or employment.

1. Notwithstanding the provisions of subsection (3) of this section, a public servant or his relative:

(a) May be an officer or stockholder of banks or savings and loan associations or other such financial institutions bidding for bonds, notes or other evidences of debt or for the privilege of keeping as depositories the public funds of a governmental entity thereof or the editor or employee of any newspaper in which legal notices are required to be published in respect to the publication of said legal notices.

(b) May be a contractor or vendor with any authority of the governmental entity other than the authority of the governmental entity of which he is an officer or employee or have a material financial interest in a business which is a contractor or vendor with any authority of the governmental entity other than the authority of the governmental entity of which he is an officer or employee where such contract is let to the lowest and best bidder after competitive bidding and three (3) or more legitimate bids are received or where the goods or services involved are reasonably available from two (2) or fewer commercial sources, provided such transactions comply with the public purchases laws.

(c) May be a subcontractor with any authority of the governmental entity other than the authority of the governmental entity of which he is an officer or employee or have a material financial interest in a business which is a subcontractor with any authority of the governmental entity other than the authority of the governmental entity of which he is an officer or employee where the primary contract is let to the lowest and best bidder after competitive bidding or where such goods or services involved are reasonably available from two (2) or fewer commercial sources, provided such transactions comply with the public purchases laws.

(d) May be a contractor, subcontractor or vendor with any authority of the governmental entity of which he is an officer or employee or have a material financial interest in a business which is a contractor, subcontractor or vendor with any authority of the governmental entity of which he is an
officer or employee where such goods or services involved are reasonably available from two (2) or fewer commercial sources, provided such transactions comply with the public purchases laws.

(e) May purchase securities issued by the governmental entity of which he is an officer or employee if such securities are offered to the general public and are purchased at the same price as such securities are offered to the general public.

(f) May have an interest less than a material financial interest in a business which is a contractor, subcontractor or vendor with any governmental entity.

(g) May contract with the Mississippi Veteran's Home Purchase Board, Mississippi Housing Finance Corporation, or any other state loan program, for the purpose of securing a loan; however, public servants shall not receive favored treatment.

(h) May be employed by or receive compensation from an authority of the governmental entity other than the authority of the governmental entity of which the public servant is an officer or employee.

(i) If a member of the Legislature or other public servant employed on less than a full-time basis, may represent a person or organization for compensation before an authority of the governmental entity other than an authority of the governmental entity of which he is an officer or employee.

1. No person may intentionally use or disclose information gained in the course of or by reason of his official position or employment as a public servant in any way that could result in pecuniary benefit for himself, any relative, or any other person, if the information has not been communicated to the public or is not public information.

2. Any contract made in violation of this section may be declared void by the governing body of the contracting or selling authority of the governmental subdivision or a court of competent jurisdiction and the contractor or subcontractor shall retain or receive only the reasonable value, with no increment for profit or commission, of the property or the services furnished prior to the date of receiving notice that the contract has been voided.

3. Any person violating the provisions of this section shall be punished as provided for in Sections 25-4-109 and 25-4-111.

A number of Supreme Court decisions and Advisory Opinions issued by the Mississippi Ethics Commission have helped clarify the scope and applicability of the Ethics in Government Act.

Meaning of "Contractor" and "Member" of Board

In Moore ex rel Chickasaw County v. McCullough, 633 So. 2d 421 (Miss. 1993), the Mississippi Ethics Commission sued McCullough, the Chancery Clerk of Chickasaw County, to recover interest payments as a pecuniary benefit obtained under a lease-purchase agreement in violation of §25-4-105(3)(a). The facts of the case were that the Board of Supervisors had accepted a bid from a supply company on a lease-purchase basis for a used front-end loader for $70,000.00 at 8 percent interest over a 60 month term, with monthly payments by the county of $1,419.35. On the same day that a lease-purchase agreement was executed by the supply company and the Board of Supervisors, the supply company assigned the lease-purchase agreement to M & H Loans, which was in effect the clerk, Durwood McCullough, and M & H Loans received monthly payments of $1,419.25 from the county under the lease-purchase agreement from October 1988 through March 1990, totally $25,548.30, of which $7,392.84 was interest. The trial court dismissed the action, finding that the assignment of the lease-purchase agreement to McCullough did not amount to a violation of §25-4-105(3)(a), and the Mississippi
Supreme Court upheld the lower court's decision to dismiss the action based on the conclusion that there was no violation of that statute. In its opinion the Court found there was no authority for the view that an assignment of a contract to a public servant's business violates the statute, and that in this instance neither the Chancery Clerk himself nor his business, M & H Loans, could be termed a contractor, subcontractor or vendor with the county. The Court also held that a public servant with purely ministerial duties and with no power to vote on matters considered by the governmental entity with which he is associated is not considered a "member" of that entity as that term is used in §25-4-101, et seq.

In related federal proceedings, United States v. McCullough, 760 F. Supp. 101 (N.D. Miss. 1991), the U. S. District Court concluded that there was no conflict between M & H Loans’ purchase of the lease agreement and §25-4-105, since McCullough, through M & H Loans, was neither a contractor with the county nor did he have a material financial interest in a business which was a contractor with the county. The court also concluded that for the government to attempt to interpret §25-4-105 so as to make a prosecutable offense out of the Chancery Clerk’s acts was overreaching and beyond the intent of the writers of the statute.

In Hinds Community College Dist. v. Muse, 725 So. 2d 207 (Miss. 1998), the Court distinguished Moore v. McCullough, 633 So. 2d 421 (Miss. 1993), holding McCullough was inapplicable to Dr. Muse’s situation as President of Hinds Community College while his wife received pecuniary benefits through use of his official position:

McCullough dealt with a violation of 25-4-105 (3) (a), the personal contracting subsection of the statute. Muse is charged with violating 25-4-105 (1) which prohibits use of his official position to benefit a relative. McCullough was not a member of the Chickasaw County Board of Supervisors under 25-4-105 (3) (a) nor was he married to any of the supervisors. Muse is a "public servant" employed by Hinds Community College as contemplated § by 25-4-105 (1). He used his position to obtain a pecuniary benefit for a relative, his spouse.

Requesting Advisory Opinions from the Mississippi Ethics Commission

Just as opinions on the legality of prospective action or matters may be obtained from the Attorney General’s office, advisory opinions may be requested and obtained by Supervisors and other public officials required to file a Statement of Economic Interest from the Mississippi Ethics Commission as to whether certain prospective actions or matters are ethical or prohibited by §109 or the provisions of the Mississippi Ethics in Government Act.

Good Faith Immunity

Miss. Code Ann. §25-4-17 (Supp. 1990) authorizes the Mississippi Ethics Commission to issue advisory opinions, upon written request by any individual required to file a statement of economic interest, which includes members of the Board of Supervisors. This statute provides for a limited "good faith" immunity:

When such an advisory opinion is issued pursuant to a complete and accurate request, then there shall be no liability, civil or criminal, accruing to or against the individual requesting such opinion who, in good faith, follows the direction of the opinion and makes disclosure in accordance therewith unless a court of competent jurisdiction, after a full hearing, shall judicially declare that such opinion is manifestly wrong and without substantial support. No opinion shall be given or considered if such opinion is given after suit is filed or prosecution begun. All requests for advisory opinions and all advisory opinions issued pursuant to the provisions of this paragraph shall be confidential and the Commission shall not publicly disclose any advisory opinion issued or the fact that an advisory opinion has been requested or issued unless the individual requesting the opinion gives his permission, in writing, to the Commission.

Requests for Advisory Opinions generally seek advice from the Mississippi Ethics Commission as to whether certain proposed action or conduct may be violative of either Section 109 of the Mississippi Constitution of 1890 or the general and specific prohibitions set forth in Miss. Code Ann. §25-4-105 (Supp. 1994), discussed hereinabove.
Limitations

There are also limitations on the usefulness of Advisory Opinions from the Mississippi Ethics Commission, including the statutory restriction that no opinion shall be given or considered if the opinion was given after a suit was filed or prosecution begun. Advisory Opinions, like Official Opinions from the Office of the Attorney General, will likewise not be issued after the fact. Further, as is the case with Attorney General’s Opinions, Advisory Opinions are often based on specific factual situations set forth in an opinion request and may not be applicable to all cases.

Advisory Ethics Opinions

The Mississippi Ethics Commission has issued a number of Advisory Ethics Opinions clarifying and interpreting a number of the statutory provisions cited above.

· Op. No. 88-21-E: Guidelines to distinguish between public office and public employment include:
  (1) The position should be prescribed by law;
  (2) The position should have some specified term;
  (3) The duties and powers of the office should be defined or implied by law and should include authority to exercise some sovereign powers of the state;
  (4) The duties of the office must concern the public; and,
  (5) The holder of the position should have the power and authority to act in his or her own right.

· Op. No. 92-086-E: Whenever Section 109 of the Mississippi Constitution is violated, §25-4-105(2) is also violated.

· Op. No. 99-100-E (October 1, 1999); Constitutional Section 109 and Code Section 25-4-105 (2) would prohibit a county's contracting with the child of one of its supervisors to provide architectural services to the county if the supervisor was directly or indirectly interested in the child’s contract. In order for the supervisor to avoid a violation of Constitutional Section 109 and Section 25-4-105 (2), the supervisor's child must be totally and completely financially independent from the supervisor and the supervisor must have no interest, direct or indirect, in the child's contract with the county. The child would be financially dependent on the supervisor should he live in his household or be receiving other financial assistance from him. The following are some examples that could result in the supervisor having an interest, direct or indirect, in his child’s contract with the county. The child leased or rented property from the supervisor; was a debtor of the supervisor; lived on property owned by the supervisor; or, co-owned a business with the supervisor. The above examples should not be considered as a complete list of circumstances that could result in the supervisor having an interest, direct or indirect, in his child’s contract with the county.

· Op. No. 99-032-E (April 23, 1999): A county supervisor having an interest in a private/misdemeanor probation company providing services to the county’s courts must be balanced against the clear statutorily declared public policy of public trust. A county board of supervisors, and therefore each individual county supervisor, has a trustee's duty to act in the best interest of the county. Therefore, a county supervisor is prohibited by public policy from having any interest in a private/misdemeanor probation company providing alternative sentencing services to the courts funded by the county. This prohibition is based on such a course of conduct raising suspicion among the public and reflecting unfavorably upon the county. Based on the above, the state’s public policy of public service being a public trust requires that a private/misdemeanor probation company owned by a county supervisor's spouse and/or employing a county supervisor be precluded from providing alternative sentencing services to the courts of the county that the county supervisor serves.
· Op. No. 99-087-E (September 3, 1999): The state conflict of interest laws do not as such prohibit a board member of a nonprofit rural water association from serving as a county supervisor. However, a public servant who is a member of a governmental board, such as a county supervisor, must be extremely careful and deliberate when serving as a board member of a nonprofit rural water association located in the jurisdiction he or she serves as a governmental board member. Constitutional Section 109 and Code Section 25-4-105 (2) will absolutely prohibit the board member’s nonprofit rural water association from contracting with or receiving funding, directly or indirectly, from the county during his term of office and for one year thereafter. Also, should the board member’s nonprofit rural water association be contracting with or receiving funds from local governmental entities other than the county, then he must be certain that the county board of supervisors does not authorize any agreement with those other governmental entities, such as through an interlocal agreement, that would promote, enable or enhance any of the nonprofit rural water association’s projects or operations. Such actions would also violate Constitutional Section 109 and Code Section 25-4-105 (2). Also, if the nonprofit rural water association receives public funds from any source, then Code Section 25-4-105 (3)(a) will prohibit the board member’s nonprofit rural water association from being a contractor, subcontractor or vendor with the county during the time that he serves as a county supervisor. Also, Code Section 25-4-015 (3)(a) would be violated if the county had a contract with the nonprofit rural water association that was entered into prior to the board member taking office as a county supervisor. In addition, the board member’s intentional use of any non-public information obtained through the his public position of county supervisor that could result in a pecuniary benefit for the requestor or the nonprofit rural water association would cause him to be in violation of the above cited Constitutional Section 109 and Code Section 25-4-105 (5). Furthermore, as a county supervisor, he could violate Code Section 25-4-105 (1) and/or (3)(d) should he, either individually or through the county, use his official position to cause any action by the county board of supervisors, or any other governmental body over which he has influence, that provides a pecuniary benefit to the rural water association or influences a decision in favor of the rural water association. A county supervisor may avoid violating Code Section 25-4-105 (1) or (3)(d) by totally and completely recusing himself from any matter concerning the nonprofit rural water association that the county supervisor serves as a board member. An abstention is a vote with the majority of the governing entity's board and therefore does not qualify as a recusal. A total and complete recusal requires that the public servant not only avoid debating, discussing or taking action on the subject matter during the official meeting, but also avoid discussing the subject matter with other board members, staff or any other person prior to and after the official meeting. This includes casual comments, as well as detailed discussions, made in person, by telephone or by any other means. Also to properly recuse oneself from a matter, the public servant must leave the room or area where such discussions, considerations and/or actions take place. The minutes of the governing entity's board should state the public servant left the meeting by showing him or her absent for that matter. An abstention or a recusal will not prevent a violation of Constitutional Section 109 or Code Section 25-4-105 (2) or (3)(a). Even without a board member's vote, the authorization by the member's board nonetheless results in a contract in which the board member has a prohibited interest.

· Op. No. 99-083-E (September 3, 1999): It is not as such a violation of the state conflict of interest laws for an individual employed by the Mississippi Department of Education as a school attendance officer to serve as a county supervisor or a member of a county school board of trustees. The individual should totally and completely recuse himself from any matter coming before the board of supervisors or the school district board of trustees concerning the state agency. Moreover, a circumstance can exist that would cause a violation of Constitutional Section 109 and Code Section 25-4-105 (2), when a state employee serves as a county supervisor or as a member of a school district board of trustees, namely, the existence of contracts between the state agency and the local governmental entity and the public servant having an inherent interest and/or a private pecuniary benefit in such contracts. Constitutional Section 109 and Code Section 25-4-105 (2) would prohibit a county supervisor or a school board member from directly or indirectly having an inherent interest and/or receiving a personal or pecuniary benefit as a result of any contracts existing between the county and the state agency or the school district and the state agency. Any school attendance officer considering seeking a position as a board member of a local governmental entity should be cautioned that a recusal or an abstention will not prevent a violation of Constitutional Section 109 and Code Section 25-4-105 (2). Even without a board member's vote, the authorization by the member's board nonetheless results in a contract in which the board member has a prohibited interest.

· Op. No. 99-075-E (August 6, 1999): Constitutional Section 109 and Code Section 25-4-105 (2) will prohibit the county supervisor's business from contracting with the city when the city is receiving the discretionary gaming
monies from the county board of supervisors and when the county and the city have numerous interlocal agreements currently in effect between them.

Op. No. 99-061-E (June 4, 1999): Constitutional Section 109 and Code Section 25-4-105 (2) prohibit a local governmental entity's board, including a county board of supervisors or a municipal board, from authorizing funding to a nonprofit corporation when a member of the local governmental entity's board, including a county supervisor or a municipal board member, is also a member of the board of director's of the nonprofit corporation.

Op. No. 99-058-E (June 4, 1999): Constitutional Section 109 and Code Section 25-4-105 (2) will absolutely prohibit a county soil and water conservation commission employee/spouse from remaining in her current employment position with the commission if her spouse is elected to the county board of supervisors. The violation will occur once the commission employee/spouse is paid with funds approved in a budget authorized by the county board of supervisors of which her spouse is a member or once the new county board of supervisors of which her spouse is a member reauthorizes the current contract with the USDA-NRCS.

Op. No. 98-022-E (April 3, 1998): The state conflict of interest laws do not as such prohibit a county supervisor from serving as a member of a nonprofit corporation or from having an interest in a for-profit corporation that is involved in receiving federal or state loans or grants to fund housing projects. This is also true if the county supervisor is the executive director of a nonprofit corporation receiving federal or state grants to fund housing projects. However, a public servant who is a member of a governing board, such as a county supervisor, must be extremely careful and deliberate when involved with a corporation receiving federal or state funding to provide for housing projects within the governing board's geographical jurisdiction, such as a county. Constitutional Section 109 and Code Section 25-4-105 (2), both cited above, will prohibit the requestor's nonprofit corporation contracting with or receiving funding, directly or indirectly, from the county during the requestor's term of office and for one year thereafter. This includes the county acting as a conduit by obtaining a grant or loan from the state government or the federal government in which the nonprofit corporation will have contracts or receive funding related thereto. Also, should the requestor's nonprofit corporation be contracting with or receiving funds from local governmental entities other than the county, then the requestor must be certain that the county board of supervisors does not authorize any agreement with those other governmental entities, such as through an interlocal agreement, that would promote, enable or enhance any of the nonprofit corporation's housing projects. Such actions would also violate Constitutional Section 109 and Code Section 25-4-105 (2). Code Section 25-4-105 (3)(a) will prohibit the requestor's nonprofit corporation from being a subcontractor or vendor with the county during the time that the requestor serves as a county supervisor. This includes the nonprofit corporation contracting with the county to provide services, such as program administration, related to any grant or loan in which the county is involved. Also, Code Section 25-4-015 (3)(a) would be violated if the county had a contract with the nonprofit corporation that was entered into prior to the requestor taking office as a county supervisor. Furthermore, the requestor, as a county supervisor, could violate Code Section 25-4-105 (1) and/or (3)(d), cited above, should the requestor, either individually or through the county, use his official position to cause any action by the county board of supervisors, or any other governmental body over which he has influence, that sanctions or supports the construction of any housing project in which his nonprofit corporation is involved.

Op. No. 99-033-E (March 12, 1999): The state conflict of interest laws do not as such prohibit a county supervisor from serving as a member of a nonprofit corporation or from having an interest in a for-profit corporation that is involved in receiving federal or state loans or grants to fund housing projects. This is also true if the county supervisor is the executive director of a nonprofit corporation receiving federal or state loans or grants to fund housing projects. However, a public servant who is a member of a governing board, such as a county supervisor, must be extremely careful and deliberate when involved with a corporation receiving federal or state funding to provide for housing projects within the governing board's geographical jurisdiction, such as a county. Constitutional Section 109 and Code Section 25-4-105 (2) will absolutely prohibit the requestor's nonprofit corporation from contracting with or receiving funding, directly or indirectly, from the county during the requestor's term of office and for one year thereafter. This includes the county acting as a conduit by obtaining a grant or loan from the state government or the federal government in which the nonprofit corporation will have
contracts or receiving funds from local governmental entities other than the county, then the requestor must be certain that the county board of supervisors does not authorize any agreement with those other governmental entities, such as through an interlocal agreement, that would promote, enable or enhance any of the nonprofit corporation's housing projects. Such actions would also violate Constitutional Section 109 and Code Section 25-4-105 (2). Code Section 25-4-105 (3)(a) will prohibit the requestor's nonprofit corporation from being a contractor, subcontractor or vendor with the county during the time that the requestor serves as a county supervisor. This includes the nonprofit corporation contracting with the county to provide services, such as program administration, related to any grant or loan in which the county is involved. Also, Code Section 25-4-015 (3)(a) would be violated if the county had a contract with the nonprofit corporation that was entered into prior to the requestor taking office as a county supervisor. Furthermore, the requestor, as a county supervisor, could violate Code Section 25-4-105 (1) and/or (3)(d), should the requestor, either individually or through the county, use his official position to cause any action by the county board of supervisors, or any other governmental body over which he has influence, that sanctions or supports the construction of any housing project in which his nonprofit corporation is involved. In addition, the requestor's intentional use of any non-public information obtained through the requestor's public position of county supervisor that could result in a pecuniary benefit for the requestor or his nonprofit corporation would cause the requestor to be in violation of the above cited Code Section 25-4-105 (5). A county supervisor may avoid violating Code Section 25-4-105 (1) or (3)(d) by totally and completely recusing himself from any matter concerning his nonprofit corporation with which the county supervisor is involved. An abstention is a vote with the majority of the governing entity's board and therefore does not qualify as a recusal. A total and complete recusal requires that the public servant not only avoid debating, discussing or taking action on the subject matter during the official meeting, but also avoid discussing the subject matter with other board members, staff or any other person prior to and after the official meeting. This includes casual comments, as well as detailed discussions, made in person, by telephone or by any other means. Also to properly recuse oneself from a matter, the public servant must leave the room or area where such discussions, considerations and/or actions take place. The minutes of the governing entity's board should state the public servant left the meeting by showing him or her absent for that matter. The requestor is advised that an abstention or a recusal will not prevent a violation of Constitutional Section 109 or Code Section 25-4-105 (2) or (3)(a). Even without a board member's vote, the authorization by the member's board nonetheless results in a contract in which the board member has a prohibited interest. In addition, the requestor's intentional use of any non-public information obtained through the requestor's public position of county supervisor that could result in a pecuniary benefit for the requestor or his nonprofit corporation would cause the requestor to be in violation of the above cited Code Section 25-4-105 (5). A county supervisor may avoid violating Code Section 25-4-105 (1) or (3)(d) by totally and completely recusing himself from any matter concerning his nonprofit corporation with which the county supervisor is involved.

·Op. No. 99-013-E (February 5, 1999): It is not as such a violation of the state conflict of interest laws for the spouse of the sheriff to be an employee of the board of supervisors of the same county the sheriff is elected to serve. The reason being that the sheriff has no legal authority in decisions concerning the board of supervisors' employees. Notwithstanding the above, the requestor is cautioned to advise the sheriff to remain keenly aware of the above cited Code Section 25-4-105 (1) and Code Section 25-4-101. Code Section 25-4-105 (1) prohibits any public servant, including a sheriff, from using his official position to obtain a pecuniary benefit for his spouse. Therefore, the sheriff should completely avoid any involvement in the board of supervisors' decisions concerning his fiancé once they are married. This is especially true regarding her compensation or employment benefits. The issue presented by the requestor also must be viewed as it relates to Code Section 25-4-101, set forth above. This code section sets the tone for the conflict of interest laws as the Legislature's "Declaration of Public Policy." This public policy can be summarized as any circumstance having the potential of creating suspicion among the public and reflecting unfavorably upon the state or local government should be closely reviewed by public servants with the intent to reduce or eliminate any suspicion on the part of the public which detracts from the public's trust in state or local government. The sheriff's obligation as a public servant to fully comply with the public policy set forth in Code Section 25-4-101 is another reason why he must completely avoid any involvement in the board of supervisors' decisions concerning his fiancé once they are married. The question of whether an employee of the county board of supervisors may be assigned duties that include training E-911 employees and performing occasional duties in the county sheriff's department is not addressed in this advisory opinion. That question
involves legal interpretations of state laws outside the ethics laws that only the State Attorney General has jurisdiction to interpret by official opinion.

· Op. No. 99-011-E (February 5, 1999): Constitutional Section 109 and Code Section 25-4-105 (2) will absolutely prohibit the requestor, an Respiratory Care Supervisor at a Regional Medical Center, from continuing his employment, or from contracting in any other way, with the county-owned hospital if he is elected to the county board of supervisors after the county board of supervisors of which he is a member approves its first budget submitted by the county-owned hospital. The appropriation or approval of funding or expenditure authority for a governmental entity by another governmental board is part of the contract authorization process of that governmental entity's contracts. Clearly, a newly elected county supervisor remaining employed with the county-owned hospital during the remaining short period of his current budget year employment with the county-owned hospital has the potential of creating suspicion among the public and reflecting unfavorably upon the county and the county-owned hospital. Therefore, such simultaneous service is contrary to the state's public policy set forth in Code Section 25-4-101 and should be avoided by a newly elected county supervisor.

· Op. No. 99-008-E (February 5, 1999): It is not as such a violation of the conflict of interest laws for a city public works superintendent to simultaneously serve as a county supervisor when the employing city is located within the county he will serve. The finding is based on the city and the county being separate governmental entities as defined in the above cited Code Section 25-4-103 (g)(h). Notwithstanding the above, a city public works superintendent choosing to serve as a county supervisor must remain keenly aware of the above cited Code Section 25-4-105 (1) and Code Section 25-4-101.

· Op. No. 98-060-E (June 26, 1998): It is not as such a violation of the state conflict of interest laws for a city council member to be employed by the county as a bookkeeper/comptroller. Notwithstanding the above, a municipal council member who is employed by the county in which his city is located must remain keenly aware of the above cited Code Section 25-4-105 (1) and Code Section 25-4-101.

· Op. No. 98-054-E (June 26, 1998): A community hospital's senior vice president would violate Code Section 25-4-105 (1) should he initiate contracts on behalf of the community hospital with the electrical contracting company owned by his son-in-law's parents and employing the son-in-law. The electrical contracting company's contracts benefit all its employees, including the son-in-law. A pecuniary benefit to one spouse, the senior vice president's son-in-law, also accrues to the other spouse, the senior vice president's daughter. Whether the senior vice president used his official position should the community hospital award a contract to his son-in-law's parents' electrical contracting company after a legitimate competitive bid process in which the parents' company was determined to be the lowest and best bid would be controlled by the facts and circumstances surrounding each bid process. The subjective leeway and discretionary authority given the senior vice president in the bidding process will be controlling in determining if a violation of Code Section 25-4-105 (1) occurs. The extent of the senior vice president's control over which bidders are qualified and which bids comply with the community hospital's specifications will aid in determining the subjective leeway and discretionary authority given him. Certainly, the senior vice president making the final decision to award a contract to his son-in-law's parents' electrical contracting company would violate Code Section 25-4-105 (1), unless it could be shown that the decision was completely ministerial in nature. In most instances, the state public purchasing laws provide sufficient discretion to public entities and public servants in their purchasing decision, although not the purchasing process, that such decisions are not ministerial in nature. The senior vice president may avoid a violation of Code Section 25-4-105 (1) by the community hospital establishing a policy whereby the senior vice president is totally and completely removed from the purchasing decisions related to the community hospital contracting for outside electrical services.

Such a policy would not only require that the senior vice president be removed from the formal process but that he also be prohibited from directly or indirectly discussing the bidding and purchasing process with board members, staff or any other person prior to and after the official meeting. This includes casual comments, as well as detailed discussions, made in person, by
telephone or by any other means. Also, the senior vice president may not be present at the meeting where the lowest and best bidder is chosen. The requestor is cautioned to advise the senior vice president to remain keenly aware of the above cited Code Section 25-4-105 (5).

·Op. No. 99-003-E (February 5, 1999): The state conflict of interest laws do not as such prohibit a county constable and the county constable's spouse, or any law enforcement officer and law enforcement officer's spouse, from owning and operating a bail bonding company. Notwithstanding the above, the requestor is cautioned to advise his client that Code Section 25-4-105 (3)(a) does prohibit a county constable and the county constable's spouse through a bail bonding company owned and operated by the county constable and/or the county constable's spouse from writing bail bonds for the release of defendants in the custody of the county that the constable serves.

·Op. No. 98-138-E (December 4, 1998): It is not as such a violation of the conflict of interest laws for a public school principal to simultaneously serve as a county supervisor when the employing school district is located within the county he will serve. Since the Legislature's passage of the Uniform School Law of 1986, there is no absolute prohibition to such dual service as the county board of supervisors' tax levying authority for school purposes is now a mandatory action and not a discretionary one. Notwithstanding the above, a public school principal choosing to serve as a county supervisor must remain keenly aware of the above cited Code Section 25-4-105 (1) and Code Section 25-4-101.

·Op. No. 98-128-E (December 4, 1998): It is not as such a violation of the state conflict of interest laws for a supervisor's business to contract with a county other than the county the supervisor is elected to serve. In addition, the Mississippi Association of Supervisors is not a governmental entity as defined by the above cited Code Section 25-4-103 (g)(i)(v). Although public servants due to their elections as county supervisors, the officers of the Mississippi Association of Supervisors also are not public servants due to their positions with the Association as defined in the above cited Code Section 25-4-103 (p)(i)(ii)(iii). Therefore based on the above, it is not a violation of the state conflict of interest laws for a county supervisor who is also an officer of the Mississippi Association of Supervisors to own or have an interest in a private business that provides goods or services to member counties of the Association other than the county of which the officer is a supervisor. The requestor is advised to remain keenly aware of the above cited Code Section 25-4-105 (1). Code Section 25-4-105 (1) prohibits public servants from using their official positions to obtain a pecuniary benefit for themselves, a relative or a business with which they are associated.

·Op. No. 99-002-E (February 5, 1999): The state conflict of interest laws do not as such prohibit an individual's simultaneous service as an employee of a state university and as a county supervisor. Notwithstanding the above, the requestor should remain keenly aware of the above cited Code Section 25-4-105 (1) and (5).

·Op. No. 98-124-E (November 6, 1998): As set forth in Advisory Opinion No. 96-151-E, a county officer or employee may simultaneously serve as an employee of the county E-911 commission without violating the above cited Code Section 25-4-105 (3)(a). In like manner, a county E-911 commissioner may simultaneously serve as a county employee without violating Code Section 25-4-105 (3)(a). There is no violation because a county E-911 commission is a separate authority of the county from the county board of supervisors for purposes of the conflict of interest laws. Since the E-911 commission is a separate authority, the exception set forth in Code Section 25-4-105 (4)(h), cited above, is applicable. Based on the above, the E-911 commissioner may also serve as a receiving clerk or assistant receiving clerk for the county.

·Op. No. 98-119-E (November 6, 1998): It is not as such a violation of the state conflict of interest laws for a municipal school board member to serve simultaneously for the county in which the school district is located as county tax collector. Notwithstanding the above, the requestor is cautioned to advise the school board member to remain keenly aware of the above cited Code Section 25-4-105 (1) and Code Section 25-4-101.

·Op. No. 98-116-E (November 6, 1998): Code Section 25-4-105 (3)(a) prohibits the deputy circuit clerk from contracting with the county, through the county election commission, to print its election ballots, unless one of the exceptions set forth in the above cited Code Section 25-4-105 (4)(b)(d) applies in this instance. Code Section
25-4-105 (4)(b) allows a public servant to be a contractor or vendor with any authority of his or her governmental entity other than the governmental entity that is employing the public servant or to have a material financial interest in a business which is a contractor or vendor with any authority of his or her governmental entity other than the authority of the governmental entity employing the public servant where such contract is let to the lowest and best bidder after competitive bidding and three (3) or more legitimate bids are received or where the goods, services or property involved are reasonably available from two (2) or fewer commercial sources, provided such transactions comply with the public purchases laws. The exception in Code Section 25-4-105 (4)(b) would apply if the circuit clerk's office is a separate authority of the county government from the county election commission for purposes of the state conflict of interest laws. Code Section 25-4-105 (4)(d) allows a public servant to be a contractor, subcontractor or vendor with the authority of the governmental entity that is employing the public servant or to have a material financial interest in a business which is a contractor, subcontractor or vendor with the authority of the governmental entity that is employing the public servant where the goods or services involved are reasonably available from two (2) or fewer commercial sources, provided such transactions comply with the public purchases laws. The question of which exception applies is obviously dependent on whether a deputy circuit clerk with election duties and responsibilities is within the same authority of the county government as the county election commission. This question has already been answered in Advisory Opinion No. 96-035-E. Advisory Opinion No. 96-035-E, pg. 4, states:

As evidenced in attached Advisory Opinion No. 95-136-E, the Commission has consistently held that the county election commission is a separate authority of the county government from the board of supervisors and the other county-wide elected offices. Thereby allowing an employee of another authority of the county government to serve as a county election commissioner [or as in this instance contract with the county election commission]. Notwithstanding the above, the circuit clerk's office's election duties and the county election commission's election duties are so intertwined that it is beyond reason to conclude that they are in separate authorities of the county government in regard to carrying out elections.

Therefore based on the above, the deputy circuit court clerk and/or the printing business in which the deputy circuit clerk has a material financial interest is prohibited by Code Section 25-4-105 (3)(a) from contracting with the county, through the county election commission, to print the county's election ballots.

·Op. No. 98-113-E (October 9, 1998): It would not as such be a violation of the state conflict of interest laws for the individual who owns one-third (1/3) of the insurance group to serve as a member of the county board of supervisors when another individual who also has a one-third (1/3) interest in the insurance group contracts to provide insurance to the county through his insurance company which is totally separate and apart from the insurance group. Constitutional Section 109 and Code Section 25-4-105 (2) and (3)(a) would prohibit the insurance group from receiving any benefits or from having any interests, direct or indirect, in the county's contract with the other individual's insurance company should the individual in question be elected to the county board of supervisors. Notwithstanding the above, the requestor is cautioned to advise the individual in question to remain keenly aware of Code Section 25-4-105 (1) should he be elected to the county board of supervisors.

·Op. No. 99-018-E (February 5, 1999): A county supervisor may be employed by the community college his or her county funds through a tax levy only if the current funding of the particular community college by the county board of supervisors is in a mandatory state by statute. Constitutional Section 109 and Code Section 25-4-105 (2) would prohibit the requestor if elected to the county board of supervisors from continuing his employment with the community college if the county board of supervisors provided any discretionary funding to the community college during his term or one year thereafter. An order of a public official's board that appropriates funds that directly or indirectly benefit the public official through a governmental contract is part of the contract authorization process. Even though the requestor states that 89 percent of his salary is reimbursed by the state, he still has a direct interest by way of his remaining percentage of salary in the community colleges other funding sources including that provided by the county. Also, the requestor has an indirect interest in all funding sources benefitting the community college including that provided by the county as an employee of the community college. Notwithstanding the above, the requestor must consider the public's overall interest that can be expected to be adversely affected by other conflict of interest laws, even if the county were to be providing the community...
college only the mandatory amount of funding at such time as the requestor might take office. Specifically, Code Section 25-4-105 (1) and Code Section 25-4-101 must be considered by the requestor. Code Section 254-105 (1) prohibits a public servant from using his official position to provide a pecuniary benefit to himself. Therefore if elected to the board of supervisors, the requestor would need to totally and completely recuse himself from any matter concerning the community college to be certain to not violate Code Section 25-4-105 (1).

·Op. No. 98-111-E (October 9, 1998): As to whether a legislator may do business with a county which is located in the legislator's district, a county is a governmental entity as defined in Code Section 25-4-103 (q)(i), thus it is necessary to determine if any legislative funding going to the county would in fact fund the legislator's contracts with the county. If such legislative funding is being used by the county to fund its contracts with the legislator, then Constitutional Section 109 and Code Section 25-4-105(2) would be violated. Certainly, counties on occasion and for specific purposes receive funding directly and indirectly from the Legislature. However, this funding is generally for specific purposes related to grants and loans for promotion of government, industrial, business and social programs. Such funding is not an appropriation for the general operation of the county. A county's general fund and/or road and bridge fund generally are used by the county to purchase its commodities and contractual services for its basis operations. Assuming the county's contracts with the legislator are related to the county's basis operations, then such contracts would normally be funded from the county's general fund and/or road and bridge fund. Both these funds are primarily supported by local ad valorem taxes and certain fuel taxes that are mandated by state statutes. Therefore after considering the above, Constitutional Section 109 and Code Section 25-4-105 (2) do not prohibit a county from contracting with a legislator when the county is funding its contracts with the legislator with monies from its general fund and/or road and bridge fund. However, should the Legislature provide direct or indirect appropriations, during the requestor's term or one year thereafter, to the county that could be used for the county's contracts with the legislator, then the legislator's contracts with the county would be in violation of Constitutional Section 109 and Code Section 25-4-105. The above cited Code Section 25-4-105 (3)(a) would not be violated if the legislator contracts with the county as a county is a separate governmental entity from the State for purposes of the state conflict of interest laws. Notwithstanding the above, the requestor is advised to remain keenly aware of the above cited Code Section 25-4-105 (1).

·Op. No. 98-110-E (October 9, 1998): Constitutional Section 109 and Code Section 25-4-105 (2) would not be violated should the county board of supervisors appoint one of its member's daughters to the board of commissioners of the local body corporate and politic. Even if the supervisor had an interest in his daughter's appointment, the position on the board of commissioners is not held by contract. One of the necessary elements in a violation of Constitutional Section 109 and Code Section 25-4-105 (2) is the existence of a governmental contract. Code Section 25-4-105 (1) prohibits a supervisor from using his official position to obtain a pecuniary benefit for the supervisor's relatives. A relative as defined in Code Section 25-4-103 (q), cited above, includes a daughter. Therefore, Code Section 25-4-105 (1) would prohibit the supervisor from making the motion and voting in the affirmative to appoint his daughter to the board of commissioners of the local body corporate and politic. There would be a violation of Code Section 25-4-105 (1) even if the supervisor's daughter is married and does not live with the supervisor. A violation of Code Section 25-4-105 (1) does require that the supervisor's relative receive a pecuniary benefit. Therefore, should the daughter not receive any remuneration, including no per diem or travel expenses, then a necessary element of violating Code Section 25-4-105 (1) would be missing. The requestor is advised to seek an official Attorney General's opinion on whether a member of the board of commissioners of the local body corporate and politic may serve without the legal authorized remuneration. A public servant, including a supervisor, may avoid a violation of Code Section 25-4-105 (1) by totally and completely recusing himself from the matter causing the conflict of interest.

·Op. No. 98-107-E (October 9, 1998): Constitutional Section 109 and Code Section 25-4-105 (2) would prohibit the supervisor's plumbing company from installing the connection lines for the homeowners if the waste water district's ability to construct the new sewer line was in effect authorized in part by a discretionary action of the board of supervisors. This is especially of concern regarding the board of supervisors' eminent domain authority and special tax levy authority. However, Constitutional Section 109 and Code Section 25-4-105 (2) would not prohibit the supervisor's plumbing company from installing the connection lines for the homeowners if the waste water district's ability to construct the new sewer line was in no way authorized by a discretionary action of the board of supervisors. Notwithstanding the above, the requestor is cautioned to advise the supervisor that Code
Section 25-4-105 (1) prohibits him from using his official position to obtain the plumbing contracts with the homeowners.

- Op. No. 98-101-E (October 9, 1998): Constitutional Section 109 and Code Section 25-4-105 (2) prohibit the legislator from having a consultant contract with the county human resource agency for the county Head Start program when such program is partially funded by the Department of Human Services, TANF Child Care program, with funds that are appropriated by the Legislature during the legislator's term or for one year thereafter.

- Op. No. 98-093-E (September 4, 1998): Where a county port commissioner's ownership of more than 50% of the stock in the company results in the county port commissioner having a material financial interest in the company as defined in the above cited Code Section 25-4-103 (k), the county board of supervisors and the county port commission are within the same authority of the county governmental entity and the exception set forth in the above cited Code Section 25-4-105 (4)(d)(i) is the only available exception in this instance and it is not applicable due to there having been 10 additional bidders for the subject contract; and the county board of supervisors' contract with the company in which the county port commissioner has a material financial interest violated Code Section 25-4-105 (3)(a), the contract being in violation of Code Section 25-4-105 (3)(a) allows the county board of supervisors to void the contract and to pay the company only the reasonable value, with no increment for profit or commission, for its services rendered under the contract as authorized in the above cited Code Section 25-4-105 (6).

- Op. No. 98-073-E (August 7, 1998): Constitutional Section 109 and Code Section 25-4-105(2) absolutely prohibit a board member of a governmental entity from having an interest, direct or indirect, in any contract authorized by the board member's governmental body during the board member's term or one year thereafter. Therefore should the requestor be elected to the school board, Constitutional Section 109 and Code Section 25-4-105(2) would absolutely prohibit the requestor's sons' company from entering into contracts with the school district for as long as the requestor remains employed by the company.

- Op. No. 98-071-E (August 7, 1998): Constitutional Section 109 and Code Section 25-4-105 (2) would prohibit a county park commission member from accepting subcontractor employment with the county construction project if the county park commission was part of the authorization process for the county construction contract approved by the county board of supervisors.

- Op. No. 98-070-E (August 7, 1998): Constitutional Section 109 and Code Section 25-4-105 (2) will prohibit the county from paying a supervisor/landowner a value-per-acre amount to acquire his property for right-of-way and to rebuild his fencing destroyed in the construction unless ordered to do so by a court of competent jurisdiction in an eminent domain proceeding. An order by a court of competent jurisdiction in an eminent domain proceeding results in the vesting of title in the public entity, in this instance the county, and the compensation to the landowner/public servant, in this instance the supervisor, being nondiscretionary on the part of the public entity and the landowner/public servant. The compliance of both the supervisor and the county are therefore mandatory acts and thus not violations of the conflict of interest laws. The supervisor should fully and completely recuse himself from all deliberations and voting concerning this matter in order to avoid a violation of the above cited Code Section 25-4-105 (1).

- Op. No. 98-068-E (June 26, 1998): It is not as such a violation of the conflict of interest laws for a public school teacher to simultaneously serve as a county supervisor. Since the Legislature's passage of the Uniform School Law of 1986, there is no absolute prohibition to such dual service as the county board of supervisors' tax levying authority for school purposes is now a mandatory action and not a discretionary one. Notwithstanding the above, a public school teacher choosing to serve as a county supervisor must remain keenly aware of the above cited Code Section 25-4-105 (1) and Code Section 25-4-101.

- Op. No. 98-044-E (May 15, 1998): With respect to whether a lawn and tree service owned by a county election commissioner may contract with the county board of supervisors, the authorization of the lawn service contract is made by the county board of supervisors and not the county election commission. Therefore, the prohibitions set forth in Constitutional Section 109 and Code Section 25-4-105 (2) do not apply in this instance. Notwithstanding the above, there are other conflict of interest laws that are applicable to this situation. Code Section 25-4-105 (3)(a) prohibits a public servant from having a "material financial interest" in a business that is a contractor,
subcontractor or vendor with the public servant's governmental entity. Code Section 25-4-105 (4)(b), cited above, also provides certain exceptions to the prohibition set forth in Code Section 25-4-105 (3)(a). These exceptions apply when the public servant is a member, officer, employee or agent of one authority of the governmental entity and the business that the public servant has a "material financial interest" in is contracting with another authority of the governmental entity. The exceptions are "where such contract is let to the lowest and best bidder after competitive bidding and three (3) or more legitimate bids are received or where the goods, services or property involved are reasonably available from two (2) or fewer commercial sources, provided such transactions comply with the public purchases laws."

· Op. No. 98-039-E (May 15, 1998): Code Section 25-4-105 (3)(a) prohibits a company employing the spouse of one of the county's employees from being a contractor, subcontractor or vendor with the county if the county employee's spouse has a material financial interest in the company. If the county employee's spouse is solely an employee of the company then her aggregate annual net income must be Five Thousand Dollars ($5,000.00) for her to have a material financial interest in the company. The county employee has a material financial interest in his spouse's company through his spouse's compensation. Code Section 25-4-103 (k)(iv) provides an exception to a violation of Code Section 25-4-105 (3)(a): a public servant, in this instance the county employee/husband, does not have a material financial interest in the income of his or her spouse if the public servant exercises no control, direct or indirect, over the contract between the public servant's spouse's company and the public servant's governmental entity, in this instance the county.

The facts presented by the requestor are not sufficient to determine if the county employee/husband's employment position with the county is one where he would exercise no control, direct or indirect, over the county's contract with the company employing his spouse. However, the attached advisory opinion provides an example of a situation involving the position of county purchase clerk where the Commission concluded that the individual serving as the county purchase clerk did exercise control over her spouse's company's contract with the county and therefore did not come under the exception set forth in Code Section 25-4-103 (k)(iv). The requestor is also cautioned to advise the county employee to remain keenly aware of the above cited Code Section 25-4-105 (1) and Code Section 25-4-101.

· Op. No. 98-038-E (May 15, 1998): It is not as such a violation of the state conflict of interest laws for a governmental entity, in this instance a county, to simultaneously employ both spouses. In this instance, it appears the employment of both spouses rests with the board of supervisors and/or the county road manager. Neither spouse is in a position to authorize the other's employment with the county. Code Section 25-4-105 (1) prohibits a public servant from using his or her position to provide a pecuniary benefit for a relative. A relative, as defined in the above cited Code Section 25-4-103 (q), does include a spouse. Therefore, either spouse would be in violation of the Code Section 25-4-105 (1) should either one be placed in an employment position with the county where he or she authorizes the other's employment, compensation and/or other benefits.

· Op. No. 98-066-E (June 26, 1998): It is not a violation of the state conflict of interest laws for an industrial park, jointly owned by a county and a city, to sell property to the brother of the county's chancery clerk/county administrator or to sell property to a corporation owned, in whole or in part, by the brother of the county's chancery clerk/county administrator. Should the chancery clerk/county administrator have a personal or pecuniary interest in the brother's business for which the property is being purchased or the brother's corporation by which the property is being purchased then the chancery clerk/county administrator could violate the above cited Code Section 25-4-105 (1) and (3)(a). Also, the requestor is advised to remain keenly aware of the above cited Code Section 25-4-105 (5).

· Op. No. 98-028-E(April 3, 1998): A public board member must recuse himself from actions by his governmental board that provide a pecuniary benefit to a business with which he is associated as in this instance where the supervisor derives more than $1,000.00 in annual income from the corporation of which he is an employee, such as the allowance of an ad valorem tax exemption, in order to avoid violating Code Section 25-4-105 (1). Clearly, a county board of supervisors providing assistance to an industry partially owned by a member of the county board of supervisors or as in this instance a corporation employing the supervisor has the potential of creating...
suspicion among the public and reflecting unfavorably upon the county. Therefore, such actions by the county board of supervisors should be avoided.

- Op. No. 97-142-E (November 7, 1997): Constitutional Section 109 and Code Section 25-4-105 (2) absolutely prohibit the county board of supervisors from authorizing a contract that provides assistance, directly or indirectly, to the industry when one of the supervisors has an ownership interest in the industry. This prohibition applies during the supervisor's term and for one year thereafter. Therefore, the county board of supervisors may not either directly or indirectly lease facilities or property to the industry; provide funding either directly or indirectly through grants or loans to the industry; or contract in any other way with the industry that is partially owned by the supervisor. Also, Code Section 25-4-105 (3)(a) prohibits the industry from being a contractor, subcontractor or vendor with the county when a member of the county board of supervisors has a material financial interest in the industry. A material financial interest is defined in the above cited Code Section 25-4-103 (k)(i)(ii). Notwithstanding the above, the requestor is cautioned to advise the supervisor to remain keenly aware of Code Section 25-4-105 (1) should the county provide assistance to the industry in a way that does not result in an authorization of a contract. An example of such assistance would be the allowance of an ad valorem tax exemption as discussed in the attached Advisory Opinion No. 93-053-E.

- Op. No. 98-025-E (April 3, 1998): As set forth in the attached Advisory Opinion No. 96-155-E, the employment of a county supervisor's child by the county, or as in this instance by an officer of the county, may certainly result in a violation of the state conflict of interest laws. The question of whether the county supervisor's child is financially dependent or financially independent from the county supervisor is critical in determining if there is an absolute conflict of interest or if there is not an absolute conflict of interest what the county supervisor must do to avoid a conflict of interest from occurring. The question of whether a county supervisor's child is financially dependent upon the county supervisor requires an evaluation of all the facts and circumstances. However, the following are some examples that would result in a county supervisor's child being financially dependent. The child would be financially dependent on the county supervisor if he or she leased or rented property from the county supervisor; the child was a debtor of the county supervisor; the child lived on property owned by the county supervisor or in his household; or, the child and the county supervisor co-owned any business or businesses. The above examples should not be considered as a complete list of circumstances that could result in the child being financially dependent on the county supervisor. Constitutional Section 109 and Code Section 25-4-105 (2), both cited above, absolutely prohibit a county supervisor's financial interest in the industry. A material financial interest is defined in the above cited Code Section 25-4-103 (k)(i)(ii). Notwithstanding the above, the requestor is cautioned to advise the supervisor to remain keenly aware of Code Section 25-4-105 (1) should the county provide assistance to the industry in a way that does not result in an authorization of a contract. An example of such assistance would be the allowance of an ad valorem tax exemption as discussed in the attached Advisory Opinion No. 93-053-E.

- Op. No. 97-142-E (November 7, 1997): Constitutional Section 109 and Code Section 25-4-105 (2) absolutely prohibit the county board of supervisors from authorizing a contract that provides assistance, directly or indirectly, to the industry when one of the supervisors has an ownership interest in the industry. This prohibition applies during the supervisor's term and for one year thereafter. Therefore, the county board of supervisors may not either directly or indirectly lease facilities or property to the industry; provide funding either directly or indirectly through grants or loans to the industry; or contract in any other way with the industry that is partially owned by the supervisor. Also, Code Section 25-4-105 (3)(a) prohibits the industry from being a contractor, subcontractor or vendor with the county when a member of the county board of supervisors has a material financial interest in the industry. A material financial interest is defined in the above cited Code Section 25-4-103 (k)(i)(ii). Notwithstanding the above, the requestor is cautioned to advise the supervisor to remain keenly aware of Code Section 25-4-105 (1) should the county provide assistance to the industry in a way that does not result in an authorization of a contract. An example of such assistance would be the allowance of an ad valorem tax exemption as discussed in the attached Advisory Opinion No. 93-053-E.
using his position as a supervisor to obtain a pecuniary benefit for his child. To avoid using his official position to obtain a pecuniary benefit for his child, the supervisor must totally and completely recuse himself from subject matters providing a pecuniary benefit to his child.

·Op. No. 98-016-E (March 6, 1998): Regarding whether a county may purchase sand and fill dirt from an estate when one of the heirs is the spouse of an employee of the county who serves as the county's receiving clerk, the question is whether the county employee's position as county receiving clerk does allow her to exercise control, direct or indirect, over the contract her spouse's family business has with the county. Unlike the county purchase clerk, the county receiving clerk does not authorize purchasing contracts or approve and evaluate bids. The receiving clerk's duties are limited to receipting the item or items purchased by the county. An analysis of the receiving clerk statutes set forth above leads to the conclusion that the county receiving clerk's duties are not of the type anticipated in Code Section 25-4-103 (k)(iv) which would allow her to exercise control, direct or indirect, over the county's contracts. Therefore, the county may purchase sand and fill dirt from its receiving clerk's spouse's family business without violating Code Section 25-4-105 (3)(a). The requestor is advised that there would be a violation of Code Section 25-4-105 (3)(a) if the county's receiving clerk, and not her spouse, was an heir to the sand and fill dirt business. Notwithstanding the above, the requestor is cautioned to advise the receiving clerk to remain keenly aware of the above cited Code Section 25-4-105 (1) and 25-4-101.

·Op. No. 98-015-E (March 6, 1998): Constitutional Section 109 and Code Section 25-4-105 (2), both cited above, prohibit a county supervisor from having an interest, direct or indirect, in any contract authorized by the board of which he is a member during his term or for one year thereafter. The Home Investment Partnerships Program grant awarded the county by the Department of Economic and Community Development is a contract for purposes of Constitutional Section 109 and Code Section 25-4-105 (2). The parent of the supervisor is not as such absolutely prohibited from participating in the Home Investment Partnerships Program grant awarded to the county unless the supervisor is interested, directly or indirectly, in her receipt of the financial assistance for her homeowners' rehabilitation. The supervisor cannot have any financial interest in her property receiving the improvements under the grant. Also, the supervisor cannot have any other financial interest with his parent where the improvement to her property provides him a benefit. An example would be where the supervisor and his parent have a joint loan on which the parent's property is being used as collateral. The requestor is cautioned to advise the supervisor that a recusal or an abstention will not prevent a violation of Constitutional Section 109 and Code Section 25-4-105 (2). Even without a board member's vote, the authorization by the member's board nonetheless results in a contract in which the board member has a prohibited interest.

·Op. No. 98-002-E (January 9, 1998): Code Section 25-4-105 (3)(a) prohibits a public servant, including a county administrator, from having a material financial interest in a business that is a contractor with the public servant's governmental entity. Code Section 25-4-105 (4)(a), cited above, provides a limited exception to the prohibition set forth in Code Section 25-4-105 (3)(a) when the business that the public servant has an interest in is a bank. However, as stated in the attached opinion, the exception found in Code Section 25-4-105 (4)(a) does not apply to a public servant whose position with the bank is that of an "advisory board member." Therefore, the sole question herein is whether the requestor has a "material financial interest" in the bank. "Material financial interest" is defined in Code Section 25-4-103 (k)(i)(ii), cited above, for purposes of this request. Specifically, the appropriate subsection applicable to this instance is Code Section 25-4-103 (k)(ii). Since the requestor clearly owns less than two percent (2%) of the bank, it is necessary to determine whether the requestor receives an aggregate annual net income from the bank of $5,000.00 or more from the bank. The facts provided by the requestor clearly reflect that his last year's income from the bank was $1,437.50. Therefore, as long as the requestor's income from the bank remains under the $5,000.00 aggregate annual net income threshold, the bank may contract with the county employing the requestor as its county administrator without the county administrator violating Code Section 25-4-105 (3)(a). Notwithstanding the above, the requestor also must remain keenly aware of the above cited Code Section 25-4-105 (1) and 25-4-101.

·Op. No. 98-004-E (February 13, 1998): Regarding whether a justice court judge's spouse may be employed by or enter into a contract with the county to serve process on a fee basis for the county's sheriff's department, Code Section 25-4-105 (3)(a) prohibits a justice court judge's spouse from being a contractor with the county the justice court judge is elected to serve. The only exception applicable in such an instance to the prohibition set forth in Code Section 25-4-105 (3)(a) is found in the above cited Code Section 25-4-103 (k)(iv). In order for the
exception in Code Section 25-4-103 (k)(iv) to apply, the justice court judge may not exercise control, direct or indirect, over the contract between the justice court judge's spouse and the county. Clearly, a justice court judge exercises control over the issuance of warrants and other process within the county. Therefore, the justice court judge has control over the amount of process to be served in the county and therefore does have indirect control over the potential amount of fees the justice court judge's spouse could be paid by the county under the contract. Therefore, Code Section 25-4-105 (3)(a) does prohibit a justice court judge's spouse from being a contractor with the county the justice court judge is elected to serve for the purpose of serving process on a fee basis for the county's sheriff's department. The state conflict of interest laws do not as such prohibit a justice court judge's spouse from being an employee of the county sheriff's department. As to whether or not an individual can be an employee of the county sheriff's department and be paid on a fee basis is a legal question that must be addressed by the State Attorney General's Office. Notwithstanding the above, the requestor is cautioned to advise the justice court judge to not use her official position to obtain a pecuniary benefit for her spouse by helping him secure employment with the county sheriff's department as to do so would violate the above cited Code Section 25-4-105 (1).

· Op. No. 97-163-E (January 9, 1998): With regard to a county supervisor's company providing equipment and services to a regional mental retardation commission which is funded in part by the county board of supervisors on which the county supervisor serves, contracts with a regional mental retardation commission (facility), including a county supervisor's company's contract, are authorized, in part, by the county boards of supervisors' actions in approving funding for the regional mental retardation commission (facility). The county's appropriation to the regional mental retardation commission by way of the county board of supervisors' authorization of the discretionary levy assists the regional mental retardation commission in sustaining its contracts and expenditures, including the contract with the supervisor's company. Therefore, Constitutional Section 109 and Code Section 25-4-105 (2), both cited above, prohibit the county supervisor's business from contracting with the regional mental retardation commission during his term of office and for one year thereafter. The requestor is cautioned to advise the board member that a recusal or an abstention will not prevent a violation of Constitutional Section 109 and Code Section 25-4-105 (2). Even without the board member's vote, the authorization by the member's board nonetheless results in a contract in which the board member has a prohibited interest.

· Op. No. 97-150-E (November 7, 1997): A physician member of a board of trustees of a community hospital attempting to persuade the board of trustees to reconsider its vote to begin the process of looking at alternatives for recruiting an additional physician that would practice in the same field as the physician member has the potential to create suspicion among the public and reflecting unfavorably upon the community hospital. Also, such an action by a physician member of a board of trustees of a community hospital, raises concerns about violations of the above cited Code Section 25-4-105 (1) and (3)(d). Code Section 25-4-105 (5), cited above, prohibits the trustee from intentionally using or disclosing nonpublic information gained as a member of the board of trustees that could result in a pecuniary benefit for himself, his company or his company's center. An advisory opinion is not the appropriate means to determine whether or not a violation of the conflict of interest laws has occurred. An investigation is necessary to determine all the facts and circumstances relating to any particular instance in order to determine whether a violation of the conflict of interest laws has occurred. Also, the ultimate decision as to whether or not a public servant has violated the conflict of interest law must be made by a court of competent jurisdiction as set forth in the above cited Code Section 25-4-109 and Code Section 25-4-113.

· Op. No. 97-148-E (November 7, 1997): The county board of supervisors is required to act on sixteenth section lease contracts as proposed by the board of education by either approving or rejecting the proposed rental amounts. Even if the county board of supervisors rejects a sixteenth section lease and the appointed appraisers, as authorized by state law, approve a rental amount, the county board of supervisors may appeal that decision to the chancery court. Also, all sixteenth section land lease contracts are required to be signed by the president of the board of supervisors. (1) In Frazier v. State, 504 So. 2d 675 (1987), the Mississippi Supreme Court set out four elements that must exist for there to be a violation of Constitutional Section 109. These four elements equally apply in determining if a violation of Code Section 25-4-105 (2) has occurred. The necessary elements are:

1. Is there a governamental contract (with the state, county, municipality or district)?

2. Does the public officer have an interest (direct or indirect) in the contract?
3. Is the contract authorized by a law passed or order made by a board or public body of which the public officer is a member?

4. Was the "authorizing" law or order passed or made during the public officer's term or within one year after the expiration (or termination) of such term?

It is clear from the sixteenth section land laws that a sixteenth section land lease contract may not be entered into without the approval of the county board of supervisors. Therefore, the county board of supervisors' action is part of the authorization of the sixteenth section land lease contract. Also, clearly a sixteenth section land lease contract is clearly a governmental contract. Furthermore, the current and former supervisors in this instance certainly have an interest in the sixteenth section land lease contracts, i.e., the governmental contracts, and the contracts were entered into during their terms of office. Therefore, the four elements set forth in *Frazier*, *supra*, were present when the members of the county board of supervisors leased the sixteenth section land from the county school district. Also, the board of supervisors has discretion under Code Section 29-3-82 (d) and therefore do not fall under the non-discretion exception carved out by the Supreme Court in *Frazier*, *supra*.

Based on the above, Constitutional Section 109 and Code Section 25-4-105 (2) prohibit the county supervisors from having an interest in any sixteenth section lease contracts with the county school district when the lease contracts' rental amounts were approved by the county board of supervisors during the members' terms or within one year thereafter. The requestor is cautioned to advise the current board member that a recusal or an abstention will not prevent a violation of Constitutional Section 109 and Code Section 25-4-105 (2). Even without the board member's vote, the authorization by the member's board nonetheless results in a contract in which the board member has a prohibited interest.

·Op. No. 97-141-E (November 7, 1997): As set forth in the attached Advisory Opinion No. 93-231-E, Code Section 25-4-105 (3)(a) prohibits a company owned by a justice court judge from doing business with the county if the justice court judge is elected to serve. Code Section 25-4-105 (4)(d) is an exception to Code Section 25-4-105 (3)(a), and provides that a public servant's business may be a contractor, subcontractor or vendor with the authority of the governmental entity the public servant is an officer of "where such goods or services involved are reasonably available from two (2) or fewer commercial sources, provided such transactions comply with the public purchases laws." A service center is not a business that would be considered as one that provides goods or services that are reasonably available from two (2) or fewer commercial sources. Therefore, the exception set forth in Code Section 25-4-105 (4)(d) is not applicable to the requestor's circumstance.

·Op. No. 91-137-E: Section 25-4-105 prohibits a county from contracting with a company that employs the spouse of one of the county's supervisors, and the spouse's salary constitutes a prohibited interest on the part of the supervisor in any contract with the spouse's employer.

·Op. No. 92-010-E: Section 25-4-105 prohibits a county supervisor from becoming employed by a county tourism board or commission at the expiration of his term of office, where such tourism board or commission is formed as a result of state, local and private legislation and implemented by the Board of Supervisors.

·Op. No. 92-031-E: Section 25-4-105 prohibits a corporation in which a county supervisor has a material financial interest from contracting with a regional mental health authority.

·Op. No. 92-075-E: Section 25-4-105 prohibits a county from contracting with an electric company owned by a person whose father is a member of the Board of Supervisors who rents the building to his son.

·Op. No. 92-216-E: Where a person is elected County Supervisor and later becomes affiliated with a law firm which contracts with an insurance company to represent certain county entities and public officials in the same and other counties, a violation of §25-4-105 would occur. Such a violation would not exist if the law firm did not represent any of the county personnel or entities of the county or if the Supervisor chose not to affiliate with the law firm.

·Op. No. 92-103-E: Section 25-4-105 may be violated if a Supervisor and his immediate family serve as teachers in the same county. If the Supervisor or a "relative," meaning a spouse, child or parent, become employed by the
county school system, where all of the local funding portion or of salaries under the teaching contract comes from mandatory local tax levies, no violation would occur. However, where a portion of the salary derived by a public school teacher under a teaching contract or that of a "relative" comes from discretionary local tax levies, such teaching contract would violate Section 109 and §25-4-105(2), while the teacher is a member of the board of the governing authority which makes such tax levies or within one year after the term on the governing board expires.

·Op. No. 92-123-E: A business owned by a County Supervisor may contract with cities and towns within the county, provided no county funds are used by entities in payment pursuant to a purchase, such purchase is not a consequence of the town or city’s compliance with a requirement of the county brought about by action of the Board of which the Supervisor was a member or within one year thereafter, and the Supervisor has not used his official position for pecuniary benefit for himself or his business in violation of the statute. Nor do the ethics laws prohibit a Supervisor from doing business with other counties and cities within the state or with the state.

·Op. No. 92-146-E: Section 25-4-105 prohibits a county from contracting with a bank as depository when one of the Supervisors received $6,600.00 per year as an advisory member of the bank Board of Directors.

·Op. No. 92-231-E: A member of the County Board of Supervisors simultaneously employed by the county hospital of the same county would have a prohibited interest in the contract authorized by the board of which he is a member. Only complete recusal on the part of the Supervisor in all board deliberations and voting as to matters involving the hospital, including appointment of its Trustees, would avoid a violation as to §25-4-105(1), but recusal removes only the vote, and not the prohibited interest subject to Section 109 and §25-4-105(2).

·Op. No. 93-208-E: Section 25-4-105 prohibits a volunteer fire department from purchasing gasoline from a service station owned by the son of a County Supervisor and from which the Supervisor receives monthly income.

·Op. No. 93-037-E: Section 25-4-105 prohibits an employee of the County Tax Assessor’s office from writing bail bonds returnable to the county. Any bond written by a county employee or his bail bonding company and accepted by the County Court and returnable to the county would constitute a prohibited contract between the county and employee and his company.

·Op. No. 93-175-E: Section 25-4-105 prohibits an Assistant Data Clerk and Secretary for the County Tax Assessor from accepting a fee from a citizen to furnish the citizen with information from property record cards and tax receipts, if the public servant conducted such work during regular work hours, unless such duty was part of her official duties, and if it were considered her official duty, any receipt of a fee would constitute a violation of §25-4-105(1). Moreover, this Code section would also be violated if any of the records or facilities of the Tax Assessor which were not available to and freely used by the public after hours were used by a public servant after hours in fulfilling the desired request for a fee.

·Op. No. 92-085-E: Section 25-4-105 would be violated if a Sheriff employs his spouse. The Board of Supervisors must authorize the Sheriff's expenditures, including the hiring of employees, based on the recommendation of the Sheriff, and the Sheriff’s recommendation or hiring would constitute use of his official position to obtain pecuniary benefit in violation of this Code section.

·Op. No. 91-111-E: Section 25-4-105 prohibits a newly elected County Supervisor from having his spouse employed as Deputy Justice Court Clerk. The violation would occur once the Board adopts the annual budget after the newly elected Supervisor takes office, based on the principle that any interest of one spouse accrues to the other spouse.

·Op. No. 89-98-E: The conflict of interest laws do not permit a Chancellor to lease his private law office property to the county for the use of the Court Administrator whose existence was created by Order of the Chancellor.

·Op. No. 89-98-E: A Chancellor may sell his private law office real property to a third party and thereafter lease the same or part of the same premises for his own use and the use of the Court Administrator whose existence was created by Order of the Chancellor, such lease to be paid at county expense, but only if the sale to the
disinterested third party is absolute and final with no future options and is not contingent upon any future action of the Chancellor, and the space leased from the third party would be that for use by the Chancellor.

Section 109 Cases

"The prohibitions of Section 109 may be expanded but may not be diluted by the legislature." Hinds Community College Dist. v. Muse, 725 So. 2d 207 (Miss. 1998) . Several key decisions handed down by the Mississippi Supreme Court have consistently driven home the fundamental premise of Section 109:

The meaning of "direct interest" in a contract was clarified in Cassibry v. State, 404 So. 2d 1360 (Miss. 1981). In that case the Mississippi Supreme Court affirmed the conviction of a State Senator under the statutory counterpart to Section 109, prohibiting a legislator from being interested in a contract with the state authorized by any law passed during his term of office. The record revealed that the legislator had a direct interest in a contract between the Department of Public Welfare and a corporation, Developmental Learning Associates, Inc., which was represented by the legislator in his capacity as attorney. The legislator had voted in favor of appropriation bills authorizing the Department of Public Welfare to purchase services, and these appropriation bills were necessary before the Department of Public Welfare had authority to obligate the state to make payments of money. In upholding the conviction, the Court recognized the authority of the Mississippi Legislature, acting in furtherance of Section 109, to make it a misdemeanor for a legislator to have an interest in a contract with the state authorized by a law passed during his term of office, for the period of his term of office and for one year after the expiration of such term. Since the legislator in this case had a direct interest in the contract with Developmental Learning Associates, Inc., the Court found it unnecessary to define the line of demarcation between an "indirect interest" which would be prohibited by the statute and Section 109 and an indirect interest which would constitute no offense. The Court concluded at 1367:

We suggest the following as an accurate test for determining whether a person is directly interested in a contract. Does his compensation depend upon payment being made under the contract? On this test Mr. Cassibry made a passing grade.

The Court handed down a landmark decision on §109's application to county government in Frazier v. State by and through Pittman, 504 So. 2d 675 (Miss. 1987). Frazier provided a detailed analysis of §109, finding that its foremost purpose was to protect the government and not individual rights, cf. State ex rel. Mississippi Ethics Comm'n v. Aseme, 583 So.2d 955, 957(Miss. 1991), that."[i]t is not concerned with whether some individual or class of individuals may suffer from its enforcement." Frazier, 504 So.2d at 695, and that its purpose was to remove any temptation to invade its proscription regardless of motive or intent. The test was to be objective and mechanistic in application. In that case the Court held that an individual who serves as a member of a County Board of Supervisors which contracts with a bank of which he is an officer and stockholder violates §109. The Court further held that §109 was never intended to prohibit an individual from serving in the Mississippi Legislature and voting on general public school laws simply because his or her spouse was employed as s public school teacher, and that where a portion of the salary under a teaching contract came from discretionary rather than mandatory local tax levies, teachers cannot validly contract with the school district while on the board of the governing authority making such tax levies or within one year after expiration of the term on the governing board. The Court concluded with this emphatic description of §109 as a self-executing provision that prohibited an individual from having an interest in a contract when he as a public officer enabled the contract to come into existence:

[W]e must interpret this section in accordance with the plain meaning of its words so long as it bears some rational relationship to this purpose. Yet no meaning, however abstractly valid, should be carried into practical effect if doing so would cause grave risks to be imposed on the sound government of the people of this State. Such an interpretation would insult the common sense of our predecessors when they adopted § 109.

Frazier, 504 So. 2d at 695.
The reach of §109 was extended further in Smith v. Dorsey, 530 So. 2d 5 (Miss. 1988)[Dorsey I]. The Mississippi Supreme Court held in that case that Section 109 prohibited a school board from contracting with spouses of its members, reasoning that the school board members had a manifest and direct interest in the public school employment contracts of their wives and that they were "directly responsible for the hiring and firing of their spouses." Id. at 7. While the Court did not question the integrity or fairness of these board members in any way, it did recognize that each had an indirect interest in his wife's contract which violated Section 109. The Court declined to require the non-party spouses to make restitution for compensation they had received in the course of their school employment, absent some showing of bad faith by the board members, reasoning that to require restitution under these facts would put the school teachers in a position where they would have served as public school teachers without pay, some for several years. See Golden v. Thompson, 11 So. 2d 906 (Miss. 1943) (a public official is not liable where he had acted in good faith in reliance upon an unconstitutional statute).

In Smith v. Dorsey, 599 So. 2d 529 (Miss. 1992)[Dorsey II], the issue before the Mississippi Supreme Court was whether taxpayer plaintiffs could establish that members of the school board had engage in illegal conduct in their application and expenditure of school funds, including payment of money to a State Senator and his wife for their assistance to the school board as consultants in an effort to pass a bond issue. In its initial majority opinion authored by Justice Chuck McRae and handed down on September 4, 1991, the Court interpreted Section 109 to prohibit any public official, including Supervisors, school board members and municipal officials, from doing any business with any other state or local government, and would have made any member of any governmental board or entity which authorizes any business activity between that entity and a public official (or spouse of one) personally liable for any funds paid in connection with that activity, regardless of the Board member’s good faith and regardless of the fact that the type of activity authorized was within the power and jurisdiction of the Board or other governmental entity. About 4,000 public officials held their breath until April 16, 1992, at which time the Court’s original opinion of September 4, 1991, was withdrawn and a new opinion was issued on Petition for Rehearing. That new opinion simply concluded that the contracts with the state legislator and his spouse as public relations consultants were a "blatant and unauthorized expenditure" without finding a violation of Section 109, and that the school board members who voted for them were personally liable. Justice McRae, concurring in part and dissenting in part as to that portion of the opinion dealing with the Section 109 conflict, had this to say:

Lay people who have never held public office understand well the meaning of Article IV, Section 109 of our Constitution.... Countless pages of our judicial decisions attempt to explain Section 109. The private citizenry of our state, however, encounter no such confusion.... The majority opinion leaves our public officeholders in a quandary. What constitutes an "unauthorized expenditure" and what doesn’t?... Unfortunately, the majority opinion invites yet another interpretation for another day when some other officeholder will have his hand slapped because we have not done today what should have been done. I, therefore, dissent from this portion of the majority’s holding. Id. at 558.

Irrelevance of Good Faith and Value Received

In Waller v. Moore ex rel. Quitman County Sch. Dist., 604 So. 2d 265 (Miss. 1992), the Court held that a school district entering into a contract with a school board member's wife violated § Miss. Code Ann. 25-4-105 (2) as well as § 109 of the Mississippi Constitution. In Waller the defendants admitted their guilt but asked the Court to bar restitution arguing good faith and performance of the contract. Id. at 266. Even though the Court had allowed similar defendants in Smith v. Dorsey, 530 So. 2d 5 (Miss. 1988), to escape liability for a § 109 Constitutional violation, it emphasized here that it did not intend for Smith to issue a license for repeated § 109 violations, and went on to hold that good faith, long practice, and value received were not defenses to violations of the Ethics in Government Act or § 109 of the Mississippi Constitution. Id. at 266, citing Golding v. Slater, 234 Miss. 567, 107 So. 2d 348 (1958) and Miller v. Tucker, 142 Miss. 146, 105 So. 774 (1925)).

Nodding and Winking Governmental Cronyism

The Court reaffirmed this position in Towner v. Moore ex rel. Quitman County School District, 604 So. 2d 1093 (Miss. 1992), upholding a summary judgment ordering the Towners to repay Ezra Towner's teacher's salary because at the time he was employed as a teacher, his wife was a member of the school board. Id. at 1099. The
Towners were well aware of their violation of the Mississippi Constitution and the statutes. Evidence showed that shortly after Ezra Towner was hired, the school board attorney sent out a memorandum explaining the Smith case and informing school board members that it was a violation of Mississippi conflict of interest laws for the school district to employ their spouses. Towner, 604 So. 2d at 1094-95. The Court held in Towner that despite the fact that Mary Towner did not vote on whether or not to hire Ezra Towner, the contract was illegal and void because it violated Mississippi conflict of interest law §25-4-105 (2) as well as the Mississippi Constitution.

More recently, in Hinds Community College Dist. v. Muse, 725 So. 2d 207 (Miss. 1998) (en banc), the Mississippi Supreme Court emphasized:

We shall continue to follow our Waller interpretation § of 25-4-105 (2) and hold that good faith and value received are irrelevant when a public servant § violates 25-4-105 (1). ...

Any benefits Hinds Community College received as a result of Vashti's employment are irrelevant in light of Dr. Clyde Muse's repeated violations of the conflict of interest laws. Any benefit Vashti may have bestowed on Hinds Community College likely could have been conferred by any other equally competent and qualified educator whose honors further would not have been tainted by the appearance of nepotism and self-dealing. If we accepted Dr. Muse's argument, our conflict of interest laws would apply only when the employee was perceived to be only average or less than adequate. Such an interpretation of the law lacks intellectual credibility. ...

In Towner v. Moore ex rel. Quitman County School District , 604 So. 2d 1093 (Miss. 1992) we found that Mrs. Towner violated the conflict of interest laws even though she "abstained" when the school board voted on whether or not to hire her husband. The nodding and winking governmental cronyism forbidden in Towner is indistinguishable from the Muse facts. The bottom line is Dr. Clyde Muse was president of Hinds Community College. As president, he played a significant, and likely determinative, role in employing teachers. He was the only individual empowered to arrange courses of study and to recommend teachers for employment at the college. Since he was in a position to effect the employment of teachers, and since both he and his wife obtained pecuniary benefit through her employment as a teacher, their § actions constitute a clear violation of 25-4-105 (1). ...

After this suit was brought, there was an attempt to pass a bill in the legislature that would allow someone other than a community college president to recommend two teachers each year to the Board of Trustees for employment at that institution. If the "Muse Amendment" had passed, someone other than Dr. Muse would have been able to recommend Vashti for employment and he would have been shielded from her future employment activity with the community college. The legislature rejected this attempt to create an exception to our conflict of interest laws. We follow the legislature's lead, and decline to create a Muse exception.

Separation of Powers

Sections 1 and 2 of the Mississippi Constitution of 1890 deal with separation of powers. These two constitutional provisions state:

Section 1. The powers of the government of the State of Mississippi shall be divided into three distinct departments, and each of them confined to a separate magistrate, to-wit: those which are legislative to one, those which are judicial to another, and those which are executive to another.

Section 2. No person or collection of persons, being one or belonging to one of these departments, shall exercise any power properly belonging to either of the others, the acceptance of an office in either of said departments shall, of itself, and at once, vacate any and all offices held by the person so accepting in either of the other departments.

"Core" Powers
The Mississippi Supreme Court interpreted Sections 1 and 2 in *Ball v. Fitzpatrick*, 602 So. 2d 873 (Miss. 1992). In *Ball*, the Court held that the Lowndes County Veteran’s Administration Clerk and Inventory Control Clerk could also serve as an elected member of the Council for the City of Columbus, and that his positions with the county and his position with the city were not in violation of Sections 1 and 2, "in that his positions with the Board are ministerial and do not require that he exercise executive or judicial powers." *Id.* at 876.

The Court in *Ball* reasoned that the jobs held by this county employee were ministerial and that neither the position of Inventory Control Clerk nor Veteran’s Administration Clerk was a public office and that his duties as an employee of the county Board of Supervisors did not allow him to exercise powers at the core of the executive or judicial departments.

**Applicability to Local Government**

In an earlier decision, *Broadus v. State ex rel Cowan*, 132 Miss. 828, 96 So. 745 (1923), the Court considered the doctrine of separation of powers with regard to local government. *Broadus* was a suit to oust from office a member of the Harrison County Board of Supervisors who was also serving as Trustee of a school district. The Court in that case determined that the position of School Board Trustee was not wholly executive or judicial and largely ministerial, that supervisors exercise legislative and executive duties even though they are in the judicial department, and there was accordingly no violation of the separation of powers doctrine. *Broadus* was distinguished in *Alexander v. State by and through Allain*, 441 So. 2d 1329 (Miss. 1983), wherein the Court held that members of the Legislature could not serve on certain boards and commissions whereby they might exercise powers at the core of the executive power, stating:

> Broadus deals with separation of powers at the county level which, of course, is important, but it in no way is authority for the contention that a member of the legislative department may exercise powers at the core of the executive power. *Id.* at 1337.

As Justice Banks noted in his concurring opinion in *Ball*, the only case where the doctrine of separation of powers has actually been applied at the local level is *In re Anderson*, 447 So. 2d 1275 (Miss. 1984), wherein the Court held that an individual serving as both a Justice Court Judge and a city law enforcement official violated the doctrine of separation of powers. Justice Banks called for abandonment "once and for all [of] the idea that the constitutional doctrine of separation of powers applies to local government." *Ball v. Fitzpatrick*, supra at 887.

**Core Executive Functions vs. Non-Judicial Functions**

In the recent decision of *Moore v. Hinds County Board of Supervisors*, 658 So. 2d 883 (Miss. 1995), the Mississippi Supreme Court held that Mississippi’s constitutional separation of powers doctrine was not violated by Youth Court Judges drafting proposed budgets and selecting and hiring personnel. The Court reasoned that the Youth Court Judges’ implementation through supervising and hiring those approved by the Board of Supervisors and the budget was constitutional since

1. these were people who are selected and supervised by the Youth Court Judges pursuant to statutory guidance and not additionally charged with the duty of enforcing any laws, and

2. the acts to be performed by those hired are non-executive judicial duties.

At issue in this case were whether the actions of the Youth Court Judges or their employees were core executive functions, that is, whether any of the personnel hired by the Youth Court perform a non-judicial function at the core of the executive power, that is, do any of the Youth Court personnel enforce a law. The Court concluded:

> The question of the constitutionality of the Youth Court Judges’ involvement in the development of the budget weighs more favorably on the constitutional side. The role of the Judges, with ultimate budget authority remaining with the Board, does not create any sort of power imbalance such as to violate the separation of powers doctrine imbedded within the Mississippi Constitution of 1890. Rather, it follows this Court’s dictates in Alexander, as well as the mandates of the Legislature.
Nepotism

"Conflict of interest laws are designed to instill public confidence in the integrity of government. Nepotism and self-dealing are two of the more pernicious threats to our democratic ideals." Hinds Community College Dist. v. Muse, 725 So. 2d 207 (Miss. 1998). Mississippi’s nepotism statute, while limited in its application to very specific classifications of employees, nonetheless carries with it a very substantial penalty: forfeiture to the state of the amount of all sums of money paid to any person appointed or employed in violation of the nepotism statute. That statute, Miss. Code Ann. §25-1-53 (1975), provides as follows:

It shall be unlawful for any person elected, appointed or selected in any manner whatsoever to any state, county, district or municipal office, or for any Board of Trustees of any state institution to appoint or employ, as an officer, clerk, stenographer, deputy or assistant who is to be paid out of the public funds, any person related by blood or marriage within the third degree, computed by the rule of the civil law, to the person or any member of the Board of Trustees having the authority to make such appointment, or contract such employment as employer. This section shall not apply to any employee who shall have been in said department or institution prior to the time his or her kinsman, within the third degree, became the head of said department or institution or member of said Board of Trustees. The provision herein contained shall not apply in the instance of the employment of physicians, nurses or medical technicians by governing boards of charity hospitals or other public hospitals.

According to the Attorney General’s office, a three-part analysis should be employed to determine whether an employment relationship violates the nepotism statute:

(1) Are the parties related within the third degree?

(2) Is the relative who is the public official a "appointing authority"?

(3) Is the job included in the list of prohibited positions?


In Hinds Community College Dist. v. Muse, supra, Dr. Muse argued that the nepotism statute, § 25-1-53, was a separate statute specifically governing nepotism, specifically prohibiting the Board of Trustee from employing a relative, and that it pre-empted application of § 25-4-105 (1), a general statute governing ethics in government, and that when a particular statute deals with a special and particular subject, its terms govern that precise subject over the general statute dealing with the subject. Assuming preemption, § 25-1-53 did not speak to the president of a college employing a relative. The Court rejected this "nepotism shield" argument:

This statute does not shield the Muses because it does not include the employment of teachers. However, should we interpret the statute to include teachers as "assistants," then the statute would prohibit presidents of institutions, as well as members of Boards of Trustees, from employing their relatives as teachers. The nepotism shield is not a proper defense to this action.

The nepotism statute has been found applicable to a number of county employment relationships:

- a Coroner/County Medical Examiner Investigator cannot appoint his son as Deputy County Medical Examiner Investigator. AG Op. No. 91-0077 to Beech, dated February 26, 1992.

- a Board of Supervisors is prohibited from compensating the son of a County Medical Examiner Investigator for his services as Deputy County Medical Examiner Investigator. AG Op. No. 92-0423 to Sims, dated June 17, 1992.

- the nepotism statute would prohibit the Sheriff from appointing his sister-in-law as Deputy Sheriff, but would not prohibit him appointing her as dispatcher or jailer. AG Op. No. 93-0554 to McMillan, dated September 23, 1993.
a County Administrator is prohibited by the nepotism statute from appointing the nephew of a County Supervisor as Assistant Purchasing Clerk, since the Board of Supervisors is ultimately the appointing authority of the Assistant Purchasing Clerk in all counties, regardless of whether they operate under the beat system or unit system. AG Op. No. 93-0482 to Trapp, dated July 14, 1993.

The Attorney General’s office has consistently construed §25-1-53 strictly. See AG Op. No. 93-0217 to Hathorn, dated April 28, 1993, as the following summary of AG opinions illustrates:

- the employment of a brother of a member of the Board of Supervisors as road hand/machine operator/heavy equipment operator/road maintenance individual does not constitute a violation of the nepotism statute. AG Op. No. 90-0094 to Lamar, dated February 22, 1990.

- the hiring of the sister of a member of the Board of Supervisors by the Tax Assessor and Collector to be Deputy Assessor would not violate the nepotism statute, since the Tax Assessor and Collector is the hiring authority, and not the Board of Supervisors. The employee would thus not be related to the hiring authority within the third degree according to civil law. AG Op. No. 90-0651 to McGregor, dated August 29, 1990.

- the employment by a Sheriff of a Deputy who is the son of a Supervisor does not present a violation of the nepotism statute. AG Op. No. 92-0433 to Hatcher, dated June 17, 1992.

- the nepotism statute does not prohibit a Board of Supervisors from employing the sister-in-law of one of the Board’s members as a dispatcher. AG Op. No. 93-0271 to Hathorn, dated April 28, 1993.

- an administrator who implements a federal law such as the Americans With Disabilities Act is not one of the five listed positions in the nepotism statute and thus the Board of Supervisors or the County Administrator could appoint the nephew of a Board member as Administrator in a county charged with responsibility of implementing the ADA. AG Op. No. 93-0482 to Trapp, dated July 14, 1993.

**Official Attorney General Opinions**

Supervisors as well as other public officials have the right to request an Official Opinion from the Attorney General’s office regarding the legality of matters or action to be taken in the future. The primary purpose of obtaining an AG opinion is to protect the Supervisor or board members from liability in the event they rely in good faith upon the opinion and a subsequent legal challenge is mounted with respect to action taken. The controlling statute is Miss. Code Ann. §7-5-25 (Supp. 1980), which provides a limited form of "good faith" immunity:

> When any officer, board, commission, department or person authorized by this section to require such written opinion of the Attorney General shall have done so and shall have stated all the facts to govern such opinion, and the Attorney General has prepared and delivered a legal opinion with reference thereto, there shall be no liability, civil or criminal, accruing to or against any such officer, board, commission, department or person who, in good faith, follows the direction of such opinion and acts in accordance therewith unless a court of competent jurisdiction, after a full hearing, shall judicially declare that such opinion is manifestly wrong and without any substantial support. No opinion shall be given or considered if said opinion is given after suit is filed or prosecution begun.

**Limitations**

There are thus three significant limitations on the usefulness of Official Attorney General Opinions and the propriety of requesting such opinions:

(1) The Office of the Attorney General will not issue an official opinion after-the-fact.

(2) Opinion requests which should properly be directed to the Mississippi Ethics Commission are generally beyond the purview of the Office of the Attorney General, who will usually invite the official making the inquiry to consult with the Mississippi Ethics Commission.
Opinions rendered by the Attorney General are in response to specific facts and circumstances and may not be applicable in all cases.

Written Opinions

State ex rel Summer, Attorney General v. Denton, 382 So. 2d 461 (Miss. 1980), made it clear that §7-5-25 requires AG opinions to be in writing and the statute makes no provision for an oral opinion of the Attorney General and parties may not rely on the good faith defense provided in the statute based on an oral opinion from the Attorney General.

It is also clear that official opinions from the office of the Attorney General, in order to be effective at all, must be in writing. As the Mississippi Supreme Court noted in Meeks v. Tallahatchie County, 513 So. 2d 563 (Miss. 1987):

Meeks argues that he was advised by someone in the office of the Attorney General that, so long as he resigned the office of Elections Commissioner and so long as he had not in fact acted as an Elections Commissioner with respect to the 1987 elections, he would be eligible to run. Suffice it to say that Meeks never produced any written opinion of the Attorney General to this effect. The Attorney General, according to our understanding, gives opinions only in writing. Miss. Code Ann. §7-5-25 (Supp. 1986). Even so, we would not be bound by any such opinion.

In City of Durant v. Laws Construction Co., Inc., 721 So 2d 598 (Miss. 1998), the Mississippi Supreme Court underscored this basic prerequisite for good faith reliance on AG Opinions:

The City claims to have acted in good faith when relying on the Attorney General opinions. The City argues that even if this Court does not reach the same conclusion in regards to the interpretation of §31-3-21 as the Attorney General opinions, the correct construction should only apply to future applications of the statute. We have in the past, when determining that an Attorney General opinion was erroneous, applied the correct construction in future cases thereby not penalizing a party's reliance. See Meeks v. Tallahatchie County, 513 So.2d 563, 568 (Miss. 1987). However, §7-5-25 requires the party to contact the Attorney General's office in writing requesting an opinion on his particular facts. In return, the Attorney General's office will prepare and deliver a legal written opinion. In the case sub judice, the City merely spoke with the Attorney General's office over the phone. Furthermore, the Attorney General's office sent opinions regarding similar circumstances, and did not render a written opinion with regard to the particular facts in the case sub judice, as required by the statute. Therefore, the City should be held liable.

Ethical Considerations for Attorneys in the Public Sector

When an attorney provides legal representation to a local government entity, a number of ethical considerations and concerns arise that do not necessarily pertain to non-governmental clients. A local government attorney must often face ethical issues in both non-litigation and litigation contexts. For example, a question may arise concerning a conflict of interest between an elected county supervisor or a county employee and the governmental entity itself. See Huey Stockstill, Inc. v. Hales, 730 So. 2d 539 (Miss. 1999), for a good example of the multiple pressures that are brought to bear upon a board and certainly upon the board attorney while trying to resolve a prohibited conflict of interest during the competitive bid process. While knowledge of the Mississippi Rules of Professional Conduct is essential in order for any lawyer to even attempt to address what is or may not be ethical conduct, a local government attorney would be well advised to have at least a working knowledge of the ABA Model Rules of Professional Responsibility, the Restatement of the Law Governing Lawyers, the Uniform Local Rules of the Circuit and Chancery Courts, the Uniform Local Rules of the United States District Courts for the Northern District and Southern District of Mississippi, as well as the national standards utilized by and looked to by the federal courts. See FDIC v. U. S. Fire Ins. Co., 50 F.3d 1304, 1314-15 (5th Cir. 1995).

Many of the ethical dilemmas and professional responsibility concerns faced by Board Attorneys, while extremely fact specific, revolve around conflicts of interest in non-litigation county government matters and
conflicts in dual representation in litigation. Moreover, a cursory review of the Official Opinions and Advisory Opinions rendered by the Ethics Committee of The Mississippi Bar as well as Advisory Ethics Opinions handed down by the Mississippi Ethics Commission during the past two decades reveals a significant number of inquiries involving local government Attorneys.

- MB Ethics Opinion No. 126 (December 5, 1986)(There is no conflict of interest per se for a law firm to represent both a County Board of Supervisors and a municipality within said county; nor is there a conflict of interest per se for a law firm to represent the Board of Supervisors for two different counties.)

- MB Ethics Opinion No. 37 (April 2, 1977)(An attorney who represents a municipality cannot also represent a personal injury plaintiff against a city-county hospital.)

- MB Ethics Opinion No. 31 (June 26, 1975)(It is not unethical for an attorney or a law firm which regularly represents a County Board of Supervisors to defend persons charged with crimes and misdemeanors in that same county nor is it unethical for such an attorney or law firm to represent clients in civil cases in the courts of that county. A lawyer may represent several clients whose interests are not actually or potentially differing. Nevertheless, he should explain any circumstances that might cause a client to question his undivided loyalty. Regardless of the belief of a lawyer that he may properly represent multiple clients, he must defer to a client who holds the contrary belief and withdraw from representation of that client.)

- MB Ethics Opinion No. 224 (April 10, 1995)(An attorney employed by the County Board of Supervisors may not represent criminal defendants in any justice court, county court or circuit court of the county in any case investigated and/or prosecuted by the county sheriff. In this ethics opinion, the Mississippi Bar’s Ethics Committee provided this rationale and justification for its opinion:

  Whether or not the attorney is representing the criminal defendant as a private attorney or as the duly appointed public defender is immaterial. The prohibited conduct is as a result of the representation of the body politic, i.e., the Board of Supervisors. The sheriff is required by Miss. Code Ann. §19-3-25 (1972), as amended, to attend all meetings of the Board of Supervisors and to execute all its process and orders. The office of the sheriff is provided for by Article 5, Section 135 of the Mississippi Constitution. Article 5 deals with the executive branch of government in Mississippi. The sheriff is, thus, constitutionally and statutorily, the executive officer for the Board of Supervisors.

  Furthermore, Miss. Code Ann. §19-3-41 (1972), as amended, granted to County Boards of Supervisors jurisdiction of all matters involving county law enforcement and maintenance of a county jail. Section 19-25-13 requires the Board of Supervisors to examine the sheriff’s annual operating budget and determine the amount to be expended by the sheriff in the performance of his duties for the fiscal year and further provides that the Board may increase or reduce the amount of the sheriff’s budget as the Board deems necessary and proper. The United States Supreme Court in the case of Monell v. Dept. of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), held that actions for damages against persons acting in their official capacities are actions against the governmental entity of which they are an agent. Hence, a civil action against a county official or employee, including the sheriff, is a suit against the county. Finally, Article 14, Section 261 of the Mississippi Constitution (1890) provides that the expenses of criminal prosecution shall be borne by the county in which such prosecution shall be begun, and all fines and forfeitures shall be paid into the treasury of such county.

  Although the scope of the request was limited to representation in circuit court, it follows that the same prohibition would apply to the justice court and the county court, if any, of the county in which the attorney is employed by the Board of Supervisors.

- ABA Formal Opinion No. 186 (July 24, 1938)(A County Attorney elected or appointed by the popularly elected County Justices of the Peace, i.e., County Supervisors, who represents the county in civil matters only, may not represent a defendant in a criminal case prosecuted by the District Attorney. Because of the distinctions between civil and criminal actions, it might at first glance appear that there is no conflict, but the situation actually presented is that of two public bodies, both charged with loyalty to the public, one representing the public in a
criminal prosecution and the other defending the accused in the criminal prosecution. For the County Attorney charged with public duties to accept employment adverse to his public employer puts him in an unseemly situation likely to destroy public confidence in him as a public officer.

·MB Ethics Opinion No. 26 (November 15, 1974)(A lawyer who is a public officer or attorney for any public body, whether full-time or part-time, and his partners and associates, should not engage in activities in which their personal or professional interests are, or foreseeably may be, in conflict with the official duties of the lawyer-official.)

·MB Ethics Opinion No. 117 (June 5, 1986)(A lawyer who represents another client in an unrelated matter either before or against a municipality may serve as bond counsel for the municipality, provided the requirements of DR5-105[c] have been met, requiring full disclosure and informed consent.)

·MB Ethics Opinion No. 165 (June 23, 1989)(An attorney for a County Board of Supervisors does not violate the Mississippi Rules of Professional Conduct by executing a pre-written legal opinion prepared by the successful bidder of road equipment giving an opinion as to the validity of this transaction, as long as the provisions of Rule 1.7, M.R.P.C., are followed. If the successful bidder is also a client of the Board Attorney, then the attorney should follow the provisions of 1.7(b) and make a determination accordingly. Rule 1.7(b), M.R.P.C., provides that "a lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer’s responsibilities to another client or to a third person, or by the lawyer’s own interests, unless the lawyer reasonably believes that the representation will not be adversely affected, and the client has given knowing and informed consent after consultation, which consultation must include explanation of the implications of representation and the advantages and risks involved.")

·FIO No. 210 (September 17, 1993)(A law firm which serves as bond counsel for a municipality may not simultaneously represent the County Board of Supervisors in annexation litigation against the same municipality. "A lawyer ordinarily may not act as an advocate against a person the lawyer represents in some other matter, even if it is wholly unrelated. On the other hand, simultaneous representation in unrelated matters of clients whose interests are only generally adverse, such as competing economic enterprises, does not require consent of the respective clients." Because the municipality has not consented, the law firm is prohibited from representing the county in the annexation litigation. The committee declined to reach the question of whether a public body can consent under these circumstances or whether a disinterested lawyer would conclude that the client should not agree to the representation, thereby precluding consent.)

·Ms Ethics Comm’n Advisory Ethics Op. No. 95-139-E (December 1, 1995): An attorney for the county board of supervisors may simultaneously serve as a youth court referee/judge, since the youth court referee/judge is appointed by the chancellor who also fixes the compensation as set forth in Section 43-21-111, 1972 Mississippi Code Annotated, and the attorney for the board of supervisors is employed by the board of supervisors which fixes the annual compensation not to exceed the maximum amount authorized by law as set forth in Section 19-3-47, 1972 Mississippi Code Annotated. The appointing and employing entities being separate authorities results in the individual's simultaneous holding of the positions of youth court referee/judge and attorney for the board of supervisors not being prohibited by the above cited Code Section 25-4-105 (3)(a). The individual should recuse herself from any matter coming before the board of supervisors that concerns the chancellor and/or the youth court and from any matter coming before the youth court that might concern the members of the board of supervisors.

·Ms Ethics Comm’s Advisory Ethics Op. No. 98-095-E (September 4, 1998): The attorney's position as staff attorney for the state commission would give him the authority and responsibility to advise the state commission on what is in the best public interest. The attorney's ability to provide such advice can reasonably be expected by the public to be in question when the attorney is also personally interested in his law firm's and the law firm's clients' current and future interests before the state commission. Based on the above, the state's public policy of public service being a public trust forbids the attorney from serving in the public position of temporary staff attorney for the state commission when his law firm will simultaneously be representing clients before the state commission. The question of whether the attorney's law firm may represent clients before the state commission when the attorney is serving as temporary staff attorney for the state commission is also a question that must be
addressed by the Mississippi State Bar. The general premise that "where one attorney with a law firm is disqualified, all members are disqualified" appears to be of particular concern in this instance. Therefore, the requestor is advised to have the attorney present this question to the Mississippi State Bar.

·Ms Ethics Comm’s Advisory Ethics Op. No. 97-143-E (November 7, 1997): It would not be a violation of the conflict of interest laws for a law firm to contract with either of two record storage companies that are partially owned by board members of governmental entities that the law firm represents as either their general or special counsel. This above statement is with the understanding that the conflict between the law firm and either of the two storage companies will be for the storage of the law firm's records and not the records of its clients, the two governmental entities. Also, neither governmental entity could pay, either directly or indirectly, for the storage of the law firm's records with a record storage company partially owned by one of the governmental entities' board members. The storage of the governmental entities' records or payments by the governmental entities for the storage of the law firm's records, even though, the law firm's records pertain to its representation of the respective governmental entity clients. The requestor is also advised to remain keenly aware of the above cited Code Section 25-4-105 (1) and Code Section 25-4-101.

·Ms Ethics Comm’n Advisory Ethics Op. No. 98-064-E (June 26, 1998): Code Section 25-4-105 (1) prohibits a public servant from using his or her official position from obtaining a pecuniary benefit for him or herself or a business with which he or she is associated. In this instance, Code Section 25-4-105 (1) prohibits the requestor from serving as counsel to the city port commission on any matters concerning a casino developer or developers which has employed him to represent them. The casino developer or developers would be businesses with which he is associated and the city port commission's approval of the site would certainly provide a pecuniary benefit to the casino developer or developers. The requestor is required to totally and completely recuse himself from such matters before the city port commission. Code Section 25-4-105 (3)(d), cited above, prohibits a public servant from performing any service for any compensation during his term of office or employment by which he attempts to influence a decision of the authority of the governmental entity of which he is a member. Code Section 25-4-105 (3)(d) prohibits the requestor from serving as counsel to the city port commission on any matter concerning a casino developer or developers when said developers are compensating the requestor regarding such casino development matters. Code Section 25-4-105 (5), cited above, prohibits a public servant from intentionally using nonpublic information obtained by reason of his or her official employment that could provide a pecuniary benefit to the public servant or any other person. A casino developer would be considered as a "person" under the definition set forth in the above cited Code Section 25-4-103 (m). The requestor is also advised to remain keenly aware of the above cited Code Section 25-4-105 (3)(a). This code section would prohibit the requestor, as counsel for the city port commission, from having a material financial interest in a casino developer or developers through payments from them if the casino developer or developers become contractors with the city port commission. The casino developer or developers would be contractors with the city port commission. The state's public policy of public service being a public trust is clearly expressed in Code Section 25-4-101. The requestor's ability to represent casino developers must be balanced against this clear statutorily declared public policy of public trust. The requestor's position as counsel for the city port commission gives him the authority and responsibility to advise the city port commission on what is in the best public interest. The requestor's ability to provide such advice can reasonably be expected by the public to be in question when the requestor is also personally interested in the casino developer or developers on the other side of the site location issue. Based on the above, the state's public policy of public service being a public trust forbids the requestor from serving in his public position as counsel to the city port commission while simultaneously being employed by casino developers that are seeking casino site approval from the city port commission.

·Ms Ethics Comm’n Advisory Ethics Op. No.99-048-E (April 23, 1999): An attorney from the same firm as the attorney for the board of supervisors may accept a youth court appointment as a guardian ad litem as anticipated in Code Section 43-21-121 , 1972 Mississippi Code Annotated, without violating the state conflict of interest laws if the payments to the attorney for the guardian ad litem services are paid outside of the board attorney's firm with no financial benefit flowing to the firm in order to not violate Code Section 25-4-105 (3)(a), except hat
under 25-4-105 (4)(b), payments accruing to the board attorney's firm for services as a youth court guardian ad litem would only be allowed if the services were reasonably available from two (2) or fewer sources.

'·Ms Ethics Comm’n Advisory Ethics Op. No. 98-053-E (May 15, 1998): It is not as such a violation of the state conflict of interest laws for a state legislator, who is also an attorney, to file suit on behalf of a client against the State, its agencies or employees involving coverage by the Mississippi Tort Claims Board. Also, there would not be a violation should a court of competent jurisdiction award a judgment, including attorney fees, in favor of the state legislator/attorney's client. However, Constitutional Section 109 and Code Section 25-4-105 (2) would prohibit a state legislator/attorney from receiving attorney fees, directly or indirectly, through a settlement agreement in such cases involving the Mississippi Tort Claims Board on behalf of his or her client. The settlement agreement would constitute a government contract for purposes of Constitutional Section 109 and Code Section 25-4-105 (2). Of course, this is with the understanding that the funds paid by way of the settlement agreement were appropriated by the State Legislature during the state legislator/attorney's term or within one year thereafter. The question of whether a state legislator/attorney can properly represent his or her client in a suit of this nature when prohibited from entering into a settlement agreement in lieu of litigation is a question that must be addressed by the Mississippi State Bar. Notwithstanding the above, a state legislator/attorney must remain keenly aware of Code Section 25-4-105 (1) and Code Section 25-4-101, both cited above, in such circumstances as presented in this request.

'·Ms Ethics Comm’n Advisory Ethics Op. No. 97-156-E ( December 5, 1997): A state attorney assigned to provide counsel to DHS is not as such prohibited by the state conflict of interest laws from serving as a member of the county head start policy council. However, the issue presented by the requestor must be viewed as it relates to Code Section 25-4-101 , set forth above. This code section sets the tone for the conflict of interest laws as the Legislature's "Declaration of Public Policy." This public policy can be summarized as any circumstance having the potential of creating suspicion among the public and reflecting unfavorably upon the state or local government should be closely reviewed by public servants with the intent to reduce or eliminate any suspicion on the part of the public which detracts from the public's trust in state or local government. Clearly, the state attorney's providing counsel to the state Department of Human Services and serving as a head start policy council member, when the council is operated by the county human resource agency which receives some funding from the state Department of Human Services, has the potential of creating suspicion among the public and reflecting unfavorably upon the state and county. Therefore, the state attorney should not be providing legal advice to the state Department of Human Services regarding matters that concern this particular county human resource agency should the state attorney be appointed to the county head start policy council.

'·Ms Ethics Comm’n Advisory Ethics Op. No. 99-017-E (February 5, 1999): An attorney's holding of the positions of board attorney simultaneously with a county and a municipality is not as such a violation of the conflict of interest laws. This finding is based on the county and the municipality being two separate governmental entities within the definition set forth in the above cited Code Section 25-4-103(h). Regarding the question of an attorney's specific ethical responsibilities when advising the two governmental entities he serves as legal counsel on a mutual matter such as the lease referred in this request, the Commission cannot advise on the attorney's professional ethics as governed by the Mississippi Rules of Professional Conduct . The Mississippi Supreme Court and the Mississippi State Bar have the exclusive and inherent jurisdiction over matters concerning an attorney's professional ethics. Notwithstanding the above, all public servants, including local board attorneys and members of local governmental boards, are obligated to adhere to the Legislature's "Declaration of Public Policy" set forth in Code Section 25-4-101. Code Section 25-4-101 sets the tone for the conflict of interest laws as the Legislature's "Declaration of Public Policy." This public policy can be summarized as any circumstance having the potential of creating suspicion among the public and reflecting unfavorably upon the state or local government should be closely reviewed by public servants with the intent to reduce or eliminate any suspicion on the part of the public which detracts from the public's trust in state or local government. Therefore, both the board attorney and the members of both governmental boards have a responsibility to avoid circumstances that have the potential of creating suspicion among the public and reflecting unfavorably upon both local governments. Certainly, the circumstance presented by the requestor regarding the proper value of the lease is a circumstance that could create public suspicion and reflect unfavorably upon both governmental boards, especially since there appears to be a dispute among the members of the same governmental board about the value of the lease. The appearance of impropriety that leads to the public suspicion and the unfavorable reflections may be avoided by
the attorney recusing himself or by the governmental boards asking the attorney to recuse himself from the discussions and deliberations concerning the lease. A total and complete recusal requires that the public servant not only avoid debating, discussing or taking action on the subject matter during the official meeting, but also avoid discussing the subject matter with board members, staff or any other person prior to and after the official meeting. This includes casual comments, as well as detailed discussions, made in person, by telephone or by any other means. Also to properly recuse oneself from a matter, the public servant must leave the room or area where such discussions, considerations and/or actions take place. The minutes of the governing entity's board should state the public servant left the meeting by showing him or her absent for that matter.

Ms Ethics Comm’n Advisory Ethics Op. No. 98-020-E (April 3, 1998): It is not as such a violation of the conflict of interest laws for a municipal board attorney to simultaneously serve on the county's economic development district's governing board. This is true because the municipality and the county are separate governmental entities. However, certain concerns do exist that the municipal board attorney should be aware of if he accept the position on the county economic development district's governing board. These concerns stem from the municipal governing authority's contract with the county board of supervisors to contribute funding to the county economic development district as authorized by Code Section 19-5-99. First, the municipal board attorney must remain keenly aware of the above cited Code Section 25-4-105 (1) and Code Section 25-4-101. Code Section 25-4-105 (1) prohibits a public servant from using his or her official position to obtain a pecuniary benefit for himself or a business with which he is associated. Should the municipal board attorney advise the municipal governing authority on a matter that could provide him a pecuniary benefit as a member of the county economic development district or should he as a board member of the county economic development district act on a matter that could provide him or his law firm a pecuniary benefit as municipal board attorney, then the municipal board attorney/county economic development district board member would violate Code Section 25-4-105 (1). Code Section 25-4-101 sets the tone for the conflict of interest laws as the Legislature's "Declaration of Public Policy." This public policy can be summarized as any circumstance having the potential of creating suspicion among the public and reflecting unfavorably upon the state or local government should be closely reviewed by public servants with the intent to reduce or eliminate any suspicion on the part of the public which detracts from the public's trust in state or local government. The municipal board attorney's advising the municipal governing authority on matters concerning the county economic development authority, especially funding, when he is also serving as a board member of the county economic development authority certainly has the potential of creating suspicion among the public and reflecting unfavorably upon the municipality and the county economic development district. Therefore, the municipal board attorney/county economic development district board member should totally and completely recuse himself from matters concerning the municipality when acting as a county economic development district board member and recuse himself from matters concerning the county economic development district when advising the municipal governing authority.

Conflicts of Interest in Section 1983 Defense Representation

When defense counsel is called upon to represent multiple parties in §1983 litigation, the issues become exceedingly complex and troublesome. One specific context in which the actual or apparent conflict issues may arise is where the attorney is called upon to defend both an individual county employee and the county that employs him in a civil suit for damages. A number of these practical problems were recently addressed in *Sword and Shield Revisited: A Practical Approach to Section 1983* (1998 ABA Section of State & Local Govt. Law).

The interest of a governmental entity defendant may well be in showing that the defendant employee did not act in accordance with the established policies, procedures, and customs of the governmental unit, but acted erratically and unpredictably in such a manner that it would be unjustified to impose liability for his actions on the governmental unit. Conversely, the interest of the employee may be best served by showing that he followed an accepted, standard, approved course of conduct sanctioned by the policies of the governmental unit in question.

A less common but just as troublesome example is that of the governmental employee who has clearly committed an unlawful act for which the plaintiff seeks to impose liability on this individual's employer on "a failure to train" basis. One possible strategy for defending the governmental unit would be to attempt to defeat causation by establishing that the employee was so bent on committing
misconduct that no amount of training would have made any difference. Of course, such an argument could not be made by an attorney who also represents the individual employee. Id. at 22.

Before local government counsel decides to undertake multiple representation, a frank analysis must be undertaken to determine whether there are any obvious or perhaps subtle ways in which the interests of these multiple clients may diverge. The wrong time to begin that analysis is at the conclusion of litigation in which defense counsel is facing a number of disgruntled individual defendants and potential questions of compromised advocacy resulting from the joint representation. While full disclosure and client consent are indispensable in such cases, constant communication with the client and thorough documentation of the file are just as important:

It may be possible to avoid the worst potential conflicts through governmental unit decisions to fully indemnify its individual employees in some types of case situations, or through stipulations as to some issues which could otherwise create conflicts. However, even these situations may expose defense counsel to increased risks, and therefore call for careful communication and file documentation about such things as informing all clients of litigation risks and settlement offers, diligence in following up on evidentiary leads suggested by clients. It is clear that mere boilerplate, pro forma "disclosure" and "consent" are not enough. In addition to exercising caution about the acceptance of joint representation in the first place, counsel should also remain on the alert as the case develops for unexpected circumstances that increase the seriousness of potential conflicts, and that may mandate the hiring of separate counsel, even if it must be at the expense of the governmental unit. Id. at 23.

Patricia E. Salkin, Associate Dean and Director of the Government Law Center of Albany Law School, recently presented a "1999 Survey of Issues in Ethics for Municipal Lawyers," before the ABA Section of State and Local Government Law in Kansas City, Missouri. Salkin addressed cases arising from conflicts of interest relating to personal financial gain, as well as ethical issues arising from conflicting duties owed to clients and employers. In State of New Jersey v. Clark, 735 A.2d 1 (N.J. 1999), for example, the Court held that a Defendant's constitutional right to a fair trial was violated when his defense counsel was also employed as a part-time municipal prosecutor in the same county where the trial took place, the Court noting that "what happened here can undermine public confidence in our system of government and in the independence and integrity of the legal profession."

In a case focusing on "who is the client," the Court in Salt Lake County Commission v. Salt Lake County Attorney Douglas R. Short, 1999 WL 561538 (Utah 1999), held that an elected County Attorney had an attorney-client relationship only with the county as an entity, and not with each individual commissioner. In examining the applicable requirements of state law for county attorneys, including the statutory designation of the county attorney as "the legal advisor of the Board of County Commissioners," the Court concluded that there was no explicit statutory suggestion that the County Attorney had an attorney-client relationship with each individual commissioner or with the commission as a group of individuals, and further noted that the County Attorney performed a dual role, acting as an attorney for the county and in carrying out his statutory duties as an elected official. Turning to the question of when a County Commission may hire outside, independent counsel, the Court stated:

The county must be represented by the elected attorney in all matters falling within the scope of the attorney-client relationship unless the person cannot act, either because of a refusal to do so, an incapacity, or a disqualification, as by a conflict of interest. Id.

In an election contest brought by an unsuccessful candidate for the office of Mayor, the Mississippi Supreme Court in Esco v. Scott, 735 So. 2d 1002 (Miss. 1999), held that an attorney who was "of counsel" to the law firm of the attorney representing the unsuccessful candidate was ineligible to make the required statutory certification of a practicing attorney that an independent assessment of a claim had been made. Miss. Code Ann. §23-15-927 (1986) requires certification by two practicing attorneys, as a condition precedent to bringing such an election contest, that the attorneys have each "fully made an independent investigation into the matters of fact and law upon which the protest and petition are based and that after such investigation they verily believe that the said
protest and petition should be sustained and that the relief prayed therein should be granted." In concluding that the "of counsel" relationship triggered disqualification, the Court stated:

Given the close, regular, personal relationship between attorney and law firm contemplated by the ABA where the "of counsel" designation is employed, ...an attorney listed as being "of counsel" on the letterhead of the firm representing the contestant...is not eligible to make the certification required by the election code. Id. at 1005.

Taxes, Tax Levies and Tax Exemptions

The primary jurisdictional statute setting forth the powers of the Board of Supervisors is Miss. Code Ann. §19-3-41 (Supp. 1990), which makes the following provision with regard to taxation:

The Board of Supervisors...shall have power to levy such taxes as may be necessary to meet the demands of their respective counties, upon such persons and property as are subject to state taxes for the time being, not exceeding the limits that may be prescribed by law.

Section 112 of the Mississippi Constitution of 1890 as amended by House Concurrent Resolution No. 41, was ratified by the electorate on June 3, 1986, and was the subject of litigation in both federal and state court, including Eddie Burrell, et al. v. William A. Allain, Governor of Mississippi, et al., Civil Action No. J86-0373 (L), United States District Court for the Southern District of Mississippi, and Burrell v. Mississippi State Tax Commission, 536 So. 2d 848 (Miss. 1988).

Section 112 provides in part as follows:

Taxation shall be uniform and equal throughout the state. All property not exempt from ad valorem taxation shall be taxed at its assessed value. Property shall be assessed for taxes under general laws, and by uniform rules, and in proportion to its true value according to the classes defined herein. The legislature may, by general laws, exempt particular species of property from taxation, in whole or in part.

The legislature shall provide, by general laws, the method by which the true value of taxable property shall be ascertained; provided, however, in arriving at the true value of Class I and Class II property, the appraisal shall be made according to its current use, regardless of location....

The assessed value of property shall be a percentage of its true value, which shall be known as its assessment ratio. The assessment ratio on each class of property as defined herein shall be uniform throughout the state upon the same class of property, provided that the assessment ratio of any one (1) class of property shall not be more than three (3) times the assessment ratio on any other class of property. For purposes of assessment for ad valorem taxes, taxable property shall be divided into five (5) classes and shall be assessed at a percentage of its true value as follows:

Class I. Single-family, owner-occupied residential real property, at ten (10%) percent of true value.

Class II. All other real property, except for real property included in Class I or IV, at fifteen (15%) percent of true value.

Class III. Personal property, except for motor vehicles and for personal property included in Class IV, at fifteen (15%) percent of true value.

Class IV. Public utility property, which is property owned or used by public service corporations required by general laws to be appraised and assessed by the state or the county, excluding railroad and airline property and motor vehicles, at thirty (30%) percent of true value.

Class V. Motor vehicles, at thirty (30%) percent of true value.

The Legislature may, by general law, establish acreage limitations on Class I property.
Assessment Rates

The rates of assessment established by the Legislature for the above classes of property are set forth in Miss. Code Ann. §27-35-4 (Supp. 1986), providing as follows:

1. All Class I property, as defined in Section 112, Mississippi Constitution of 1890, shall be assessed at the rate of ten (10%) percent of true value.

2. All Class II property and Class III property, as defined in Section 112, Mississippi Constitution of 1890, shall be assessed at the rate of fifteen (15%) percent of true value.

3. All Class IV property and Class V property, as defined in Section 112, Mississippi Constitution of 1890, shall be assessed at the rate of thirty (30%) percent of true value.

Goal of §112

The Mississippi Supreme Court has observed that the goal of the constitutional mandate of §112 "is a fair and equitable distribution of the tax burden." The Court also noted that there are two types of assessment discrimination which may thwart this goal of fair and equitable distribution of the tax burden: first, widely varying assessment ratios for properties of like kind, quality and value, and second, discrimination in the assignment of true value even before the assessment value is applied. As the Court noted in Rebelwood, Ltd. v. Hinds County, 544 So. 2d 1356, 1366 (Miss. 1989):

Where properties, superficially similar, but in fact having widely varying true values, are assigned the same true value, this form of discrimination occurs. A familiar example is the assessment of all cultivatable agricultural acreage at the same dollars per acre value. Conversely, such discrimination occurs when properties of like kind, quality and value are assigned widely varying true values.

Discriminatory Assessment Ratios Prohibited

It was on the above basis that the Mississippi Supreme Court held in Washington County Board of Supervisors v. Greenville Mill, 437 So. 2d 401 (Miss. 1983), that §112 had been violated by reason of the County’s use of discriminatory assessment ratios:

The interpretation of constitutional provisions of other states similar to or analogous to ours has been so universal and consistent that it may fairly be said to be settled throughout the United States that such constitutional provisions forbid and prohibit discriminatory assessment ratios between real and personal property. Id. at 403.... There can be little or no question about the authority of taxing officials to classify property for tax-related purposes. However, the classification must have as its ultimate goals inclusion of all taxable property on the assessment rolls and arriving at the true value of each and every item of property, regardless of its classification. Once the true value is determined, a uniform and equal ratio of assessment must be applied thereto so as to arrive at the assessed value for the purpose of taxation.

We are therefore of the opinion that the Circuit Judge was eminently correct in holding that the utilization of different ratios of assessed value to true value in regard to personal property as opposed to real property by the Washington County Tax Assessor and the Board of Supervisors in 1980 was unconstitutional and in violation of §112, as amended, of the Mississippi Constitution. Id. at 404.

In Riley vs. Jefferson County, No. 92-CA-00848-SCT, February 5, 1996, the Board of Supervisors decided to affirm a tax classification by the County Tax Assessor and held that the property was properly assessed as residential, even though the proof was indisputable that the land was used only for growing pine trees and that at no time had the landowner constructed a residence or any form of habitable structure on the land. Subsequent to a subdivision plat being recorded on July 20, 1962, the subdivision was zoned for residential use. The landowner contended that pursuant to Miss. Code Ann. 27-35-50(4) (1972), it is the use of the land and not the location...
which must be the determining factor in assessing the land for tax purposes, but the Board, on the other hand, claimed that the location controlled how the assessment will be ascertained. The relevant part of 27-35-50(4) (Supp 1990) provided as follows:

(4) In arriving at the true value of all Class I and Class II property and improvements, the appraisal shall be made \textit{according to current use, regardless of location}. In arriving at the true value of any land used for agricultural purposes, the appraisal shall be made \textit{according to its current use, regardless of location}. The land shall be deemed to be used for agricultural purposes when it is devoted to the commercial production of crops and other commercial products of the soil, including but not limited to the production of fruits and timber or the raising of livestock and poultry. (emphasis added).

The Mississippi Supreme Court rejected the county’s contention that the tax assessor had discretion to classify the property as he saw fit, and held that the lower court had further erred by in effect render the current use of the land immaterial to the classification of that land for purposes. Reversing and remanding on constitutional and statutory grounds, the Court stated:

Section 27-35-50 is in accord with the Mississippi Constitution. Article 4, Section 112 states that "[t]he Legislature shall provide, by general laws, the method by which the true value of taxable property shall be ascertained; provided, however, in arriving at the true value of Class I and Class II property used for agricultural purposes, the appraisal shall be made \textit{according to current use, regardless of location}. The land shall be deemed to be used for agricultural purposes when it is devoted to the commercial production of crops and other commercial products of the soil, including but not limited to the production of fruits and timber or the raising of livestock and poultry. (emphasis added).

The Mississippi Constitution and the relevant statute require that land be assessed \textit{according to current use for purposes of ad valorem taxes}. Yet, the Board determined that reliance upon location and use of surrounding parcels of land was the test for assessment by the tax assessor. The Board created unfettered discretion and acted beyond its powers in doing so. Therefore, the Board's actions were in direct conflict with controlling law and are improper, arbitrary, capricious, beyond their powers, and a violation of Riley's constitutional rights. Thus, this case is reversed and remanded for action consistent with this opinion.

\textit{Ad Valorem Tax Levies and Exemptions}

The primary provisions for county ad valorem tax levies include the following:

·Miss. Code Ann. §27-39-303 (Supp. 1987), which empowers the Board of Supervisors to levy ad valorem taxes on taxable property as shown by the property assessment roll and the motor vehicle assessment roll for all general county purposes, exclusive only of levies for roads and bridges and schools at the rate necessary to fund such purposes, and to expend the proceeds of this levy for any purpose authorized for any other levy which the Board is authorized to make, excluding the levy for roads and bridges;

·Miss. Code Ann. §27-39-305 (Supp. 1990), which provides authority for the Board annually to impose a countywide ad valorem tax levy for the maintenance and/or construction of roads and bridges subject to a ten (10%) percent increase limitation;

·Miss. Code Ann. §27-39-317 (Supp. 1990), prescribing the procedure as to when and how county taxes are to be levied;

·Miss. Code Ann. §§19-9-93, et seq., providing for special tax levy authority with reference to erection, remodeling, enlargement or repair of county buildings, funding the operation of a youth court division, funding
for certain matters of public health, eradication of fire ants, maintenance of fair associations, advertisement of economic opportunities and other specific objectives;

· Miss. Code Ann. §27-31-1 (Supp. 1990), providing tax exemptions for certain types or classifications of property;

· Miss. Code Ann. §§27-31-51, et seq. (Supp. 1982), providing free port warehouse exemptions;

· Miss. Code Ann. §§27-31-101, et seq. (Supp. 1990), providing exemptions for new, additional or expanded enterprises;

· Miss. Code Ann. §27-73-1 and §27-73-7 (Supp. 1990), providing the procedure for tax refunds for overpayment of taxes paid to the State Auditor, State Tax Commission and Insurance Commissioner (27-73-1) and for taxes paid to the county tax collector (27-73-7). See State v. Loranth and Associates, Inc., __ So. 2d __, No. 1998-CA-01068-SCT (Miss. 1999)(Taxpayer’s petition for refund of overpayment of ad valorem taxes dismissed because erroneously filed with DFA under § 27-73-1, which had been amended in 1985 to specifically remove "any tax collector" from this section, rather than being filed under 27-73-7 for refund for taxes paid to the county tax collector);

· Miss. Code Ann. §27-35-155 (1995), providing for back assessment for property that has escaped taxation. See Enterprise Products Co. v. Board of Supervisors of Forrest County, 729 So. 2d 790 (Miss. 1998)(holding that salt dome caverns constituted valuable improvements to the property but were erroneously, but knowingly and intentionally, never assessed a value not included in the total assessment of the property and thus "escaped taxation" and were subject to assessment of back-payments on unpaid taxes, where (1) improvements were in the form of caverns created through salt water injection into salt domes suitable for liquified petroleum product storage, (2) the improvements had never been considered in determining the value of the property, (3) the tax assessor was aware of the existence of the structures as untaxable gas wells but unaware of their true nature as storage facilities "until the attorney general issued an opinion that this hole in the ground was an improvement subject to taxation," and (4) the landowner never filed the requisite property tax assessment statement or return);

· Miss. Code Ann. §27-35-4(3) (1995), providing rate of assessments against the value of trucks. See Thomas Truck Lease, Inc. v. Lee County, __ So. 2d __, No. 95-CT-00745-SCT (Miss. 1999)(upholding constitutionality of county’s collection of ad valorem tax assessed against 30% of the value of trucks, which were registered in Alabama but domiciled in Lee County)

· Miss. Code Ann. §§27-35-49, 81, 83, 89, 93 (1972), as amended, provided the various methods for a taxpayer to challenge the assessment of ad valorem taxes on his property. See Alford-Tupelo, L.P. v. Board of Supervisors of Lee County, __ So. 2d __, No. 95-CA-00958 COA (Ms. Ct. App. 1997)(ndp)(Judge Herring provided this excellent synopsis of the various mechanisms available: "Mississippi statutes dealing with the assessment of ad valorem taxes provide a variety of methods whereby a taxpayer can challenge the assessment of taxes on his real property. See generally State Tax Comm’n v. Fondren, 387 So. 2d 712, 715 (Miss. 1980). According to the statutory scheme, it is the duty of the county tax assessor to assess all of the lands in his county

and file his assessment rolls with the clerk of the board of supervisors on or before the first Monday in July of each year. Miss. Code Ann. 27-35-49 (Supp. 1980) and 27-35-81 (1972). The board of supervisors is thereafter required to equalize the assessment rolls at least ten days prior to its August meeting and notify the public that the rolls are ready for inspection. Miss. Code Ann. 27-35-83 (1972). The general public is then given an opportunity to object to any assessment of ad valorem taxes at a public meeting held by the board of supervisors on the first Monday of August. At this meeting, a taxpayer is given the opportunity to state the reasons for his objection, and the board supervisors is required to consider the objections and rule thereon. Miss. Code Ann. 27-35-89 (Supp. 1989). A person who is dissatisfied with the assessment is required to present his objections in writing and file such objections with the clerk of the board. Otherwise, except for minors and persons non compos mentis, the objecting party is precluded from questioning the validity of the assessment after its final approval by the board of supervisors or its final approval by operation of law. Miss. Code Ann. 27-35-93 (1972). A taxpayer whose
objection has been denied at the August public hearing has the right to appeal from the decision of the board of supervisors to the circuit court within ten days after the adjournment of the meeting of the board of supervisors at which the approval of the assessment roll is entered. Miss. Code Ann. 27-35-119 and 27-35-121 (1972); see also Miss. Code Ann. 11-51-77 (1972) for the procedure through which to perfect such an appeal.

Exemptions Narrowly Construed

With regard to exemptions from county ad valorem taxation, the Court in **Better Living Services, Inc. v. Bolivar County, Mississippi, and the City of Cleveland, Mississippi**, 587 So. 2d 914 (Miss. 1991), denied a non-profit corporation an exemption from county and city ad valorem taxes for its federally subsidized Section 8 Apartments, holding that the corporation was not a "charitable society" within the meaning of Miss. Code Ann. §27-31-1(d) (Supp. 1990) and reaffirming the general rule that tax exemption statutes must be strictly construed against the exemption and all reasonable doubt must be resolved against it, and following the majority rule that tax exemptions are disfavored generally "perhaps because they seem to conflict with principles of fairness--equality and uniformity--in bearing the burden of government."

**Better Living Services** was followed in **Hattiesburg Area Senior Services v. Lamar County**, 633 So. 2d 440 (Miss. 1994), in which the Court again confronted the question of whether residential rental property owned by a non-profit corporation was tax exempt as belonging to a "charitable society...used exclusively for such society" as provided in §27-31-1(d) (Supp. 1993). Finding that it was unable to distinguish the property in question from that found taxable in Better Living Services, the Court affirmed the lower court’s judgment holding that the property was subject to taxation, reasoning that the funds of the corporate taxpayer were not derived mainly or substantially from private or public charity, but from rental receipts which the corporations relied on to meet all their expenses, including repayment of principal and interest on quite substantial loans procured to improve the properties, the distinction being between corporations meeting a need through charity and corporations meeting a need through a non-charitable, though laudable, economic activity.

The Court also cited **Better Living Services** in **Mississippi State Tax Com’n v. Medical Devices, Inc**. 624 So.2d 987 (Miss.1993) wherein it reaffirmed the rule of construction in cases involving claims for tax exemption:

This Court has consistently applied the familiar rule of construction in tax exempt cases: Since taxation is the rule and exemption is the exception, and since exemptions from taxation are not favored, general rule is that a grant of exemption from taxation is never presumed; on the contrary, in all cases having doubt as to legislative intention, or as to inclusion of particular property within terms of statute, presumption is in favor of taxing power, and burden is on claimant to prove or establish clearly his right to exemption, bringing himself clearly within terms of such conditions that statute may impose. ...In **Better Living Services, Inc. v. Bolivar County**, 587 So.2d 914, 916-17 (Miss.1991), this Court stated "that the law exempting property will be strictly construed against the exemption and in construing the statute the rule *ejusdem generis* applies."

See also **Supervisor of Assessments of Baltimore City v. Har Sinai West Corp.**, 622 A.2d 786, 793 (Md. App. 1993), in which the Maryland Court held that a building, constructed with HUD financing, owned by a non-profit corporation, and used exclusively for low income housing was not entitled to an exemption from Maryland real property taxes, citing **Better Living Services** and cases from others jurisdictions involving similar claims of "charitable organizations" which either received all income from HUD or tenant rent, or were funded primarily by tenant rent payments and federal subsidies, or otherwise undertook to create low and moderate income housing through their own efforts in dedicating church funds, or establishing a program of charitable solicitation using funds derived mainly from private or public charity. As with the taxpayer in **Better Living Services**, the corporate owner of the low income housing project in **Har Sinai West Corp.** "merely created a conduit for federal mortgage money and for federal rent subsidies." Id.

**County Budget Law**
The overriding objective of the county budget law is to prohibit deficit spending.

This law is set forth in Miss. Code Ann. §§19-11-1, et seq. (1972), as amended, and these are the highlights:

**Fiscal Year Basis**

- Each county must operate on a fiscal year basis, beginning October 1 and ending September 30 of each year. §19-11-5.

**Budget Preparation**

- In counties operating under the unit system, the County Administrator prepares and submits to the Board at its August meeting a complete budget of revenues, expenses and working cash balance estimates for the next fiscal year. This includes the Sheriff's budget, which is required to be prepared by the Sheriff, and must be published no later than September 15 along with a statement of revenues showing every source of revenue and expenses. In beat system counties, however, the Board prepares the budget. §19-11-7.

**Form of Budget**

- The form of the budget is prescribed by the State Auditor and, according to §19-11-9, must show in detail all estimates of the expenditures to be made out of the General County Fund and its auxiliary funds, all estimates of expenditures to be made out of the Road and Bridge Maintenance and Construction Funds, and all amounts to be paid out of the several bond and interest sinking funds for the bonded debt service in the next fiscal year.

**Uniform System of Accounts**

- The Clerk of the Board is required to keep a set of books known as "the uniform system of accounts for the counties," which is always required to be open to inspection by the public within office hours. According to §19-11-13, said books shall contain accounts, under headings, corresponding with the several headings of the budget, so that the expenditures under each head may at once be known. It shall be the duty of said clerk to enter all receipts and expenditures in the said books or system of accounts monthly, post and balance the ledgers thereof at the end of each month so that all information needed for a comprehensive review of operations of the county under budgetary limitations may be readily obtainable. Such books shall be paid for out of the General County Fund, upon the order of the Board of Supervisors.

**No Deficit Spending**

- The County Budget Law's express prohibitions against deficit spending are set forth in §§19-11-15 and 19-11-17. Section 19-11-15 provides in part that the amount that the Board appropriates and authorizes to be spent for any item contained in the budget must not exceed the amount actually estimated for such item, and the total amount appropriated and authorized to be expended from any fund, except for capital outlay, election expenses and payment of emergency warrants and interest thereon, or for extraordinary court expenses, shall not exceed the total amount actually estimated for all purposes.
In *Board of Supervisors v. Parks*, 71 So. 2d 197 (Miss. 1954), the Court emphasized that the primary aim of the County Budget Law was to prohibit deficit spending. "The provisions of the law are mandatory; and the law applies to expenditures made by the Board of Supervisors for road purposes, whether such expenditures are made by the Board under a County Unit Plan or under a Supervisor's District Unit Plan." *Id.*

An taxpayer challenged the Board of Supervisors’ authority to collect garbage fees under a countywide system for rural garbage collection in *Zimmerman v. Pontotoc County Board of Supervisors, et al*, NO. 97-CP-00694-SCT (Miss. 1998)(ndp), and included in his arguments the novel claim that the county had violated the separation of powers doctrine by "making local laws, including budget preparation and submission for operation of the county, and by levying taxes."

His argument was premised on the assertion that boards of supervisors were created as a part of the Judiciary by Article VI, Section 170 of the Mississippi Constitution of 1890. The Court disagreed, holding that the duties carried out by the county in this case were powers and duties granted to the boards of supervisors by statute, and thus, there was no violation of the separation of powers doctrine by the county by "making local laws and levying taxes."

The Court concluded that the question of the constitutionality of the Youth Court judges' involvement in the development of the county budget "weighs more favorably on the constitutional side," in *Moore v. Board of Sup'rs Of Hinds County*, 658 So. 2d 883 (Miss. 1995), reasoning as follows:

In applying the *Alexander* precedent, we find that the budget for the Youth Court can be created by non-legislative members, i.e., the Youth Court judges, but still must be *approved and voted upon by legislative members only, i.e. the Board*. This method prevents any separation of powers problems between the Board and the Youth Court judges under § 43-21-119 and § 43-21-123 and pursuant to *Alexander*. In other words, pursuant to the language of the statute, the Youth Court judges, who are a non-legislative committee as allowed by *Alexander*, can submit the proposed budget to the Board for their approval by vote which will act in a legislative capacity. Therefore, there is no encroachment upon powers held by either branch since the judges are permitted to be a committee assisting in the development of the budget which is subject to the Board's votes and not the non-legislative committee members who helped prepare it. Accordingly, we find that the Youth Court judges' participation in the development of their budget is constitutional pursuant to § 43-21-123. ...The acts to be performed by those hired in the case sub judice are non-executive judicial duties. Therefore, the statutes are constitutional and the Board can not complain since they have conceded that they have no problem with the Youth Court judges hiring and supervising personnel necessary to carrying out duties of the judiciary. Accordingly, the Youth Court judges' implementation through supervising and hiring those approved by the Board in the budget is constitutional.

*Personal Liability of Supervisor*

Section 19-11-17 renders a member of the Board of Supervisors liable for the full amount of any claim allowed, contract entered into or public work provided for in violation of this provision:

No expenditures shall be made, or liabilities incurred, or warrants issued, in excess of the budget estimates as finally determined by the Board of Supervisors, or as thereafter revised under the provisions of this chapter. The Board of Supervisors shall not approve any claim, and the Clerk shall not issue any warrant for any expenditures in excess of the budget estimates thus made and approved by the Board of Supervisors, or as thereafter revised under the provisions of this chapter, except upon the order of a court of competent jurisdiction, or for an emergency as hereinafter provided.

In *Lincoln County v. Entrican*, 230 So. 2d 801 (Miss. 1970), the Mississippi Supreme Court held that while §19-11-17 gives the State Auditor exclusive authority to sue for sums charged to be due, newly elected members of a County Board of Supervisors do not have authority to bring a suit against defeated members of the Board of
Supervisors and their sureties to recover amounts alleged to have been expended in violation of §§ 19-11-17 and 19-11-27, where no corruption is charged and the money was spent for objects authorized by law.

_Canton Farm Equipment, Inc. v. Richardson_, 501 So. 2d 1098 (Miss. 1987) involved the rejection of a low bid for sale to the county of two backhoes. The Mississippi Supreme Court reversed a motion to dismiss and found that the circuit court had subject matter jurisdiction, and the complaint and amended complaint did state a claim upon which relief could be granted under Miss. Code Ann. §§ 19-13-37 and 31-7-57 but any relief on those claims would be obtained on behalf of Madison County. _Canton Farm Equip.,_ 501 So. 2d at 1109. While addressing the issue of standing this Court held that Canton's personal claims are within the pendent jurisdiction of the court and "[t]hat those claims might have been asserted via an appeal under Section 11-51-75 is beside the point. Because they arise out of a common nucleus of operative fact with the Section 19-13-37/31-7-57 claims, Canton's personal claims may be asserted in this action." _Canton Farm Equip.,_ 501 So. 2d at 1109-10. Accord, _City of Durant v. Laws Const. Co., Inc._, 721 So. 2d 598 (Miss. 1998).

Following remand and a trial, the case made its second trip to the Supreme Court in _Richardson v. Canton Farm Equipment_, 608 So. 2d 1240 (Miss. 1992). There the Court traced the tortured legislative history of the statutory scheme from _Entrican_ to the present §§19-13-37(1) and 31-7-57(1), and concluded that four member of the board of supervisors could be held personally liable for procedural violations of the competitive bid laws relative to the acquisition of a backhoe, based upon a statutorily authorized compensatory damages standard:

_Entrican v. King_, 289 So.2d 913 (Miss. 1974), began today's line of thought. Conventionally, _Entrican_ explained:

> Since _Paxton_, this Court has held, in several cases involving expenditures of public funds where such expenditures were devoted to lawful objects, the public sustained no loss, the officer making them did not profit personally as the result, and no statute imposed personal liability upon the officer, that the officer is not personally liable, although such expenditures were made in an unauthorized or prohibited manner. _Entrican_, 289 So.2d at 915. Significantly, we added:

> Unless the Legislature has expressed, in clear terms, in a statutory enactment, an intention to impose personal liability as a penalty in circumstances such as those in the present case, it must be concluded that it was intended that the common law should prevail and no personal liability should result.

_Entrican_, 289 So.2d at 916.

Whether the legislature regard this an invitation, we are not sure. See _State Ex Rel. Summer v. Denton_, 382 So.2d at 465. What we do know is within a few months of _Entrican_, the legislature enacted Miss. Laws, ch. 444 (1974), which specifically amended Section 19-13-37 to give us the text the Supervisors rely on. The amendment provided that members of boards of supervisors, and others, who caused public funds to be expended or contracts to be let or payments to be made without complying with any statute regulating or prescribing the manner in which such actions were to be carried out, were to be liable, individually, and upon their official bond, for compensatory damages, in such sum up to the full amount of such contract, purchase, expenditure or payment, as will fully and completely compensate and repay such public funds for any actual loss caused by such unlawful expenditure. Chapter 444 went on to provide for penal damages, that any such official who substantially departed from the statutory method for letting contracts, making payments, purchases or expending public funds should be liable individually and on his bond for further penal damages of up to $5,000.00.

At that moment, Section 19-13-37(1), as Chapter 444 had amended it, provided the lone rule regarding the damages issue that vexes us today. Rather than fill the void _Entrican_ had noted, Chapter 444 proved a Hydra which divided and grew two heads, as the Keepers of the Mississippi Code--upon what authority is not clear--carved out a new code section, being Section 31-7-57. Until this time, Section 31-7-57 had no existence. This new section, as noted, plowed the same ground as the 1974 amendment and covered individual members of any governing authority, defined in Section 31-7-1 to include members of boards of supervisors. The measure of damages to be recovered and
the provisions for penal damages of up to $5,000.00 were identical in both sections. The new Section 31-7-57(1) simply mirrored Section 19-13-37(1). The codifiers had taken Chapter 444 and produced two essentially identical statutes, placing one in Title 19, Counties and County Officers, Chapter 13, Contracts, Claims and Transaction of Business With Counties, and the other in Title 31, Public Business, Bonds and Obligations, Chapter 7, Public Purchases.

The Hydra's two heads coexisted peacefully until 1980. Section 31-7-57's damages prescription then metamorphosed to authorize courts to hold offending officials for compensatory damages in such sum equal to the full amount of such unlawful contract, purchase, expenditure or payment. (Emphasis added.)

Miss.Laws, ch. 440, § 15 (1980). The $5,000.00 additional penalty authority was left unchanged. A further amendment in 1981 added another section in the form of a preface to Section 31-7-57 but did not change any existing language. Today's dilemma is created by antagonistic phraseology in amended Section 31-7-57(1) and by the legislature's failure to touch Section 19-13-37(1), which retained its actual damages standard.

For what it may be worth, when the legislature amended Section 31-7-57(1) in 1980, the bill did not include the somewhat standard next-to-last section:

Any statute or part thereof in conflict with this act is repealed to the extent of such conflict.

The bill did repeal a number of statutes, one of which was even in Title 19, chapter 13. 4 All of this negates any notion the enactment repealed or amended Section 19-13-37(1) by implication or otherwise.

The final chapter is after the fact. By 1988, it had become apparent Sections 19-13-37(1) and 31-7-57(1) covered (some of) the same officials and proscribed the same conduct, but authorized compensatory damages with differing language arguably with important differences in legal meaning. The legislature opted to retain the actual damages standard and did so by amending Section 31-7-57, so that it now provides for compensatory damages, in such sum up to the full amount of such contract, purchase, expenditure or payment as will fully and completely compensate and repay such public funds for any actual loss caused by such unlawful expenditure.


The history noted, return to the facial conflict between the two statutes, as they read in 1984. For one thing, we know of nothing that prohibits the legislature acting twice regarding a particular course of conduct it wishes proscribed. And so in the criminal field we have allowed, when this occurs, the prosecution to elect between the two statutes and, if it wishes, prosecute for the offense carrying the greater penalty. See, e.g., Weaver v. State, 497 So.2d 1089, 1093 (Miss.1986). In any event, where two statutes address the same subject matter, our first duty is to see if they may be reconciled and, if not fully harmonious one with the other, at least accommodated so that unequivocal language is not wholly ignored. See Roberts v. Mississippi Republican Party State Executive Committee, 465 So.2d 1050, 1052 (Miss.1985); Bridges v. Barr, 245 Miss. 137, 141-42, 146 So.2d 544, 545 (1962); Board of Supervisors of Lauderdale County v. City of Meridian, 149 Miss. 139, 149, 114 So. 803, 805 (1927). Even where, as here, there may be a technical conflict in the language, it is our duty to read the entire text of both statutes objectively and together and attribute to them the meaning most coherent in principle which best accommodates the whole, best fits the texts, and flows most naturally from the best justification an external observer may find for the statutory scheme so assembled, given its political history. See Simmons v. Bank of Mississippi, 593 So.2d 40, 43 (Miss.1992); Burrell v. Mississippi State Tax Commission, 536 So.2d 848, 855 (Miss.1988);
Mississippi Insurance Guaranty Association v. Vaughn, 529 So.2d 540, 542 (Miss.1988); Warren County v. Culkin, 497 So.2d 433, 436 (Miss.1986).

There is no getting around the fact that an isolated phrase in Section 31-7-57(1), as it read at the time of these violations, provided for damages "equal to the full amount of such unlawful contract, purchase, expenditure or payment," though it labels those damages "compensatory damages," nor is there any escape from the fact that Section 19-13-37(1) employed a liability standard for boards of supervisors identical to Section 31-7-57(1)'s and provided, instead, for damages only in the amount of losses actually sustained by the counties.

Seeking to resolve the conflict, without dishonoring the constructive principles just noted, we find Section 31-7-57(1)'s measure of damages preceded by the phrase "for compensatory damages," as though the "sum equal to the full amount ..." would be compensatory damages. What is odd about this, of course, is that compensatory damages are ordinarily thought otherwise. Compensatory damages are such damages as will compensate the injured party for the injury sustained, and nothing more; such as will simply make good or replace the loss caused by the wrong or injury. Black's Law Dictionary, 352 (5th Ed.1979); see also, The Southland Co. v. Aaron, 224 Miss. 780, 787, 80 So.2d 823, 826 (1955); Lee v. Southern Home Sites Corp., 429 F.2d 290, 293 (5th Cir.1970). Of course, the legislature has power to define a term or phrase as it sees fit. See, e.g., Mississippi State Tax Commission v. Moselle Fuel Co., 568 So.2d 720, 723 (Miss.1990). Absent expressed definition to the contrary, phrases such as "compensatory damages" are to be given their common and ordinary meaning. Miss.Code Ann. § 1-3-65 (1972); Davis v. State, 586 So.2d 817, 820 (Miss. 1991); Wilson v. Wilson, 547 So.2d 803, 805 (Miss.1989). Defining "compensatory damages" as the full amount of the contract is wholly at odds with the way the phrase is commonly understood, although the label should ordinarily give way to the substance that follows. See, e.g., Bowe v. Bowe, 557 So.2d 793, 795 (Miss.1990).

This leaves us with or combined text including Section 19-13-37(1)'s clear prescription for actual damages only and with Section 31-7-57(1) using a label that means actual damages, only followed by language suggesting a different standard ordinarily labeled by lawyers "liquidated damages," "a penalty," or some such. The suggestion of a literal and isolated reading of "in such sum equal to the full amount ..." is further embarrassed by the enactment in 1988 deleting that language and embracing Section 19-13-37(1)'s actual-damages-only standard, the one and only standard until the 1980 enactment of Chapter 440, thus remerging the two statutes that had been one since 1871, until they divided in 1974 for reasons not made clear. In a variety of contexts, we have held post-event amendments among the available aids to interpretation of statutory language, see, e.g., Ryals v. Pigott, 580 So.2d 1140, 1153 (Miss. 1990); Wansley v. First National Bank of Vicksburg, 566 So.2d 1218, 1222-23 (Miss. 1990); Grant Center Hospital v. Health Group of Jackson, Inc., 528 So.2d 804, 809 (Miss.1988), particularly where the state seeks enforcement of a repealed or amended statute against a citizen or, as here, against a public official in his individual capacity. See e.g., State ex rel. Pittman v. Ladner, 512 So.2d 1271, 1274-77 (Miss. 1987); Crosby v. Barr, 198 So.2d 571, 574 (Miss.1967).

Notwithstanding, we are told that a failure to read Section 31-7-57 to require assessment of damages equal to the amount of the contract could result in minimal damage awards for egregious violations, with the attendant consequence that the law would possess no deterrent capacity. Here we enter the arena of value judgments and legislative primacy, although if, altogether, the applicable statutes require what has been ordered, we should not flinch. But when we look at the entire statutory scheme, as it existed in 1984, we see further penalties provided, and severe ones at that. In addition to making the county whole for its actual damages, both statutes empower the court to assess "penal damages" in an amount "up to the sum of $5,000.00," Miss.Code Ann. § 31-7-57(3), and Section 19-13-37(2) (Supp.1984). Beyond this, the statutes authorize fine and/or imprisonment and/or removal from office. Miss.Code Ann. § 31-7-55(1) (Supp.-1984). We think this a full panoply of public remedies, consistent with public interest, if compensatory damages be limited to actual damages. These things said, we hold the best reading of all of this law is that it limits the compensatory
damages that may be assessed individually against these Supervisors for these procedural offenses to
the actual loss Madison County has sustained. The Circuit Court erred when it held otherwise. By
reason of their offense to the law in the manner of letting these two bids to Tubb-Williamson, Inc.,
these Supervisors may be held for that sum as will fully and completely "compensate and repay such
public funds for any actual loss caused by such unlawful expenditure." Miss.Code Ann. § 19-13-37
(1) (Supp.1984). The Supervisors argue the county suffered no actual damage, and the Circuit Court
certainly so found. In support the Supervisors reason the two districts had the use of the backhoes, a
use they say should be valued at a fair rental value for the hours used. They couple this with a
consideration of the present "as is" value of each backhoe and compare it with the purchase price for
the District Three backhoe of $31,993.20 and that for the District Five backhoe of $27,903.24, and
say it may readily be seen the county "did not suffer any actual damages as result of the Board's
accepting the lease purchase bids submitted by Tubb-Williamson."

The Supervisors neglect to note that, in the case of the District Three backhoe, Canton Farm
Equipment was the apparent low bidder by $3.41 per month, and on the District Five backhoe by
$22.18 per month, that if the Board had, in fact, accepted Canton's bids (assuming it legally could), it
would have had to pay at the price Canton bid. In this view, Madison County may well have suffered
actual loss, albeit in the somewhat modest difference between the Tubb-Williamson bid which was
accepted and the lower Canton bid. Then there is the matter of interest or finance charges on the
lease purchase contract (which are economically real and recoverable though hidden in the monthly
lease payments).

Since the August 20, 1984, minutes authorized only acceptance of bids on a cash basis, the finance
charge expenditures are without authorization and must be repaid. To this extent, the Circuit Court
clearly erred when it held the county had suffered no actual damages.

On the other hand, we do not see the cost of repairs to the equipment nor the cost of insuring the
equipment as losses to the county. Nobody questions that Districts Three and Five needed a backhoe.
Purchasing backhoes is something Supervisors may do, if only they pursue prescribed procedures. If
the Board had accepted bids from Canton Farm Equipment, it would still have had to insure the
equipment and pay all reasonable and necessary repairs. Nothing before us suggests the Tubb-
Williamson equipment was sub-standard. Indeed, the Board found the Tubb equipment to be of better
quality and more durable with lower maintenance, and these findings are in no way expressly
refuted. The Circuit Court said the "repair bills seem excessive" but, without proof, they could not be
held illegal.

In sum, we hold, under a combined reading of Sections 19-13-37(1) and 31-7-57(1), the liability of
these four Supervisors for compensatory damages shall be (a) all amounts of principal payment over
and above the sums that would have been required under the Canton Farm Equipment bids, (b) all
sums expended for interest, finance charges and related costs, and (c) any other sums as may be
necessary to "fully and completely compensate and repay ... [the coffers of Madison County] for any
actual loss caused by such unlawful expenditure."

Budget Revision Through Interfund Transfer

The county budget may be revised through interfund transfers under §19-11-19. Under this Code section, if an
item of the budget "is in excess of the requirements of said item" and the amount budgeted to that item will not be
needed during the fiscal year, the Board may

transfer funds to and from items within the budget when and where needed, but no such transfer shall
be made from fund to fund, or from item to item, which will result in the expenditure of any money
for a purpose different from that for which the tax was levied. However, revisions as herein
authorized shall not be deemed to permit any expenditures in excess of the various items of the
budget as then approved, and any expenditures made in excess of the budget as then approved shall
be invalid, and subsequent revision shall not validate such expenditures.
Emergency Revision

· The County Budget Law does provide for the budget to be revised in emergencies. Under §19-11-21,

upon the happening of any emergency caused by fire, flood, storm, epidemic, riot or insurrection, or
caused by an inherent defect due to defective construction, or when the immediate preservation of
order or of public health is necessary, or when the restoration of a condition of usefulness of any
public building or other property which has destroyed by accident or otherwise, is necessary, or when
mandatory expenditures required by law must be met, the Board of Supervisors may, upon adoption,
by unanimous vote of all members present at any meeting, of a resolution stating the facts
constituting the emergency and entering the same on its minutes, make the expenditures, borrow
money or incur the liabilities necessary to meet such emergency, without further notice or hearing,
and may revise the budget accordingly.

Clerk’s Monthly Report to Board

· The Clerk of the Board is required to submit to the Board of Supervisors each month a report of expenditures
and liabilities incurred against each separate budget item during the preceding month and for the whole of the
fiscal year up to that time, showing

A. The unexpended balance of each budget item,

B. The unencumbered balance in each fund,

C. The receipts from property tax, and

D. Detailed receipts from other taxes and all other sources by each fund.

§19-11-23.

Last-Year-Of-Term Prohibitions

· During the last year of a Supervisor’s term of office, the prohibitions of §19-11-27 must be carefully observed:

No Board of Supervisors of any county shall expend from, or contract an obligation against, the
budget estimates for road and bridge construction, maintenance and equipment, made and published
by it during the last year of the term of office of such Board, between the first day of October and the
first day of the following January, a sum exceeding one-fourth (1/4) of such item of the budget made
and published by it, except in cases of emergency. The clerk of any county is hereby prohibited from
issuing any warrant contrary to the provisions of this section. No Board of Supervisors nor any
member thereof shall buy any machinery or equipment in the last six months of their or his term
unless or until he has been renominated at the primaries of that year.

The provisions of this section shall not apply to a contract, lease or lease-purchase contract entered
into pursuant to §31-7-13.

In addition to the above prohibitions, other statutory provisions should be followed during the last year of office.
These include the following:

· Miss. Code Ann. §19-13-17 (Supp. 1993) authorizes the Board of Supervisors to purchase tractors, trucks and
other machinery or equipment for road construction and maintenance and to provide for deferred payments to be
represented by notes of the county, subject to the prohibition that none of such notes can mature later than June
15 of the last year of the term of office of the members of the Board making such purchase.

· Miss. Code Ann. §23-15-881 (1987) makes it unlawful for the Board of Supervisors to employ during the
months of May through August in a general primary year a proportionally greater number of persons to work and
maintain the public roads in any Supervisor’s district of the county than the average number of persons employed
for similar purposes in such district during May through August of the three preceding years. This same statute also prohibits the Board of Supervisors from expending out of the road funds of the county or any district for payment of wages or compensation for labor in working and maintaining the public roads during the months of May through August of a primary election year a total amount that exceeds the average total amount expended for such labor in such district during the corresponding four months’ period of the three preceding years. Under this statute, the Board of Supervisors is required to keep sufficient records of the number of employees and expenditures made for labor on the public roads of each Supervisor’s district for May through August of each year, to show the number of persons employed for such work in each district for the four months’ period, and the total amount expended in paying salaries and other compensation to such employees, so it can be ascertained from examining such records whether or not the statute has been violated.

‘Miss. Code Ann. §23-15-883 (1987) provides exceptions to the prohibitions under §23-15-881 with regard to public road expenditures or employment, and states that the prohibition "shall not apply to road contractors or bridge contractors engaged in the construction or maintenance" of county roads under contracts awarded by the Board of Supervisors, nor shall the restrictions apply to labor employed by such road contractors or bridge contractors in carrying out those contracts. The statute also exempts from the employment provisions "extra labor employed to make repairs upon...county roads or bridges, in cases where [they] have been damaged or destroyed by severe storms, floods or other unforeseen disasters."

‘Miss. Code Ann. §65-9-19 (1972) provides restrictions on awarding of state aid contracts during the last six months of the Board’s term of office, providing in part as follows:

Contracts for construction of state aid road projects shall be advertised and let by the Board of Supervisors of any county desiring so to do, in the manner now required by law but subject to the approval of the State Aid Engineer; however, during the last six (6) months of the Board of Supervisors’ terms of office, no contracts for state aid projects shall be awarded unless construction programs embracing such projects shall have been adopted by the Boards and approved by the State Aid Engineer in writing prior to July 1 of said year.

In a January 27, 1987, memorandum from State Aid Engineer William P. Stevenson, Mr. Stevenson advised that this same law has been followed in 1967, 1971, 1975, 1979 and 1983 and that it applies to federal and non-federal projects alike. This same memorandum reminds Boards of Supervisors to submit programs for projects which it anticipates letting during the last six months of the last year of the term of office, preferably during May, so that the State Aid Road Construction Division Office will have sufficient time to take action on them.

‘Miss. Code Ann. §19-3-21 (1972) provides for certain restrictions on the repairs of road equipment (any tractor, truck or other road machinery or equipment) after the first day of July of the last year of the term of office of members of the Board of Supervisors. That provision states in part:

If any repairs herein permitted to be made after the first day of July of the last year of the term of office of the members of the Board making such repairs shall exceed the sum of Five Hundred ($500.00) Dollars, such repairs shall not be made unless and until the Board of Supervisors, or a majority of the members thereof, shall have authorized the making of such repairs at a regular meeting of such Board, or a special meeting called for that purpose.

Bond Issues and Short-Term Financing


Public Purposes

Section 19-9-1 authorizes the Board of Supervisors to issue negotiable bonds of the county to raise money for a variety of public purposes, including erecting, equipping, repair or remodeling county buildings, courthouses, office buildings, jails, hospitals, health centers, county homes for indigents, public libraries, agricultural high school-junior colleges, as well as construction and repairing of roads and bridges and purchase of heavy
construction equipment, establishing rubbish and garbage disposal systems, defraying county cooperative service district projects, purchasing machinery and equipment with an expected useful life in excess of ten (10) years, and purchasing firefighting equipment and apparatus.

**Diversion of Bond Proceeds**

State law provides that the proceeds of bonds issued by a county are to be placed at a special fund and "shall be used for no other purpose than that for which such bonds were authorized to be used." Miss. Code Ann. §19-9-21 (1972). This statute provides for criminal penalties in case of illegal diversion of the proceeds of bonds, in the event the Board of Supervisors or any member of it shall willfully divert or aid or assist in diverting any such fund, or any part thereof, to any purpose other than that for which such bonds were authorized to be issued....

**Tax Anticipation Notes**


**Short-Term Financing Procedure**

In 1985, the Mississippi Legislature enacted Miss. Code Ann. §§17-21-51, *et seq.* (Supp. 1985), establishing a "Uniform System for Issuance of Negotiable Notes or Certificates of Indebtedness." This law, which was amended in 1994, authorizes a Board of Supervisors to borrow money up to the greater of one percent (1%) of the assessed value of all taxable property located within the county according to the last completed assessment for taxation or $250,000.00. Such borrowing may be undertaken "to accomplish any purpose for which such governing authorities are otherwise authorized by law to issue bonds, notes or certificates of indebtedness." Miss. Code Ann. §17-21-51 (1994). This statutory procedure provides a convenient and streamlined method for obtaining short-term financing:

1. The governing authority, which would include a Board of Supervisors, is required first to adopt a resolution declaring the necessity for the borrowing and specifying the purpose for which the money borrowed is to be expended, the amount to be borrowed, the date or dates of maturity and how the indebtedness is to be evidenced.

2. The borrowing must be evidenced by negotiable notes or certificates of indebtedness signed by the head and clerk of such governing authority.

3. Such notes or certificates of indebtedness must be offered at public sale by the governing authority after not less than ten (10) days advertising in a newspaper having general circulation within the governing authority.

4. The sale must be made to the bidder offering the lowest rate of interest or whose bid represents the lowest net cost to the governing authority, which rate cannot exceed the statutory ceiling provided by §75-17-101.

5. The notes or certificates of indebtedness must mature in approximately equal installments of principal and interest over a period of not more than five (5) years from the dates of the issuance thereof.

6. The full faith, credit and resources of the issuing entity are pledged for the prompt payment of the notes or certificate of indebtedness at maturity.

7. If the issuing entity does not have available funds in an amount sufficient to provide for the payment of principal and interest, then it is required annually to levy a special tax upon all of its taxable property at a rate the avails of which will be sufficient to provide such payment. §17-21-53(2).

**Personnel Policies**
In those counties which have adopted the "County Unit" form of local government, and are required to operate on a countywide system of road administration, the Board of Supervisors is required to adopt and maintain "a system of countywide personnel administration for all county employees" other than those employees of other elected officials. Section 9 of the County Government Reorganization Act of 1988, Miss. Code Ann. §19-2-9(1)(Supp. 1989) provides in part:

The personnel system shall be implemented and administered by the County Administrator. Such personnel system may include, but not be limited to, policies which address the following: hiring and termination of employees, appeal and grievance procedures, leave and holidays, compensation, job classification, training, performance evaluation and maintenance of records. All employees of the county shall be employees of the county as a whole and not of any particular supervisor district. However, any employee which the County Administrator is authorized to employ shall be terminated at the will and pleasure of the administrator without requiring approval by the Board of Supervisors. The Board of Supervisors of each county shall spread upon its minutes all its actions on personnel matters relating to hiring or termination and such other personnel matters deemed appropriate by the Board.

With regard to employees of elected officials of the county other than members of the Board of Supervisors, such officials who are authorized by law to employ "shall adopt and maintain a system of personnel administration for their respective employees or shall adopt a system of personnel administration adopted by the Board of Supervisors. The personnel system adopted and any amendments thereto shall be filed with the Board of Supervisors." Miss. Code Ann. §19-2-9(2) (Supp. 1989).

1. Hiring and Termination of Employees

A specific chain of command should exist in all decisions to hire, discipline or fire county employees. If multiple avenues of authority are allowed to exist in making decisions to hire or fire county employees, such a lack of uniformity may be seized upon in a court of law as evidence that there are no objective criteria for such hiring and firing decisions, and may tend to establish the lack of objectivity and neutrality of such decisions.

At-Will Doctrine

Up until June 17, 1992, it appeared that Mississippi still recognized the "at will" termination rule, followed since 1858, which states essentially that absent an employment contract expressly providing to the contrary, an employee may discharged at the will of his employer for good reason, bad reason or no reason at all, except for reasons independently declared legally impermissible. Shaw v. Burchfield, 481 So. 2d 247, 254 (Miss. 1985). As explained below, the at-will doctrine is on the verge of collapse.

Legally impermissible reasons would include (but are not limited to) race, sex or age discrimination, as well as discriminatory conduct violative of such federal laws as the Americans with Disabilities Act, discussed in more detail in the chapter on Personnel Administration.

On June 17, 1992, the Mississippi Supreme Court held in Bobbitt v. The Orchard, Ltd., 603 So. 2d 356 (Miss. 1992), that an employee’s manual

did create an obligation on the part of (the employer) to follow its provisions in reprimanding, suspending or discharging an employee for infractions specifically covered therein.

With regard to the continuing viability of the at-will doctrine, the Mississippi Supreme Court in Bobbitt, speaking through presiding Justice Armis Hawkins, undercut the doctrine even further:

Neither Shaw v. Burchfield nor this case presents a precise terminable at will question, but Shaw warns employers that this Court will be looking for a wiser and more humane alternative to the terminable at-will rule in an employment contract. Id. at 361.

Public Policy Exception
In *McCarn v. Allied Bruce-Terminix Co.*, 626 So. 2d 603 (Miss. 1993), an employee was allegedly discharged for refusing to commit deceptive, fraudulent or illegal actions against the clients of his employer or for reporting same, under a set of facts which prompted the Mississippi Supreme Court to create a public policy exception to the at-will doctrine:

We are of the opinion that there should be in at least two circumstances, a narrow public policy exception to the employment-at-will doctrine and this should be so whether there is a written contract or not:

1. An employee who refuses to participate in an illegal act...shall not be barred by the common law rule of employment-at-will from bringing an action in tort for damages against his employer;

2. An employee who is discharged for reporting illegal acts of his employer to the employer or anyone else is not barred by the employment-at-will doctrine from bringing an action in tort for damages against his employer. To this limited extent, this Court declares these public policy exceptions to the age old common law rule of employment-at-law. These exceptions apply even where there is "privately made law" governing the employment relationship, where the illegal activity either declined by the employee or reported by him affects third parties among the general public, through they are not parties to the lawsuit.

**Discharge Without Reference to Manual**

In *Coleman v. Chevron Pascagoula Federal Credit Union*, 616 So. 2d 310 (Miss. 1993), a credit union employee was discharged without reference to the policy and procedure manual which was given to her at the time she was employed. The manual provided for a six month probationary period, during or at the end of which employees performing unsatisfactorily may be terminated, and also provided a procedure for disciplinary action. Holding that the employer at the time of discharge had in effect an employment manual from which, in the present posture of the case, it could not be determined whether it was followed or violated in discharging the employee, the Mississippi Supreme Court reversed for further proceedings.

**Effect of Listing Reasons for Discharge**

In *Hartle v. Packard Electric*, 626 So. 2d 106 (Miss. 1993), the Court held that at-will employment relationships are not governed by an implied covenant of good faith and fair dealing. *Id.* at 110. In *Hartle*, the employer distributed handbooks to employees, including the Plaintiff, setting forth employment conditions, policies, practices, responsibilities, rules of conduct and benefits for employees. It also contained a warning that the policies and procedures contained in the handbook did not constitute a legal contract and also preserved the employer’s right to terminate the employee at will. The employee argued that the handbook's listing of reasons for discharge limited the employee’s discretion to discharge him only for just cause. The Mississippi Supreme Court rejected this argument, reasoning that the listing in an employment handbook of causes that may result in termination did not give a basis for saying the employee was employed under a "for cause" contract, and in this case "the handbook did not alter the at-will status of the employment relationship." *Id.*

**Effective Disclaimer**

The Court in *Bobbitt* made it clear that a different result might obtain if the employer published an "express disclaimer or contractual provision that the manual did not affect the employer’s right to terminate the employee at will...." *Id.* at 362. Accordingly, in *McDaniel v. Mississippi Baptist Medical Center*, 869 F. Supp. 446 (S.D. Miss. 1994), the Court found without merit certain state law claims for breach of employment contract or wrongful discharge. In granting summary judgment in favor of the Defendant employer, the Court noted the rule in *Bobbitt* that where an employer distributes an employee manual containing procedures to all its employees the employer is bound to follow its provisions in reprimanding, suspending or discharging an employee for violations of its policies, even in a situation where the employment relationship is one which is at-will, but that this holding
was expressly qualified and the rule did not apply where there is something in the employment contract to the contrary, citing *Bobbitt v. The Orchard, Ltd.*, *supra* at 357. The Court concluded in *McDaniel*:

Since the language quoted from the Handbook expressly preserved the at-will nature of Plaintiff’s employment relationship and preserved the right of Defendant to terminate its employees with or without cause, nothing in the Handbook gave Plaintiff a right to be disciplined or terminated in accordance with the policies expressed therein.

*Accord, Mann v. City of Tupelo*, 1:93cv107-B-D (N.D. Miss. 1995)("The City retained its right to discharge an employee without cause through the express disclaimer in the applicant’s statement signed by all employees, including the Plaintiff, as a matter of standard operating procedure. Therefore, the Plaintiff has no breach of contract cause of action.").

**Retaliation for Reporting Illegal Conduct**

In *Willard v. Paracelsus Healthcare Corp.*, 681 So. 2d 539 (Miss. 1996), two former employees of a hospital sued for wrongful discharge, alleging that they were subjected to retaliatory discharge. The evidence at trial showed that the employees had been fired in retaliation for their reporting forgery and financial irregularities on the part of their employer. The Mississippi Supreme Court, citing *McArn v. Allied Bruce-Terminix, Inc.*, reaffirmed the public policy exceptions to the at-will doctrine, where an employee refuses to participate in an illegal act or an employee is discharged for reporting illegal acts of the employer to the employer or anyone else. Concluding that the jury should have been provided an instruction on retaliatory discharge, the Court noted that the public policy exception for reporting illegal acts as an exception to the employment-at-will doctrine sounds in tort, and that "a party is entitled to pursue all remedies available in tort, including punitive damages."

Today, we answer in the affirmative the question of whether such conduct, if found, is an independent tort giving rise to punitive damages. The public has a legitimate interest in seeing that people are not discharged for reporting illegal acts or not participating in illegal acts which may result in harm to the public interest. Anyone who terminates an employee for such reasons should be allowed a jury instruction on the issue of punitive damages in order to deter similar future conduct. Discharge in retaliation for an employee’s good faith effort to protect the employer from wrongdoing constitutes an independent tort and may support punitive damages. Noting that the two employees had "outstanding" and "impeccable" personnel records, the Court found that they had been terminated on questionable grounds, the policies of the employer’s handbook had not been followed in the process, and an evidentiary basis existed for a jury to find an intentional wrong necessitating the imposition of punitive damages.

The case was remanded for a new trial, and in the second appeal, the Mississippi Supreme Court affirmed in a decision on November 4, 1999, *Paracelsus Healthcare Corp. v. Willard*, ___ So. 2d ___, No. 93CA0021SCT (Miss. 1999). In the jury trial on remand, a punitive damages instruction was submitted along with jury instructions on retaliatory discharge and tortious breach of an oral contract, and on the basis of the evidence, the jury returned punitive damages awards of $1,500,000.00 each to the two employees. In affirming the jury verdicts, the Mississippi Supreme Court cited the common law factors for assessing punitive damage awards, including whether the amount serves to punish the wrongdoer and as a deterrence from similar future conduct, whether the amount serves as an example to deter others from similar offenses, and whether the amount accounts for the pecuniary ability and net worth of the Defendant. *See Dixie Ins. Co. v. Mooneyhan*, 684 So. 2d 574, 585 (Miss. 1996). The Court also considered the guidelines set out in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), wherein the United States Supreme Court held that state courts, when faced with challenges that a punitive damage award is excessive and exceeds the constitutional limits, should consider the degree of reprehensibility of the defendant’s conduct, the ratio between the plaintiff’s compensatory damages and the amount of punitive damages, and the difference between the punitive damages and the civil or criminal sanctions that could be imposed for comparable misconduct. *Id.* at 575-76. The Mississippi Supreme Court concluded that the punitive damages awarded to the two former employees of the hospital were not excessive under the *BMW* guidelines, stating:
The appellees, however, were terminated in violation of their contracts. There was testimony that back-up copies of the vouchers and checks, which appellees argue was proof of the forged checks, could not be found although there is testimony that it did exist. There was also testimony that much of the back-up documentation had been housed at a storage facility, which was later burglarized. Paracelsus offered this as reason why some documentation related to the forged checks was missing. The jury was entitled to infer from the evidence presented whether there was any concealment of documentation by Paracelsus.

2. Appeal and Grievance Procedures

A county can be exposed to significant liability if it fails to maintain adequate and complete documentation of infractions and other disciplinary matters involving county employees. In drafting a personnel policy, as alluded to above, care must be taken to avoid creating in an employee a property interest in his or her employment, since an employee who enjoys a property interest in employment or who enjoys a reasonable expectation of continued employment on the basis of statements inadvertently inserted in a personnel policy, will be entitled under the United States Constitution to a meaningful hearing concerning any disciplinary action, including an evidentiary hearing prior to discharge, complete with court reporter, transcript of testimony, attorneys and witnesses. See Conley v. Board of Trustees of Grenada County Hospital, 707 F.2d 175 (5th Cir. 1983). To avoid this inadvertent creation of a "property interest" in employment, the personnel policy provisions applicable to appeal and grievance procedures should clearly state that the county/employer or the County Administrator with respect to employees he or she is authorized to employ, reserves the authority to terminate the employment relationship at any time as is deemed in the best interest of the county, and that any benefits, including appeal rights and grievance procedures, are voluntarily extended on the part of the county and are not construed to be a contract or guaranty of employment or the continuation of any benefit, and that the employer reserves the right to change its policies or eliminate benefits at any time with or without notice.

As noted above, in Hartle v. Packard Electric Division, supra, a disclaimer in the policies and procedures booklet that it did not "constitute a legal contract" and did not "modify the month-to-month employment relationship" was found to be a sufficient disclaimer to defeat an employee’s claim of employment contract obligation. Similarly, the employment handbook in McDaniel v. Mississippi Baptist Medical Center, supra, specified that it was "not a contract of employment, either express or implied; confers no property interest in one’s job," and that either employer or employee were "privileged to terminate employment at-will, without notice and without cause," and that the contents of the handbook were guidelines and not a guarantee of continued employment, was also held to be a sufficient disclaimer to defeat such a claim.

Without such disclaimers, public as well as private employers may face needless liability exposure under Bobbitt v. The Orchard, Ltd., supra at 361, in which the Court held that a manual given to all employees becomes a part of the contract, and while it did not give the employees tenure or create a right to employment for any definite length of time, it did create an obligation on the part of the employer to follow its own provisions with regard to the reprimand, suspension or discharge of employees for infractions specifically covered in the manual.

3. Vacations and Sick Leave

Miss. Code Ann. §19-3-63 (Supp. 1990) provides the following for vacations and sick leave for county employees:

(1) The Board of Supervisors of each county by resolution adopted and placed on its minutes may establish a policy of sick leave and vacation time for employees of the county not inconsistent with the state laws regarding office hours and holidays.

(2) Notwithstanding the provisions of subsection 1 of this section, each elected official of the county, other than a member of the Board of Supervisors, who is authorized by law to employ, may, by written policy filed with the Clerk of the Board of Supervisors, establish a policy of sick leave and vacation time for his employees which may be inconsistent with the policy established by the Board of Supervisors but which shall not be inconsistent with the state laws regarding office hours and holidays. If such elected
official fails to adopt and file such a policy with the clerk of the Board of Supervisors, the policy adopted by the Board of Supervisors for sick leave and vacation time for county employees shall apply to employees of such elected official.


Family and Medical Leave Act of 1993 (FMLA)

Although a detailed discussion of the Family and Medical Leave Act of 1993 is beyond the scope of this chapter, it should be noted that the FMLA, 29 U.S.C. §2601, provides for up to twelve weeks of unpaid leave with health insurance coverage once an employee exhausts his or her paid leave. County employees must meet all the requirements for eligibility, including the requirement that the county employ at least 50 employees at or within 75 miles of the workplace, and the leave must be for certain family and medical reasons covered by the Act. The employee must also have been employed by a state agency for at least 12 months and must have worked a minimum of 1250 hours during the 12 prior months. The following highlights some more recent developments in FMLA litigation.

The FMLA is designed only to protect employees when there is a serious health condition, and only in a manner that accommodates the legitimate interests of employers . 29 U.S.C. § 2601(a)(4), (b)(3). As the Fifth Circuit explained in Bocalbos v. National Western Life Ins. Co., 162 F.3d 379, 383 (5th Cir. 1998), the Act has two distinct provisions. First, it provides certain entitlements. [10 See Hodgens v. General Dynamics Corp., 144 F.3d 151 (1st Cir. 1998); Diaz v. Fort Wayne Foundry Corp., 131 F.3d 711 (7th Cir. 1997); Morgan v. Hilti, Inc., 108 F.3d 1319 (10th Cir. 1997).] An eligible employee of a covered employer has the right to take unpaid leave for a period of up to 12 workweeks in any 12-month period when the employee has a serious health condition that makes [him or her] unable to perform the functions of [his or her] position;[11 29 U.S. C. § 2612(a)(1)(D).] to care for a close family member with a serious health condition;[ 12 29 U.S.C. § 2612(a)(1)(C).] because of the birth of a son or daughter; [13 29 U.S. C. § 2612(a)(1)(A).] or placement of a child with the employee for adoption or foster care. [14 29 U.S.C. § 2612(a)(1)(B); see also § 2611(12).] Following a qualified leave period, the employee is entitled to reinstatement to the former position or an equivalent one with the same benefits and terms. [15 29 U. S.§ 2614(a).] Second, the Act protects employees from interference with their leave as well as against discrimination or retaliation for exercising their rights. [Hypes v. First Commerce Corp., 134 F.3d 721 (5th Cir. 1998); Hodgens; Diaz.] It is unlawful for any employer to interfere with, restrain, or deny the exercise of or the attempt to exercise, any rights provided under the Act. [17 29 U.S. C. § 2615(a)(1).] Further, an employer is prohibited from discriminating or retaliating against an employee for exercising his rights under the Act. [18 29 U.S. C. § 2615(a)(2).]

The FMLA provides, in part, that an employee shall be entitled, on return from [a qualified] leave (A) to be restored by the employer to the position of employment held by the employee when the leave commenced; or (B) to be restored to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. 29 U.S.C. § 2614(a)(1). The FMLA also provides that, [n]othing in this section shall be construed to entitle any restored employee to . . . any right, benefit, or position of employment other than any right, benefit, or position to which the employee would have been entitled had the employee not taken leave. 29 U.S.C. § 2614(a)(3).

In determining whether an employee s leave request qualifies for FMLA protection, the employer must assess whether the request is based on a serious health condition , and, for that purpose, may request supporting medical documentation. U.S.C. § 2613; 29 C.F.R. § 825.302(c). The Act defines a serious health condition as an illness, injury, impairment, or physical or mental condition that involves[:] (A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider. 29 U.S.C. § 2611(11).

To establish a prima facie case of unlawful discrimination under the FMLA, an employee must prove: (1) protection under the Act, (2) an adverse employment action, and (3) a causal link between the adverse action and
the request for leave. **Bocalbos v. National Western Life Insurance Co.**, 162 F.3d 379, 383 (5th Cir. 1998); see also **Chaffin v. John H. Carter Co.**, No. 98-30155, 1999 WL 414269, at *2 (5th Cir. June 22, 1999). If the employee establishes a prima facie case, the burden shifts to the employer to articulate a legitimate nondiscriminatory or nonretaliatory reason for the termination. **Bocalbos**, 162 F.3d at 383. Once the employer has carried that burden. The employee must then show that the employer’s proffered reason is a pretext for discrimination or retaliation.

With regard to damages recoverable under the FMLA, a plaintiff may recover (i) damages due to lost compensation, (ii) interest on that amount, and (iii) liquidated damages equal to (i) and (ii). "This effectively doubles the size of the award." **Nero v. Industrial Molding Corp.**, 167 F.3d 921, 925 n.2 (5th Cir. 1999). Moreover, as District Judge Glen Davidson recently observed in **Hardin v. Caterpillar**, No. 1:97cv213-D-D (N. D. Miss. 1999),

> a district court may not exercise its discretionary authority to reduce or to eliminate a liquidated damages award unless the employer first sustains its burden of showing that its failure to obey the statute was in good faith." **Nero**, 167 F.3d at 928. Furthermore, "[e]ven assuming that [an employer] acted in good faith, the decision to award liquidated damages [under the FMLA] is still within the discretion of the trial court." [Citing **Nero** at 929.]

As noted in **Bocalbos**, the first type of distinct provision creates a series of entitlements or substantive rights. An employee’s right to return to the same position after a qualified absence falls under this category. An employer must honor entitlements, and cannot defend by arguing that it treated all employees identically. Because the issue is the right to an entitlement, the employee is due the benefit if the statutory requirements are satisfied, regardless of the intent of the employer. The second type of provision is proscriptive, and protects employees from retaliation or discrimination for exercising their rights under the FMLA. See also 29 C.F.R. § 825.220(c) (1997) (An employer is prohibited from discriminating against employees . . . who have used FMLA leave.). The trial court had concluded that Bocalbos was protected under the FMLA, but the Fifth Circuit disagreed. First, the Court noted that the FMLA permits employees to take unpaid leave "[b]ecause of the placement of a son or daughter with the employee for adoption or foster care,[22 29 U.S.C. § 2612(a)(1)(B)]" and that "when taking such leave because of the placement of a child, the employees entitlement to FMLA leave shall expire at the end of the 12-month period beginning on the date of such . . . placement.[23 29 U.S.C. § 2612(a)(2); 29 C.F.R. § 825.201.]" Finding that the FMLA did not apply to Bocalbos’ situation, the Court held that no reasonable juror could conclude that the employer, National Western, fired Bocalbos because he took leave under the FMLA:

> The adoption of the two children was made final in April 1992, more than one year before the effective date of the Act on August 5, 1993. In April 1992, Bocalbos had become a parent of the children, with complete rights, obligations and responsibilities, yet he sought FMLA leave almost three years after the adoption was finalized.[ 24 The Department of Labor regulations provide: Employers covered by FMLA are required to grant FMLA leave pursuant to paragraph (a)(2) of this section before the actual placement or adoption of a child if an absence from work is required for the placement for adoption or foster care to proceed. For example, the employee may be required to attend counselling sessions, appear in court, consult with his or her attorney or the doctor(s) representing the birth parent, or submit to a physical examination. The source of an adopted child (e.g., whether from a licensed placement agency or otherwise) is not a factor in determining eligibility for leave for this purpose.

29 C.F.R. § 825.112(d).] While we recognize the importance of child-parent bonding and of a parents presence in early child rearing, we cannot read the Act to extend placement for adoption to encompass Bocalbos situation. The children, ages 17 and 12, were not being placed for adoption in April 1995, but were being brought to the United States to live in Austin, Texas. The Act contemplates placement for adoption to include the circumstances in which a child is placed in a home before the adoption is finalized.[ 25 See 29 C.F.R. § 825.112(d) (1997).] There is no indication, however, that Congress intended placement to include a situation in which the children were actually adopted, left in another country for an extended period of time, and then retrieved at the convenience of the adoptive parent. Congress placed a 12-month limitation on the eligibility so
that the period of time for employees to request leave would not be indefinite or too far removed from the actual adoption. [26 29 U.S.C. § 2612(a)(2).]

Bocalbos also contends that the defendant granted the leave and therefore should not be permitted to now insist that the FMLA was not applicable. [27 It is the employee’s responsibility to determine whether leave qualifies under the FMLA. 29 C.F.R. § 825.208(a); see also Manuel v. Westlake Polymers Corp., 66 F.3d 758 (5th Cir. 1995).] His argument is not persuasive in light of the fact that National Western was not aware at the time of his request that he had adopted the children in 1992.

Even if the Act did apply to the facts of this case, it is clear that National Western did not interfere with Bocalbos leave and tendered a nonretaliatory reason for his termination. National Western did not interfere with, restrain, or deny the exercise of or the attempt to exercise Bocalbos FMLA rights. Rather, National Western made it clear that the actuary students would be required to take the exams in May and November of each year until they achieved the requisite score. Bocalbos was fully aware of the test dates when he placed his request for leave from April through June. When questioned, he acknowledged that he could have chosen the time period after the exam to take the leave.

As for Bocalbos termination, the attainment of the Society of Actuaries examination credits had been a job requirement since June 1992, and at the time of his termination in June 1995, Bocalbos had attained no credits whatsoever. The failure to satisfy a legitimate job requirement is a nondiscriminatory reason and sufficient grounds for his termination. Faruki v. Parsons S.I.P, Inc., 123 F.3d 315 (5th Cir. 1997); Nichols v. Loral Vought Sys. Corp., 81 F.3d 38 (5th Cir. 1996).

In Manuel v. Westlake Polymers Corp., 66 F.3d 758 (5th Cir. 1995), pursuant to the employer’s no fault attendance policy, the employee was warned in February, July, and September 1992 that her absenteeism could result in severe disciplinary action, including termination. At the end of December 1992, the employee had missed 14 days of work in the preceding three months, and was warned again that continued absenteeism could result in suspension or termination. Id. In October 1993, the employee received permission from her supervisor to miss work on a Friday for removal of an ingrown toenail; her doctor had advised her that she could return to work the following Monday. Id. Complications developed after the procedure, and the employee contacted her supervisor on the following Monday and told him that she could not return to work because of her toe. Keeping in constant contact with her employer, she missed work for more than a month. After the employee returned to work, she was suspended for four days and issued a final warning for unsatisfactory attendance, which stated that her employment would be terminated unless she reported to work as scheduled. Id. Less than two months later, the employee went home from work after becoming ill. She returned three days later, but was fired because of her persistent absenteeism, including due to the toenail removal. Id at 760. At the time of discharge, the final FMLA regulations had not been adopted. The district court granted summary judgment for the employer, holding that the employee’s notice of her extended absence due to the toenail was insufficient to trigger protection under the FMLA because the employee did not expressly refer to the Act when requesting leave. Id. at 761. Reversing, the Fifth Circuit held that the district court erred by so interpreting the FMLA, and remanded for consideration of whether the employee gave sufficient notice to her employer of the need for FMLA leave. In regard to the notice issue, the Fifth Circuit declined to announce any categorical rules for the content of the notice by an employee, id. at 764, but stated, consistent with the final regulations, which had been adopted after the employees discharge:

What is practicable, both in terms of the timing of the notice and its content, will depend upon the facts and circumstances of each individual case. The critical question is whether the information imparted to the employer is sufficient to reasonably apprise it of the employee’s request to take time off for a serious health condition. Id.

In Hopson v. Quitman County Hosp. & Nursing Home, Inc., 126 F.3d 635 (5th Cir. 1997), the Fifth Circuit again addressed the FMLA notice requirements for foreseeable not unforeseeable leave, including whether a change in circumstances must be medically-related. In Hopson, the Court stated that, in a case where the court is asked to apply the standards of a relatively recent statute to undisputed facts, the adequacy of Hopson’s notice is a fact issue. Id. at 640.
What constitutes a change in circumstances, whether a plaintiff’s notice is given as soon as practicable, and whether the employee has made a reasonable effort to schedule her treatment so as not to disrupt unduly the operations of the employer requires an inquiry into the particular facts and circumstances of each case. Such determinations are questions of fact and are better left to the jury with its traditional function of assessing human behavior and expectations. Id.

In *Satterfield v. Wal-Mart Stores, Inc.*, 135 F.3d 973, 980-81 (5th Cir. 1988), cert. denied, 119 S.Ct. 72, where an employee had habitual unexcused absences, her excuse that she was "sick" or was "having a lot of pain in her side" was insufficient to require employer to seek additional information about her condition and whether it qualified for FMLA protection. The question before the Court was whether, under the FMLA, 29 U.S.C. § 2601, et seq., Satterfield, an at-will employee of Wal-Mart Stores, Inc., gave adequate notice of her need for leave, because of an unforeseeable medical problem/condition, pain in her side. One of the regulations promulgated by the Secretary of Labor (approximately two months before Satterfield’s discharge) defines a serious health condition as:

an illness, injury, impairment, or physical or mental condition that involves:

(1) Inpatient care (i.e., an overnight stay) in a hospital, hospice, or residential medical care facility, including any period of incapacity (for purposes of this section, defined to mean inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom), or any subsequent treatment in connection with such inpatient care; or

(2) Continuing treatment by a health care provider....

29 C.F.R. § 825.114(a)

The regulation further provided that continuing treatment by a health care provider includes, in pertinent part:

(i) A period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of more than three consecutive calendar days, and any subsequent treatment or period of incapacity relating to the same condition, that also involves:

(A) Treatment two or more times by a health care provider, by a nurse or physician’s assistant under direct supervision of a health care provider, or by a provider of health care services (e.g., physical therapist) under orders of, or on referral by, a health care provider; or

(B) Treatment by a health care provider on at least one occasion which results in a regimen of continuing treatment under the supervision of the health care provider.

29 C.F.R. § 825.114(a)(2)(i).

According to the Court, when the need for FMLA leave is foreseeable, an employee must provide her employer with no less than 30 days advance notice. "If, however, leave is for the birth of a child or the placement of a child with the employee for adoption or foster care and must begin in less than 30 days, the employee shall provide such notice as is practicable," citing 29 U.S.C. § 2612(e)(1)&(2)(B); see also 29 C.F.R. § 825.302.

The Court further noted, however, that the FMLA was silent as to notice requirements when, as in this case, the need for leave is unforeseeable, but found that the regulations address this question:

(a) When the approximate timing of the need for leave is not foreseeable, an employee should give notice to the employer of the need for FMLA leave as soon as practicable under the facts and circumstances of the particular case. It is expected that an employee will give notice to the employer within no more than one or two working days of learning of the need for leave, except in extraordinary circumstances where such notice is not feasible. In the case of a medical emergency
requiring leave because of an employee's own serious health condition or to care for a family member with a serious health condition, written advance notice pursuant to an employer's internal rules and procedures may not be required when FMLA leave is involved.

(b) The employee should provide notice to the employer either in person or by telephone, telegraph, facsimile (fax) machine or other electronic means. Notice may be given by the employee's spokesperson (e.g., spouse, adult family member or other responsible party) if the employee is unable to do so personally. The employee need not expressly assert rights under the FMLA or even mention the FMLA, but may only state that leave is needed. The employer will be expected to obtain any additional required information through informal means. The employee or spokesperson will be expected to provide more information when it can readily be accomplished as a practical matter, taking into consideration the exigencies of the situation. 29 C.F.R. § 825.303

Even though "the FMLA makes incredible inroads on an at-will employment relationship, such as Satterfields with Wal-Mart," the Fifth Circuit concluded that in view of Satterfields employment history and her knowledge, as well as utilization, of Wal-Mart's rules and procedures concerning leave and absenteeism, and pursuant to the Manuel test, 66 F.3d at 764, no rational trier of fact could conclude that her efforts to give notice were sufficient to reasonably apprise Wal-Mart of her request to take time off for a serious health condition within the meaning of the FMLA, stating:

While an employer's duty to inquire may be predicated on statements made by the employee, the employer is not required to be clairvoyant. Johnson v. Primerica, 1996 WL 34148, at *5 (S.D.N.Y. 1996). Although Satterfield was able to telephone her doctor's office on the afternoon of 16 June and schedule an appointment, she made no attempt to then contact Wal-Mart to advise of both the status of her condition and that appointment for the following Tuesday, 20 June. Indeed, she did not contact Wal-Mart until 28 June.

The 28 June doctor's excuse Satterfield providedWal-Mart stated that she had been under the doctor's care since 20 June, after Wal-Mart had discharged her, and that it was indefinite as to when she could return to work; but, it did not state that the condition for which she was being treated necessitated her absence from work on 16 June. As explained, Satterfield and her mother testified that they also provided Wal-Mart an excuse dated 20 June. But, there is no evidence regarding its contents.

Obviously, [w]hat is practicable, both in terms of the timing of the notice and its content, will depend upon the facts and circumstances of each individual case. Manuel, 66 F.3d at 764 (emphasis added); see 29 C. F.R. § 825.303. Other very relevant facts and circumstances at hand include: (1) Satterfield knew how to obtain similar leave from Wal-Mart, because she had requested, and received, leave pursuant to its policies in 1993 and 1994; and (2) in the three weeks preceding 16 June 1995, she had three unexcused absences.

Considering all of these facts and circumstances, no rational trier of fact could conclude that the meager information Satterfield imparted to Wal-Mart on 16 June was sufficient to require Wal-Mart to seek additional information about her condition, and whether it qualified for FMLA protection.

Reversing and rendering in favor of the employer on the notice issue, the Fifth Circuit summed up the rationale for its holding, emphasizing that the FMLA was not intended to replace traditional sick leave and personal leave policies but was geared more toward serious, less common medical situations:

Requiring an employer to undertake to investigate whether FMLA-leave is appropriate each time an employee, who has been absent without excuse three times in the preceding three weeks, informs the employer that she will not be at work that day because she is having a lot of pain in her side or is sick, is quite inconsistent with the purposes of the FMLA, because it is not necessary for the protection of employees who suffer from serious health conditions, and would be unduly burdensome for employers, to say the least. See Price v. City of Fort Wayne, 117 F.3d 1022, 1023 (7th Cir. 1997) (The goal of the FMLA was not to supplant employer-established sick leave and
personal leave policies, but to provide leave for more uncommon and, presumably, time-consuming events such as having or adopting a child or suffering from what is termed a serious health condition.

Accord, Gaston v. General Binding Corp., ___ F. Supp. 2d ___, No. 1:98CV26-S-D (N.D. Miss. 1999)("[E]ven if the court were to find that Gaston has raised sufficient genuine issues of material fact as to her prima facie case, she simply cannot show that the reason offered by GBC for her termination, excessive unexcused absences, was a pretext for FMLA discrimination or retaliation, especially in light of the fact that Bowlin, who made the final termination decision, was the person who first suggested that Gaston invoke her FMLA rights."); Starling v. Auto-Zone, Inc., NO. 1:98CV253-B-A (N. D. Miss. 1999)("The FMLA provides "an eligible employee shall be entitled to a total of 12 week's leave during any 12 month period ... (D) because of a serious health condition." 29 U.S.C. §2612(a)(1). If the employer designates an employee's leave as FMLA leave under the federal statute and regulations "the employee's FMLA entitlement may run concurrently with a worker's compensation absence." 29 C.F.R. §825.207(d)(2). The defendant's letter on March 16, 1998 designating the plaintiff's leave as FMLA leave was proper written notification. aking all facts in the light most favorable to the non-movant, the plaintiff's FMLA entitlement expired on or about June 7, 1998. Considering the normal course of mailing and the addition of three days for mailing under the federal rules, the latest date that the plaintiff's 12-week entitlement could have run is June 10, 1998. Fed. R. Civ. P. 6; see also. Viereck v. City of Glouster, 961 F. Supp. 703, 708 (D. N.J. 1997) (date of notification of leave considered to be the date upon which the plaintiff would have received the notification letter sent by mail. The court took into consideration that mail could not have been delivered on Sunday or a legal holiday (Monday), to determine that mail sent on Friday should have been received by the plaintiff on the following Tuesday). Accordingly, the court finds that the plaintiff had expended his FMLA leave entitlement in June 1998. Thus the plaintiff's dismissal in July 1998 is not a violation of the FMLA and the plaintiff's claims are dismissed.")

Where the employee argued repeatedly and clarified at trial that he was not saying he got fired because of taking the leave, but rather, argued consistently throughout trial that the crux of the claim was that he was not restored to his job, the Fifth Circuit concluded that the "evidence presented and the reasonable inferences from it, viewed in a light most favorable to [the employee], sufficiently support the jury’s verdict that [the employer] violated the FMLA." Nero v. Industrial Molding Corp., ___ F. 3d ___, No. 98-10020 (5th Cir. 1999). The Court reasoned:

On the basis of the evidence, a jury could reasonably believe that Nero was performing his job properly for a number of months and that the time of IMCs termination of Nero (days after his heart attack) was not merely a coincidence. A jury also could reasonably believe that IMCs stated reasons for firing Nerossubstandard management practices and department restructuringwere not the real reasons for its termination decision. Although conflicting, some evidence supports the jurys finding that the decision to terminate Nero did not occur prior to his heart attack, and therefore the FMLA entitled Nero to return to his job as plant manager.

Pinegar v. Baptist Memorial Hospital - DeSoto County, 2:96cv63-B-A (N.D. Miss. 1997)("To qualify for the benefits and protection afforded by the FMLA, an employee must have been employed for at least 1,250 hours of service during the 12-month period immediately preceding the commencement of the leave. 29 U.S.C. § 2611(2) (A)(ii). In her deposition, the plaintiff testified that the leave she requested in April of 1994 was to commence on May 26, 1994. She further testified that after being denied her first request for leave, she made a second request for leave which was to commence on June 3, 1994. The defendant has submitted the affidavit of its Director of Human Resources, who states that the plaintiff had not worked 1,250 hours during the 12-month period preceding either May 26 or June 3, 1994. The defendant's affidavit is uncontroverted by the plaintiff. Since the undisputed evidence shows that the plaintiff failed to work the requisite number of hours during the twelve months preceding her requests for leave, the court finds that the plaintiff was not entitled to the benefits and protection of the FMLA."); Hardmon v. City of Clarksdale, 2:97cv32-S-B (N. D. Miss. 1998)(In remanding for lack of federal question jurisdiction, Court noted that Plaintiff sought relief based on defendants' alleged arbitrary and capricious behavior in connection with her termination from employment, claiming that she had been negligently and carelessly terminated for absences covered by the FMLA when she was off to care for her mother who had cancer, asserting only claims arising under state tort for noncompliance with FMLA. "As to plaintiff's claim for negligence per se based on defendants' alleged violation of the FMLA, the court reaches the same conclusion."

http://www.griffithlaw.net/research.database/uploads/957187922_file_finalboardattorney... 10/16/2014
With plaintiff's specific disclaimer, the court can draw only one conclusion: plaintiff is not seeking any relief under the FMLA. In that situation, no federal question is raised.

Several opinions have also been issued by the Attorney General's office on the subject of personal and sick leave for county employees.

· AG Op. No. 95-0117 to Gamble, April 6, 1995, stated that a county may continue to pay health insurance premiums as part of its benefits package for an employee who had exhausted his annual leave and sick leave unless that person's employment is terminated with the county, and that a county is authorized by state law to pay health and life insurance premiums for an employee who has exhausted all of his personal and sick leave and who is on extended leave without pay if the county's personnel policy and benefits package so provide.

· AG Op. No. 95-0321 to Logan, May 10, 1995, stated that a County Board of Supervisors has the authority to pay health insurance premiums on behalf of a county employee who has exhausted all of his personal and sick leave and who is on a leave of absence status due to an extended illness, if the county's personnel policy and benefits package so provides.

· AG Op. No. 95-0251 to Teel, July 31, 1995, stated: "a court reporter for the County Court is a county employee and would be subject to the leave policies adopted by the county. A court reporter for the Chancery Court or Circuit Court is an appointed officer of the State of Mississippi acting within the district from which the appointment is made.... As such, court reporters of the Chancery and Circuit Courts earn leave under the provisions of section 25-3-91 et seq. insofar as these sections apply to appointed officers of the State of Mississippi. Under the provisions of section 25-3-91 et seq., employees and appointed offices may be paid for not more than 30 days of accumulated personal leave upon termination of employment. Unused personal leave in excess of 30 days and any unused sick leave is counted as creditable service for purposes of the retirement system as provided in section 25-11-103. If the county leave policies are identical to the State provisions, then the same answer would apply to the accumulated leave of the court reporter for the County Court."

· AG Op. No. 98-0154 to Ready, May 26, 1998, stated: "In most instances, an individual who is an "employee" as defined in Miss. Code Ann. Section 25-3-91 (Rev. 1991), receives credit for personal and sick leave pursuant to the general statutes. Miss. Code Ann. Sections 25-3-93 and 25-3-95 (Supp. 1997). Such employees are entitled to accrue personal and sick leave. All lawfully credited unused leave, not exceeding the accrual rates and limitations as provided for in Section 25-3-93 et seq., may be counted as creditable service in the calculation of retirement benefits. Miss. Code Ann. Sections 25-3-93 and 25-3-95. However, when a specific statute relative to an individual's employment status prescribes the manner in which the individual's leave, whether with or without pay, is calculated, whether it be administrative leave, personal leave or sick leave, the terms of the specific statute control over the general statute. Lenoir v Madison County, 641 So2d, 1124, 1128 (Miss. 1994); Townsend v Estate of Gilbert, 616 So2d 333, 335 (Miss. 1993)."

· AG Op. No. 97-0415 to Tufaro, July 18, 1997, stated: "An employee may receive pay which is earned for accumulated sick leave and/or personal leave at the same time that he or she is receiving workers' compensation benefits. If a library board continues paying a regular salary to an employee who is off work due to a job related injury after his or her accrued sick leave and personal leave have been exhausted, that compensation constitutes an unauthorized donation. MS AG Op., Creekmore (December 14, 1994)."

4. Legal Holidays

The subject of legal holidays is statutorily prescribed by Miss. Code Ann. §3-3-7 (Supp. 1994). It is suggested that these legal holidays be clearly set forth in the county’s written personnel policy:

1. First day of January (New Year’s Day)

2. Third Monday of January (Robert E. Lee’s birthday and Dr. Martin Luther King, Jr.’s birthday)

3. Third Monday of February (Washington’s birthday)
4. Last Monday of April (Confederate Memorial Day)
5. Last Monday of May (National Memorial Day and Jefferson Davis’ birthday)
6. Fourth day of July (Independence Day)
7. First Monday of September (Labor Day)
8. Eleventh day of November (Armistice or Veterans’ Day)
9. Thanksgiving, which is the day fixed by proclamation by the Governor of Mississippi to correspond to the date proclaimed by the President of the United States
10. The 25th day of December (Christmas Day)

The statute also provides that in the event any holiday declared legal shall fall on Sunday, then the next following day shall be a legal holiday.

Courthouse Closure

The courthouse is required to be closed on all state holidays set forth in §3-3-7. See Miss. Code Ann. §25-1-99 (1988). When any state holiday set forth in §3-3-7 falls on a Saturday

the courthouse may be closed on the Friday immediately preceding such Saturday and when such holiday falls on a Sunday, the courthouse may be closed on the Monday immediately succeeding such Sunday. The Board of Supervisors, in its discretion, may close the county offices on those holidays created by Executive Order of the Governor.

The Court has noted that the state and federal statutes relating to legal holidays generally effectuate a "long weekend" by placing many of the holidays arbitrarily on a Monday, and as to some federal statutes, in some instances on a preceding Friday. See Parkman v. Mississippi State Highway Commission, 250 So. 2d 637 (Miss. 1971).

Several official opinions have also been issued by the Attorney General’s Office on the subject of legal holidays.

· AG Op. No. 86-48 to Smith, February 26, 1986, stated that, based on the statutory language in §3-3-7 and §25-1-99, the offices of Circuit and Chancery Clerks and Sheriffs must be open for business on all business days, except such offices may be closed pursuant to Order of the Board of Supervisors as provided in §25-1-99. Further, the Clerks of the Circuit and Chancery Courts, the County Superintendents of Education, the County Tax Assessors and the Sheriffs are required under §25-1-99 to close their offices on the legal holidays of the state, and that "the Board of Supervisors do not have the authority to change, reschedule or rearrange the date of any of the state’s legal holidays."

· AG Op. No. 92-0091 to Sullivan, February 12, 1992, stated that in view of the conflict between Rule 77 of the Mississippi Rules of Civil Procedure ("The Clerk’s office with the Clerk or a Deputy in attendance shall be open during business hours on all days except Saturdays, Sundays and legal holidays") and §25-1-99, insofar as the statute allows the Clerk, as Clerk of the Court, to maintain lesser office hours than those provided for in Rule 77, and since Rule 77 controls over any conflicting statutes, the Clerk or his Deputy, as Clerk of the Court, could not, pursuant to an Order passed under §25-1-99, be absent from the office during this time. "However, the Board of Supervisors is still free to set different office hours, in accordance with §25-1-99, for the Clerks in their non-judicial roles."

Political Activities of County Personnel
Where a person employed by a county is involved in a job financed in whole or in part by loans or grants made by the federal government, the employee’s political activity may be restricted under the Hatch Act, 5 U.S.C. §1502(a), providing in part that a state or local employee may not

· Use his official authority or influence for the purpose of interfering with or effectuating the result of an election or a nomination for office;

· Directly or indirectly coerce, attempt to coerce, command or advise a state or local officer or employee to pay, lend or contribute anything of value to a party, committee, organization, agency or person for political purposes; or

· Be a candidate for elective office.

The above restrictions do not apply to an individual holding elective office. 5 U.S.C. §1502(c). In AG Op. No. 83-312 to Greer, February 2, 1983, the Attorney General’s office, while declining to render an opinion on the Hatch Act or its applicability to state personnel, noted that 5 U.S.C. §§1501-1508 prohibit employees of a federally funded agency from being a candidate for a public elective office in a partisan election, and that active participation, such as serving as a treasurer or campaign manager for a candidate seeking elected office, would seem to be covered also.

Similarly, state law authorizes the State Personnel Board to administer a state personnel system in accordance with principles which include the assurance that:

Employees are free from coercion from partisan or political purposes and to prohibit employees from using their official authority for the purpose of interfering with or affecting the result of an election or a nomination for office.


As to requiring local government employees to take a mandatory leave of absence during a political campaign, the Mississippi Supreme Court has held that a county Board of Education had the authority to require a teacher to take a leave of absence without pay during the time the teacher was engaged in a political campaign. The Court noted that the Board had applied the requirement to another teacher who became a candidate and that there was no charge that the Board did not apply this regulation fairly or that it abused its discretion in taking this action. Chatham v. Johnson, 195 So. 2d 62 (Miss. 1967). In that case the Court stated:

It will be conceded that he has the same privilege as any other citizen to become a candidate for public office. Such candidacy should not be and is not ground for cancellation of his contract as a permanent teacher. But anyone who has been a candidate recognizes that political activity is apt to interfere with one’s usual avocation and this fact, independent of any possible involvement of the school system in political controversies, affords a sound reason for a temporary severance of the candidate’s connection with the schools. Id. at 65-66.


The extent to which a local government body can regulate political activities has been the subject of several Official Attorney General’s Opinions. If a county does not have a past practice or policy requiring mandatory leave of absence for a county employee who runs for elective office, adopting a new requirement for county employees to take such a leave of absence without pay in the event they run for office would probably be considered a "procedure with respect to voting" which would trigger the preclearance requirements under §5 of the Voting Rights Act of 1965, as amended and extended. In response to an opinion request (Burrell, August 31, 1983), the Attorney General’s office gave the following interpretation of Daugherty County, Georgia, Board of Education v. White, 439 U.S. 32 (1978):
In summary, that case states that a county Board of Education in a state covered by the Voting Rights Act of 1965 must seek federal approval under §5 of said Act of a rule requiring its employees to take unpaid leaves of absence while they campaigned for elective office and that such a rule may not be enforced unless federal approval is first obtained. While the above decision speaks directly to school employees, this office is of the opinion that the legal principles involved would also be applicable to similar rules adopted by Boards of Supervisors.

**Election Code Restrictions**

Mississippi’s Election Code also contains a provision that places severe restraints upon political activities of County Commissioners of Election. These provisions were construed by the Mississippi Supreme Court in *Meeks v. Tallahatchie County*, 513 So. 2d 563 (Miss. 1987). At issue in *Meeks* was whether an Election Commissioner may resign and seek another office during the term for which he was elected Commissioner, or whether the law disqualifies an Election Commissioners from such candidacy. The Court held that once a person assumes the office of Election Commissioner,

he becomes obligated to stay out of any other electoral endeavor of the term of his office period. If this seem harsh, it is certainly less so than the adverse impact upon the public interest if our people come to doubt the integrity of the system.

The Attorney General’s office has also issued a number of opinions on the subject of political activities by county employees.

· AG Op. No. 91-0517 to Walters, July 10, 1991, opined that county employees who are not subject to civil service prohibitions against political activities or formerly adopted personnel regulations prohibiting same, may be candidates for public office without having to resign their positions with the county. "We emphasize that county employees who seek public office must be careful not to campaign while being paid to perform duties for the county or use any county automobiles or other equipment or supplies for campaign purposes."

· AG Op. No. 93-0422 to Shepard, August 26, 1993, stated that there was no statute or rule known to the Attorney General that would require an employee of the County Civil Defense to resign in order to be a candidate for the County School Board of Education, provided the employee carries out the duties of his or her job and does not engage in any political activities during working hours. The County Civil Defense employee should be cautioned that should she decide to become a candidate for the school board, she should avoid campaigning in any official capacity relating to her job with the Civil Defense.

· AG Op. to Davies, January 9, 1991, discusses the enforceability of a municipal personnel regulation prohibiting political activities of his employees, and that opinion, according to the Attorney General, would also apply to a county. See AG Op. No. 91-0517, supra.

· AG Op. No. 79-0812 to Jones, April 11, 1979, opined that if a city or its agencies attempted to enforce a requirement that an employee take a leave of absence when engaged in running for political office, and if such requirement was made subsequent to 1965, then the requirement should be submitted to the Office of the Attorney General of the United States for preclearance under §5 of the Voting Rights Act, consistent with *Daugherty County*, supra.

**Protected Speech in the Public Workplace**

"Congress shall make no law ... abridging the freedom of speech... ."

The First Amendment is a simple statement of a fundamental right. So how come we have conflicts and lawsuits over its meaning and how, why, when, and to whom it applies? That question gets even more complicated when we move into the public workplace.
Employees in the public sector stand on a somewhat different footing from employees in the private sector when it comes to freedom of speech and the First Amendment. These words from the Supreme Court’s landmark Pickering decision 30 years ago sum up the difference:

[T]he state has interests as an employer in regulating the speech of its employees that differ significantly from those it possesses in connection with regulation of speech of the citizenry in general. The problem in any case is to arrive at a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees.

In *Pickering v. Board of Education*, 391 U.S. 563, 568 (1968), the Supreme Court held that a school board could not constitutionally dismiss a teacher for writing a letter to the newspaper criticizing the board’s handling of a bond proposal and its allocation of funds between academic and athletic programs. Its ruling was based on a balancing of the relative importance of the teacher’s interests as a citizen in commenting publicly on matters of public concern and the board’s interests in promoting the efficiency of the public services it performs through its employees.

*Basic First Amendment Principles*

A government cannot limit or prohibit free speech just because the ideas expressed rub it the wrong way, but there are situations when a citizen’s right to free speech has to give way to greater societal interests. A classic example: nobody has an absolute constitutional right to yell "FIRE!" in a crowded theater. The risk of injuries resulting from a panic-stricken crowd rushing for the exit outweighs the individual’s right to speak without any restraint.

When the government becomes the employer, it takes on the dual role of sovereign and boss, and it still has to allow employees to enjoy freedom of individual expression while also carrying out its duty to provide efficient public services. As the Court said in *Waters v. Churchill*, 114 S.Ct. 1878, 1886 (1994), "the government as employer...has far broader powers than does the government as sovereign."

*Low Value Speech*

Regardless of whether the speaker is a private employee or government employee, some types of speech are considered low value speech, like obscenity (e.g., "I’ll whip your ass, Bert"), fighting words, defamation, incitement to engage in unlawful action through speech that presents a clear and present danger of imminent lawless action, and seditious teaching of the forceful overthrow of government coupled with specific directions regarding illegal action to be taken in the future.

*High Value Speech*

Other types of speech are considered high value speech which, because of the nature and historical underpinnings of our democracy and society’s recognition of the need to protect the free flow of ideas, receives the broadest protection under the First Amendment from government restriction. Examples include speaking on matters of important public debate, speech concerning the political process, and similar speech by those who wish to enter the "marketplace of ideas."

"Marketplace of Ideas"

When the government seeks to place restrictions on high value speech in a way that has a harmful or negative impact on this "marketplace of ideas," courts will subject that governmental action to the highest level of scrutiny, known as strict scrutiny, and will require the government to prove that the restriction it is trying to place on this type of speech is narrowly tailored to serve a compelling governmental interest. There are still other examples of high value speech, including speech expressed in a public forum and symbolic or expressive conduct that seek to communicate an idea. Consider the difference between a person claiming that he has a right to sleep on a sidewalk and a person who sleeps on the sidewalk as a protest against the lack of shelters for the homeless. The
First Amendment generally will not protect the first person, but the expressive conduct of the second person will probably implicate First Amendment concerns and protection.

**Controversial Expressive Conduct**

All this sounds pretty straightforward until we get to the truly controversial examples of expressive conduct that the Supreme Court has recognized and held entitled to First Amendment protection: flag-burning, mass demonstrations, desegregation sit-ins, cross-burning, displaying signs in one’s window or yard, picketing and strikes.

While the First Amendment protects expressive conduct, that protection is not absolute. Moreover, while government may not constitutionally regulate the message conveyed or aim its regulatory power at the content of the expressive conduct, government does have more leeway to regulate the time, place and manner of conduct in public places. For example, justifiable restrictions on speech have been found to be supported by a significant governmental interest in traffic safety, orderly crowds, noise control and personal privacy. These and similar restrictions will usually be upheld so long as the regulation or restriction is subject-matter neutral, narrowly tailored to serve a significant governmental interest, and provides alternative avenues of communication. *Frishy v. Schultz*, 487 U.S. 474 (1988). See generally M. Edwards, et al., Freedom of Speech in the Public Workplace 2-12 (ABA Section of State and Local Government Law 1998), which is the source for the bulk of the case material and analysis that follows.

**Prior Restraint**

A prior restraint is a governmental restriction or regulation that seeks to prevent a certain type of communication from reaching the public. Prior restraints are particularly disfavored, as shown by decades of the Supreme Court’s First Amendment jurisprudence, and the Court has long said that it is better for speech to be allowed to reach the public than to muzzle the speaker and the speech at the outset, because if the speech is slanderous, defamatory or otherwise unprotected, the courts and legal system can punish the speaker. Prior restraints have been upheld on the basis of such strong justifications as national security, the need to preserve a fair trial, and prevention of the dissemination of obscenity. More than theoretical harm must be shown even in these compelling situations.

**Prior Restraints in Public Employment**

Public employment presents a unique context for prior restraints. Government employers at times seek to impose "prepublication review" on public speech by employees about internal governmental operations. For example, in *Firefighters’ Association v. Barry*, 742 F. Supp.1182 (D.C.Cir. 1990), a D.C. regulation required fire department employees to get prior approval from the public affairs officer before they could take part in media interviews. The regulation did not provide an objective standard to guide the public affairs officer’s decision to grant or deny a request, and this vesting of unbridled discretion in one fire department official, without guiding standards, created an unconstitutional prior restraint. Similar media-muzzle policies have been declared unconstitutional prior restraints in the context of such governmental employers as police departments, child welfare agencies and federal agencies, usually because of the unbridled discretion placed in one individual.

**Overbroad Regulations**

The First Amendment’s central purpose is to encourage the free, robust and uninhibited flow of ideas. For this reason, governmental restrictions that restrict much more speech than is necessary can be attacked at unconstitutionally overbroad, as where a regulation "sweeps within its ambit... activities that...constitute an exercise of freedom of speech." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). A good example of overbroad governmental employer regulations involving employee speech is found in *Holland v. Dillon*, 531 N.Y.S. 2d 467 (N.Y.Sup.Ct. 1988), where the duty manual of the county sheriff’s department prohibited employees from making public statements or granting interviews concerning the county without advance approval from a competent authority. Similarly, in *Barrett v. Thomas*, 649 F. 2d 1193 (5th Cir. 1981), a sheriff’s office regulation prohibiting "unauthorized public statements" and speaking to reporters on controversial topics was held unconstitutionally overbroad as an attempt to limit protected speech.
Discharge and Disciplinary Action in Retaliation for Protected Speech

A governmental employer cannot discharge an employee based on his or her constitutionally protected speech. *Perry v. Sindermann*, 408 U.S. 593, 597 (1972), held that a college board unconstitutionally refused to renew a teacher’s employment contract based on his free speech activities when he testified before a legislative committee and publicly supported structural changes to the college that the board opposed. The Court there recognized that the teacher may not have had a "right" to a valuable governmental benefit, i.e., renewal of his employment contract, and the government may even deny him the benefit for "any number of reasons," but it may not deny a benefit to a person on a basis that infringes his constitutionally protected interests - especially his interest in freedom of speech.

**Mount Healthy Defense**

A governmental employer does not have to reinstate an employee, however, when the employee’s constitutionally protected conduct played only a part in the discharge decision, according to the Supreme Court in *Mount Healthy City School District v. Doyle*, 429 U.S. 274 (1977). The Court held that a board’s non-renewal of a teacher’s contract and discharge of the teacher for "unprofessional conduct" did not violate the teacher’s constitutional rights under the First Amendment where the teacher (1) made a telephone call to a local radio station to report the board’s proposed dress code for teachers, admittedly protected speech and conduct, but (2) also used obscene gestures in dealing with two female students.

The Court reasoned that if a public employer would have discharged an employee in the absence of his exercise of free speech, the mere fact that protected speech might have been an additional factor or consideration in the discharge decision did not justify a court stepping in and reversing the employer’s decision, stating:

A borderline or marginal candidate should not have the employment question resolved against him because of constitutionally protected conduct. But the same candidate ought not to be able, by engaging in such conduct, to prevent his employer from assessing his performance record and reaching a decision not to rehire on the basis of that record, simply because the protected conduct makes the employer more certain of the correctness of its decision.

The *Mount Healthy* defense enables a public employer to dismiss a public employee justifiably, even if the employee engages in protected speech, if the employer is able to prove that its dismissal was for reasons other than the exercise of protected speech.

**Private Conversations by Public Employees**

Public speech by public employees was involved in *Pickering, Perry* and *Mount Healthy*. However, when a public employee expresses his or her speech privately to an employer, the speech is no less protected, as the Court held in *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979):

Neither the [First] Amendment itself nor our decisions indicate that this freedom is lost to the public employee who arranges to communicate privately with his employer rather than to spread his views before the public.

**Personal Employment Grievances**

When Harry Connick, Jr. was barely out of grade school, his father, New Orleans District Attorney Harry Connick, fired an assistant D.A. on grounds of insubordination and failure to accept a transfer after she distributed a questionnaire to other employees in the office concerning working conditions, the office’s transfer policy, office morale, the need for a grievance committee, the level of confidence employees had in supervisors, and whether employees felt pressured to work in political campaigns. *Connick v. Myers*, 461 U.S. 138 (1983).

Connick said this questionnaire being distributed by the assistant D.A. caused a "mini-insurrection," and his discharge decision was upheld by the Supreme Court. Concluding that a public employee’s work-related speech
is not protected by the First Amendment unless it involves a matter of public concern and does not disrupt the workplace, the Court said:

When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters only of personal interest, absent the most unusual circumstances, a federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee’s behavior. *Id.* at 147.

The *Connick* case tells us that in determining if an employee’s statement is a matter of public concern, one should consider the content, form and context of the statement. Government officials as employers should be given wide latitude in managing their offices, without the intrusive oversight of the federal courts, "when an employee’s expression cannot fairly be considered as relating to any matter of political, social, or other concern to the community." *Id.* at 146. Given that there will be work environments in which close working relationships are essential to carrying out public responsibilities, "a wide degree of deference to the employer’s judgment is appropriate," and, moreover, the employer is not required to "allow events to unfold to the extent that the disruption of the office and the destruction of working relationships is manifest before taking action." *Id.* at 151-52.

*First Amendment--Sheriff as Final Policymaker*

In *Brady v. Ft. Bend County, Texas*, 145 F.3d 691 (5th Cir. 1998), Plaintiffs, former deputy sheriffs, a lieutenant of the detective bureau, a detective sergeant in narcotics, a patrol sergeant, lieutenant in charge of the county jail, supervising sergeants and a patrol deputy sued the County claiming that the Sheriff was liable under 42 U.S.C. §1983 for failure to rehire them based on their exercise of First Amendment Rights of Free Speech and Association. The Fifth Circuit affirmed the District Court’s judgment in favor of the Plaintiffs, holding that as a matter of law the County was liable for the Sheriff’s hiring decisions since the Sheriff was acting as the County’s final policymaker when he declined to rehire the Plaintiffs, all of whom had supported the Sheriff’s opponent by attending rallies, posting signs and campaigning door-to-door in opposition to the Sheriff’s re-election bid.

*Sheriff’s Exercise of Final Policymaking Authority*

First, the Fifth Circuit noted that the State Legislature had vested sheriffs with discretion to hire and fire employees, and that the Sheriff’s exercise of that discretion was unreviewable by any other official or governmental body in the County, and thus Texas Sheriffs "exercised final policymaking authority with respect to the determination of how to fill employment positions in the County Sheriff’s Department." Noting that a municipal official need only exercise final policymaking authority with respect to the specific action that allegedly constitutes a constitutional tort, the Fifth Circuit concluded that the Sheriff possessed sufficient final policymaking authority regarding such decisions as hiring and firing of deputies and, moreover, when the Sheriff failed to rehire the plaintiffs, he was acting in a final policymaking capacity and "as such, if his decision not to rehire the plaintiffs constituted an infringement of their First Amendment rights, the County is liable for the consequences of that decision."

*Patronage Dismissals vis a vis Civil Service System*

The Fifth Circuit then turned to the issue of whether the Sheriff’s failure to rehire the plaintiffs violated their First Amendment rights, and rejected the County’s contention that it was "unfair to subject it to a new round of lawsuits every four years when a new sheriff is elected merely because Texas law allows patronage dismissal by county sheriffs." The Fifth Circuit noted that counties were given the option by state legislation to create a civil service system for Sheriffs’ Departments, and this option at least limited to some degree the Sheriff’s ability to engage in unconstitutional hiring practices, and in this case there was no justification for allowing constitutional violations by the County’s Sheriff to go unremedied.

*Pickering-Connick Balance*
Finally, the Fifth Circuit held that the Sheriff’s failure to rehire the plaintiffs, based upon their political activities in support of the Sheriff’s opponent, constituted a violation of the First Amendment adhering to the *Pickering-Connick* balancing of relevant factors, the Fifth Circuit concluded that campaigning for a political candidate relates to a matter of public concern, that the plaintiffs did not occupy positions for which political affiliation was an appropriate employment criterion, and that their political activity in support of the sheriff’s opponent "had little if any potential for undermining close working relationships with the sheriff’s department or for impairing discipline by superiors or harmony among co-workers within the department." The Court then concluded that the *Pickering-Connick* balance weighed in favor of the plaintiffs and that the Sheriff was not privileged to decline to rehire them based on their political support for his opponent.

In affirming the jury’s verdict and judgment thereon, the Fifth Circuit held that the District Court properly denied the County’s Motion for a New Trial, since the evidence did not point so strongly or overwhelmingly in favor of a conclusion that the Plaintiffs’ political activity was not a substantial or motivating factor in the Sheriff’s decision not to rehire them or that the Sheriff would have chosen not to rehire the Plaintiffs in the absence of their support for the Sheriff’s opponent that a reasonable jury could not reach a contrary conclusion.

*Investigation Leading to Employee Discipline*

The *Pickering-Connick* balancing test was applied in *Waters v. Churchill*, 511 U.S. 661 (1994), to the facts that a government employer reasonably believed to exist at the time it decided to discipline an employee, as opposed to the facts a jury ultimately determines existed. A public hospital discharged a nurse allegedly because of statements she made to a fellow employee. The actual content of what the nurse said was sharply disputed. The nurse claimed the hospital discharged her because she had made non-disruptive statements that were critical of the hospital’s cross-training program. The hospital claimed the discharge was the result of the nurse making disruptive statements critical of her department and supervisor. The nurse argued that whether her speech was protected or not must be determined on the basis of the jury’s factual determination of the actual content of her speech.

The Supreme Court held that when a public employer conducts a reasonable investigation and reasonable concludes that its employee’s speech is not protected, the conclusions of the employer as to the nature of the speech, not the trier of facts, will control. To allow the jury to determine what the content of the employee’s speech actually was would force employers to adopt rules of evidence similar to those in a court of law before making employment decisions, the Court reasoned. If an employer’s investigation, conclusions and actions were reasonable under the circumstances, the courts should not use 20-20 hindsight to determine the content of the employee’s speech or the reasonableness of the employer’s decision.

Waters applies when there is a dispute concerning whether an employee’s speech addressed a matter of public concern, and it teaches us that an employer need only act reasonably in making its actual decision, and that its actions do not have to be defended based on information that surfaces later on during pretrial discovery. In other words, as long as an employer can base its employment decision on its reasonable conclusions as to an employee’s speech, it should be able to avoid liability. But if an employer does not conduct an investigation before it discharges an employee, this may show that the employer acted unreasonably, and liability could result.

*Grievances Involving Matters of Public vs. Private Concern*

Sometimes public employees speak out on internal government agency operations, claiming the are speaking as concerned taxpayer and not as employees. Such efforts to characterize speech as flowing from one’s status as a taxpayer or citizen are often used to mask what is nothing more than a personal employment dispute, and these efforts usually fail. For example, in *Deremo v. Watkins*, 939 F.2d 908, 912 (11th Cir. 1991), an employee wrote a letter to a county clerk asking for compensation that had been promised to her and other victims of sexual harassment. This letter was held to be made in the employee’s "personal interest, rather than speech implicating a public concern." Similarly, in *Brenner v. Brown*, 36 F. 3d 18, 20 (7th Cir. 1994), an employee’s letters to two congressmen and the V.A. office of General Counsel were held to address an "entirely private concern" where the...
letters contained complaints that the employee’s supervisor was harassing her and giving her an excessive caseload, and also made false and defamatory statements about V.A. personnel.

At other times, however, employee speech that may at first blush appear to involve personal employment matter does in fact address issues of public concern. Indeed, speech relating to employment grievances is not always a personal matter, but may be protected speech that reveals a wider issue of concern to the general public, such as where black police officers picketed and demonstrated in protest against racially discriminatory policies, Leonard v. City of Columbus, 705 F.2d 1299 (11th Cir. 1983), an employee’s complaint about working 7 hours yet getting paid for 8 hours addressed a public concern over misuse of tax dollars, German v. City of Batavia, 1995 WL 66361 (N.D. III. 1995), and a nurse in a state-operated nursing home reported an incident of suspected patient abuse, White v. Washington, 929 P.2d 396 (Wash. 1997).

Employee speech that is critical of a direct supervisor will often be found to lack any appreciable public concern. In Voigt v. Savell, 70 F.3d 1552 (9th Cir. 1995), for example, a state clerk of court gave a speech criticizing a state court judge’s handling of internal personnel matters and referring to unfair discrimination against nonresidents of the state. This speech did touch on a limited matter of public concern, but that concern was outweighed by the state’s interest and thus was unprotected.

Allegations of Corruption and Waste

When a government employee speaks out on the misuse of public funds or takes the bold step forward to expose corruption in a governmental agency, the courts often find that such speech addresses matters of public concern. For example, where a county mechanic spoke at a public meeting on inefficiency and waste at the Motor Vehicles Division, his speech was held to have addressed an issue of significant public concern in Czurlanis v. Albanese, 721 F.2d 98 (3d Cir. 1983), the court noting that “information concerning the functioning of a segment of the county government is of considerable public importance.” Id. at 104. And where an employee alleged that the police chief had instructed police officers not to issue tickets to certain individuals, that speech was held to address a matter of the ”utmost public concern” in O‘Donnell v. Yanchulis, 875 F. 2d 1059 (3d Cir. 1989).

Finally, in Williams v. Board or Regents, 693 F.2d 993, 1103 (5th Cir. 1980), the U.S. Court of Appeals for the Fifth Circuit said these words of encouragement to those public employees who become whistle-blowers in order to put the spotlight on agency wrongdoing, fraud and misuse of public funds:

The falsification of an official document by one official for the protection of another official is such a grave miscarriage of the public trust that such conduct must be disclosed to the public if the people are to remain the true sovereigns in this country.

The body of law that springs from the First Amendment continues to expand. As government employees become more aware of their constitutional rights and the courts continue the trend of opening more and more avenues for the redress of civil rights in the public workplace, you can rest assured that our democracy’s "marketplace of ideas" will not just remain open - it will thrive.

First Amendment Perspective on Emergencies, Safety and Crowd Control Measures

An emergency crowd control plan was implemented by the City of Louisville and Jefferson County, Kentucky, officials during a Ku Klux Klan rally and a counter-demonstration organized by KKK opponents. The emergency crowd control plan, entitled "KKK Rally Detail," was attacked by the Klan as allegedly violative of their First Amendment guarantees of free speech, assembly and association. The District Court refused to grant the Klan's Motion for a Restraining Order and Preliminary Injunction, and ultimately entered Summary Judgment for the governmental defendants. In a recent article appearing in Municipal Lawyer, entitled "When the Ku Klux Klan Announces a Visit," the authors discussed the Sixth Circuit’s decision in Grider v. Abrahamson, 180 F.3d 739 (6th Cir. 1999), pet. for cert. filed, No. 99-490 (U.S. September 16, 1999), wherein the Sixth Circuit affirmed the District Court, holding that no First Amendment violation resulted from subjecting the rally attendees to mandatory searches as a prerequisite to their admission to the rally, that separating the Klan rally from the counter-demonstration did not violate the attendees’ free association rights, that no First Amendment violation
resulted from excluding private citizens from a police-occupied buffer zone, that it was a valid content-mutual
time, place and manner regulation for the City and County in the Emergency Crime Control Plan to disallow
unscheduled oration in the restricted area.

See also Norwood v. Bain, 143 F.3d 843, 854 (4th Cir. 1998), rehearing en banc granted, opinion vacated, 166
F.3d 243 (4th Cir. 1999)(en banc), cert. denied, 119 S.Ct. 2342 (1999), in which the Fourth Circuit suggested that
unobtrusive mechanical screening would have provided individualized suspicion to search the saddlebags of
attendees at a motorcycle rally.

The attorneys representing the City during the Grider litigation emphasize the need for a working knowledge of
the First Amendment:

As lawyers for a sizable urban police department, we have had the opportunity over the years to
review safety and crowd-control measures from the First Amendment perspective. You need a
comfort level with First Amendment jurisprudence when you are trying to tell city officials what they
cannot legally do. They will have good questions and legitimate concerns, and you will need to be
confident in your answers.

W. Stone, L. Fleming and P. Guagliardo, "When the Ku Klux Klan Announces a Visit," Municipal Lawyer at 15

Mississippi Public Records Act of 1983


The Act provides that all public records are public property and that any person has the right to inspect or obtain a
copy thereof subject to certain procedures concerning costs, time, place and method of access. The Act provides
public access to records, subject to certain exemptions. Certain of these exemptions include judicial records, jury
records, certain personnel records, attorney's work product, documents from third parties containing confidential
information, certain appraisal records, academic records, archeological records, hospital records, investigative
and criminal justice records, and certain commercial and financial records.

A specific exemption is provided for "test questions and answers in the possession of a public body...which are to
be used in employment examinations," Miss. Code Ann. §25-1-100(2) (Supp. 1983), and a similar exemption is
made for "personnel records and applications for employment in the possession of a public body" except those
released to or with the prior written consent of the person who made the application. Miss. Code Ann. §25-1-100
(1) (Supp. 1983).

It is important to note that if a public body has not adopted such written procedures, the statute provides that the
"right to inspect, copy or mechanically produce or obtain a production of a public record of the public body shall
be provided within one (1) working day after a written request for a public record is made."

The public body may adopt procedures to authorize the production or denial of production of public records up to
fourteen (14) days from the date of the request for the production of such record. Miss. Code Ann. §25-61-5(1)
(Supp. 1983).

Public Records Cases

The public’s right to have meaningful access to public records is substantial, and the Act carries with it a civil
penalty of One Hundred ($100.00) Dollars plus reasonable expenses for willful and knowing violations. Miss.
Code Ann. §25-61-15 (Supp. 1983). This right of meaningful access has been described as follows:
Any person need only make a request to inspect, copy, mechanically reproduce or obtain a reproduction of a public record, and, if the record is in existence, the custodian must supply it. The reasons for the making of the request are not material and the custodian may not inquire into the reason for the request. The choice of which option to employ for obtaining access to the record rests with the person requesting the record, not with the custodian. The vested right of persons to obtain records must be balanced against the duty of the custodian to preserve such records so as to insure their integrity, but the exercise of custodial duties must be in a manner least intrusive to access.

**Comp Time Records Subject to Disclosure**

In *Mississippi Department of Wildlife, Fisheries & Parks v. Mississippi Wildlife Enforcement Officers’ Association, Inc.*, 740 So. 2d 925 (Miss. 1999), the Mississippi Supreme Court handed down a landmark public records act decision, holding that employment records maintained by a state agency reflecting the accrued compensation time of its employees are subject to disclosure pursuant to the Mississippi Public Records Act. The MDWFP (Department) denied a public records request by the Association for "all information and/or records pertaining to the accrued compensation time of the Department's 967 employees. The denial was based on the Department’s concern ed that the information and records being sought were confidential employee information and its "understanding that ... personnel records, including accumulated annual and sick leave information as well as accumulated ‘comp time’, are exempt from the provisions of the Mississippi Public Records Act except as the requests of the individual employee or with his or her prior written consent [and that it] can release such information only to the individual employee when requested or with his or her prior written consent." The trial court disagreed and entered a final judgment directing the Department to (1) produce "a complete list of all employees of the Department, in alphabetical order, last name first, setting forth their accumulated compensatory time ("comp time") as of July 1, 1996; (2) to identify any and all records containing information related to the requested information and provide information as to any and all such records destroyed by it and/or tampered by it during the period from June 1, 1996 to the present; (3) to pay the statutory fine of $100. 00 due to its failure to comply with the Act and its bad faith actions and conduct throughout the course of this matter; and (4) to pay to the Association its expenses, including attorney's fees, in the total amount of $11,138. 50 as provided by the Act and all costs in this matter as provided by Mississippi Rules of Civil Procedure Rule 54(d)." Over a year after the initial public records request and after suit had been filed, the Department ultimately provided to the Association: (1) a computer generated list of 391 named Department employees with their comp time provided as of August 1, 1996; (2) a computer generated list of the names of all 947 Department employees but without any information as to their comp time; and (3) a computer generated list of the comp time for 947 unnamed Department employees. Addressing the first issue, the Mississippi Supreme Court rejected the Department’s argument that the requested list of comp time for its public employees was exempt from disclosure under the provisions of Miss. Code Ann. §25-1-100 (1) (Supp. 1998) providing that "[p]ersonnel records . . . in the possession of a public body, . . . shall be exempt from the provisions of the Mississippi Public Records Act of 1983." While the Department contended that any document and/or records which reflect the accumulated comp time of the Department's employees constitute "personnel records" within the meaning of § 25-1-100, and is thus exempt from the provisions of the Public Records Act, the Court took a much broader approach to statutory construction:

It is true that there are no Mississippi cases addressing whether comp time records maintained pursuant to the Fair Labor Standards Act (hereinafter "FLSA") are subject to disclosure as public records. Furthermore, there are no Mississippi cases construing the scope of the personnel records exception in the present context. Thus, the Department urges this Court to rely on a handful of Attorney General's opinions to support its position that the exemptions to disclosure somehow control over the broad, general disclosure requirements of the Act. However, this is simply not in conformity with long-established legal principles dealing with interpreting such statutory language.

Citing the statutory preamble, the definition of "public records," and the manifest legislative intent favoring public access to records, the Court found that "the intent of the Legislature is manifestly clear from these
provisions: public records which do not fall into a carefully defined exception provided by law are entirely open to access by the general public." Citing Miss. Code Ann. § 25-61-11 (Rev. 1991), with regard to the creation of narrow exceptions to this broad public policy, the Court took note of the fact that the Mississippi Legislature had provided that the provisions of the Mississippi Public Records Act "shall not be construed to conflict with, amend, repeal or supersede any constitutional or statutory law or decision of a court of this state or the United States which at the time of this chapter is effective or thereafter specifically declares a public record to be confidential or privileged, or provides that a public record shall be exempt from the provisions of this chapter." The Court focused on one specific exemption which was furnished in the Act when it was passed in 1983 is found under Miss. Code Ann. §25-1-100 (Supp. 1998), providing that "certain personnel records" are exempt: The four categories of information covered by this exemption were:

1. Personnel records and applications for employment in the possession of a public body, as defined by paragraph (a) of § 25-61-3, except those which may be released to the person who made the application or with the prior written consent of the person who made the application, shall be exempt from the provisions of the Mississippi Public Records Act of 1983.

2. Test questions and answers in the possession of a public body, as defined by paragraph (a) of 25-61-3, which are to be used in employment examinations, shall be exempt from the provisions of the Mississippi Public Records Act of 1983.

3. Letters of recommendation in the possession of a public body, as defined by paragraph (a) of § 25-61-3, respecting any application for employment, shall be exempt from the provisions of the Mississippi Public Records Act of 1983.


The Court took issue with the Department’s reliance upon this statute as the basis for denying the Association's public record request. Addressing the Department’s reason that the requested comp time information and all information regarding a public employee's compensation, salary, and leave time, was exempt from the disclosure, the Court said:

...However, it is difficult to find any support for this position when one compares the broad, general provisions of the Act with the narrow exceptions of §25-1-100. Section 25-61-11 dictates that any exemption to the Act must be "specifically" enumerated; yet, §25-1-100 does not explicitly exempt from disclosure an employee's salary or accrued comp time record. This appraisal of the Act and §25-1-100 is supported by the general rules governing statutory construction:

While there are some cases in which exceptions are liberally construed, particularly with respect to statutes subject to a strict construction, ordinarily a strict or narrow construction is applied to statutory exceptions to the operation of laws. Thus, in the resolution of ambiguities, courts favor a general provision over an exception, and one seeking to be excluded from the operation of the statute must establish that the exception embraces him. These rules are particularly applicable where the statute promotes the public welfare, or where, in general, the law itself is entitled to a liberal construction. . . .

Statutes granting exemptions from their general operation must be strictly construed, and any doubt must be resolved against the one asserting the exemption. 73 Am. Jur. 2d Statutes § 313, at 463-64 (1974).

Reasoning that courts "have a duty to give statutes a practical application consistent with their wording, unless such application is inconsistent with the obvious intent of the legislature," and that if a statute "is not ambiguous, the court should simply apply the statute according to its plain meaning. . . .", the Court identified its the ultimate goal as being "to discern and give effect to the legislative intent." The Court also emphasized that an exception must appear in the language the legislature employed and "cannot be created by construction", and, moreover,
"where no exception in positive words is made, the presumption is the legislature intended to make none." (internal citations omitted). It then concluded:

Therefore, based upon the foregoing, it is obvious to this Court that the Department's reliance upon § 25-1-100 to withhold disclosure of the requested information is improper because no such specifically worded exemption exists. (emphasis added)

Turning next to three AG Opinions relied upon by the Department to support its exemption position, A.G. Op. #93-0900 to J.K. Stringer, Jr. (March 23, 1994), A.G. Op. 84-1015 to N.F. Smith (July 2, 1984) and A.G.Op. 92-0688 to Dr. Milton Walker (September 2, 1992), the Court swiftly distinguished these opinions, noting in each "there are specific, narrowly drawn exceptions to the general provisions of the Act pertaining to the information held to be exempt by the Attorney General." The Attorney General had made certain in each of the opinions that the exemptions to the Act remained within the narrow parameters of the given statutory exception. Finally, in the Department’s letter denying the public records request, its Executive Director regarded leave time and comp time in the same category of records that should be exempt, but he and the Department now asserted that leave information should be disclosed. The Court concluded: "Thus, it would follow that an employee's comp time is also a public record which should be disclosed."

The Department’s second argument fared no better. It contended that, even if the accumulated comp time records are public records subject to disclosure, it had complied with the Association's request "in a manner which balances the interests at stake in this dispute, the public's right to access public information versus the right of the Department's employees to have personal employment information kept private." Noting that cited no supporting authority that these employees have a privacy interest in this information, the Court continued:

Although it is true that Mississippi has no case law on this issue, many other jurisdictions throughout the country have reached a completely contrary rule of law that public employees do not enjoy such a privacy right or, if they do, this right is outweighed by the public's right to know the details of their government, how it functions and how the public's tax dollars are being spent.

Citing precedent from Massachusetts, New York and Ohio, the Mississippi Supreme Court gleaned these controlling principles from factually similar cases:

What emerges from these cases are the following principles: (1) there is to be a liberal construction of the general disclosure provisions of a public records act, whereas a standard of strict construction is to be applied to the exceptions to disclosure; (2) any doubt concerning disclosure should be resolved in favor of disclosure; (3) compensation information on public employees, such as gross salary and accrued leave time, is subject to disclosure; and (4) such disclosure does not violate a public employee's right to privacy. These guidelines leave little doubt that the information sought by the Association is public and does not fall under any specific, narrowly construed exemption to the Act. Furthermore, this Court must keep in mind the broad public policy goals at work in this case, as set forth in the Act itself and found in the case law construing such statutes. There is no argument that accrued comp time can be paid out of the public treasury, and that this forms a part of the public employee's compensation benefits. Therefore, the chancery court did not err in finding that the Association was entitled to the information requested by it.

Based upon this persuasive authority and the plain meaning of the Act itself, there was no justification for the Department's assertion that it somehow met a balancing of interests

Finally, the Court emphasized that the records request by the Association was narrowly drawn and "did not seek the underlying personnel records concerning the reasons that comp time was accumulated by a particular employee, nor the reasons a particular employee used or did not use his or her comp time," but sought "only a list of the Department employees with each individual's comp time as of July 1, 1996." Even if some privacy interest was at stake, the Court concluded, "there was no possible intrusion into that area by the Association's request."
Turning to the lower court’s imposition of a $100 statutory penalty, the Court held that since the Department had "no direct Mississippi authority to guide it to release the accumulated "comp time" records for its employees," it did not "willfully and knowingly deny the Association access to non-exempt public information, nor did it engage in actions or conduct which rises to the level of bad faith." The lower court’s award of attorneys fees was likewise set aside as erroneous.

Fees Not Set at Profit-Making Level

In *Roberts v. Mississippi Republican Party Executive Committee*, 465 So. 2d 1050 (Miss. 1985), the Mississippi Republican Party made a request for access to the complete drivers license records contained on computer tape from the Commissioner of Public Safety, whose response demanded a fee of $75,000.00 based on a $250.00 run charge plus 5 cents per name for 1.7 million names. The Mississippi Republican Party tendered $500.00 for the reasonable actual cost of providing the records and then filed suit, arguing that it was required to pay no more than the actual cost of providing copies of the requested records. The Commissioner of Public Safety invoked a statute, §45-1-21, which authorizes the Department of Public Safety to furnish certain records and services and "collect for such services a proper fee, commensurate with the service rendered and the costs of such service for the furnishing of any record or abstract thereof...." The Mississippi Supreme Court reconciled the Public Records Act and the cited statute, holding that the latter statute "does not mandate that the Commissioner set the fee at a profit-making level. To the contrary, the fee can only be one which compensates or makes up for the actual cost of furnishing the records or the services provided." Since there was no irreconcilable conflict between the two statues, the Court held that both statutes refer to the same thing, the actual cost of providing copies of the records.

No Constitutional Right of Access

In *Mississippi Publishers Corp. v. Coleman*, 515 So. 2d 1163 (Miss. 1987), the Court rejected Mississippi Publishers’ claim that it had a constitutional right of access to public records, with reference to access to the transcript of a criminal proceeding involving Marion "Mad Dog" Pruett. The Court held:

No one has rights under the Public Records Act which would deprive one criminally accused of his constitutionally created right to a fair trial. Where common law or statutory rights of the petitioner conflict with Pruett’s Sixth Amendment rights, under the supremacy clause the former must yield.

Investigative and Criminal Justice Reports

An example of records exempted or privileged by law from disclosure would be investigative offense reports and other documents containing witness statements, police radio logs, taped communications or officers’ daily reports. A.G. Op. No. 92-0793 to Whitmore dated October 14, 1992.

Specific statutory exemptions that relate to records in criminal investigative matters and proceedings are provided under several statutes, one of which applies to certain investigative and criminal justice records under Miss. Code Ann. §45-29-1 (1983), which provides:

- Records in the possession of a public body, as defined by paragraph (a) of section 25-61-3, which are not otherwise protected by law, that (i) are compiled in the process of detecting and investigating any unlawful activity or alleged unlawful activity, the disclosure of which would harm such investigation; (ii) would reveal the identity of Informants; (iii) would prematurely release information that would impede the public body's enforcement, investigative or detection efforts in such proceedings; (iv) would disclose investigatory techniques; (v) would deprive a person of a right to a fair trial or an impartial adjudication; (vi) would endanger the life or safety of a public official or law enforcement personnel; ... shall be exempt from the provisions of the Mississippi Public Records Act of 1983.

- Nothing in this section shall be construed to prevent any and all public bodies from having among themselves a free flow of information for the purpose of achieving a coordinated and effective detection and investigation of unlawful activity. Where the confidentiality of records covered by this section is being determined in a private hearing before a judge as provided for by subsection (2) of section 25-61-13, the
public body may delete or separate from such records the identity of confidential informants or the identity of the person or persons under investigation.

Under §45-29-1, a criminal affidavit and warrant are exempt until the warrant is served. A.G. Op. No. 93-0210 to Erby dated April 14, 1993. As to whether traffic tickets turned in by a law enforcement office to the Justice Court and entered into the computer become public records, the Attorney General’s office has made it clear that the records contained in the Justice Court Clerk’s office, including traffic tickets, are public records unless exempt by statutory provision. Under §45-29-1 there are exemptions provided for records that would harm investigations, reveal the identity of informants, impede a public body’s law enforcement or investigative efforts, deprive a person of a right to a fair trial, endanger the life or safety of public officials or law enforcement officers, etc. As stated in the Erby opinion, the criminal affidavit and warrant generally would be exempt under this provision until the warrant is served. A.G. Op. to Aldridge dated June 28, 1995, 1995 WL 398274.

Other statutory exemptions are provided under Miss. Code Ann. § 45-29-3 (1990), entitled "Exemptions from Mississippi Public Records Law," which states:

The following records shall be exempt from the provisions of the Mississippi Public Records Law of 1983:

Records which are in the possession of a public body, as defined by paragraph (a) of Section 25-61-3, that performs as one of its principal functions activities pertaining to the enforcement of criminal laws, the apprehension of criminal offenders or the investigation of criminal offenders and/or criminal activities, and which records consist of information compiled for the purpose of a criminal investigation, including reports of informants and investigators, and associated with an identifiable individual.

Under this exemption, a law enforcement complaint report having sensitive information, i.e., names of victims, witnesses, and narratives, may be withheld from the press, regardless of whether the criminal charge is a felony or a misdemeanor; however, a sheriff may release those complaint reports after determining on case-by-case basis that the complaint reports do not contain sensitive information protected by statute or court rule. (A.G.Op. No. 90-0656 to Hatcher dated September 6, 1990.)

Another related statutory exemption appears to prohibit disclosure by law enforcement agencies of information identifying persons arrested for misdemeanors, but the same statute immunizes from liability any political subdivision or its employee who makes such a disclosure. This exemption is set forth in Miss. Code Ann. § 25-1-109 (Supp.1997):

No law enforcement agency shall disclose the name of any person arrested for any misdemeanor, issued a citation, or being held for any misdemeanor unless such person shall be formally charged and arrested for the offense, except to other law enforcement agencies or to the Mississippi Department of Human Services or child day care providers where such information is used to help determine suitability of persons to serve as child care providers or child service workers. No political subdivision nor any employee thereof shall be held liable for the disclosure of any information prohibited by this section.

Public Access to Computerized Information

The Mississippi Legislature enacted the Digital Signature Act of 1997, Miss. Code Ann. §§25-63-1, et seq. (1998), with an effective date of July 1, 1998. The legislative intent of this Act is to "facilitate economic development and efficient delivery of government services by means of reliable electronic messages; to foster the development of electronic commerce through the use of digital signatures to assure authenticity and integrity of writings in any electronic medium; to enhance public confidence in the use of digital signatures; and to minimize the incidence of forged digital signatures and fraud in electronic commerce."

Records exempt from Public Records Act include:
A. Records containing information that would disclose, or might lead to the disclosure of, private keys, or the
mathematical formulas or other systems used to develop or confirm private keys or key systems; and,

B. Records the disclosure of which might jeopardize the security of an issued certificate or a certificate to be
issued.

"Private key" is defined in §25-63-5(e) as a "computer program, known only by its rightful owner, used to create
a digital signature," and the term "digital signature" is defined as

a message or part of a message which has been transformed using a computer program called a
"private key" such that a person receiving the message can use a related computer program referred
to as the signer’s "public key".

To determine whether the transformation was created using the private key that corresponds to the
public key and whether the original message has been altered since the transformation was made.

Data Processing Software As Trade Secret

Under Miss. Code Ann. §25-61-9(6) (Supp. 1996), a statutory amendment exempts from disclosure certain
"sensitive" data processing software produced by a public body:

Data processing software obtained by an agency under a licensing agreement that prohibits its
disclosure and which software is a trade secret...and data processing software produced by a public
body which is sensitive must not be subject to inspection, copying or reproduction under [the
Mississippi Public Records Act].

The word "sensitive" as used in §25-61-9(6) means only that portion of the data processing software,
specifications and documentation used to collect, process, store and retrieve information that is exempt under the
Public Records Act or disclosure of which would "require a significant intrusion into the business of the public
body," and also includes those portions of the data processing software used to control and direct access
authorizations and security measures for automated systems.

If a public body uses sensitive software or proprietary software, it "must not thereby diminish the right of the
public to inspect and copy a public record." Miss. Code Ann. §25-61-10(1) (Supp. 1996). In this context a public
body that uses sensitive software or proprietary software to store, manipulate or retrieve a public record will not
be deemed to have diminished the right of the public if it either

(A) if legally obtainable, makes a copy of the software available to the public for application to the public records
stored, manipulated or retrieved by the software, or

(B) insures that the software has the capacity to create an electronic copy of each public record stored,
manipulated or retrieved by the software in the common format such as, but not limited to, the American
Standard Code for Information Interchange [ASCII].

Miss. Code Ann. §25-61-10(2) requires a public body to provide a copy of the record in the format requested if it
maintains the record in that format, and authorizes the public body to charge a fee for that copy.

Miss. Code Ann. §25-61-10(3) requires a public body to make adequate plans to provide public access and
redaction of exempt or confidential information in its information technology system, equipment or software
before it acquires or makes a major modification to that system used to store, retrieve or manipulate a public
record.

Finally, Miss. Code Ann. §25-61-10(4) prohibits a public body from entering into a contract to create or maintain
a public records data base "if that contract impairs the ability of the public to inspect or copy the public records of
that agency, including public records that are online or stored in an information technology system used by the
public body."
AG Opinions on Open Records Act

The Attorney General’s office has issued a number of opinions interpreting the Open Records Act and its application in a variety of factual contexts.

AG Op. No. 91-0922 to Stebbins, April 3, 1992, which predated §25-61-9(6) discussed above, stated that in view of the nature and characteristics of computer software programs, to the extent that software programs do contain confidential file access information, such software programs are not subject to public disclosure under the Mississippi Public Records Act of 1983.

AG Op. No. 93-0975 to Rimmer, January 10, 1994, said that computerized data is to be treated like any other public record in the possession or control of the public body, and is subject to disclosure under the Public Records Act. The public body may not restrict access to the data unless the data is protected under the Act or by other statute. The public body must, when reasonably possible, provide the public record or information in the format requested provided that format is reasonably available, but it is not required to do so if such would require a significant intrusion into the business of the public body, provided the information can be made available in some other medium.

AG Op. No. 94-0244 to Cruber, May 2, 1994, said there is nothing known to the Attorney General that would exempt the Justice Court Civil Docket, kept on computer, from the Public Records Act. A request under the Public Records Act for computer records may be met by printing out the requested information.

AG Op. No. 94-0407 to Harper, July 18, 1994, stated that lists of names and addresses in possession of a public body must be made available upon appropriate written request under the Public Records Act, although it is not the public body’s responsibility to compile a list that did not already exist.

AG Op. No. 94-0582 to Lavigne, September 14, 1994, opined that since it was the Department of Data Processing, a part of the Office of the Board of Supervisors, that did the searching, reviewing and duplicating of records, the money collected for this information would go to the General Fund of the county.

AG Op. No. 94-0643 to Gex, October 5, 1994, opined that the Public Records Act only allows a governmental entity to collect fees to reimburse it for, but in no case to exceed, the actual costs of searching, reviewing and/or duplicating, and, if applicable, mailing copies of the public records, which fees may be collected in advance before complying with the request. In this instance, maps owned by a county and compiled through aerial photography for use by the County Tax Assessor’s office, would constitute public records. If the mapping company or the county had a copyright on the material in question, then federal copyright law would govern reproduction of the materials.

A.G. Op. No. 95-0378 states that records in Justice Court, including traffic tickets, are public records unless exempt by statutory provision. Criminal affidavits and warrants are exempt until the warrant is served. Miss. Code Ann.§45-29-1 (1972).

A.G. Op. No. 94-0244 provides that records maintained in a computer database are public record under Miss. Code Ann. §25-61-3 (Supp. 1996), and the Attorney General is not aware of anything that would exempt the Justice Court civil docket from the Public Records Act.

A. G. Op. No. 91-0910 to Watts dated December 18, 1991, states that the docket must be available and open to inspection by the public at all times, whether in printed form or by computer.

A.G. Op. No. 97-0218 to Rayborn dated April 11, 1997, states that under §§9-10-11 and 9-11-13, a Justice Court Judge must sign a court record of each case and a court docket, and the docket must be maintained in paper form, but this does not preclude a Justice Court from also maintaining a docket on computer in addition to the paper docket.

A.G. Op. No. 93-0210 provides that individuals have a right to examine public records in the Clerk’s Office during regular office hours but may not disturb the work of the Clerk and staff.
A.G. Op. No. 94-0342 states that a clerk is not required to gather documents from other courts for prosecutor; however, the clerk must upon written request and pursuant to the Public Records Act provide copies of or access to public records in her custody.

A.G. Op. No. 96-0407 to Maness dated June 21, 1996, states that, based on Miss. Code Ann. §99-33-2 (2)(1991), the Clerk must forward a certified copy of the case file to the Judge within two days after the case has been recorded and assigned and all necessary process has been issued, and if there are any significant additions to or changes in the case file prior to the court date, those additions or changes should be forwarded to the judge prior to court. To the extent that such documents are public records, anyone may request a copy of the documents subject to the Public Records Act and the public records policy.

A. G. Op. No. 97-0534 to Mullen dated August 22, 1997, states that the Justice Court docket need not be maintained in paper form, but may instead be maintained on computer so long as the public has access to the docket by way of printed copies or access to the computer itself.

AG Op. No. 91-0922 to Stebbins, April 3, 1992, stated that in view of the nature and characteristics of computer software programs, to the extent that software programs do contain confidential file access information, such software programs are not subject to public disclosure under the Mississippi Public Records Act of 1983.

AG Op. No. 93-0975 to Rimmer, January 10, 1994, opined that computerized data is to be treated like any other public record in the possession or control of the public body, and is subject to disclosure under the Public Records Act of 1983 as amended. The public body may no restrict access to the data unless the data is protected under the Public Records Act or by other statute. The public body must, when reasonably possible, provide the public record or information in the format requested provided that format is reasonably available, but it is not required to do so if such would require a significant intrusion into the business of the public body, provided the information can be made available in some other medium.

AG Op. No. 94-0244 to Cruber, May 2, 1994, reiterated the earlier opinion that records maintained in a computer database are public record, and that there is nothing known to the Attorney General that would exempt the Justice Court Civil Docket, kept on computer, from the Public Records Law. A request under the Public Records Act for computer records may be met by printing out the requested information.

AG Op. No. 94-0407 to Harper, July 18, 1994, stated that lists of names and addresses in possession of a public body must be made available upon appropriate written request under the Public Records Act, although it is not the public body's responsibility to compile a list that did not already exist.

AG Op. No. 94-0582 to Lavigne, September 14, 1994, opined that since it was the Department of Data Processing, a part of the Office of the Board of Supervisors, that did the searching, reviewing and duplicating of records, the money collected for this information would go to the General Fund of the county.

AG Op. No. 94-0643 to Gex, October 5, 1994, opined that the Public Records Act only allows a governmental entity to collect fees to reimburse it for, but in no case to exceed, the actual costs of searching, reviewing and/or duplicating, and, if applicable, mailing copies of the public records, which fees may be collected in advance before complying with the request. In this instance, maps owned by a county and compiled through aerial photography for use by the County Tax Assessor's office, would constitute public records. If the mapping company or the county had a copyright on the material in question, then federal copyright law would govern reproduction of the materials.

**Vacancies in Public Office and Special Elections**


Section 23-15-833 designates the first Tuesday after the first Monday in November of each year as the "regular special election day" on which an election shall be held to fill any vacancy in county, county district or district attorney elective offices, except as otherwise provided by law.
Section 23-15-839 sets forth the procedure for filling vacancies in county or county district offices, procedures for a special election to fill such vacancy and the procedure where only person has qualified for candidacy in the special election.

This statute also provides that when a vacancy occurs in a county or county district office and the unexpired term is no longer than six months, the Board of Supervisors by order entered on its minutes, or by appointment of the Board President with the consent of the majority of the Board if the vacancy occurs when the Board is not in session, may fill the vacancy by an appointment which is then certified by the Clerk of the Board to the Secretary of State, and the appointee is then commissioned by the Governor to serve until a successor is elected as provided under the statute,

unless the regular special election day on which the vacancy should be filled occurs in a year in which an election would normally be held for that office as provided by law, in which case the person so appointed shall serve the unexpired portion of the term. Such vacancy shall be filled for the unexpired term by the qualified electors at the next regular special election day occurring more than ninety (90) days after the occurrence of the vacancy. The Board of Supervisors of the county shall, within ten (10) days after the happening of the vacancy, make an order, in writing, directed to the Commissioners of Election, commanding an election to be held on the next regular special election day to fill the vacancy.

This same statute provides that if only one person qualifies with the Commissioners of Election to be a candidate within the time provided by law, the Commissioners of Election will certify to the Board of Supervisors that there is but one candidate and

thereupon, the Board of Supervisors shall dispense with the election and shall appoint the candidate so certified to fill the unexpired term. The clerk of the board shall certify to the Secretary of State the candidate so appointed to serve in said office and that candidate shall be commissioned by the Governor. In the that no person shall have qualified at least sixty (60) days prior to the date of the election, the Commissioners of Election shall certify that fact to the Board of Supervisors which shall dispense with the election and fill the vacancy by appointment. The Clerk of the Board of Supervisors shall certify to the Secretary of State the fact of the appointment, and the person so appointed shall be commissioned by the Governor.

Removal From Office

Section 175 of the Mississippi Constitution of 1890 prescribes the mandatory penalty of removal from office upon conviction for wilful neglect of duty or misdemeanor in office. This constitutional provision, which provides the exclusive method of removal from office, states in its entirety:

All public officers, for wilful neglect of duty or misdemeanor in office, shall be liable to presentment or indictment by a grand jury; and, upon conviction, shall be removed from office, and otherwise punished as may be prescribed by law.

The principal statutory provision for removal of county officials from office is Miss. Code Ann. §25-5-1 (1979), which provides as follows:

If any public officer, state, district, county or municipal, shall be convicted in any court of this state or any other state or in any federal court of any felony other than manslaughter or any violation of the United States Internal Revenue Code, of corruption in office or peculation therein, or of gambling or dealing in futures with money coming to his hands by virtue of his office, any court of this state, in addition to such other punishment as may be prescribed, shall adjudge the defendant removed from office; and the office of the defendant shall thereby become vacant....
When any such officer is found guilty of a crime which is a felony under the laws of this state or which is punishable by imprisonment for one (1) year or more, other than manslaughter or any violation of the United States Internal Revenue Code, in a federal court or a court of competent jurisdiction of any other state, the Attorney General of the State of Mississippi shall promptly enter a motion for removal from office in the Circuit Court of Hinds County in the case of a state officer, and in the Circuit Court of the county of residence in the case of a district, county or municipal officer. The Court, or the Judge in vacation, shall, upon notice and a proper hearing, issue an order removing such person from office and the vacancy shall be filled as provided by law.

Removal Cases Under §25-5-1 and §25-1-59

In Cumbest v. Commissioners of Election of Jackson County, 416 So. 2d 683 (Miss. 1982), the Mississippi Supreme Court reaffirmed the principal of law that a person removed from office under Section 175 of the Constitution and §25-5-1 has no right whatsoever to such office by virtue of his election thereto, and these statutory and constitutional mandates contain no provision for reinstatement in office after removal. The Court reasoned that when a public official is convicted of a crime in office, both the statute and the Constitution require that he be removed from public office in addition to whatever punishment he receives, and he is entitled to appeal from his conviction which may ultimately be overturned. Such public officer removed from office following his conviction in Circuit Court and pursuant to Section 175 and §25-5-1 "forfeits all of his rights to such office, regardless of what transpires on appeal. His right to such office for the remainder of the term to which he was elected is thereby extinguished...."

Rights of the Public

The rationale for the Court's decision was that while an officeholder has a material interest in his office and may have gained it only at a great personal sacrifice in time and money and may have served honorably and well for many years, and while his conviction may be completely overturned on appeal,

the citizenry of this state, however, have the compelling right to be represented by the public official whom they select by ballot and in whom they can repose confidence, unstained by any conviction. The public should not be required to suffer because of his conviction. They are entitled to know that whomever they elect to fill the vacancy created by such removal will keep the office for the entire interim period remaining in the term. On balance, the rights of the public far outweigh the rights of the public official to this office and its emoluments. A public office belongs to the people it serves.

No Opportunity for Hearing

In Gerrard v. State, 619 So. 2d 212 (Miss. 1993), Section 25-5-1 was held to mandate removal from office of a member of the County Board of Supervisors who was convicted of embezzlement, even though the Supervisor was not given the opportunity for a hearing, since the statute mandates the removal of officers found guilty of felonies, and thus the Board member would have been removed from office regardless of what would have occurred at a hearing.

Removal by Order of Supervisors

In Moore v. Sanders, 558 So. 2d 1383 (Miss. 1990), a County Supervisor was removed from office by an order of the County Board of Supervisors, finding that the Supervisor in question was no longer a resident of the district from which he was elected, and the Board of Supervisors thereupon declared the office vacant. The Board’s Order declaring the office vacant was made under the authority of Miss. Code Ann. §25-1-59 (1972), which provides in part that

if any state, district, county, county district or municipal officer during the term of his office shall remove out of the state, district, county or municipality for which he was elected or appointed, such office shall thereby become vacant and the vacancy be supplied as by law directed....
The Supervisor sought and was denied injunctive relief in Chancery Court, and the Mississippi Supreme Court affirmed, noting that he had a statutory method of appeal to the Circuit Court which afforded him a plain, adequate, speedy and complete remedy for a judicial determination of his right.

**Litigation and Defenses: A Practical Perspective**

Local government entities often find themselves in the eye of a storm—a litigation storm.

Litigation over county jails, discrimination in employment, acts or omissions on the part of law enforcement agencies, Voting Rights Act litigation, sexual harassment and sex discrimination litigation, and litigation under the Americans with Disabilities Act (ADA) and Age Discrimination in Employment Act (ADEA) have required and will continue to require the expenditure of much time, money and effort at the county level.

**An Overview of §1983**

One of the principal vehicles for such litigation has been the federal statute initially enacted to curb the abuses of the Ku Klux Klan following the Civil War. This statute, codified as 42 U.S.C. §1983, provides as follows:

> 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 Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

In *Monell v. Dept. of Social Services*, 436 U.S. 658 (1978), the United States Supreme Court held that local government units may be sued for damages, as well as declaratory and injunctive relief, whenever

> the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation or decision officially adopted and promulgated by that body’s officers. Moreover...local governments...may be sued for constitutional deprivations visited pursuant to governmental "custom" even though such a custom has not received formal approval through the body’s decisionmaking channels. *Id.* at 690-91.

*Monell* rejects local government liability based on the doctrine of respondeat superior. In other words, a county cannot be held liable under §1983 merely because it employs a tortfeasor. 436 U.S. at 691-92.

Section 1983 is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred. It encompasses claims based upon rights secured by federal statutes as well as by the United States Constitution. *Maine v. Thiboutot*, 448 U.S. 1, 4 (1980).

Local government liability may be imposed under *Monell* where an unconstitutional policy statement, ordinance, regulation or decision is formally adopted and promulgated by the governing body of the county or a department or agency thereof. For example, in *Monell*, the Department of Social Services and the Board of Education had officially adopted a policy requiring pregnant employees to take unpaid maternity leaves before medically necessary. In that case, the Supreme Court examined local government liability [in this case liability of two city agencies] for an unconstitutional employment policy and held that a municipality is a "person" for purposes of being held liable for the unconstitutional policies of its executive departments, and that a municipality may be held liable under §1983 if the municipality itself caused the constitutional deprivation. *Monell v. Dept. of Social Services*, 436 U.S. at 690. Subsequent decisions of the United States Supreme Court and lower courts have vastly expanded the scope of local government liability under §1983, as discussed below.

**Final Policymaking Authority**

A municipality, county or other local government unit is subject to suit under §1983, but, as noted above, it does not incur §1983 liability for injury that is inflicted solely by its agents or employees. As the Supreme Court made clear in *Monell*, *respondeat superior* will not suffice to impose §1983 liability on a municipality. Rather, a
municipality is only liable when the constitutional deprivation or injury is caused by the execution of the local government’s policy or custom. It is only those local government officials who have "final policymaking authority" who may by their actions subject the local government entity to §1983 liability. "Official policy" in the context of county or municipal liability under §1983 was defined by the District Court in Padgett v. Palmer, 856 F. Supp. 1185, 1188 (S.D. Miss. 1994), as follows:

1. A policy statement, ordinance, regulation, or decision that is officially adopted and promulgated by the municipality's lawmaking officers or by an official to whom the lawmakers have delegated policymaking authority; or

2. A persistent widespread practice of city officials or employees, which although not authorize by officially adopted and promulgated policy, is so common and well-settled as to constitute a custom that fairly represents municipal policy. Actual or constructive knowledge of such custom must be attributable to the governing body of the municipality or to an official to whom that body has delegated policymaking authority. Actions of officers or employees of a municipality do not render the municipality liable under §1983 unless they execute official policy as above defined. Id. at 1188.

Where a policy is made by a local government official under authority to do so give by the governing authority, the policy is that of the local government entity. Padgett v. Palmer, supra at 1188, citing Bennett v. Slidell, 728 F.2d 762, 769 (5th Cir. 1984)("Policymakers act in the place of the governing body in the area of their responsibility; they are not supervised except as to the totality of their performance.").

Padgett was a §1983 action brought by the owner of a truck and trailer against a farmer who had retained the truck and trailer during a dispute over shipment of a load of watermelons, during which dispute Deputy Sheriffs intervened. District Judge Charles Pickering held that the Deputy Sheriffs were not under a duty to force the farmer to return the truck and trailer to its owner, so as to subject the county to §1983 liability, noting:

The question that confronts this Court is what, if any, official custom or policy of the County Defendants caused the Plaintiffs to be subjected to a deprivation of constitutional rights. The Plaintiffs make no allegations in this regard. They merely assert that the deputies had a duty to force Padgett (the farmer) to return the truck and trailer to them. What the plaintiffs assert is untenable. Placing the burden of deciding the legal decision as to who is entitled to disputed property on the deputy sheriffs who were dispatched to keep the peace in a potentially violent confrontation is absurd. Plaintiffs have offered no proof of a custom or policy of Greene County, Mississippi, which has caused the complained of injuries.

Padgett v. Palmer, supra at 1189.

Policy Violating Civil Rights

Applicable case law thus recognizes three ways in which a local government’s policy can violate an individual’s civil rights. First, by an express policy that, when in force, causes a constitutional deprivation; second, by a widespread practice that, even though it is not authorized by written law or express local government policy, is so permanent and well-settled as to constitute a "custom or usage" with the force of law; or, third, a constitutional injury may be caused by a person with "final policymaking authority." McTigue v. City of Chicago, 60 F.3d 381, 382 (7th Cir. 1995).

Moreover, before a supervisory employee of a local government entity may be held liable under §1983 for the constitutional torts of a subordinate, the plaintiff must show that the supervisor either encouraged the specific incident of misconduct or in some other way directly participated in it, and the liability of the supervisor cannot be grounded solely upon his right to control employees. Leach v. Shelby County Sheriff, 891 F.2d 1241, 1246 (6th Cir. 1989), cert. denied, 495 U.S. 932 (1990), cited in Thompson v. City of Norton, 61 F.3d 904 (6th Cir. 1995).

Single Incident of Unconstitutional Activity
The Supreme Court held a decade ago that "proof of a single incident of unconstitutional activity is not sufficient to impose liability...unless proof of the incident includes proof that it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." City of Oklahoma City v. Tuttle, 471 U.S. 808, 823-24 (1985). That same year the U. S. Court of Appeals for the Fifth Circuit decided Grandstaff v. City of Borger, Texas, 767 F.2d 161 (5th Cir. 1985), in which the entire night shift of a city’s police department opened fire upon and killed an innocent person after mistaking him for a fugitive. Affirming liability against the City, the Fifth Circuit held that the concerted action of the officers indicated a prior existing policy authorizing the reckless use of deadly force, and that a prior unconstitutional policy could also be inferred from the City’s subsequent failure to reprimand, discharge or admit error on the part of its officers. It was this additional evidence, according to the Fifth Circuit, that allowed a factfinder to reasonably infer a municipal policy based on a single incident of conduct.

Other courts have noted that the inferences permitted by the Grandstaff decision "approach dangerously close to dissolving the direct liability rationale of Monell and imposing respondeat superior liability upon a city," Cauthen v. City of Greenville, 745 F. Supp. 377, 384 (N.D. Miss. 1990), and for that reason the Fifth Circuit has expressly limited Grandstaff to "equally extreme factual situations." Coon v. Ledbetter, 780 F.2d 1158, 1161 (5th Cir. 1986).

Also distinguishable from the single incident principle enunciated in Tuttle is the concept that a single act by one policymaker may constitute a local government policy sufficient to provide the basis for imposition of liability under §1983. As the Supreme Court noted in Pembaur v. City of Cincinnati, 475 U.S. 469, 478 (1986):

Once a municipal policy is established, it requires only one application...to satisfy Monell’s requirement that a municipal corporation be held liable only for constitutional violations resulting from the municipality's official policy.

Failure to Train/Negligent Hiring

A local government policy that merely permits or tolerates unconstitutional acts by government employees may serve as the basis for §1983 liability. "Tolerance" in the form of failure to investigate, discipline or correct violations, such as the persistent failure of a local government entity to discipline subordinates who violate civil rights, may give rise to an inference of an unlawful and unconstitutional local government policy of ratification of such unconstitutional conduct. Circumstantial evidence may be presented in the form of notice to the local government entity of charges of unconstitutional conduct by government employees, followed by repeated failure to make any meaningful investigation into such charges. Thus, while a municipality or county may not be subjected to §1983 liability on a theory of respondeat superior for the actions of non-policymaking government employees, it may incur §1983 liability for the actions of its employees when an official policy or custom of hiring or training causes those actions.

In City of Canton v. Harris, 109 S.Ct. 1197 (1989), the United States Supreme Court was faced with a plaintiff's claim that her constitutional rights were deprived under the Due Process Clause of the United States Constitution, when she failed to receive necessary medical care while in police custody. The plaintiff asserted a claim of municipal liability for this deprivation based on a theory of "grossly inadequate training." The Court noted that the City of Canton had a published policy which authorized a jail shift commander to determine the need for and supply medical aid to prisoners. The facts reveal that following her arrest, the plaintiff had fallen down several times and was incoherent, but no medical assistance was summoned for her. After release from jail, she was diagnosed as suffering from severe emotional ailments requiring hospitalization and out-patient treatment.

Direct Causal Link

The United States Supreme Court held that a local government body could be liable under 42 U.S.C. §1983 for constitutional violations resulting from failure to train its employees if there was a direct causal link between the failure to train and the resulting injury, using this test for causation:

Only where the failure to train amounts to deliberate indifference to the rights of persons with whom the police came in contact.
Deliberate Indifference

The Supreme Court gave an example of factual situations which may meet the "deliberate indifference" standard of liability:

For example, city policymakers know to a moral certainty that their police officers will be required to arrest fleeing felons. The city has armed its officers with firearms, in part to allow them to accomplish this task. Thus, the need to train officers in the constitutional limitations on the use of deadly force...can be said to be "so obvious," that failure to do so could properly be characterized as "deliberate indifference" to constitutional rights.

Merely Inadequate Training

The Court specifically noted that the mere fact that a particular officer may be unsatisfactorily trained "will not alone suffice" because the mistakes made by the officer may have arisen from factors other than faulty training.

Neither will it suffice to prove that an injury or accident could have been avoided if an officer had had better or more training, sufficient to equip him to avoid the particular injury-causing conduct. Such a claim could be made about almost any encounter resulting in injury, yet not condemn the adequacy of the program to enable officers to respond properly to the usual and recurring situations with which they must deal. And plainly, adequately trained officers occasionally make mistakes; the fact that they do says little about the training program or the legal basis for holding the city liable.

Board of County Commissioners of Bryan County v. Brown

In 1997, the United States Supreme Court addressed the question of whether and under what circumstances a single hiring decision by a local government policymaker, in this case the Sheriff of Bryan County, Oklahoma, can give rise to liability under 42 U.S.C. §1983. Board of County Commissioners of Bryan County v. Brown, 117 S.Ct. 1382 (1997). While Mrs. Brown was riding as a passenger in a truck driven by her husband, they came upon a police checkpoint which Mr. Brown sought to avoid by turning the truck around and attempting to drive back over the Oklahoma state line into Texas. A Deputy Sheriff and Reserve Deputy began pursuing the Browns, and the chase ended four miles later with the deputy aiming the gun toward the truck and ordering the Browns to get out. The Reserve Deputy, Stacy Burns, approached the truck from the passenger side and ordered Mrs. Brown to get out, and when she failed to obey the order, he physically removed her from the vehicle by grabbing her arm at the wrist and elbow, pulling her from the vehicle and throwing her to the ground. Reserve Deputy Burns had a long record of driving infractions, assault and battery, public drunkenness and resisting arrest, a record which Mrs. Brown in her subsequent §1983 action claimed the Sheriff had failed to adequately investigate. The United States Supreme Court held that the County could not be held liable solely for the Sheriff’s decision to hire Reserve Deputy Burns, stating:

As our municipal liability jurisprudence illustrates, however, it is not enough for a §1983 plaintiff merely to identify conduct properly attributable to the municipality. The plaintiff must also demonstrate that, through its deliberate conduct, the municipality was the "moving force" behind the injury alleged. That is, a plaintiff must show that the municipal action was taken with the requisite degree of culpability and must demonstrate a direct causal link between the municipal action and the deprivation of federal rights. Id. at 1388.

Writing for the majority, Justice Sandra Day O’Conner addressed Mrs. Brown’s claim that the cause of her injuries was the Sheriff’s hiring decision:

A lack of scrutiny may increase the likelihood that an unfit officer will be hired, and that the unfit officer will, when placed in a particular position to effect the rights of citizens, act improperly. But that is only a generalized showing of risk. The fact that inadequate scrutiny of an applicant’s background would make a violation of right more likely cannot alone give rise to an inference that a policymaker’s failure to scrutinize the record of a particular applicant produced a specific
constitutional violation. After all, a full screening of an applicant’s background might reveal no cause for concern at all; if so, a hiring official who failed to scrutinize the applicant’s background cannot be said to have consciously disregarded an obvious risk so that the officer would subsequently inflict a particular constitutional injury. Id. at 1392.

The Court also addressed what type of "failure to scrutinize" might amount to deliberate indifference sufficient to result in Monell liability:

Only where adequate scrutiny of an applicant’s background would lead a reasonable policymaker to conclude that the plainly obvious consequences of the decision to hire the applicant would be the deprivation of a third party’s federally protected right can the officials’ failure to adequately scrutinize the applicants’ background constitute "deliberate indifference." Id. at 1391.

The Court held that the burden was upon Mrs. Brown to prove that a reasonable policymaker would have realized that it was "plainly obvious" that the reserve deputy would inflict excessive force upon citizens with whom he came into contact, and that the record in this case was inadequate as to this requirement. Earrey v. Chickasaw County, Miss., 965 F.Supp. 870 (N.D.Miss. 1997), District Judge Glen Davidson discussed Bryan County in the context of the state of mind requirement in a conditions of confinement case:

In any § 1983 action concerning a constitutional injury which does not arise directly from a municipal action, but rather as a more indirect result of municipal action,

We held that, quite apart from the state of mind required to establish the underlying constitutional violation --in [Canton], a violation of due process--a plaintiff seeking to establish municipal liability on the theory that a facially lawful municipal action has led an employee to violate a plaintiffs rights must demonstrate that the municipal action was taken with "deliberate indifference" as to its known or obvious consequences. Board of County Com'rs of Bryan County v. Brown, 117 S.Ct. 1382, 1390, 137 L.Ed.2d 626 (1997). It is important to distinguish between the "state of mind" required to establish a violation of a constitutional right and the culpability standard required to impose § 1983 liability upon a municipality or county. Brown, 117 S.Ct. at 1388 ("In any 1983 suit, however, the plaintiff must establish the state of mind required to prove the underlying violation.")

Adequacy of Training Procedures

In Barney v. City of Greenville, ___ F. Supp. ___, 1995 WL 534352 (N.D. Miss. 1995), following the suicide of a 14-year-old teenager who had been arrested for shoplifting and was thereafter incarcerated in the juvenile section of the adult jail facility of the Greenville City Jail where she remained until she hung herself four days later, the Plaintiff charged, inter alia, that the City had failed to train its police officers and that such inadequate training had resulted in failure to detect and care for the teenager’s suicidal tendencies. The Court found that there was no reasonable basis to conclude that anyone directly associated with the police department knew that the teenager was a suicide risk, and in the absence of such knowledge, the training received by the city’s police officers did not cause a constitutional deprivation of rights. The Court noted that under Monell, an allegation of inadequate training must be supported by evidence of a policy or custom which is the "moving force" of the constitutional violation, but in this case there was no evidence that any incompetence resulted from inadequate training, nor was there any basis for inferring that additional training of the jail staff would have prevented the teenager from committing suicide.

Further, there was no basis to conclude that it was apparent to Greenville’s policymakers that a constitutional violation would result from the training procedures they had imposed. 1995 WL 534352 *6.


In County of Sacramento v. Lewis, 118 S.Ct. 1708 (1998), the Supreme Court addressed a substantive due process challenge brought by the parents of a teenager who was killed during the course of a police pursuit of a motorcycle. In a chase which lasted about 75 seconds and reached speeds of up to 100 miles per hour,
motorcycle driver unsuccessfully attempted a sharp left turn and tipped, and the chasing officer was unable to stop his vehicle in time to avoid striking the Plaintiff's decedent. In an action alleging violations of the decedent's substantive due process rights secured by the Fourteenth Amendment, the Supreme Court considered whether or not the Plaintiff had asserted a viable constitutional claim by addressing two questions: Was a more specific provision of the Constitution controlling? If not, were the factual allegations sufficiently set forth to support a due process claim? Reasoning that the Fourth Amendment covered only searches and seizures, the Court concluded that no seizure had occurred, citing *Brower v. County of Inyo*, 489 U.S. 593 (1989). The Court then applied a substantive due process analysis to answer the question of whether the Plaintiff had stated a viable claim under the Fourteenth Amendment, concluding that the applicable standard for determining whether there had been a violation of substantive due process was the shock-the-conscience standard. Holding that the Plaintiff had failed to state a viable claim for substantive due process violations, the Court stated that there was a lack of malicious intent on the part of the officer and that the officer had responded instinctively to the driver's decision to run:

Accordingly, we hold that high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressable by an action under §1983.

*See generally Mitchell v. Tunica County*, No. 2:97cv163-B-B (N.D. Miss. August 2, 1998),

for an interesting example of a plaintiff's attempt to circumvent *County of Sacramento v. Lewis* by proposing alternative theories of recovery on the issue of pursuit. In *Mitchell*, the plaintiff initially asserted that his constitutional rights were violated by both the nature of the pursuit as well as the failure to summon medical assistance after the wreck. Following the Supreme Court's decision in *Lewis*, the plaintiff conceded that he did not have a viable claim arising out of the pursuit, leaving only the issue of the failure to summon medical assistance. Plaintiff then contended that the accident was of such severity that it should have been obvious to a reasonable officer that the occupant of the vehicle was in need of medical attention. Plaintiff also asserted that the state played a role in creating the danger and therefore had a duty to provide medical attention even absent a custodial relationship. Chief Judge Biggers granted a defense motion for summary judgment based on qualified immunity, stating: "The court finds that the plaintiff's reference to the state-created danger theory is merely an attempt to circumvent the Supreme Court's holding in *Lewis*. None of the cases cited by the plaintiff concerning the state-created danger theory bear even a remote resemblance to the factual scenario presented herein."

Absent evidence from which a jury can infer a purpose to cause harm unrelated to the legitimate objective of law enforcement, the courts applying the *Sacramento v. Lewis* standard appear to be uniform in their insistence that an adequate showing be made of the requisite element of arbitrary conduct shocking the conscience, before allowing such cases and even other mid-level-culpability due process claims to survive beyond the summary judgment stage. See *Davis v. Township of Hillside*, ___ F 3d ___, No. 98-6176 (3d Cir. August 24, 1999); *McCaslin v. Wilkins*, ___ F3d ___, No. 98-2612 (8th Cir. July 7, 1999); *Hawkins v. City of Farmington*, 189 F.3d 695 (8th Cir. 1999); *Scioto v. Marple Newtown School Dist.*, ___ F.Supp.2d ___, 1999 WL 972011(E.D. Pa. Oct. 22, 1999); *Khan v. Gallitano*, 180 F.3d 829 (7th Cir. 1999); *cf. Feist v. Simonson*, 36 F.Supp.2d 1136, 1146 (D.Minn.1999) ("Rather than aborting the chase as the danger increased, the speed and number of pursuing vehicles also increased. While catching a car thief is a law enforcement goal, there is no indication that, had Simonson suspended the chase, the MPD would not have been able to eventually apprehend Shannon. Simonson had secured a physical description and license number of the vehicle; he likely could make an eyewitness identification of the driver; and numerous MPD officers had been notified of the chase and called to the area in the event of a "bail" or exit off the freeway. A review of Simonson's conduct, in light of *Lewis* and other established precedent, reveals that genuine issues of fact exist as to whether his actions "shocked the conscience" for the purpose of a substantive due process claim."); *Wilkinson ex rel. Wilkinson v. Russell*, 182 F.3d 89, 103+ (2nd Cir. 1999); *Miller v. City of Philadelphia*, 174 F.3d 368, 375+ (3rd Cir. 1999); *Hawkins v. Freeman*, 195 F.3d 732, 738 (4th Cir. 1999); *Brown v. Nationsbank Corp.*, 188 F.3d 579, 591 (5th Cir. 1999); *Morris v. Dearborne*, 181 F.3d 657, 668 (5th Cir. 1999).
Independent Contractors in Prison Setting: No Immunity

In *Richardson v. McKnight*, 117 S.Ct. 2100 (1997), the Supreme Court refused to extend qualified immunity to prison guards who were employed by a private firm. Reasoning that §1983 liability is imposed primarily upon state actors, the Court held that the special policy concerns raised in suits against government officials were not implicated with private actors, and that the historically recognized qualified immunity was thus unavailable. Looking to the history and purposes of the qualified immunity doctrine to determine whether the protection should be applied, the Court noted that prisoners could recover from privatized prison management under the common law, *id.* at 2104, and that there was no conclusive historical evidence of a tradition of immunity for private companies or their employees, nor did history provide significant support for application of qualified immunity in this case. Since the Defendant prison guards were employees of a private company, the Court also reasoned that market pressures provided the same pressures that qualified immunity provides in the context of public employees, and that the privatized management system has the incentive to perform its duties aggressively or face the risk of replacement by competitors. The Court held that the prison guards were more akin to private employees than public employees, and that

our examination of history and purpose thus reveals nothing special enough about the job or about its organizational structure that would warrant providing these private prison guards with governmental immunity. *Id.* at 2107.

Qualified Immunity

The defense of qualified immunity in §1983 cases is designed to shield from civil liability "all but the plainly incompetent for those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). The purpose of the defense in actions brought under §1983 is to limit the deleterious effects that the risks of civil liability would otherwise have on the operations of government. As the Supreme Court noted in *Harlow v. Fitzgerald*, infra at 807, "for executive officers in general,... qualified immunity represents the norm." The Court has stated that the measure of what is "clearly established" in American law is an objective one. *See Anderson v. Creighton*, 483 U.S. 635, 640 (1987). It is inevitable that the inescapably imperfect, discretionary decisions by government actors will sometimes impact upon the lives of private individuals with harmful effects, especially in the context of law enforcement work wherein decisions are often made in an atmosphere of great uncertainty. This has led the courts to refrain in many instances from holding law enforcement officers liable in hindsight for every injurious consequence of their actions, since to do otherwise would paralyze law enforcement functions. The defense of qualified immunity accordingly allows officials the freedom to exercise fair judgment and shields those officials from civil liability under §1983 unless their actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, infra at 818. The linchpin of the defense is the objective reasonableness of the officer's actions, and no liability will attach so long as those actions, viewed from the perspective of the officer at the time of the incident, can be seen within the range of reasonableness.

To defeat the defense of qualified immunity, a §1983 Plaintiff cannot rely on general conclusory allegations or broad legal truisms to show that the alleged violated right is clearly established. On the contrary, it is the Plaintiff's burden to show that "when the official acted, the law established the contours of a right so clearly that a reasonable official would have understood his acts were unlawful." *Anderson v. Creighton*, supra at 640. "If case law, in factual terms, has not staked out a bright line, qualified immunity almost always protects the defendant." *Id.* If, on the other hand, this "bright line" can be drawn so as to make it clear that no reasonable person in the position of the Defendant could have thought that the facts were such that they justified the actions of the Defendant, then the Plaintiff can defeat the assertion of qualified immunity.

A recent example of a Court’s rejection of the qualified immunity defense is *Brady v. Ft. Bend County*, 58 F.3d 173 (5th Cir. 1995). In that case, the Fifth Circuit held that a Sheriff was not entitled to qualified immunity with respect to a §1983 action brought against him by Deputy Sheriffs who alleged that they were not rehired because
they supported the Sheriff’s opponent. Both the District Court and the Fifth Circuit rejected the qualified immunity defense on the basis that the Sheriff’s actions violated clearly established Fifth Circuit law that a public employee cannot be terminated for the exercise of First Amendment rights arising from partisan affiliation or political activity in the absence of an allegation of disruption of governmental functions. The Court noted that as far back as 1985, the established law in the Fifth Circuit had been that a public employer could not retaliate against an employee for expression protected by the First Amendment merely because of the employee’s status as a policymaker.

For a good discussion of qualified immunity in a 1983 action brought in state court, see *Gulf Coast Research Laboratory v. Amanareni*, 722 So. 2d 530 (Miss. 1998):

An official acts within his discretionary authority when he performs nonministerial acts within the boundaries of his official capacity." *Tamez v. City of San Marcos*, 118 F.3d 1085, 1091-92 (5th Cir. 1997). As head of GCRL, Howse decided whether to request the declaration of financial exigency. And while GCRL was required to get final approval from IHL for actions taken under the reduction in force plan, it was Howse and Cook who designed the criteria for implementing the plan. Their actions here were not pursuant to specific orders, or spelled out in minute detail beforehand. See id. Thus, some degree of deliberation or judgment characterized the actions of the defendants and as such these actions are discretionary.

Whether an official protected by qualified immunity may be held personally liable for an allegedly unlawful official action generally turns on the "objective leg I reasonableness" of the action, assessed in light of the legal rules that were "clearly established" at the time it was taken. The Fifth Circuit has recently outlined this standard as it relates to the employment context:

To determine whether qualified immunity applies, a court must first determine whether the plaintiff has asserted a violation of a constitutional right. *Siegert v. Gilley*, 500 U.S. 226, 231, 111 S. Ct. 1789, 1793, 114 L.Ed.2d 277 (1991). This determination is made using currently applicable constitutional standards. *Nerren v. Livingston Police Department*, 86 F.3d at 473. If so, the court must then decide if the defendant's conduct was objectively reasonable, using the standards applicable at the time the events occurred. *Id.; Johnston v. City of Houston*, 14 F.3d at 1059. If, upon viewing the evidence in the light most favorable to the nonmovant, reasonable public officials could differ on the lawfulness of the defendant's actions, the defendant is entitled to qualified immunity. *Anderson v. Creighton*, 483 U.S. 635, 639, 107 S. Ct. 3034, 3038, 97 L.Ed.2d 523 (1987), citing *Pfannstiel v. City of Marion*, 918 F.2d 1178, 1183 (5th Cir. 1990).

**Southard v. Texas Bd. of Criminal Justice**, 114 F.3d 539, 550 (5th Cir. 1997).

Stated in simple terms, officials performing discretionary functions are shielded from civil damages liability "as long as their actions could reasonably have been thought consistent with the rights they are alleged to have violated." *Anderson*, 483 U.S. at 638.

Qualified immunity will not protect officials who knowingly violate the law. *See Malley v. Briggs*, 475 U.S. 335 (1986). As we will discuss, this Court is remanding for more specific findings and conclusions on the issue of whether Howse and Cook intentionally discriminated against Ramiah and Lakshmi. The issue of qualified immunity is dependent upon this determination, since it can fairly be said that intentional discrimination on the basis of race or ethnic heritage would constitute objectively unreasonable grounds on which to terminate the plaintiffs.

**Failure to Protect: Prisoners and Pretrial Detainees**

**Hare v. City of Corinth, Mississippi**, 135 F.3d 320 (5th Cir. 1998) was a jail suicide case brought by survivors of a pretrial detainee. After the District Court on remand again denied summary judgment on qualified immunity grounds, the focus of this second appeal to the Fifth Circuit was upon the standard of liability for jail officials sued in their individual capacity. At issue was whether the individual jail officials were entitled to qualified immunity as a matter of law. The Fifth Circuit panel held that Plaintiffs had alleged violation of a clearly
established constitutional right by consistently alleging that the individual jail officials knew or should have
known that the deceased, a pretrial detainee, was exhibiting suicidal tendencies and that their actions and
inactions in placing the decedent in an isolated cell without removing a blanket--strips of which she fashioned
into a noose and hung herself--constituted deliberate indifference to her serious medical and psychiatric needs.
Finding that the plaintiffs satisfied the first prong of qualified immunity under Siegert v. Gilley, 500 U.S. 226,
231 (1991), the Court then turned to the second prong of the qualified immunity test: this is a two-part inquiry
into whether the allegedly violated constitutional rights were clearly established at the time of the incident, in
this case 1989, and if so, whether the defendant jail officials’ conduct was objectively unreasonable in light of the
then clearly established law.

Objective Reasonableness vis a vis Subjective Deliberate Indifference

At the outset of its evaluation and analysis of objective reasonableness, a question of law for the Court, the Fifth
Circuit panel concluded that under the deliberate indifference standard, "the actions of the individual defendants
are within the parameters of objective reasonableness." Id. at 329. The Court then noted that the objective
reasonableness standard as used and applied in the qualified immunity context is analytically different from and
should not be confused with the subjective deliberate indifference standard used for addressing the merits of a
plaintiff’s claim. The latter "serves only to demonstrate the clearly established law in effect at the time of the
incident." Id. at 328. Although summary judgment should have been granted to the individual jail officials on
qualified immunity grounds by the trial court, the Fifth Circuit panel nonetheless cautioned that "our holding does
not insulate all public officials from liability for suicides by pretrial detainees." Id. at 329. The Court also
emphasized that the objective reasonableness analysis employed in this case could result in a denial of qualified
immunity to the officials if evidence were forthcoming that the officials were subjectively deliberately indifferent
in gaining actual knowledge of the substantial risk of suicide and then responding with deliberate indifference. Id.
at 329. See Hare v. City of Corinth, Mississippi, 74 F.3d 633, 650 (5th Cir. 1996)(en banc).

Failure to Protect Against Private Violence

The nature and scope of a constitutional duty to protect against private violence was addressed in DeShaney v.
Winnebago County Dept. of Social Services, 489 U.S. 189 (1989), a landmark case in which the United States
Supreme Court rejected a general duty to protect individuals from criminal misconduct. In DeShaney, the County
Department of Social Services received a number of reports that a young boy, Joshua DeShaney, was being
abused by his father. As the child abuse continued, several social service workers personally observed injuries
that had been inflicted on the child and new firsthand of the threat to the boy's safety. They nonetheless failed to
remove the child from his father's custody or otherwise protect him from child abuse, until finally the father beat
the child so violently that the child suffered serious brain damage. The mother brought a §1983 action on behalf
of the child, arguing that the county and its employees had deprived the child of his liberty interests without due
process by failing to provide adequate protection against his father’s violent acts.

The U. S. Supreme Court held that there was no §1983 liability under these circumstances, noting that the due
process clause of the Fourteenth Amendment does not require governmental actors to affirmatively protect life,
liberty or property against intrusion by private third parties, but instead works only as a negative prohibition on
state action. "Its purpose was to protect the people from the state, not to insure that the state protected them from
each other." Since the Due Process Clause did not require the state to provide its citizens with particular
protective services, the Court concluded that the state could not be held liable under the Due Process Clause for
injuries that could have been averted had it chosen to provide them, and that a state's failure to protect an
individual against private violence simply does not constitute a violation of the Due Process Clause, except in
"limited circumstances".

Fickes v. Jefferson County: Custodial Situations

The Court in DeShaney did recognize that there are certain limited circumstances under which the Constitution
may impose upon the state (and political subdivisions thereof) affirmative duties of care and protection with
respect to particular individuals, for example, pretrial detainees held in a county jail. A good discussion of cases
recognizing such affirmative duties of care and protection can be found in Fickes v. Jefferson County, Texas,

http://www.griffithlaw.net/research.database/uploads/957187922_file_finalboardattorney... 10/16/2014
F. Supp. ___, 1995 WL 552851 (E.D. Tex. 1995), wherein the Court noted that a pretrial detainee is protected by the Due Process Clause of the Fourteenth Amendment, and in certain instances may be accorded rights that are not enjoyed by a convicted prisoner. The Court noted the conflicting case law in the Fifth Circuit, and observed that the standard for failure to protect claims brought by convicted inmates is "deliberate indifference" which requires a showing of a deprivation that is so serious as to deprive the prisoner of minimal civilized measures of life’s necessities such as the deprivation of a basic human need, coupled with a showing that the official is both aware of facts from which an inference could be drawn that a substantial risk of serious harm exists, and also draws the inference. The Court also noted a number of Fifth Circuit cases which have held a different standard applies to failure to protect cases involving pretrial detainees, the test for liability being whether the action was reasonably related to a legitimate government purpose or whether it was done for the purpose of punishment or retaliation, there being no necessity for the pretrial detainee to establish that the individual involved acted with "deliberate indifference". See Grabowski v. Jackson County Public Defenders’ Office, 47 F.3d 1386 (5th Cir. 1995).

Public Housing: Subsidy Not Same as Custody

The mere fact that individuals are living in a public housing project has not yet been found sufficient to give rise to an affirmative duty to protect individuals. In Dawson v. Milwaukee Housing Authority, 930 F.2d 1283 (7th Cir. 1991), a resident of a municipal public housing project was shot by another resident. The Plaintiff argued that the City owed him an affirmative duty of protection because his presence in the Housing Authority Project was the functional equivalent of custody. The Court rejected this argument and refused to equate "subsidy with custody," holding that no affirmative duty to protect was owed.

No Affirmative Duty to Protect from Domestic Violence

In Pinder v. Johnson, 54 F.3d 1169 (4th Cir. 1995), the Court rejected a §1983 claim by a mother who alleged that a police officer had an affirmative duty to protect and safeguard her children from the criminal depredations of her ex-boyfriend.

The genuinely tragic facts of this case started with a law enforcement officer responding to a domestic disturbance call at Plaintiff's home. The Plaintiff's former boyfriend had broken into her home, pushed her, punched objects at her and was screaming and threatening both the Plaintiff and her children, saying he would murder them all. A neighbor had subdued the former boyfriend and restrained him until the police office arrived. The officer arrested the former boyfriend, confined him in the squad car, and returned to the Plaintiff's house, where she informed him of prior threats, including a conviction of attempted arson at the Plaintiff's residence ten months earlier. The Plaintiff wanted to know if it would be safe for her to return to work that evening, and the officer assured her that the former boyfriend would be locked up overnight. However, the former boyfriend was brought before a magistrate for an initial appearance that evening, charged with misdemeanors of trespassing and malicious destruction of property, and was released on his own recognizance and warned to stay away from the Plaintiff's home. Upon release he returned to the Plaintiff's home, set fire to it and while the Plaintiff was still at work, her three children died of smoke inhalation while sleeping.

The boyfriend was arrested, charged with first degree murder and was serving three life sentences without possibility of parole at the time the Plaintiff brought her §1983 action against the County Commissioners and the police officer. The officer argued in the lower court that he did not have a constitutionally-imposed affirmative duty to protect the Plaintiff and her children and that he was shielded from liability by the doctrine of qualified immunity, which shields officials from civil liability unless their actions violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800 (1982).

On appeal to the Fourth Circuit, the Court rejected the Plaintiff’s claim that the officer’s express promises to her created a "special relationship," which in turn gave rise to an affirmative duty to protect her under the Due Process Clause of the Fourteenth Amendment, and that no such due process right to protection was clearly established, and, accordingly, the police officer was entitled to qualified immunity. Citing DeShaney, the Fourth Circuit noted that an affirmative duty to protect may arise when the state restraints persons from acting on their own behalf, as when the state by the affirmative exercise of its power so restrains an individual's liberty that it
renders him unable to care for himself and also fails to provide for his basic human needs. The specific source of that affirmative duty to protect referred to in *DeShaney* was the custodial nature of a "special relationship," and that such an affirmative duty had to be triggered by some sort of confinement of the injured party, such as incarceration, institutionalization or the like. Since there was no custodial relationship between the law enforcement officer and the plaintiffs in this case, since the officer had not restrained the Plaintiff's freedom to act on her own behalf and since the Plaintiff was never incarcerated, arrested or otherwise restricted in any way, and no such limitation was imposed on her liberty, *DeShaney* compelled the conclusion that the Plaintiff was due no affirmative constitutional duty of protection from the state, and the officer would not be charged with liability for the criminal acts of a third party.

**No Special Relationship Arising from Promise of Aid**

The Fourth Circuit also rejected the Plaintiff's argument that the officer's explicit promises that the former boyfriend would be incarcerated overnight created the requisite "special relationship" contemplated in *DeShaney*, stating:

Promises do not create a special relationship--custody does. Unlike custody, a promise of aid does not actually place a person in a dangerous position and then cut off all outside sources of assistance. Promises from state officials can be ignored if the situation seems dire enough, whereas custody cannot be ignored or changed by the persons it affects. It is for this reason that the Supreme Court made custody the crux of the special relationship rule. Lacking the slightest hint of a true "special relationship," Pinder's (Plaintiff's) claim in this case boils down to an insufficient allegation of a failure to act.

**State-Created Danger**

Other cases, including several decided prior to *DeShaney*, have recognized an affirmative duty to protect that arises outside the traditional custodial context, usually under circumstances where the state takes a much larger and more direct role in "creating" the danger itself. In those cases where the state has created the dangerous situation that results in a victim’s injury, the state is not merely accused of failing to act but is more akin to an actor itself directly causing harm to the injured party. For example:

- when the state brought inmates into a victim’s workplace, *Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989);
- when the state brought dangerous prisoners to the victim’s store, *Wells v. Walker*, 852 F.2d 358 (8th Cir. 1988), *cert. denied*, 489 U.S. 1012 (1989);
- when the state provided a squad car to an unsupervised parolee, *Nishiyama v. Dickson County*, 814 F.2d 277 (6th Cir. 1987);
- when prison authorities allegedly knew of the special danger posed to hospital employees who were murdered by an inmate shortly after his release from the state penitentiary, *Beck v. Kansas University Psychiatry Foundation*, 580 F. Supp. 527 (D.Kan. 1984); and
- where a registered nurse at a medium-security custodial institution for young male offenders was raped and terrorized by an inmate, the Court noting that *DeShaney* does not require custody where the state affirmatively creates the danger, in this case the likelihood of a violent sex offender who had failed all treatment programs at the institution committing a violent crime if placed alone with a female, *L. W. v. Grubbs*, 974 F.2d 119 (9th Cir. 1992).

In *Pinder v. Johnson*, *supra*, the Court reasoned that these and other cases relied on by the Plaintiff to establish an affirmative duty to protect based on a special relationship were cases that had been decided months or years after the officer in question had dealt with the Plaintiff and were thus irrelevant to the Court’s assessment of the
clearly established law at the time of the incident, thus presenting a classic case for application of the qualified immunity doctrine, which "forecloses the need for officials to guess about such future developments in constitutional law."

Post-DeShaney, some Plaintiffs have sought to escape DeShaney’s holding by arguing "abuse of governmental authority" as opposed to a constitutional failure to protect from harm inflicted by third parties. This semantic dodge was rejected in Saenz v. Heldenfels Brothers, Inc., ___F3d___, No. 98-40902 (5th Cir/1999), involving claim that a deputy sheriff abused his governmental authority by ordering his partner to refrain from investigating an apparently drunk driver who was driving minutes before a motor vehicle accident involving a third party occurred. The Fifth Circuit concluded:

We decline to issue the novel ruling that when one officer exercises his discretion by ordering another officer not to apprehend a drunk driver, a third party unknown to the officer at the time of the order who is later injured by the drunk driver has a constitutional claim against the ordering officer.

See also White v. Lemacks, ___ F3d ___, No. 98-9513 (11th Cir. 1999)(noting that the "special danger" theory employed in Cornelius v. Town of Highland Lake, supra, has been supplanted by Sacramento v. Lewis and Collins v. City of Harker Heights, supra:

Under Collins, government officials violate the substantive due process rights of a person not in custody only by conduct "that can properly be characterized as arbitrary, or conscience shocking, in a constitutional sense." ... See also Lewis, 118 S. Ct. at 1717(citing Collins). That standard is somewhat amorphous, but the Collins opinion does provide some guidance for applying it.


Degree of Knowledge and Culpability

Other courts have addressed the "state-created danger" theory of §1983 liability, where under certain limited circumstances the constitution may impose upon the state an affirmative duty of care and protection with respect to particular individuals. Under this theory of liability, a plaintiff in order to qualify for relief would have to demonstrate (1) the state actors increased the danger to the plaintiff and (2) the state actors acted with deliberate indifference. Illustrative of the "state-created danger" theory of liability are the following:

-Johnston v. Dallas Independent School District, 38 F.3d 198, 200-01 (5th Cir. 1994)(noting that the key to the state-created danger cases lies in the state actors' culpable knowledge and conduct in "affirmatively placing an individual in a position of danger, effectively stripping a person of her ability to defend herself, or cutting off potential sources or private aid.");

-Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989), cert. denied, 498 U.S. 938 (1990)(female passenger raped by a stranger who offered her a lift, after police officer arrested drunken driver and impounded his car, leaving the female passenger alone at night and without any means to go home in a neighborhood known for criminal activity);

-K.H. ex rel Murphy v. Morgan, 914 F.2d 846 (7th Cir. 1990)(state officials could be guilty of knowingly subjecting 16-month-old child to serious psychological damage, where state removed child from her parents’ custody and over next four years shuttled her among 11 foster homes, in at least two of which she was molested or abused);

-White v. Rochford, 592 F.2d 381 (7th Cir. 1979)(state held liable for injuries to minor children left in car on side of busy highway after state officer arrested driver); and

-D.R. v. Middlebucks Area Vocational Technical School, 972 F.2d 1364 (3rd Cir. 1992)(en banc), cert. denied, 113 S.Ct. 1045, 122 L.Ed.2d 354 (1993)(school exonerated from liability for series of sexual assaults committed against two female students in unisex bathroom and darkroom of school’s graphics arts class, where "the abuse allegedly occurred during class, virtually under the of a teacher trainee, two to four times weekly for an entire
semester," court finding no sufficient demonstration that state placed plaintiffs in danger, increased their risk of
harm or made them more vulnerable to danger, and also finding that the risk that some students will sexually
molest other students during a class was not foreseeable to or known by school officials.).

Post-DeShaney Litigation Trends

The courts have continued to struggle with a clear definition of what constitutionally-imposed duty, if any,
governmental entities owe and under what limited circumstances and in what special relationships an affirmative
duty to protect will be recognized. In addition to §1983 actions based on custodial or state-created danger
exceptions recognized in the above cases, a number of litigation trends have emerged under state tort law in the
context of premises liability security. These include cases finding liability based on failure to take adequate
security measures to protect employees, business invitees and others from criminal activities on or about the
premises. See Brock v. Watts Realty Co., Inc., 582 So. 2d 438 (Ala. 1991); Havner v. E-Z Mart Stores, Inc., 825
S.W.2d 456 (Tex. 1992); Galloway v. Bankers Trust Co., 420 N.W.2d 437 (Iowa 1988); Taco Bell v. Lannon,
744 P.2d 43 (Colo. 1987); Isaacks v. Huntington Memorial Hospital, 695 P.2d 653 (Cal. 1985); Lay v.

In this area of developing case law, counties and other governmental entities that no longer enjoy the blanket of
sovereign immunity may anticipate that such premises liability security claims will eventually be asserted in the
public sector. See generally Crain v. Cleveland Lodge 1532, 641 So. 2d 1186 (Miss. 1994)(good discussion of
duty imposed on premises owners to protect invitees from foreseeable acts by third persons).

ADA Litigation

The Americans With Disabilities Act prohibits covered employers from discriminating against a "qualified
individual with a disability because of the disability of such individual" in regard to various facets of the
employment relationship, including hiring, discipline and discharge. 42 U.S.C. §12112(a). The ADA defines the
term "disability" as

(a) a physical or mental impairment that substantially limits one or more of the major
life activities...;

(b) a record of such impairment; or

(c) being regarded as having such an impairment.

42 U.S.C. §12102(2).

Substantially Limited in Major Life Activity

Under the applicable regulations, 29 C.F.R. §1630, three factors have to be considered in determining whether an
individual is substantially limited in a major life activity:

(1) The nature and severity of the impairment;

(2) The duration or expected duration of the impairment; and,

(3) The permanent or long-term impact, or the expected permanent or long-term impact
of or resulting from the impairment.

"Direct Threat" Standard
The Americans With Disabilities Act was enacted in order to "provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities," in part by eliminating the continued existence of "unfair and unnecessary discrimination and prejudice" resulting from stereotypical assumptions "not truly indicative of the individual abilities of such individuals to participate in, and contribute to, society." 42 U.S.C. §12101(a)(7), (9), 12101(b)(1) (1994). There are times, however, when the competing interests between the law, medical science and public policy can place undue strains upon the effectiveness of the Americans With Disabilities Act, and one means by which the ADA seeks to accommodate these competing interests is to permit an employer to use "qualification standards" to show that the qualifications are lawful even though they may disadvantage a protected individual. 42 U.S.C. §12113(b) states that the qualification standards "may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." The statute defines "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. §12111(3).

Under the Americans With Disabilities Act, if an employer seeks to exclude an otherwise qualified individual from employment because of that individual’s disability or a condition perceived as a disability, the ADA may preclude the employer from doing so. In determining whether an individual is qualified for the employment he or she seeks, holds or from which he has been excluded, the ADA applies to those individuals who are able to perform the essential functions of the employment position with or without reasonable accommodation. 42 U.S.C. §12111(8).

The "direct threat" standard, the only express qualification standard provided by the ADA, has been further interpreted in the EEOC’s technical assistance manual, TAM Section I-4.5–4.6, under which the employer has the burden to show "significant risk," defined as a high probability of substantial harm, in a "direct threat" analysis. It is the employer’s burden to identify the specific risk and to show what particular aspect of disability poses a direct threat. The Technical Assistance Manual requires the employer to address such factors as the duration of the risk, whether present constantly or only intermittently, the nature and severity of the potential harm, the likelihood that potential harm will occur, and the imminence of potential harm. TAM Section I-4.5.

In a pre-ADA case brought under §504 of the Rehabilitation Act, Huber v. Howard County, 849 F. Supp. 407 (D. Md. 1994), aff’d, 56 F.3d 61 (4th Cir. 1995), summary judgment was granted in favor of the employer county against an asthmatic plaintiff who was seeking to become a professional firefighter, where the plaintiff was not otherwise qualified, particularly in view of a physician’s affidavit that established that because of the demands on firefighters at the scene of a fire, rapidly fluctuating temperatures, work at or near maximal heart rates and exposure to toxic substances, "there is no medical plan which, if followed by Huber, would enable him to serve without a risk of future harm to himself or others." Even though the plaintiff had served eight years as a volunteer firefighter, the Court emphasized he was not "otherwise qualified," since his service did not necessarily indicate his future performance, given the unpredictable nature of asthma, which, according to his own medical expert, is induced by cold and exercise, conditions which are faced by firefighters. The Court held that the plaintiff could not perform a most essential function of a career firefighter, that is, to be available, in a healthy physical condition, at any moment during a shift, despite his handicap. Suggested accommodations, such as having other firefighters evaluate the plaintiff on a daily basis, using a stethoscope, to determine whether he was having a wheezing problem, or having paramedics at the scene of a fire listen to his lungs to see if there was a wheezing problem, were rejected by the Court, reasoning that an "accommodation which permits an employee to work only when his or her impairment permits is not reasonable in a job, such as firefighting, where active attendance and immediate, undelayed participation is crucial." 849 F. Supp. at 413.

Applicability of Americans with Disabilities Act to State Prisons

According to the United States Bureau of the Census, approximately 567,079 inmates were held in the nation’s local jails as of mid-1997. "Court to Rule on Prison ADA Case," 30 County News No. 9, at page 1 (May 11, 1998). It is against this backdrop that the U. S. Supreme Court handed down a ruling that may have staggering implications for county jails. In Pennsylvania Dept. of Corrections v. Yeskey, 140 L.Ed. 2d ___ (1998), the Court held that the Americans with Disabilities Act (ADA) applies to state prisons.
Yeskey was serving an 18 to 36 month term on a DUI charge in a state correctional facility. He was denied participation in a Motivational Boot Camp for first-time offenders, successful completion of which would have led to his parole in only six months. His admission to this program was denied because of his medical history of hypertension. The state prison officials believed that Yeskey’s participation in the rigorous routine of the boot camp program could be harmful to him. His subsequent Section 1983 suit against the State Department of Corrections and several department officials alleged that his exclusion from the state boot camp violated the Americans with Disabilities Act, 42 U.S.C. §12132, Title II of which prohibits a "qualified individual with a disability" from discrimination against a "qualified individual with a disability" on account of that disability. The district court granted the state’s Motion to Dismiss for failure to state a claim, holding that the ADA did not apply to state prison inmates. The Third Circuit reversed, and the Supreme Court affirmed, in a unanimous opinion delivered by Justice Scalia, holding that state prisons fall squarely within the ADA’s definition of "public entity," which includes "any...instrumentality of a state...or local government," and thus the ADA is applicable to state prisons.

The Court rejected the argument that the statutory term "qualified individual with a disability" was ambiguous as far as it concerned application to state prisoners. Justice Scalia noted that 42 U.S.C. §12132(2) defines the term to include any individual with a disability

who, with or without reasonable modifications to rules, policies or practices, the removal of architectural, communication or transportation barriers, or the provision of auxiliary aids and services, meets the essential eligibility requirements for the receipt of services or the participation in programs or activities provided by a public entity.

Among the examples given by the Court of "eligible individuals participating in programs, were:

- a drug addict convicted of drug possession who, as part of his sentence might be required to "participate" in a drug treatment program for which only addicts would be "eligible"
- services in the form of a prison law library, "which prisoners are free to take or leave" and
- such "recreational activity" for state prisoners as pro se civil rights litigation.

As applied to the facts of this case, Yeskey’s participation in the state boot camp program was voluntary under applicable state law, and one of the conditions of participation in the boot camp was that applicants agree to be bound by certain terms and conditions.

The Court further rejected the argument that Congress did not envision that the Americans with Disabilities Act would be applied to state prisoners, noting the breadth of the statute, its lack of ambiguity and the inapplicability of the doctrine of constitutional doubt.

Significantly, the Court left open the question, addressed by neither the district court nor the Third Circuit, of whether applying the ADA to state prisons was a constitutional exercise of Congress’ power under the Commerce Clause or Section 5 of the Fourteenth Amendment. The Court declined to address that issue, and concluded that the plain text of Title II of the Americans with Disabilities Act "unambiguously extends to state prison inmates."

In Rizzo v. Childrens World Learning Centers, Inc., ___F. 3d___, No. 97-50367 (5th Cir. April 15, 1999), pending reh’g en banc, ___F.3d___ (5th Cir. August 17, 1999), the Fifth Circuit continues to grapple with an ADA case involving the direct threat standard. A panel had initially upheld a jury verdict over the protest of the employer who argued that Rizzo, who suffered from a substantial hearing impairment, presented a direct threat to the students whom she regularly drove in a van to and from the Learning Centers in her capacity as an administrative aid. In 1993, a student’s parent complained that her child had been unable to get Rizzo’s attention because of her hearing disability and also voiced a concern that Rizzo’s disability might prevent her from hearing a choking child while driving a van full of small children. Shortly after this complaint, Rizzo was removed from her van driving duties, suffered a reduction in work hours, was forced to work a split-shift to make up those lost hours, was assigned to cook meals in the Learning Centers kitchen, and occasionally worked fewer than the necessary hours to keep her benefits. After these changes in her work assignments, Rizzo quit her job at the Learning Centers and filed this ADA suit, alleging discrimination due to her hearing disability. The panel noted at
the outset that the burden of proof is on the plaintiff to prove that, as a qualified individual, she is not a direct threat to herself or others, holding that "in accord with the federal regulations, when a court finds that the safety requirements imposed tend to screen out the disabled, then the burden of proof shifts to the employer, to prove that the employee is, in fact, a direct threat." Moreover, the panel noted that in order to prevail under the ADA, the plaintiff must prove three things: (1) she has a disability; (2) she is an otherwise qualified employee; and (3) she suffered an adverse employment decision solely because of her disability. Affirming the trial court, including its denial of the employer’s motion for JNOV, the panel stated:

Was Rizzo an otherwise qualified employee? CWLC contends that Rizzo could not safely drive the school van, and that she was therefore not qualified. We have already established that the burden of proof that Rizzo constituted a direct threat falls on the appellant. Again, the issue is intertwined with CWLC’s assertion that it proved, as a matter of law, that Rizzo was a direct threat to others. We disagree. There is no evidence in the record that Rizzo ever had any problems driving the van. There is no evidence of a previous accident, or even a previous near-miss. There is no evidence that her disability resulted in her being distracted from her driving duties. CWLC points out that, as Rizzo would be unable to hear the children in the van, she would have to rely on the additional mirrors placed in the van for visual clues as to the children’s safety. CWLC contends that this would tend to distract Rizzo, and could result in an accident. There is no evidence that the mirrors were placed in the van to accommodate Rizzo. These mirrors were there so that any van driver, with or without a disability, could check on the children visually. This was a necessary step since it would be enormously difficult for anyone to distinguish words in a van filled with up to two dozen children.

With regard to her other duties, there is no evidence Rizzo was not qualified. As an administrative assistant she appears to have completed successfully all her other duties, including answering the telephone, despite her hearing loss. CWLC’s only problem with Rizzo appears to have been what they perceived as a potential threat in the area of van driving.

Finally, Rizzo must prove that she suffered an adverse employment decision solely because of her disability. CWLC contends that Rizzo suffered no adverse employment decision. They blame the reduction in Rizzo’s work hours on the seasonal nature of daycare work. They point out that other teachers shared in the cooking duties along with Rizzo. They contend that Rizzos change in duties was based on her own request not to be alone in the classroom with children for an extended period. In short, CWLC contends that Rizzo was never demoted.

Viewing the evidence in the light most favorable to the appellee, we must disagree. Rizzo’s hours were reduced, resulting in lost wages. To compensate for the reduction, Rizzo was forced to work a split-shift of early mornings and late afternoons. Even with the split-shift she was not working enough hours to keep her full benefits package (though we recognize that she never actually lost her benefits). She was removed from her duties as the van driver, and sent to work in the kitchen. The cook replaced her as the van driver. In the light most favorable to Rizzo, a reasonable juror could clearly find she was demoted.

While not conceding a demotion, CWLC argues that, in the alternative, the record will clearly show such a demotion was not based solely on her disability. CWLC re-urges its previous arguments: that the work was seasonal; that everyone cooked; that Rizzo asked not to perform certain duties. Mainly, CWLC asserts that driving the van was not an essential part of Rizzo’s duties, so suspending her from van driving was not a demotion based on her disability. We disagree. Rizzo’s duties included driving the van every day. We remind CWLC, and all appellants, that a motion for judgment as a matter of law does not require this Court to decide which side has the better of the case. It is the function of the jury as the traditional finder of the facts, and not the Court, to weigh conflicting evidence.[ 8 Id.]8 Clearly, a reasonable juror could conclude that driving the van was an essential part of Rizzo’s job, and CWLC offers no grounds for her suspension from that duty other than her disability.

CWLC’s final argument is that this Court should recognize the unique circumstances of this case, and adopt an equally unique balancing test to fit the facts of the case. CWLC contends that a school and
daycare facility must make the protection of the children their primary concern. With that in mind, they propose that this Court determine whether CWLC properly balanced the need to protect the children in its care and Rizzos interest in continued employment at the Learning Center.[ 9 Appellants Brief at page 23.]9 We decline to adopt such a balancing test. We recognize CWLCs interest in protecting the children in their care. We must also recognize that the evidence produced at trial shows only speculation as to the threat that could be posed by an employee with a disability who had been safely doing her job for two years.

Congressional intent with regard to the ADA is clearly spelled out: To provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.[ 10 28 U.S.C. 12101 (b)(1).]10 Had Congress intended this Court to apply a balancing test in evaluating a discrimination claim, the Code of Federal Regulations would have made that plain. Yet CWLC provides us with no statutory authority for the test they propose. As such a test has no basis in either the regulations or the caselaw, and is not mandated by the interests of justice, we decline to adopt such a test.

Having reviewed the record in the light most favorable to Rizzo, we conclude that a reasonable jury could have found for the plaintiff, and affirm the trial courts denial of the amended motion for judgment as a matter of law.

A majority of the Fifth Circuit has voted in favor of rehearing en banc, supplemental briefs have been filed by the parties, and the EEOC's en banc amicus curiae brief in support of appellee Rizzo was filed on December 17, 1999. Oral argument will be scheduled in due course.

Migraine Headaches Not Disability

In Barfield v. BellSouth Telecommunications, Inc., 886 F. Supp. 132 (S.D. Miss. 1995), a telephone company's service representative was discharged for excessive absenteeism and thereafter sued her employer for alleged violation of the Americans With Disabilities Act, claiming that her migraine headaches constituted a disability and that her employer was required to make reasonable accommodations for her absenteeism since the predominant cause for her absences was such migraine headaches.

The District Court concluded that the Plaintiff failed to present sufficient proof that she suffered from a disability to withstand the employer's Motion for Summary Judgment. The Court reasoned that an impairment is a disability only if it "substantially limits one or more of the major life activities" of the impaired individual, and in this context major life activities are the basic activities that an average person can perform with little or no difficulty, such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working. 29 C.F.R. §1630.2(i). The Court concluded that the evidence was insufficient to support a finding that the Plaintiff's headaches substantially limited a major life function, noting that "one whose impairment merely affects one or more major life activities is not disabled," and that an individual is disabled within the meaning of the ADA only if her impairment substantially limits a major life activity "which, in that it either makes the individual either unable to perform a major life activity, or severely restricts her ability to perform a major life activity as compared to the general population."

The Plaintiff in this case presented no medical proof that her headaches imposed any limitations on her, or that they were so severe on such a consistent basis as to substantially limit her ability to perform any major life activities. On the contrary, while the Plaintiff undertook to describe how her headaches affected her, limited her life and kept her from "doing things that I want to do that other people simply take for granted," and despite Plaintiff's proof that her headaches were sometimes so intense that they caused her to miss planned outings and prevented her from performing some basic life functions,

there is no proof as to the frequency with which headaches of such an intensity occur. Nor has Plaintiff presented proof as to the duration of such episodes. For these reasons, the Court views her proof as insufficient to support a finding that her impairment substantially limits a major life activity other than working.
With regard to the effect of the Plaintiff's headaches on her working, the Court found that while the Plaintiff's headaches may prevent her from talking to customers while stationed at a computer terminal, she had not shown that they preclude her from performing a wide range of jobs and thus had not shown that she had a disability cognizable under the ADA. Moreover, the Court found that the Plaintiff would not be able to establish a violation of the ADA "since she has not shown that she is otherwise qualified to perform the essential functions of the job of service representative, whether with or without reasonable accommodation. Manifestly, an individual who is disabled still must be able to perform the essential functions of her job to receive the protection afforded by the ADA." The Court concluded as a matter of law that an essential function of the job of service representative was regular and predictable attendance and that it was unreasonable for the Plaintiff to argue that her employer should never count on her working and performing her job "but should instead allow her to work when she feels like it." In this regard, the Court noted that while "job restructuring" or "part-time or modified work schedules" are included in the definition of "reasonable accommodation" under the Americans With Disabilities Act, 42 U.S.C. §12111(9)(B), the Plaintiff in this case was asking too much of her employer, and that such "open-ended work when able" schedules have been held in other cases not to be reasonable accommodations but requirements which would otherwise place an undue hardship on the employer.

High Blood Pressure Controlled Through Medication

In Oswalt v. Sara Lee Corp., 889 F. Supp. 253 (N.D. Miss. 1995), a former employee sued his former employer for wrongful discharge in violation of the Americans With Disabilities Act, alleging that his high blood pressure was a disability within the meaning of the ADA and that this condition, together with the temporary side effects from medication, qualified as a disability. The Court found that the Plaintiff did not have a record of an impairment that substantially limited a major life activity, and that while his doctor authorized him to stay away from work for almost a month while his body adjusted to the blood pressure medication, there was no evidence that the Plaintiff was suffering from any ill effects of the medication. In rejecting the Plaintiff's claim, Chief Judge L. T. Senter reasoned that

The ADA was never intended to extend to persons suffering from temporary conditions and, although hypertension is unfortunately only treatable and not curable, it was not hypertension the Plaintiff was using as a reason for his disability, rather, it was the temporary adjustment to the medicine used to treat the hypertension. ... The ADA was not meant to cover every ailment or infirmity that renders an employee temporarily unable to perform the duties of his position. Temporary absence from work due to side effects of or adjustment to medication does not give an employee a record of impairment. Millions of Americans are diagnosed with high blood pressure which can be controlled through medication. Some world-class professional athletes have high blood pressure and control it effectively with modern drug therapy and never miss a game. High blood pressure alone, without any evidence that it substantially affects one or more major life activities, is insufficient to bring an employee within the protection of the ADA.

On February 6, 1996, the Fifth Circuit affirmed in Oswalt v. Sara Lee Corp., No. 95-60402 (5th Cir. 1996), holding that Plaintiff Oswalt failed to carry his burden of proving that his high blood pressure was a disability within the meaning of the ADA. Its reasoning paralleled that of Chief Judge Senter:

To sustain a claim of wrongful discharge under the ADA, Oswalt must be a person with a "disability." The statutory definition of "disability" includes "a physical or mental impairment that substantially limits one or more of the major life activities." 42 U.S.C. 12102(2)(A). According to Oswalt, his physical impairment was his high blood pressure, and this impairment substantially limited a major life activity when his doctor authorized him to miss work while he adjusted to medication.

The Equal Employment Opportunity Commission has set forth factors that should be considered in determining whether an individual is substantially limited in a major life activity. These include (1) the nature and severity of the impairment; (2) the duration of the impairment; and (3) the long term impact of the impairment. See 29 C.F.R. 1630.2(j)(2).
In this case, Oswalt has provided no evidence to show that either the high blood pressure or the alleged side effects from the medication substantially limited his job. We agree with the district court that "[h]igh blood pressure alone, without any evidence that it substantially affects one or more major life activities, is insufficient to bring an employee within the protection of the ADA." Oswalt, 889 F.Supp. at 258. We do not imply that high blood pressure in general can never be a "disability," as defined by the statute. We hold only that Oswalt failed to provide any evidence that his high blood pressure substantially limited a major life activity.

**Expert Testimony and ADA Claims: Daubert's Applicability to Civil Rights Litigation**

In *Frank v. State of New York*, 972 F. Supp. 130 (N.D. N.Y. 1997), an ADA claim was brought against the state as employer. At trial Plaintiff sought to introduce medical testimony by doctors concerning "multiple chemical sensitivity." The idea behind multiple chemical sensitivity was that a person’s immune system could be depressed by a variety of environmental insults to the point that the exposed person would become hypersensitive to other chemicals and naturally occurring substances. The trial court rejected the doctors’ proffered expert testimony, reasoning that any hypothetical cause-and-effect relationship between exposure and the development of MCS symptoms was not capable of being tested or replicated, and that peer review had revealed numerous flaws in the MCS theory.


**Respondeat Superior and State Law Claims**

While §1983 liability may not be imposed on the basis of respondeat superior, vicarious liability may arise with regard to tort claims arising under state law. In *Barrett v. Miller*, 599 So. 2d 559 (Miss. 1992), Plaintiffs sued the Lauderdale County Sheriff and Deputies alleging that the Deputies acting under the Sheriff's authorization had illegally searched their home, violated the rights under the Fourth and Fourteenth Amendments of the United States Constitution, and performed the search in an unreasonable manner which damaged their home. The trial court granted Defendants' Motion to Dismiss and Motion for Summary Judgment, applying §1983 principles to determine whether the Plaintiffs' claim of excessive force was actionable. On appeal, the Mississippi Supreme Court held that the trial judge erred by characterizing this as a 1983 action, reasoning that the Plaintiffs had filed an excessive force action seeking a state remedy provided within the ambit of traditional tort law, that they did not allege a constitutional violation of their civil rights and did not seek a remedy under federal or state constitutional law.

**Impact of §19-25-19**

Turning to the applicability of the doctrine of respondeat superior and vicarious liability as applied to the Sheriff, the Court noted in Barrett that the basis of the action against the Sheriff was that the deputies were his agents and servants and acting in the scope of their authority and in furtherance of the business of the Sheriff and that "any liability he may have would have to come vicariously or through respondeat superior." The Court noted that under Miss. Code Ann. §19-25-19 (Supp. 1991), the Sheriff may be held liable for damages and shall be liable for the acts of his deputies, but "it goes without saying that the Sheriff can be held liable only if the deputies have done something wrong." The Court then held that the deputies were not clothed in qualified immunity, and the action they took was not discretionary but ministerial and immunity did not extend to them. The deputies in this case were not exercising discretionary authority in searching the plaintiffs’ home, but were acting under a search warrant which gave them the authority to search and set out the parameters in which the search should be carried out. The Court noted in this regard:

Both federal and state law protect individuals from unreasonable searches. In carrying out the search warrant, the deputies were performing a ministerial function. The discretionary function, determining the probable cause for the issuance of the warrant, had already occurred. The execution of the search warrant was a ministerial act and required no discretionary decision-making, aside from the place in the house to search, on the part of the deputies executing the warrant. As the execution of the search warrant was a ministerial act, the deputies who executed it are not shielded from liability by qualified immunity.
**Qualified Immunity**

Finally, as to the deputies who obtained the search warrant, the Court in Barrett held that the action of these deputies was discretionary and not ministerial and that as a matter of law these deputies had qualified immunity and summary judgment and dismissal were properly entered in favor of them. As to the deputies executing the search warrant, the Court held these deputies were not immune from suit under qualified or good faith immunity because they were engaged in a ministerial function, and that these deputies were obligated to search the house in a manner to locate the items indicated in the warrant. Since it did not appear beyond any reasonable doubt that the plaintiffs could prove no set of facts upon which they would be entitled to relief, the Court concluded that summary judgment and dismissal was improper as to those deputies.

**Liability Under §19-25-19**

Finally, the Court concluded that summary judgment and dismissal as to the Sheriff was improper, rejecting the Sheriff's contention that he was cloaked in immunity and was not involved in the search of the plaintiffs’ home. Notwithstanding, Sheriff Miller is made liable for the actions of his deputies through Miss. Code Ann. §19-25-19, which provides vicarious and *respondeat superior* liability to a sheriff for the actions of his deputies. Sheriff Miller has no liability for his own actions, but would be liable for the actions of his deputies if the deputies themselves are found to be liable.

**Loss of Qualified Immunity**

In *Mohundro v. Alcorn County*, ____ So. 2d ____ (Miss.1995), Plaintiff broke his neck and was rendered a quadriplegic as a result of driving his truck into a washout in the middle of a county road. One month before the accident, the County Supervisor for the district in which that road was located had replaced an existing bridge on the road with a culvert, but the day before the accident the entire roadbed surrounding the culvert had washed out, leaving an open pit or hole about 16 to 20 feet by 24 to 30 feet and 6 to 8 feet deep. The County Supervisor observed the washout and instructed a county employee to put "Road Closed" signs 200 to 300 feet to the north and south of the washout, but the signs were not lighted nor were there any barricades erected. When the Plaintiff approached from the south and drove into the pit during a heavy rain, he thought the pit was only standing water, and claimed that he saw no warning signs. When the County Supervisor discovered the Plaintiff, he observed that the sign in the southbound lane had either been blown over or knocked over. The members of the County Board of Supervisors were sued in their individual capacity and in their official capacities as the Board of Supervisors of Alcorn County. The Plaintiffs asserted that the Supervisors in their individual capacities were not entitled to qualified immunity. On appeal from the trial court's sustaining of the County Supervisors’ Motion for Summary Judgment predicated on qualified immunity, the Mississippi Supreme Court held that while Alcorn County and its Board of Supervisors had sovereign immunity, and while the County Supervisors were cloaked with qualified immunity, there was nonetheless a genuine issue of material fact as to whether the County Supervisor who had instructed a county employee to put the "Road Closed" signs north and south of the washout had exceeded his authority or was so grossly negligent that his action could be described as constructively intentional, and if so, he had no immunity. In reaching this result, the Mississippi Supreme Court reasoned that under prior precedent, Supervisors have been found immune from liability for injuries that result from negligent maintenance of public roads. See *Coplin v. Francis*, 631 So. 2d 752, 753 (Miss. 1994) and *Webb v. County of Lincoln*, 536 So. 2d 1356, 1358-60 (Miss. 1988).

**Ministerial vs. Discretionary Duties**
The Court noted in *Mohundro* that this qualified immunity only afforded protection against suits that arise out of the performance of discretionary duties and that under its earlier decision in *Grantham v. Mississippi Department of Corrections*, 522 So. 2d 219, 225 (Miss. 1988), a Supervisor or other public official has no immunity to a civil action for damages if his breach of a legal duty causes injury and (1) that duty is ministerial in nature, or (2) that duty involves the use of discretion and the governmental actor greatly or substantially exceeds his authority and in the course thereof causes harm or (3) the governmental actor commits an intentional tort.

**Definition of "Ministerial"**

Citing *Coplin*, supra at 754, *Poyner v. Gilmore*, 171 Miss. 859, 865, 158 So. 922, 923 (1935), and *T.M. v. Noblitt*, 650 So. 2d 1340, 1342 (Miss. 1995), the Court explained that a duty is ministerial in nature when the duty is one which has been positively imposed by law and its performance required at a time and in a manner or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer’s judgment or discretion.

**Statutory Minimum Standards**

In this regard, Mississippi statutes specified the minimum requirements of the construction of culverts, "leaving no room for discretion in meeting the minimum standards set out there." Slip Op. at 11. With regard to these minimum standards, the Court stated in *Mohundro*:

There is no evidence that these standards were not met; therefore, there was no breach of a ministerial duty on the part of the Board as a whole, Dixon or any of the other individual Supervisors.

**Grossly Negligent and Constructively Intentional Conduct**

In concluding, however, that there was a genuine issue of material fact as to whether the individual Supervisor, Dixon, had exceeded his authority in this case or was so grossly negligent that his action could be described as constructively intentional, thereby removing his qualified immunity, the Court stated:

The decision to replace the existing bridge on Mathis Road with a culvert was a discretionary function, but there may be a genuine issue of fact regarding whether Dixon substantially exceeded his authority in making that decision. He made the decision on his own without consulting the rest of the Board or a professional engineer to see if a culvert would be sufficient. See *Coplin*, 631 So. 2d at 755. Miss. Code Ann. §19-3-41 (1972) vests the Board of Supervisors of a county with full jurisdiction of roads, bridges and ferries. Dixon knew of the washout in Mathis Road on Sunday morning and was admittedly worried that someone might drive into it. Even though he was cognizant of the dangerous condition, by the time Mohundro drove off into the pit Monday morning, Dixon still had made no effort to warn the public other than to post unilluminated signs. Although whether to erect a barricade or some other type of warning device is dependent upon the public official's judgment and discretion, if it may be shown that Dixon acted with such gross neglect or callous indifference to the safety of Mohundro and the public as a whole such that his conduct may be fairly described as constructively intentional, he is not entitled to immunity. See *McFadden v. State*, 542 So. 2d 871, 881 (Miss. 1989).

**Reapportionment and Voting Rights**

"The opportunity to control the drawing of electoral boundaries through the legislative process of apportionment is a critical and traditional part of politics in the United States, and one that plays no small role in fostering active participation in the political parties at every level." *Davis v. Bandemer*, 478 U.S. 109, 145 (1986)(O’Connor, J., concurring in the judgment).
Who will be the principal architects of county redistricting plans after the results of Census 2000 are in? Will it be the federal courts or the boards of supervisors? Redistricting is the "most intensely partisan and self-regarding of all political acts," North Carolina’s Brief on the Merits, at 27, in Hunt v. Cromartie, No. 98-0085, and it is a daunting task for any state legislature in a state with a substantial minority population, a demonstrated record of voting overwhelmingly for one party, and a divided legislature. This presentation focuses on the difficult decisions facing the courts when they are thrust into this complex context and are called upon to decide the role of race and whether race has predominated over traditional districting principles. Following a brief introduction to the basic principles of vote dilution and a survey of the Justice Department’s maximization agenda that spawned the Shaw litigation in 1992, we will review the subsequent caselaw and judicial refinements that took place in the lengthy but necessary process of curtailing and undoing the mischief of race-predominant redistricting at the state and local government level. Then we will take a look at the developing jurisprudence in the field of racial gerrymandering litigation, from the standpoint of liability as well as remedy issues. We will evaluate how these post-Shaw developments might affect state legislatures as they approach the daunting task of redistricting following Census 2000, gearing up to evaluate new census data and existing legislative redistricting plans for compliance with the constitutional mandate of one person, one vote. This will be followed, finally, with a review of several important Shaw-based decisions at the district court and appellate level that may eventually reach the Supreme Court.

The Genesis of Race-Based Redistricting: An Overview of Overkill

Beginning with the United States Supreme Court’s 1993 decision in Shaw v. Reno, the Court has handed down a number of decisions curtailing race-based redistricting and other forms of racial gerrymandering. It will likely refine the Shaw doctrine even further with the third Supreme Court decision arising from the Shaw case, Hunt v. Cromartie, anticipated at the end of the present term. State legislatures will then have before them at least nine Supreme Court decisions and over two dozen appellate court decisions as essential guidance for redistricting of state legislatures in compliance with the demands of Sections 2 and 5 of the Voting Rights Act of 1965, as amended. Like leaping from darkness to light, the rules for redistricting and reapportionment for the decade beginning January 1, 2000, will differ significantly from the ones applied during the 1990 round of redistricting: they will be understandable. Though the old guard may grouse that the pendulum has swung to the right, nonetheless a clearly articulated set of legal principles applicable to the redistricting process on the state level will now be available well in advance of Census 2000. The battle over excessive race-consciousness and race-based redistricting has not ended, but we are now equipped with legal standards that reflect a more balanced, moderate judicial perspective, albeit one that may be hanging by the thread of a 5-4 majority.

Litigation Climate Leading to Shaw: Majority-Minority Districts

Following the 1980 census, a process of racial maximization through creation of majority-minority districts was commenced in many jurisdictions covered under Section 5 of the Voting Rights Act of 1965. A system of "political apartheid" was prompted by a seemingly unbridled coterie of Voting Section attorneys and administrative specialists within the Justice Department’s Civil Rights Division, aided and abetted by civil rights plaintiffs and a tight group of scholarly experts with impressive track records in the federal judicial arena. No bashful bunch, the proponents of the maximization agenda wielded the blunt instrument of Section 5 preclearance authority against city and county governmental entities and ultimately browbeat a number of states into creating bizarrely shaped, racial gerrymandered electoral districts in order to avoid the cost and disruption of Voting Rights Act litigation. Faced with the demand to create majority-minority districts wherever possible, and held administratively hostage if they did not, covered state and local government entities had two options in obtaining preclearance of redistricting plans and other electoral changes: make a formal submission to the Justice Department in Washington, D.C., or, in lieu of that administrative procedure, file a suit for declaratory judgment in the United States District Court for the District of Columbia, not exactly a cheap stroll in the park with a d. j. litigation price tag averaging well over $200,000.

The Justice Department’s racial maximization policy was justified by many on the basis of the low numbers of black elected officials in these covered jurisdictions, most of whom were in the southern states that comprised...
what was once the Confederacy. Implemented with a fervor rooted in the unspoken battle cry of "payback time," this maximization process entailed deliberate, vigorous collaboration between various civil rights organizations and minority leaders working in conjunction with the Justice Department. The racial gerrymandering frenzy accelerated dramatically following the 1990 census, leading to such extreme examples of "ugly" districts and government-sanctioned segregation of the races that Justice Clarence Thomas was provoked to label them "political homelands" in his concurring opinion in *Holder v. Hall*, 114 S.Ct. 2581, 2598 (1994). At a time when Bosnia and Kosovo were not exactly familiar locales to Joe Sixpack, Justice Thomas stepped up to the plate and described the practice as "balkanization." He gave this prophetic warning:

> The practice now promises to embroil the courts in a lengthy process of attempting to undo, or at least to minimize, the damage wrought by the system we created.

**Proportional Representation: Doling it Out**

We have to digress a little bit to appreciate the full impact of what was really going on in "our federalism," and how things got so out of control. Following the 1982 Amendments to the Voting Rights Act, litigation under expanded Section 2 began to be driven by a race-based goal of proportional representation. A trickle followed by a steady stream and then a raging torrent, this litigation trend was contrary to assurances provided by key Senators (including one Presidential aspirant who now hawks Viagra in television ads). Added to the Voting Rights Act during the tense debate over amended 2, the "Dole Compromise" - that nothing in Section 2 established "a right to have members of the protected class elected in numbers equal to their proportion of the population" - was fast becoming a hollow promise.

**Gingles All The Way**

In the first §2 vote dilution case decided after the 1982 Voting Rights Act amendments, *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Court set out three "necessary preconditions" for plaintiffs to prevail in a vote dilution case:

1. Geographical compactness,
2. Minority political cohesion, and
3. Legally sufficient white racial bloc voting.

**Senate Report Factors and Totality of Circumstances**

The Senate Report specifies factors which typically may be relevant to a Section 2 claim:

1. the history of voting-related discrimination in the State or political subdivision;
2. the extent to which voting in the elections of the State or political subdivision is racially polarized;
3. the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting;
4. the exclusion of members of the minority group from candidate-slating processes;
5. the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and
6. the extent to which members of the minority group have been elected to public office and the jurisdiction.
The Report also notes that the following evidence may have probative value in determining the substantiality of a Section 2 claim:

(7) evidence demonstrating that elected officials are unresponsive to particularized needs of the members of the minority group, and

(8) evidence that the policy underlying the State’s or the political subdivision’s use of the contested practice of procedure is tenuous.

Proving all three Gingles preconditions does not automatically establish a §2 violation, but the Court must also consider the Senate Report factors and other relevant evidence under the "totality of circumstances." As required by 42 U.S.C. §1973, plaintiffs are also required to show that "based on the totality of circumstances...the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected minority] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."

Post-1990 Census: The Noose Tightens

Following the 1990 census, as states and local government entities evaluated census data for purposes of one person, one vote compliance, the Department of Justice and private plaintiffs through Section 5 preclearance proceedings and Section 2 litigation routinely demanded maximization of the number of majority-minority districts in order to achieve proportionality. As the Dole Compromise went limp, racial gerrymandering emerged as a by-product. Majority-minority districts were boldly created by relying predominantly upon race and less upon non-racial traditional redistricting principles, with the Justice Department knee deep in the ill-begotten maximization agenda. But these contorted and racially homogenous electoral monstrosities soon faced equal protection-based challenges in North Carolina, Georgia, Louisiana, Texas, California and Florida. Virginia and New York weren’t far behind. Ironically, the first and ultimately successful challenge began in the state that gave us Gingles.

Shaw v. Reno

The distortion of the Voting Rights Act and its deliberate misuse to create bizarrely-shaped racial enclaves eventually gave rise to a constitutional challenge to North Carolina’s First and Twelfth Congressional Districts. Suit was filed on March 12, 1992. The two districts had been created pursuant to North Carolina’s 1992 redistricting plan in order to provide for effective black voting majorities. The Plaintiffs, five residents of Durham, North Carolina, were led by a former federal military judge and law professor, Robinson Everett. They mounted an Equal Protection argument in their challenge to these racially gerrymandered districts, but a three-judge court rejected it in a 2 to 1 ruling. Often referred to as the father of racial gerrymander litigation, Judge Everett and his talented legal team ultimately persuaded a majority of the United States Supreme Court to recognize their cause of action as a valid one, namely, that a facially neutral electoral districting plan could, in certain exceptional circumstances, be a racial classification subject to strict scrutiny under the Equal Protection Clause.

In Shaw v. Reno, 509 U.S. 630, 113 S. Ct. 2816, 125 L. Ed. 2d 511(1993), the Supreme Court held that a district violates the Equal Protection Clause of the Fourteenth Amendment if it is "so extremely irregular...that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles."

The Court concluded that "reapportionment is one area in which appearances do matter," and a district that includes voters who are individuals of the same race, but are "widely separated by geographical and political boundaries," suggests the possibility of a racial gerrymander which the Court has "rejected ...elsewhere as [an] impermissible racial stereotype."

Speaking through Justice Sandra Day O’Connor, the Court suggested that drawing race-conscious districting lines may widen the racial divide rather than get us beyond race.
Shaw and its progeny have given birth to the constitutional principle that impermissible race discrimination occurs where race for its own sake, and not other traditional districting principles, was the legislature’s dominant and controlling rationale in drawing its district lines. Several specific harms have been identified as harms that can be caused by the excessive use of race in districting, including

"representational" harm: where elected officials in a district that is obviously created solely to effectuate the perceived common interests of one racial group are more likely to believe that their primary obligation is to represent only the members of that group, rather than their constituency as a whole, as a result of which certain voters suffer representational harm, U.S. v. Hays, 515 U.S. 737, 744 (1995); Shaw v. Reno, 509 U.S. at 648.

"expressive" harm: by conveying the message that political identity is, or should be, predominantly racial, Bush v. Vera, 517 U.S. at 1053, 116 S. Ct. 1941 (1996).

"societal" harm: by carving electorates into racial blocs which can balkanize us into competing racial factions, Miller v. Johnson, 515 U.S. 927(1995); Shaw v. Reno, 509 U.S. at 657.

The resulting trilogy, Shaw v. Reno, followed on remand by Shaw v. Hunt, 517 U.S. 899 (1996), and Hunt v. Cromartie, has had and is continuing to have a profound effect on the volatile mix of race and politics in the redistricting arena.

Shaw's Underpinnings

To understand Shaw, one must start with the "separate but equal" doctrine of Plessy v. Ferguson, 163 U.S. 537 (1896), and its rejection in Brown v. Board of Education, 347 U.S. 483 (1954). A scant six years after Brown came Gomillion v. Lightfoot, 364 U.S. 339 (1960) and its rejection of the concept that political power can be allocated constitutionally on the basis of race. Just as it was wrong to gerrymander the black population of Tuskegee, Alabama, out of the city limits and thereby remove their fundamental right to vote in Gomillion, and just as it was wrong for racial segregation policies and laws institutionalizing blatant racism to be used to keep black schoolchildren out of white schools in Brown, it was just as wrong, divisive and disruptive for race-predominant redistricting and its singular emphasis on racial separatism to be foisted on state and local governments in the 1990's. Indeed, over forty years after Brown, at the urging of the Justice Department and the organized civil rights community, state and local governments had become embroiled in precisely the same wrong-headed efforts to separate blacks into their own "majority-minority districts" so as to enable blacks to elect the "authentic" black candidate of their choice, leaving in the aftermath an overwhelmingly racially identifiable assortment of elected officials supposedly beholden to those voters of their own racial or ethnic cleavage.

Johnson v. DeGrandy

In Johnson v. DeGrandy, 512 U.S. 997, 1011-12 (1994), the Supreme Court held that proof of the Gingles preconditions alone is not sufficient to establish §2 liability, and that is necessary for other evidence to be examined in the totality of circumstances, "including the extent of the opportunities minority voters enjoy to participate in the political process."

The Court further held that, in determining whether equality of opportunity exists, a court should not ask whether it is physically possible to draw additional black majority districts, because a state is not required to maximize the number of majority-minority districts. DeGrandy, 512 U.S. at 1009, 1016-17. Instead, to assess the totality of circumstances, courts should use the factors identified in the legislative history of §2. Id. At 1010-12.

Effect of Racial Separatism

It is against this backdrop of racial separatism, which unfortunately has been nurtured by the Civil Rights Division of the United States Department of Justice, that Shaw v. Reno and the decisions of the U.S. Supreme
Court in *Miller v. Johnson*, *Vera v. Bush, Shaw v. Hunt (Shaw II)* and other post-*Shaw* cases must be viewed and understood.

**Miller v. Johnson**

On the last day of the 1995 term, the Supreme Court invalidated Georgia’s Eleventh Congressional District on equal protection grounds, holding in *Miller v. Johnson*, 515 U.S. 900 (1995), that where race was the predominant factor motivating the legislature’s decision to place a significant number of voters inside or outside a district, and where the legislature subordinated traditional race-neutral districting principles to racial considerations, such a district, unexplainable on grounds other than race, would be subject to the same strict scrutiny as applies to other state laws that classify citizens by race, and can be sustained only if it is narrowly tailored to serve a compelling governmental interest.

**Bush v. Vera: The O’Connor Guidelines**

In *Bush v. Vera*, 116 S.Ct. 1941 (1996), the Supreme Court affirmed 5-4 a three-judge court’s finding that race was the predominant factor in the drawing of three congressional districts and rejected the proffered compelling governmental interests. Texas had sought to draw new congressional districts after the 1990 census and was entitled to three additional congressional seats due to population growth. The state legislature drew District 30 as a black-majority district in the Dallas area, District 29 as a Hispanic-majority district in the Houston area, and reconfigured District 18 as a black-majority district in the Houston area adjacent to District 29. To say these three districts were bizarre and contorted in shape is an understatement. Plaintiffs alleged that Districts 18, 29 and 30 were racially gerrymandered, and a three-judge court agreed and held them unconstitutional. Although the Supreme Court affirmed, no majority opinion emerged. In her concurring opinion in *Bush v. Vera*, Justice Sandra Day O’Connor recognized that the process of reconciling the VRA’s requirements with those of the Equal Protection Clause “sometimes requires difficult exercises of judgment.” Justice O’Connor’s guidance for state and local government entities was outlined in the following manner:

First, as long as states do not subordinate traditional criteria to race, they may intentionally create majority-minority districts without coming under strict scrutiny.

Second, a state may have to create majority-minority districts where the three Gingles preconditions (reasonable compactness, minority cohesion, and white bloc voting) are satisfied.

Third, the state’s interest in avoiding Section 2 liability is a compelling governmental interest.

Fourth, a district drawn to avoid Section 2 liability is narrowly tailored so long as it does not deviate substantially, for predominantly racial reasons, from the sort of district a court would draw to remedy a Section 2 violation.

Fifth, districts that are bizarrely-shaped and non-compact and that otherwise neglect traditional principles and deviate substantially from the sort of district a court would draw are unconstitutional, if drawn for predominantly racial reasons.

These "bright line" principles make it clear that a state or local government entity may intentionally draw majority-minority districts and that the Voting Rights Act itself may constitute a compelling governmental interest justifying such action. Further, Justice O’Connor’s guidelines inject flexibility and a much-needed discretion for a state or local government entity as it seeks to draw a constitutionally and statutorily sound district, even though it may not be a perfect one, the most compact one or one as compact as a court would draw as a remedial district.

Justice O’Connor’s guidelines in *Vera*, however, do not answer the question, first raised in *Shaw v. Reno*, of whether a district is necessarily unconstitutional if it looks “ugly” or if it does not measure up to certain concepts of geographical compactness, whether “functional compactness” as approved in *DeWitt v. Wilson*, 856 F. Supp. 1409, 1414, or compactness determined through a mathematical measure, as described in R. Pildes and R. Niemi,

**Lawyer v. Department of Justice**

To the extent that a state or local government body chooses to engage in race-conscious redistricting, it may be able to do so through use of a more informed legislative process, and perhaps through judicious use of mediation and other means of Alternative Dispute Resolution, as demonstrated in the mediated redistricting settlement agreement which was the subject of *Lawyer v. Department of Justice*, 117 S.Ct.2186, 138 L.Ed. 2d 669 (1997). That process is one which entails clear identification of compelling governmental interests justifying creation of a race-conscious district, and, when viewed through the lens of *Miller, Vera* and *Shaw II*, provides the necessary safeguards to assure that the district is narrowly tailored to achieve such compelling governmental interests. *Lawyer*, decided on the last day of the 1997 term, demonstrates that a district can be so narrowly tailored that it can achieve a compelling governmental interest and that the United States Supreme Court will approve such districts under strict scrutiny.

**Abrams v. Johnson**

In *Abrams v. Johnson*, 117 S.Ct. 1925, 138 L.Ed. 2d 285, 1997 U.S. Lexis 4034 (1997), the United States Supreme Court rejected constitutional challenges to a redistricting plan for Georgia’s congressional delegation drawn by the District Court after the Georgia Legislature could not reach agreement on drawing a new plan, following remand in *Miller v. Johnson*. Appellants, various minority organizations and the United States, challenged the District Court’s redistricting plan on several grounds, all of which were rejected by the Supreme Court.

Appellants in *Abrams* argued that the court-ordered plan contravened Section 2 of the Voting Rights Act, a position which the Supreme Court rejected as based on the premise the impermissible vote dilution resulted from the failure to create a second majority-black district. The Section 2 findings of the District Court were entitled to deference, including its findings that the black population was not sufficiently compact for a second majority-black district, as well as its findings that minority political cohesion and white racial bloc voting had not been established in light of evidence of significant white crossover voting. The District Court’s findings were upheld by the Supreme Court, which noted that the minority group failed to meet the *Gingles* preconditions, and the mere fact that the District Court did not hold a separate hearing on whether the remedial plan violated Section 2 did not alter that result. In affirming the District Court’s judgment, the Supreme Court concluded:

> The task of redistricting is best left to state legislatures, elected by the people and as capable as the courts, if not more so, in balancing the myriad factors and traditions in legitimate districting policies. Here, the legislative process was first distorted and then unable to reach a solution. The district court was left to embark on a delicate task with limited legislative guidance. The court was careful to take into account traditional state districting factors, and it remained sensitive to the constitutional requirement of equal protection of the law.

**Double Standard or Curtailment of a Morally Bankrupt Practice?**

This new constitutional doctrine that has in genesis in *Shaw* has been attacked by some academics as creating a double standard for minority voters while setting the stage for the systematic ouster of black and Hispanic elected officials. Does it do that? The race-predominant standard developed and refined by the Court from *Shaw v. Reno* in 1993 to *Abrams v. Johnson* in 1997, while not completely free of a few doctrinal rough edges, has moved our multi-cultural and pluralistic society closer than ever to the ideals of representative, colorblind democracy. To be sure, the Court’s invalidation of racially gerrymandered Congressional districts in North Carolina, Florida, Texas, Georgia and Louisiana has given rise to cries of "unprecedented judicial activism," disregard of historical discrimination, "a return to the days of all-white government," and wholesale dismantling of majority-minority districts. But those cries have been necessarily tempered by the fact that blacks and other minorities have achieved electoral success in growing numbers:
(1) In Georgia, after Congresswoman Cynthia McKinney’s 12th District was redrawn following Miller, McKinney complained of impending "extinction," but was reelected with a solid crossover vote from white voters in her 65% white district.

(2) Georgia Congressman Sanford Bishop ran and won in a 35% black district.

(3) In Texas, Sheila Jackson Lee and Eddie Bernice Johnson were both elected to Congress from majority white districts.

(4) In Indiana, black Democrat Julia Carson was elected to Congress from a 69% white district.

(5) In Oklahoma, Congressman J. C. Watts, a black Republican, was elected from an overwhelmingly white district, and before him, Andrew Young, Allan Wheat, Ron Dellums, Harold Ford and Gary Franks were elected to the House of Representatives from majority-white districts.

(6) Illinois Senator Carol Moseley-Braun and Virginia Governor Douglas Wilder were both elected from majority white state electorates.

(7) Mississippi has witnessed the election of Reuben Anderson and Fred Banks to the state Supreme Court, both receiving substantial support from white voters.

(8) Mel Watts has been reelected to Congress from a revised North Carolina congressional district with a substantial white voting age majority.

Indeed, whether racial gerrymandering is done to exclude blacks from the city limits of Tuskegee, Alabama, as in *Gomillion v. Lightfoot*, 364 U.S. 339, 340, 81 S.Ct. 125 (1960), or to segregate races into "political homelands" for the purpose of voting, without regard to traditional districting principles and without sufficient compelling justification, as in *Shaw v. Reno* and its progeny, it is a morally bankrupt practice. *Shaw* has begun the process, alluded to by Justice Clarence Thomas, of leading us back to a more balanced enforcement of the Voting Rights Act's guarantee of equal electoral opportunity. Equal opportunity means a level playing field. And equal electoral opportunity means equal access and participation. It does not mean a guarantee of electoral success, a stacked deck, or a "safe" district. Nor does it exempt any group from the obligation, in the rough and tumble of politics, to "pull, haul and trade" in the marketplace of political ideas.

Relationship Between Section 2 and Section 5

In *Reno v. Bossier Parish School Board*, 65 U.S.L.W. 4308 (U.S. May 12, 1997), the United States Supreme Court held that §5 preclearance of a covered jurisdiction's voting standard, practice or procedure may not be denied solely on the basis that it violates §2 of the VRA. Rejecting the Attorney General’s long-held position that §2 is effectively incorporated into §5, the Court nonetheless concluded that §2 evidence of a plan’s dilutive impact may be relevant although not dispositive of a §5 inquiry. In conducting an inquiry into a covered jurisdiction’s motivation in enacting voting changes and in considering such evidence according to the majority, the analytical framework of *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1978), should be looked to for guidance.

The opening line of Justice O'Connor’s majority opinion promised much: "Today we clarify the relationship between §2 and §5 of the Voting Rights Act of 1965...." The Court rejected the Justice Department’s position that §2 violations may form the basis for denying §5 preclearance, a position which "would inevitably make compliance with §5 contingent upon compliance with §2." Slip Op. at 5. The Court further held that "Section 2 evidence" may be relevant to prove that a covered jurisdiction had retrogressive intent and that it enacted a redistricting plan or other electoral change with a discriminatory purpose:

The fact that a plan has a dilutive impact therefore makes it "more probable" that the jurisdiction adopting that plan acted with an intent to retrogress than "it would be without the evidence." To be sure, the link between dilutive impact and intent to retrogress is far from direct, but "the basic standard of relevance...is a liberal one" and one we think is met here.
**Reno v. Bossier Parish School Board (II)**

*Bossier Parish* has come back for another visit to the high court. The Supreme Court has recently noted probable jurisdiction in two cases of great interest to state and local governments, *Reno v. Bossier Parish School Board* and *Price v. Bossier Parish School Board*. In these two cases, which were consolidated because they present the same issue, the Bossier Parish, Louisiana School Board sought approval for its redistricting plan from the Department of Justice. The Department object to the plan under Section 5 of the Voting Rights Act of 1965 on the grounds that the School Board had failed to meet its burden of proving that the redistricting plan was enacted without a racially discriminatory purpose. As it frequently does, DOJ asserted that the School Board had failed to provide adequate non-racial explanations for the absence of black majority school board districts in the plan. DOJ also relied on hearsay evidence to the effect that School Board members did not favor creation of such districts. In addition, the Department asserted that the School Board’s plan would clearly violate Section 2 of the Voting Rights Act and therefore, under Department regulations, would violate Section 5 as well.

A three-judge court in the District of Columbia held that DOJ should have approved the plan. The court reasoned that the Department had no authority under Section 5 to object to redistricting plans that it believed violated Section 2. The court further reasoned that evidence that a plan violated Section 2 was not admissible in a proceeding under Section 5 to prove the existence of a discriminatory purpose.

On appeal, as noted above, the United States Supreme Court vacated and remanded, agreeing that DOJ could not object to plans under Section 5 merely because it believed they violated Section 2, but remanding on the question of whether Section 2 evidence may be offered to prove discriminatory purpose under Section 5.

On remand, the three-judge court again ruled in favor of the School Board. The court held that Section 5's prohibition on plans enacted with a discriminatory purpose basically proscribed only those plans adopted with a "retrogressive" intent (i.e., an intent to decrease the political power of protected minority groups). The Department of Justice and minority intervenors filed separate appeals to the Supreme Court and, as noted above, the Supreme Court has noted probable jurisdiction and consolidated the two appeals.

This case presents a question of great significance for state and local governments subject to Section 5 of the Voting Rights Act. If the Supreme Court affirms the three-judge court and finds that Section 5's purpose requirement applies only to plans adopted with a retrogressive intent, the state and local governments will have a much easier time complying with Section 5 than they have had previously. If, on the other hand, the Supreme Court reverses and adopts the Department’s position, state and local governments will continue to be subject to pressure from the Department to create additional minority districts.

**Hunt v. Cromartie**

119 S. Ct. 1545 (1999)

In this third installment of *Shaw v. Reno*, a three-judge district court granted summary judgment for the Plaintiffs in this racial gerrymandering claim that challenged North Carolina’s revised 12th Congressional District, over the dissent of Fourth Circuit Judge Sam J. Ervin, III. The Supreme Court noted probable jurisdiction on September 29, 1998, and heard oral argument on January 20, 1999 and handed down its decision on May 17, 1999. The questions presented in this case are were follows:

1. In a racial gerrymandering case, is an inference drawn from the challenged district’s shape and racial demographics, standing alone, sufficient to support summary judgment for the Plaintiffs on the contested issue of the predominance of racial motives in the district’s design, when it is directly contradicted by the affidavits of the legislators who drew the district?

2. Does a final judgment from a court of competent jurisdiction, which finds a state’s proposed congressional redistricting plan does not violate the constitutional rights of the named plaintiffs and authorizes the state to proceed with elections under it, preclude a later constitutional challenge to the same plan in a separate action brought by those plaintiffs and their privies?
3. If a state congressional district subject to strict scrutiny under the Equal Protection Clause simply because it is slightly irregular in shape and contains a higher concentration of minority voters than its neighbors, when it is not a majority-minority district, it complies with all of the race neutral districting criteria the state purported to be following in designing the plan, and

there is no direct evidence that race was the predominant factor in its design?

**Background of Cromartie**

Following the mandate from the Supreme Court in *Shaw v. Hunt*, 517 U.S. 899 (1996), the North Carolina legislature redrew its congressional district boundaries, including a revised version of the Twelfth District with approximately 50% black population. The *Cromartie* Plaintiffs challenged the shape and racial demographics of the Twelfth District, arguing that the legislature had subordinated compactness and other districting principles to considerations of race, in violation of the Equal Protection Clause. They argued that revised Twelfth District was an attempt to perpetuate racial gerrymanders in North Carolina, that the district’s twists and turns through various urban areas and its racial demographic showed that the predominant motive in creating the district was race. The lower court granted summary judgment against the legislature on the ground that the uncontroverted material facts established that the legislature had used race as the predominant factor in drawing the Twelfth District.

**North Carolina’s Argument on Appeal: Politics, Not Race**

The State of North Carolina argued that the predominant basis for the challenged district was partisan voting patterns and not race, and that the district was drawn to create a Democratic stronghold, regardless of its appearance as having been carved along racial lines. Walter Dellinger in arguing for the State said that a politically gerrymandered district could not be declared unconstitutional just because "it happens to correlate with race."

The State also argued that the boundaries of the challenged district were drawn on the basis of actual voting patterns in order to create a redistricting plan that would preserve the existing partisan balance in the state’s congressional delegation, that race was anything but a predominant factor in the design of District 12, and that the State has selected and used a number of traditional, race-neutral factors and districting criteria in constructing the redistricting plan, including contiguity, respect for political subdivisions, respect for voters’ needs and interests, preservation of the partisan balance in the State’s congressional delegation, avoidance of contests between incumbents, and, to the extent possible while curing constitutional defects, preservation of the cores of prior districts.

Siding with the State, the Justice Department also acknowledged that "racial fairness" played a part in the legislature’s revision of the Twelfth District, but that partisan politics was the overriding factor.

**Shape and Demographics: Insufficient Basis for Inference of Racial Motivation?**

In its Brief on the Merits, the State of North Carolina sought to distinguish *Miller v. Johnson*, *Bush v. Vera* and *Shaw v. Hunt (Shaw II)*, contending that the lower court did not base its finding of race-predominance on any direct evidence of legislative motivation, but ruled the district unconstitutional based on an inference it drew from the shape and racial demographics of the district, namely, that

- the district was unusually shaped,
- it was the most geographically scattered of the state’s twelve congressional districts,
- its measures for dispersion and perimeter compactness were lower than the mean for the twelve districts in the plan,
- it included nearly all of the precincts with black population proportions of over 40% which lie between Charlotte and Greensboro, and
According to the lower court, these facts sufficed to establish as a matter of law that the North Carolina legislature had disregarded traditional districting criteria and utilized race as the predominant factor in designing the Twelfth District. Moreover, the lower court chose not to credit the State’s evidence that partisan political preference rather than race was the predominant factor in the district’s design, because "the legislators excluded many heavily Democratic precincts from District 12, even though those precincts immediately border the District."

**Summary Judgment On Race Predominance Issue**

The State of North Carolina challenged the lower court’s finding that race had been the predominant factor in the design of the redistricting plan and argued that summary judgment was accordingly improperly granted, citing five grounds:

(1) **Burden of Proof Misplaced.** The burden of persuasion at trial for proving that race was the predominant factor in the design of the Twelfth District clearly rested with the Plaintiffs and should not have been placed on the State for summary judgment purposes,

(2) **Insufficient Evidence of Race as Predominant Factor.** The legal evidentiary standard for race-predominance required more evidence than the Plaintiffs had presented to impugn the legislature’s considered choices, and the evidence here fell far short of what was held to be sufficient in other racial gerrymandering cases,

(3) **Presumption of Good Faith and Honesty Disregarded.** The testimony of the legislators should have been given a presumption of good faith and truthfulness, as recognized in Miller, rather than being subjected to the lower court’s "unfounded second-guessing of their motives," whereas the lower court attributed unconstitutional motivations to the legislators and assumed the legislators had lied under oath in order to hide a racial agenda,

(4) **Actual Election Results Used.** The legislature designed the plan, including the Twelfth District, to preserve the existing partisan balance in the state’s congressional delegation, using actual election results and not voter registration data to accomplish this purpose, and

(5) **Exclusion of Democratic Majority Precincts.** The lower court relied on voter registration data and on "limited information about a handful of isolated precincts rather than carefully and fully examining the design of the district as a whole." The problem here was that the State was claiming it has drawn the boundaries of the Twelfth District to keep it a Democratic district, but 32 Democratic majority precincts bordering the district were not included in it. In other words, the lower court felt that since the State has bypassed 32 Democratic voter-registration majority precincts in drawing the Twelfth District, it was not drawn on the basis of political identification, but rather was drawn based on racial identification and with a predominantly racial purpose.

**Evidence Bearing on Race Predominance**

In an effort to place more distance between the facts of this case and *Miller, Bush* and *Shaw II*, the State of North Carolina emphasized that there was nothing in the record to support the Plaintiffs’ assertion and the lower court’s finding that race was the predominant factor - the "overarching motivation" - for the design of the district.

First, the District was not the product of the Justice Department’s invalid "black maximization" policy, as in *Miller*.

Second, the State has made no concessions of racial motivations, as in *Miller* and *Bush*.

Third, there were no race-based admissions indicating legislative motive or intent as racial, and no indication of such racial intent in the sources and places one would expect to find it if indeed it existed, such as

- the plain language of the legislation,
- the committee hearings,
the committee reports,

the floor debates,

the State’s Section 5 Submissions, and

post-enactment statements by those who participated in the drafting or enactment of the plan that race was a motivating factor.

Affidavits from Legislators

With respect to this latter factor of statements from legislators, the State even introduced affidavits of legislators who headed the legislative committees that drew the 1997 Plan and shepherded it through the General Assembly, in which they addressed four basic points in an effort to establish that race was not the tail wagging the dog:

(1) the State’s lawful, non-racial motivation,

(2) their awareness of the constitutional limitations imposed by the Supreme Court’s decisions in Shaw and its progeny,

(3) their conscious efforts to ensure that race was not the predominant, or even a significant, factor in the design of any of the districts, and

(4) their overarching goal of preserving a six-to-six Democratic-Republican electoral balance in the context of a Democratic-controlled Senate and a Republican-dominated House.

Cromartie ultimately provided the vehicle for the Supreme Court to further clarify the race-predominant standard in the context of summary judgment practice. Reversing the lower court's granting of summary judgment for the Cromartie plaintiffs, a majority concluded that summary judgment was not appropriate under the facts and decided to give the State of North Carolina its day in court in view of the fact-intensive inquiry into race-predominance. This result was predicted by some observers in view of Justice O'Connor's remark during oral argument that the State may have had "sufficient evidence to avoid summary judgment" being rendered against it. Specifically, the Court held that even if the evidence did tend to support an inference that the state drew the district lines with an impermissible racial motive, the Plaintiffs had not presented any direct evidence of intent, and "the legislature’s motivation itself is a factual question."Id. at 1550.

Davis v. Chiles

A panel of the Eleventh Circuit in Davis v. Chiles, 139 F. 3d 1414(11th Cir. 1998), cert. denied, rejected a §2 challenge to two at-large judicial systems in the State of Florida, upholding the district court’s finding that the state’s interest in preserving its judicial election system outweighed its interest in a remedy for racially polarized voting in judicial elections. While the Eleventh Circuit disagreed with the District Court’s finding that a proposed modified subdistricting plan would involve unconstitutional racial gerrymandering and inject race into the state’s judicial administration, it nonetheless concluded, under Nipper and SCLC, that Florida’s interests in maintaining its constitution’s judicial election model and preserving linkage between its judges’ jurisdictions and electoral bases, considered together, outweigh [the plaintiff’s] interest in the adoption of her proposed remedy. As a result, we hold that [the plaintiff] has not proven a violation of §2.

Chen v. City of Houston

Chen v. City of Houston, 9 F. Supp. 2d 745 (S.D. Tex. May 6, 1998), appeal pending, No. 98-20440 (5th Cir.) was a Shaw-Miller-Bush racial gerrymandering claim in which the district court addressed the concept of "functional compactness." In concluding that the City of Houston presented sufficient relevant and probative evidence that it had considered and balanced traditional districting principles in developing and adopting its 1997
redistricting plan, the District Court held that the City avoided summary judgment on the Plaintiffs’ Fourteenth and Fifteenth Amendment claims of racial gerrymandering.

**City Resolution on Functional Compactness**

In the City’s resolution adopting its redistricting plan, the City provided that the district should be compact and composed of contiguous territory, but that compactness and contiguity "involve a functional as well as a geographic dimension. Dysfunctional dimension may take on added weight in situations in which geographic compactness may not be possible in light of the fact that some areas are attached to the remainder of the city only by relatively long and narrow strips of land. Functional compactness and contiguity includes, but is not limited to, consideration of factors such as

- the availability of transportation and communication
- the existence of common social and economic interests
- the ability of citizens of a council district to relate to each other and to their representative on the council and the ability of the council member to relate effectively to his or her constituency
- the existence of shared interests." *Id.* at 756.

Citing the three-judge district court decision in *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), which was summarily affirmed by the U. S. Supreme Court, 515 U.S. 1170 (1995), the District Court in *Chen* stated at 756 n.10:

> The court is persuaded...that the concept of functional compactness is an appropriate districting principle to be considered by legislators in developing districting plans in situations, such as presented in this case, in which true geographical compactness is not feasible because of the configuration of the area being districted.

**Legislative Immunity**

Unlike the legislators in *Cromartie* who readily submitted affidavits touching on the issue of racial motivation in drawing the revised redistricting plan for the State of North Carolina, the Houston City Council members in *Chen* were not as forthcoming. Plaintiffs in *Chen* sought to subpoena one of the City Council members, Wong, who in turn filed a motion to quash the subpoena and invoked her legislative immunity. The District Court rejected the Plaintiffs’ argument that the decision by this council member and other council members who voted in favor of the adopted redistricting plan to invoke legislative immunity was evidence that their testimony would have been detrimental to the city’s position and would have supported the plaintiffs’ position, stating:

> Legislative immunity exists to protect the workings of the legislature from intrusion by the judiciary.... Council member Wong’s decision to invoke legislative immunity can be considered evidence of her intent to protect the legislative process as easily as it can be considered evidence of detrimental testimony. 9 F. Supp.2d at 762.

**Race as Predominant Factor**

The District Court in *Chen* followed a line of reasoning that would have fit neatly within Judge Sam Ervin III’s dissent in *Cromartie*, concluding that while Plaintiffs had presented significant probative evidence that the City considered race an important factor in adopting its 1997 redistricting plan, they failed to satisfy their burden under *Shaw v. Hunt* to produce evidence raising the genuine issue of material fact regarding their claim that race was the predominant factor to the subordination of traditional districting principles. According to the Court, Plaintiffs had not presented evidence from which a reasonable jury could conclude that race was the criterion that in the city’s view could not be compromised, citing *Shaw v. Hunt*, 116 S.Ct. at 1901. 9 F. Supp.2d at 763. Thus, while race was without dispute a consideration, the City presented evidence to the Court that race was not the predominant factor, and the Court also had before it the City’s evidence that the 1997 plan was the result of
careful consideration and balancing of traditional districting principles, and that "the district shapes and the lack of precise geographical compactness are an unavoidable result of the shape and lack of compactness of the city itself." *Id.* at 762.

**Theriot v. Parish of Jefferson**

In *Theriot v. Parish of Jefferson*, 966 F. Supp. 1435 (E.D. La. 1997), *aff’d*, No. 97-30729 (5th Cir. August 19, 1999), the District Court upheld Jefferson Parish’s Council redistricting plan and rejected a racial gerrymandering challenge brought by registered voters and a civic association. Plaintiffs predicated their claim on *Shaw v. Reno* and *Miller v. Johnson*, and focused their attack on the majority-minority District 3. Following a bench trial the District Court held that the parish redistricting plan was primarily motivated by political incumbency and traditional redistricting considerations that included one person/one-vote concerns, the geographic realities of the parish and communities of interest, and that Plaintiffs had failed to carry their burden of proving that racial considerations predominated in the configuration of the challenged district, the configuration for which was driven primarily by politics. The District Court in so ruling remarked that "while race, through the force of Section 2 of the Voting Rights Act, provided the genesis for the majority-minority district, it did not dictate the eventual boundaries of District 3." *Id.* at 1447. With respect to District 3, the Court rejected the Plaintiffs’ contention that the shape of this district was so bizarre as to be inexplicable on grounds other than race, finding that the district’s shape was not "so horrific as to demonstrate circumstantially that race motivated the form of the district." *Id.* The Court then took a verbal stroll through the zoo of racial gerrymander metaphors, noting that this district did not resemble "a sacred Mayan bird," it did not wind in a serpentine fashion, it was neither a "Rorschach ink-blot test" nor a "bug splattered on the windshield," did not have the kind of narrow land bridges that were condemned in Miller and did not have the obvious visual indices that were apparent in *Hays, Miller and Shaw*.

Further, the District Court in upholding the challenged parish redistricting plan noted that it had been specifically approved by the Fifth Circuit and precleared by the Attorney General under Section 5, prompting the Court to state that

> The parties have not cited to the Court any reapportionment case where any court, applying *Shaw I* and its progeny, has overturned a districting scheme adopted pursuant to a United States Appellate Court decision.

Finally, the District Court held that in the exercise of its discretion it would apply *Shaw* and its progeny retroactively, discounting the parish defendants’ claim that such retroactive application of the construction of the Equal Protection Clause and the Voting Rights Act in Shaw I and its progeny would produce substantial and inequitable results and would expose the parish to the penalty and burden of redistricting in addition to the possible taxing of attorney’s fees and costs of the plaintiffs against it as its "remedy" for its previous compliance with the remedy ordered by this very court in the East Jefferson Coalition case. The Court reasoned that since it had already held that strict scrutiny did not apply in this case, "there has been no constitutional violation [and] no harm has resulted in reevaluating the situation in light of *Shaw I* and its progeny." *Id.* at 1449. Oral argument was held in *Theriot* March 1, 1999, and the Fifth Circuit handed down its decision on August 19, 1999, affirming the District Court. In a strongly worded opinion by Judge Carl E. Stewart, the Fifth Circuit panel characterized the issue before it as follows: "whether appellants were entitled to prevail at the bench trial on their claim that the Third Councilman District of the Parish of Jefferson is unconstitutional because it results from a racial gerrymander in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and of 42 U.S.C. § 1983." Perhaps not intending to mask the emotion of the moment, the Court put this spin on the Appellants’ doomed trip to Camp Street:

> In an effort to manufacture clear error, Appellants challenge every aspect of the district court's opinion. They contend that testimony regarding the drawing of the current districts, the documentary evidence in the record, the shape of District 3, and the racial geography within the Parish provides...
direct and circumstantial evidence of an impermissible racial classification. We disagree. The record reveals no clear error inasmuch as incumbency protection, maintaining communities of interest, addressing one-person, one-vote concerns and natural geographic conditions predominated in drawing District 3.

The Court then turned to each of the factors which in its judgment supported the findings and conclusions of the District Court on the racial predominance issue.

In Bush v. Vera, 517 U.S. 952 (1996) (plurality opinion), the Supreme Court recognized, "[i]n some circumstances, incumbency protection might explain as well as, or better than, race a State's decision to depart from other traditional districting principles, such as compactness, in the drawing of bizarre district lines." Id. at 967. Much of the discussion among the Parish Council members during the 1991 redistricting negotiations with the EJC plaintiffs centered on political concerns, particularly the likelihood that councilpersons Lawson and Giardina would each campaign for the single District 2 council seat. Each councilperson brought certain additional political and incumbency concerns to the negotiation process. Although the Lawson Plan resulted in a race between Lawson and Giardina in District 2, it garnered the most support because it met the political and incumbency concerns of the majority of existing councilpersons.

The record indicates that Councilperson Ward preferred the Lawson Plan because it resulted in fewer changes to his district, District 1. Councilperson Larry Hooper sought to maintain as much of his pre-1988 district as possible, particularly the communities of Kenner and River Ridge. He also voted for the Lawson plan. Councilperson Robert B. Evans, Jr. received no adverse comments from Parish residents concerning the adoption of the Lawson Plan and ultimately joined five other councilpersons in voting to adopt the plan. Councilperson Edmond Muniz similarly determined that the Lawson Plan was politically advantageous and improved his prospects for re-election. While this court's previous finding of a Section 2 violation required the Parish to redraw its districts, we find that the issue of race was plainly subordinate to the majority of the councilpersons' preoccupation with protecting incumbency and maintaining other political advantages.

The Court then offered some examples of the testimony "we found common throughout the proceedings and which support both the district court and our findings," stating that its own review of the record "leads us to conclude that the inclusion or exclusion of communities was inexorably tied to issues of incumbency."

Next, the Court agreed with the district court in its finding that District 3 was composed of communities of interest, reasoning as follows:

In Miller, the Court held that "a State is free to recognize communities that have a particular racial makeup, provided its action is directed toward some common thread of relevant interests." Miller, 515 U.S. at 920. States, however, may not engage in racial stereotyping, that is, assuming that the voters of the same race "think alike," share the same political interests, and prefer the same candidates. See id. (explaining that racial stereotyping is at odds with equal protection mandates). The same logic applies to Jefferson Parish.

Then the Court revealed what it meant by "community of interest," noting the "common thread which binds the black voters with District 3," those threads being

- the makeup up District 3, consisting of neighborhoods and subdivisions that contain low-income residents who are less-educated, more often unemployed, and more poorly-housed than voters in other districts.

- residents having common social and economic needs. See Lawyer v. Department of Justice, 521 U.S. 567, 581 (1997) (finding a community of interests as predominantly urban and low-income even though the district crossed the Tampa Bay).
Given these common threads binding the black voters of District 3, the Court concluded that they "are entitled to an effective voice in the electoral process and to an influence over the outcome of elections." See East Jefferson Coalition for Leadership and Development v. Parish of Jefferson, 691 F.Supp. 991, 1008 (E.D. La. 1988).

The Court also rejected the argument that information about the socio-economic conditions of the Parish was not properly before the district court since the data was not available to the councilpersons at the time they drew the districts. Although the Supreme Court in Vera had refused to overturn the district court's finding that race predominated over other traditional redistricting principles particularly since the State of Texas's supporting data was not available to the Legislature in any organized fashion before the challenged district was created, Vera, 517 U.S. at 966, the Fifth Circuit considered the situation different in Jefferson Parish:

We find that the issues facing Jefferson Parish, including those that affect citizens who reside in the current District 3, are not new; rather they are remnants of the historical subjugation of blacks in the State of Louisiana and in Jefferson Parish. Indeed, evidence concerning the socio-economic conditions of the Parish's neighborhoods and subdivisions was produced in the preceding EJC litigation, see e.g., EJC, 926 F.2d at 490 (exploring issues of political cohesion), as well as in this case. Many of the same councilpersons were involved in the preceding litigation and are well aware of the socio-economic conditions throughout Jefferson Parish.

The Court also refused to overturn the District Court's finding that overwhelming evidence demonstrated that one-person, one-vote considerations were paramount in configuring the districts. The one-person, one-vote concerns expressed by the District Court, according to the Fifth Circuit, were fully supported by the record. Those concerns required districts to achieve population equality "as nearly as is practicable." Abrams v. Johnson, 521 U.S. 74, 98 (1997). The record includes the testimony of Kenneth Hughes, the Director of the Council's Research and Budget Staff, and Alan Gandolfi, a research analyst and staff attorney. Both testified that one-person, one-vote considerations emerged as their primary concern while working on the various redistricting plans. Additionally, the record reveals a cause and effect relationship between Lawson's efforts to include politically advantageous communities in District 2 and alterations to the boundaries of District 3 to satisfy one-person, one-vote requirements.

Finally, the Court accepted the District Court's findings regarding the geographically challenged "past redistricting tradition" in the Parish which "did not strictly adhere to geometric standards of compactness," but consisted of "very irregular" geography and topography of the Parish, half of which was water, and substantially limited the ability of the Parish to adhere to such geographical standards.

Consequently, the district court rejected Appellants' assertion that the District was bizarre on its face. We agree and find that any irregularity associated with the shape of District 3 is derivative of politics, joining communities of interest, one-person, one-vote concerns, and the geography and population distribution in the Parish. With regard to geography and demographics, it is most apparent that the black population resides in an east-west direction, as opposed to north-south. Consequently, remediying the Section 2 violation required a district which, in some measure, proceeded in an east-west direction rather than the usual north-south direction.

Affirming, the Fifth Circuit panel said it was not persuaded that the district court had erred in finding that race did not predominate in drawing District 3, in a case where

The record presents bountiful evidence supporting the district court's finding that political incumbency, communities of interest, one-person, one-vote, and geography dwarf issues pertaining to race.

Moreover, the Court rejected Appellants’ implicit argument that any consideration of race, even where such consideration is de minimis, mandates a finding that race predominates, stating that this implication or argument has been "squarely rejected by Miller, Vera, Abrams and the EJC litigation; therefore, we cannot agree issues of race were relevant, inasmuch as the Parish Council was directed to remedy a Section 2 violation, yet did not predominate. In so doing, it found "particularly relevant" the following colloquy between the court and counsel:
THE COURT: To some extent, right down to this case, to some extent, if you look at the shape of these districts, certainly race had something to do with the shape you adopted?

THE WITNESS: Certainly, we had to maintain that majority black.

THE COURT: To some extent, one man one vote dictates the shape?

THE WITNESS: Right.

THE COURT: And to some extent, the geographical boundary of the Parish dictates the shape?

THE WITNESS: To a great extent.

THE COURT: And to some extent incumbency and political concerns dictate the shape?

THE WITNESS: I would say of the four criteria you just mentioned, the last one, the political concerns had the most effect on exactly how those other three goals were achieved. There were different ways of doing it.

The Fifth Circuit closed with the statement that it had previously opined that "strict scrutiny does not apply to all cases involving the intentional creation of majority-minority districts," Clark v. Calhoun County, Miss., 88 F.3d 1393, 1404 (5th Cir. 1996), and that "race is inherently a consideration where, as here, a governing body must respond to violations of Section 2 of the Voting Rights Act." See id. at 1407.

Resolution of this case turns on the issue of whether race predominated in the redistricting plan. Like the district court before us, we cannot find that race predominated. While relevant, issues pertaining to race were subordinated to concerns for political incumbency, joining communities of interest, satisfying one-person, one-vote requirements, and geographical realities. Since the Appellants fail to demonstrate that race predominated, we need not apply strict scrutiny analysis to the formation of District 3.

Harvell v. Blytheville School District No. 5

A racial gerrymandering challenge against a school district was rejected by the Eighth Circuit in Harvell v. Blytheville School District No. 5. Following dismissal of her §2 challenge to a school board’s at-large electoral scheme which required majority vote for election to office, the Eighth Circuit reversed and remanded, following which the district court against dismissed the complaint and the Eighth Circuit en banc found a §2 violation and remanded for entry of an appropriate remedial decree. The District Court then entered the remedial decree but refused to order a special election under the remedial "five-two plan," under which the school board would have seven members with five single-member districts and two at-large. While the Eighth Circuit in its earlier en banc opinion had cautioned the district court to "steer clear of the type of racial gerrymandering proscribed in Miller v. Johnson," the school board in this appeal alleged that race was the overriding criterion used in drawing the district boundaries of the eight school board districts. The Eighth Circuit held that the district court did not clearly err in making its findings that the districts created under this remedial plan had not been drawn in such a bizarre manner as to constitute impermissible racial gerrymandering and that the districts were generally compact in nature and followed natural boundaries, streets and neighborhoods. Moreover, even though the remedial plan clearly took race into account, it did not reject traditional, non-racial districting criteria, and the circumstances surrounding the drawing of the remedial plan were not akin to the situations in Miller and Shaw v. Hunt, where the Justice Department had exerted pressure to maximize majority-minority districts and that pressure had been the sole and predominant reason for drawing boundary lines as they were, nor was it similar to the situation in Bush v. Vera where race predominated over traditional districting criteria, even though mixed motives were involved. Finally, the Eighth Circuit concluded that this case was unlike Abrams v. Johnson, where the district
court in devising a remedial plan had found that a second majority-minority district could not be drawn unless race was the only factor used in drawing the district lines.

**Stabler v. County of Thurston**

Another Eighth Circuit panel upheld a racial gerrymandering challenge to proposed remedial plans following a §2 violation in *Stabler v. County of Thurston*, 129 F.3d 1015 (8th Cir. 1997), cert. denied, 118 S. Ct. 1796 (1998). The District Court had earlier held that the districting plans for the election of members to the Board of Supervisors of Thurston County, Nebraska, violated Section 2 and ordered the county to create an additional majority-minority single-member district for supervisor elections; however, it upheld the districting plans for the school board and village board. Since the plaintiffs had failed to establish a §2 violation with respect to the latter and were unable to prove the *Gingles* precondition of geographical compactness with respect to the Native American population of that district, and since they could not prove that Native Americans were sufficiently large and geographically compact to constitute a majority in a single-member district that was regularly drawn and non-bizarrely shaped, there could be no §2 violation.

**Not Workable Remedies**

Proposed districting plans for the school board and village board offered by the plaintiffs were rejected by the district court because they were not "workable remedies" and also because of the proposed districts’ fragile composition. The Eighth Circuit affirmed, noting that under the rejected plans,

> if four or five Native Americans moved from the proposed majority-minority districts created for the school board and village board, respectively, and they were replaced by non-Native Americans, the majority-minority composition would be destroyed.... Therefore, plaintiffs failed to prove that Native Americans are geographically compact to form an effective voting majority in a single-member district as required under *Gingles*.

**Unconstitutional Racial Gerrymandering**

As an alternative basis for its affirmance, the Eighth Circuit held that lower court correctly found the proposed plans constituted unconstitutional racial gerrymandering violative of the Equal Protection Clause and that "[a]ny remedy drawn in order to correct a §2 violation should steer clear of the type of racial gerrymandering proscribed in Miller."

Because the plaintiffs had failed to establish a §2 violation in that they could not prove the Native American population was sufficiently large and geographically compact to constitute an effective majority in a single-member district, nor could they prove that Native Americans were politically cohesive and that whites voted as a bloc to defeat Native Americans’ preferred candidates, the proposed gerrymandered districts cannot survive strict scrutiny."

**Race-Based Consent Decree Challenges**

In *Addy v. Newton County, Mississippi*, 2 F. Supp.2d 861 (S.D. Miss. 1997), a racial gerrymandering claim targeting a majority-minority district created for the purpose of remedying a §2 violation in accordance with a 1989 consent decree was rejected by the District Court following a non-jury trial. The evidence showed that the county’s 1989 and 1991 redistricting plans, as well as its earlier 1982 redistricting plan, had divided and split two major towns in the county among two or more supervisor districts, with respect to which the plaintiffs charged that the plans had failed to respect defined communities of interest. The District Court could not conclude that the county "needlessly split legitimate communities of interest in creating District 1," since the prior plans dating back to 1982 did not indicate that the county saw these towns as having any "community of interest" relative to county government and since "there was substantial evidence presented that those persons comprising the black populations from each of the towns that were included in the county’s 1989 and 1991 plans as District 1 have a community of shared political interests which warranted their collective inclusion in a single district."
Equalization of road mileage among the supervisor districts as a districting goal was "obviously not subordinated to racial considerations any more than was reasonably necessary," in view of the fact that while the challenged District 1 ended up with less road mileage than other districts, and adoption of the Plaintiffs’ proposed plan would have resulted in another district having even less road mileage than the remaining districts. The Court also found that while the county may have to an extent sacrificed a degree of compactness by selecting a north-south district instead of an east-west majority-minority district location, "it did so exclusively for political, not racial reasons." Citing Clark v. Calhoun County, the Court concluded that any deviation from a hypothetical court-drawn §2 district drawn to remedy the §2 violation was not "predominantly attributed to gerrymandering that was racially motivated and/or achieved by the use of race as a proxy," ...but was instead "a case of predominantly non-racial, political manipulations."

Rejection of Remedial Plan Including At-Large District

In Citizens for Good Government v. Quitman, MS, 148 F.3d 472 (5th Cir. 1998), the Court had before it a remedial plan that contained an at-large district. The district court found the city’s at-large electoral system violative of Section 2 of the Voting Rights Act. The city and a citizens’ group jointly declined the district court’s invitation to collaborate and develop a redistricting plan for the upcoming 1997 aldermanic elections, the district court appointed a Special Master to devise a remedial redistricting plan. The Special Master recommended a 4-1 plan which provided for an at-large district and four single-member districts. The district court adopted that 4-1 plan, directing that it govern the election of aldermen until the city devised a new plan that was precleared by the Attorney General under Section 5 of the Voting Rights Act.

The citizens’ group appealed, and the Fifth Circuit reversed and remanded, addressing primarily three points:

Federalism Principles

First, noting that the citizens’ group has misconceived the "principles of federalism at play in this case," the Fifth Circuit ruled that the district court acted properley when it appointed a Special Master to devise a judicial redistricting plan, in view of the fact that the city had previously sought to develop a 4-1 plan which the Attorney General refused to preclear, and the city declined the court’s invitation to devise another legislative redistricting plan based on the belief that any 4-1 plan it developed would be rejected by the Attorney General. This action was consistent with Wise v. Lipscomb, 437 U.S. 535, 539 (1978) and Lawyer v. Dept. of Justice, 117 S.Ct. 2186 (1997), which recognized the propriety of the district court accepting the "unwelcome obligation" to devise a remedial plan if the governmental body is "unable or unwilling to fulfill its legislative duties."

Estoppel

Second, even though the citizens’ group failed to object to the Special Master’s 4-1 plan when it was proposed, it was not estopped from challenging the inclusion of the at-large seat in the judicial redistricting plan ultimately approved by the district court. The justification for the Special Master’s 4-1 plan was that it was only an interim judicial redistricting plan to govern the upcoming aldermanic elections. That exigency, however, did not justify the district court departing from a "preference for utilization of single-member districts in court-ordered remedial plans," when it fashioned a permanent judicial redistricting plan for the city. In short, simply because the citizens’ group did not object to the use of an at-large seat in the interim remedial plan, it was not for that reason estopped from challenging the inclusion of an at-large seat in the permanent judicial redistricting plan. Id. at 476.

Single-Member District Preference

Finally, the Fifth Circuit reversed the District Court’s decision to adopt a permanent redistricting plan that included an at-large district, noting that the district court had "quite limited" discretion to depart from the long-standing general rule of preference for single-member districts to be used in judicially crafted redistricting plans. Citing Mahan v. Howell, 410 U.S. 315 (1973), the Fifth Circuit held that only if the District Court identified a "singular combination of unique factors" could it justify the abandonment of this clear judicial preference for single-member districts. In this case, the District Court’s explanation of why the case presented a rare or exceptional circumstance that allowed for a court-fashioned electoral system incorporating an at-large district was insufficient as a matter of law. The Fifth Circuit panel specifically rejected two circumstances advanced by the
city in support of its argument that there was sufficient support for the trial court to include an at-large district in the permanent redistricting plan. The first of these rejected justifications was that the parties had earlier agreed to the inclusion of an at-large district in the city’s 4-1 interim redistricting plan. That agreement, according to the Fifth Circuit, had no bearing on the propriety of the district court including the at-large seat in a judicially crafted redistricting plan. The second rejected justification for inclusion of the at-large seat in the permanent judicially drawn redistricting plan was that state law traditionally authorized the city to utilize four single-member districts and one at-large district. According to the Fifth Circuit, this alone would not rise to the level of a special circumstance justifying use of an at-large district in a judicial redistricting plan and, moreover, in order for an at-large district to be used in the city, it would be incumbent on the trial court to explain why compliance with state law would better serve the values of "fair representation and political access," or why using five single-member districts would be "impractical" and why compliance with the state-authorized 4-1 plan "makes good sense" in view of the board’s structure and function, the duties aldermen were elected to perform, and the interests each alderman is elected to represent. In this regard the Fifth Circuit panel noted that the trial court made no findings relative to the desirability of adhering to state law when it adopted the Special Master’s 4-1 plan, nor did the City provide a sufficient justification for use of the at-large district tied to the specific public policy needs of the City to justify the Court’s inclusion of this district in the permanent redistricting plan.

The Fifth Circuit remanded with instructions for the trial court to "either sufficiently articulate the relevant unique circumstances justifying the inclusion of an at-large seat in its redistricting plan" or enter an Order dividing the City into five single-member districts. *Id.* at 477.

**Remedial Plan on Remand**

On remand, the District Court approved a Consent Decree in which relevant unique circumstances were articulated to provide substantial justification for including an at-large seat in a 4-1 redistricting plan, in this instance a Court-Ordered Remedial Plan.

**Federalism and Alternative State Law Grounds**

In *Cleveland County Association for Government by the People v. Cleveland County Board of Commissioners*, a consent decree establishing a 7-member redistricting plan for the Board of Commissioners of Cleveland County, North Carolina, came largely as the result of a settlement of a voting rights suit initiated by the NAACP. The consent decree incorporating a limited voting plan was challenged as race-based in violation of the Equal Protection Clause of the 14th Amendment and violative of the 15th Amendment because it abridged the right of plaintiffs to vote on account of their race by denying them the right to vote for the two appointed board members. The electoral plan at issue increased the county board’s size from 5 to 7 members, provided that voters would be permitted to cast only four votes for the 7 positions, and also provided that until elections could be held to fill the two additional positions on the board, these positions were to be filled by appointees "representative of the black community." After the district court’s consent decree incorporating the settlement agreement was entered, an unincorporated association of voters in the county and six individual plaintiffs sued the county board and the NAACP, challenging the adoption of the limited voting plan as unconstitutional and contrary to state law. The district court granted summary judgment in favor of the county board and the NAACP.

At the district court level, the plaintiffs argued that *Shaw I* and *Shaw II* were controlling precedents for the case, and contended that the Equal Protection Clause and controlling legal precedent required the limited voting plan to be subject to strict scrutiny, and that to survive strict scrutiny it was required to be narrowly tailored to serve a compelling governmental interest. The district court held that the limited voting plan in the consent decree was not constitutionally impermissible and that "it does not guarantee any seats on the Board of Commissioners to blacks, nor does it give black voters any more voting power than other voters." The district court reasoned that while the limited voting plan was race-conscious, "race-consciousness alone does not necessarily trigger strict scrutiny," and that so long as sound non-discriminatory principles were used to implement methods to afford fair representation to minorities in order to prevent racial minorities from being repeatedly outvoted, those methods did not trigger strict scrutiny. The district court also held that the consent decree "does not contemplate any racial
classifications among voters. It does not separate voters or distinguish among voters or candidates along racial lines. It treats all voters in the county—black or white—in precisely the same way. Voting occurs countywide, with no separation of candidates or voters only geographic or otherwise, and each voter has the same number of votes. The fact that limited voting provides a greater opportunity to elect minority candidates more readily does not render this election feature constitutionally suspect. A limited voting plan is not an unusual voting procedure at odds with traditional principles of voting."

The D.C. Circuit Court of Appeals reversed, holding that (1) the plaintiffs had standing and were not estopped from challenging the consent decree, (2) their challenge to the consent decree was not moot simply because 1998 campaigns for the two seats for which interim appointment provisions had been made had already begun, and (3) the county board’s adoption of the electoral plan as set forth in the consent decree had disregarded applicable state law, rendering the consent decree invalid as a matter of law. Specifically, the North Carolina Constitution reserved to the voters of the county the authority over the structure and method of election of county boards, and state law required any subsequent changes in the structure and election of any board to be made only according to a specifically prescribed statutory procedure initiated by the adoption of a resolution, and the calling of a special referendum on the question of the adoption of the alterations or changes. These statutorily mandated requirements were not followed. The D.C. Circuit also noted that these provisions of state law may be superseded if necessary to remedy a federal law violation or by an act of the state legislature, neither of which circumstances was present in this case. In this regard the Court noted that the consent decree specifically provided that no violation of the Voting Rights Act was to be inferred, and that in the absence of a violation of federal law necessitating a remedy barred by state law, "principles of federalism dictate that state law govern."

Notwithstanding the district court’s reluctance to "tinker" with the consent decree, which it viewed as constitutionally permissible and not as a race-based measure subject to strict scrutiny, the D.C. Circuit Court of Appeals invalidated the consent decree on state law grounds and did not reach the constitutional claims.

Preclearance of State-law Default Rule for Majority Vote

In City of Monroe v. United States, the Court held that Monroe, Georgia, could hold elections under a state-law default rule that required a majority vote in municipal elections if the municipal charter did not provide for plurality voting. Speaking through Justice Scalia, the majority declared valid the default rule enacted by the Georgia legislature in 1968 as part of a comprehensive municipal election code and precleared by the Attorney General. The Court reasoned that submission of the election code that included the state law default rule had given the Attorney General an adequate opportunity to determine whether the default-rule electoral changes had a prohibited purpose and would adversely affect minority voting. The state’s submission of the 1968 Municipal Election Code was not misleading, ambiguous or otherwise defective, and thus by preclearing the 1968 code, the Attorney General approved the state-law default rule. The controlling default rule having been precleared, Monroe may conduct elections under its auspices.

Justices Souter and Breyer argued in dissent that the Court in 1980 had answered in the negative the question of whether application of this default provision effectuating a change in practice to majority voting was precleared by virtue of the blanket preclearance of the default provision in City of Rome v. United States, and that the answer should be the same in this case, particularly since no particular municipal charter provisions were submitted to the Attorney General along with the 1968 Municipal Election Code and the Attorney General was "not on notice of any particular effect that might result from application of the default provision."

Giving short shrift to this dissent, the majority noted that "because municipal law was dispositive under the first sentence of the 1968 code section, City of Rome said nothing about the state-law default rule of majority voting in the second sentence," and thus this case was clearly controlled by the default rule of state law set forth in the second sentence of the Municipal Election Code of 1968. Since Monroe’s charter prior to 1966, unlike that of the City of Rome, did not require plurality voting and thus could not trigger the rule of deference to municipal law as set forth in the first sentence of the Municipal Election Code of 1968, "Monroe, unlike Rome, does not need to breathe life into its invalid 1966 charter to circumvent the rule of deference. After one disregards Monroe’s invalid 1966 and 1971 charters, the state-law default rule mandates majority voting."
Fee Recovery in Racial Gerrymandering and Section 2 Litigation

After the Supreme Court handed down *Miller v. Johnson*, a number of jurisdictions sought relief from implementation of patently unconstitutional consent judgments that were predicated on race-based redistricting. One of those jurisdictions, the Town of St. Francisville, Louisiana, had entered into a consent judgment to divide the city into one single-member minority district and two districts which would each elect two aldermen. Following Miller, the town moved for relief from the consent judgment on the basis that the approved apportionment plan was unconstitutional under *Miller v. Johnson* and the parties should be put "back into the position they were in prior to the entry of the consent judgment, to proceed in light of the *Miller* decision." *Wilson v. Mayor and Board of Aldermen of St. Francisville, Louisiana*. Wilson, a black resident who had been a party plaintiff in the underlying reapportionment suit argued that the consent judgment was not unconstitutional under Miller, but the district court set aside the consent judgment as unconstitutional. Noting that the parties had stipulated that there was a §2 violation, the district court approved a reapportionment plan the board had proposed in 1992, the only difference being the court-approved plan had no residency requirement. The district court denied Plaintiff Wilson’s request for attorney’s fees and costs in opposing the board’s motion for relief from judgment since the board was the prevailing party. The Fifth Circuit affirmed, stating:

That the board was required to take action to enjoin the implementation of the unconstitutional consent judgment plan and that the election plan adopted was the one the board originally proposed were special circumstances justifying the denial of Wilson’s claim for attorneys’ fees.

**Prevailing Party Status Denied**

According to the court, the board’s motion to set aside the unconstitutional consent judgment was not a request to return to the previously existing at-large voting scheme, which the board itself believed to suffer from constitutional infirmity. The board had asked only that the parties be returned to the positions they were in before entry of the consent judgment so that they could proceed "in light of *Miller*." By recognizing the relevancy of *Miller v. Johnson*, the board showed "its intent to adopt a constitutional multi-district voting scheme and not a desire to revert back to the at-large system." Plaintiff Wilson’s opposition to the board’s motion for relief was not a motivating factor for having the residency requirement removed from the board’s reapportionment plan, nor did he prevent the board from disturbing the consent judgment by obtaining a judicial declaration that it was unconstitutional. Thus he was not the prevailing party with respect to the motion for relief from the consent judgment and was properly denied attorney’s fees.

**No Basis for Purposeful Discrimination Charge**

The Eleventh Circuit in *United States v. Jones* upheld a $62,000 award of attorney’s fees under the Equal Access to Justice Act against the United States in addition to fees, costs and expenses, at the conclusion of a suit brought by the Justice Department against the Dallas County Commission, in which the government asserted groundless §2 claims and constitutional claims based on alleged intentional discrimination against blacks by county officials. The factual basis for the claims was non-existent. The lower court found the position of the United States, viewed as a whole, was not substantially justified, noting that a properly conducted pretrial investigation "would have quickly revealed that there was no basis for the claim that the defendants were guilty of purposeful discrimination against black voters." The evidence mustered by the plaintiffs at trial showed only that an error had been made in assigning over fifty white voters to one of the majority black commissioner districts, as a result of mistakes in a map that had been used by election officials for many years. Contrary to the government’s claim that county officials "purposefully" discriminated against blacks in permitting white non-residents to vote in the district and intentionally discriminated against blacks in publishing a voter registration list prepared by the Board of Registrars comprised of two black members and one white member, the Eleventh Circuit found no substantial basis for those claims and upheld the fee award for the prevailing defendants in this "very troubling case," stating:

Unfortunately, we cannot restore the reputation of the persons wrongfully branded by the United States as public officials who deliberately deprived their fellow citizens of their voting rights. We also lack the power to remedy the damage done to race relations in Dallas County by the unfounded accusations of purposeful discrimination made by the United States. We can only hope that in the future the decisionmakers in the United States Department of Justice will be more sensitive to the...
impact on racial harmony that can result from the filing of a claim of purposeful discrimination. The filing of an action charging a person with depriving a fellow citizen of a fundamental constitutional right without conducting a proper investigation of its truth is unconscionable.

Voter Familiarity With Candidates

In *Askew v. City of Rome*, the Eleventh Circuit upheld the District Court’s dismissal of a §2 challenge to the City of Rome’s at-large method of electing its City Commission and Board of Education. The Eighth Circuit Panel gave District Judge Harold L. Murphy what is perhaps one of the highest compliments that an appellate court can give a district judge by affirming his judgment and incorporating in full the district court’s detailed and thoughtful order including findings of fact and conclusions of law. In this hotly contested case that turned on solid expert and lay testimony favoring the City, the district court concluded that the plaintiffs had failed to prove discriminatory intent under the 14th and 15th Amendments and rejected their purposeful discrimination claim under §2 of the Voting Rights Act. It also found that the plaintiffs had failed to show that the white majority voters in the City of Rome voted sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority’s preferred candidate. In its review of the most significant electoral evidence, the district court found that circumstances had changed in the period intervening between 1970 and the present, and that the success of minority-preferred candidates should not be discounted or given less than full evidentiary weight:

Regardless of how they got their start, the fact remains that several black candidates have successfully garnered sustained biracial support in Rome. [Two candidates] received roughly as many white votes in their re-election bids as those white incumbents also running for re-election. ... The Court concludes, therefore, that racism does affect a portion of the electorate when the voters are unfamiliar with a candidate of the opposite race, but that it is a relatively inconsequential factor once a candidate becomes familiar to the electorate through either serious campaigning, interracial endorsements, or incumbency. At that point, ideology and other legitimate voting criteria predominate in the minds of Rome’s white voters. [Emphasis added.]

Addressing the "true political reality" in Rome, Georgia, the district court concluded on an optimistic note:

Though racism in any form or degree is morally unacceptable, racism in Rome’s electorate has declined to the point where its impact may be overcome through hard work, political savvy and a willingness to compromise. The key to eliminating the effects of racism in Rome is voter familiarity with the candidate. [Emphasis added.]

Closed-Mouth Discussion of Statistics

In *LULAC v. Roscoe Independent School District*, the district court found for the defendants in this §2 challenge to the Roscoe Independent School District’s at-large election scheme used to elect its trustees. Although its findings of fact were somewhat sparse and its discussion of statistical data "was close-mouthed at best," the Fifth Circuit declined to remand for more detailed and specific findings of fact as it had previously done in *Teague v. Attala County*. No concerns were present in this case which would necessitate a remand to the district court for a more in-depth analysis of the plaintiffs’ statistical evidence and for determinations regarding the credibility of trial witnesses since (1) the plaintiff was unable to generate "substantial statistical evidence" in comparison to other vote dilution cases; (2) the database for statistics was "thin," involving statistics gathered from exit polls of city elections as opposed to data derived from Board of Trustees’ elections in the independent school district itself; and (3) "unlike in *Teague*, the district court in this case made known its credibility determinations and the evidence upon which its conclusions of law were based."

Cumulative Voting and the "Politics of Second Best"

The federal judiciary often faces major obstacles in its efforts to navigate without a rudder
through the morass of §2 precedent. Decisions on liability and remedy, while ostensibly based on a frank assessment of the political landscape of a particular jurisdiction, oftentimes are made with little or no guidance on how to balance the Gingles preconditions, much less the "totality of circumstances" or the myriad considerations that bear on equal electoral access and participation in the political process. In the remedy context, some district judges have looked beyond single-member districts to cumulative voting and other alternative electoral systems to avoid the "paradox of fashioning a voting rights remedy based on districts," most recently in McCoy v. Chicago Heights.

1998 WL 299825 (N.D. Ill. June 3, 1998). After finding the at-large electoral system for the City and its Park District violated Section 2 of the Voting Rights Act, the District Court requested remedy proposals from the parties, rejected them and then ordered into effect a 7-member structure for conducting at-large elections using cumulative voting. In fashioning this remedy and rejecting the proposals of the parties, the court acknowledged that it was a "complicated undertaking" to draw district boundary lines in such a way that would completely remedy the §2 violation while not making race a predominant factor and thereby running the risk of a racial gerrymandering challenge. The court drew on precedent from District Judge Myron Thompson's Dillard consent decree cases, the since-vacated cumulative voting remedy decision of Senior District Judge Joseph Young in Cane v. Worcester County, Maryland, and the scholarly writings of Professor Lani Guinier among others. Under this cumulative voting system, seven aldermen and seven Park District Board members would be elected at large in this manner:

Each voter would be allocated seven votes to use as he or she chooses. Thus, the voter could use all seven votes to elect one candidate, or distribute the votes among the several candidates. The seven candidates with the highest number of votes would be elected to office.

Cumulative Voting Advantages

The advantages to this cumulative voting system, according to the court, were many. First, it lets voters "draw their own jurisdictional boundaries" instead of "using race as a proxy for voting preference." Second, not just racial minorities but "all minority groups" have the potential to benefit from this system, which lets voters aggregate or "plump up" their votes to reflect the intensity of their preferences, form coalitions cutting across racial lines, and "find confidence-building measures that build trust and overcome antagonism." Third, minority voters are able to elect candidates of choice "without creating race-conscious lines that would be subject to constitutional challenge." Fourth, this system "does not compartmentalize voters according to their race." Finally, this modified form of "minority representation plan" as the court described it was further justified on the basis of Illinois’ traditional voting principles in corporate law, the current use of cumulative voting as a firmly established statutory form of aldermanic government, as well as historical legislative enactments of cumulative voting systems dating back to post-Civil War efforts to assure that minorities were represented in the legislature, although such legislation was repealed in 1980.

The fate of McCoy may turn on whether due deference was given to the legitimate interests and policy choices underlying the local governing body’s desired form of government. Failure to accord such deference was held an abuse of discretion by the Fourth Circuit when the district court ordered a cumulative voting system to be implemented in Cane v. Worcester County, supra. With no federal court mandate for cumulative voting having survived appellate scrutiny, this unique remedy decision may nonetheless survive the appellate process if it is ultimately found to be a narrowly tailored judicial response that completely cures the §2 violation while not intruding upon local government policy "any more than necessary."

Citizen Voting Age Population as Basis for Determining Proportionality

The Supreme Court in Johnson v. DeGrandy expressly left open the issue of whether total population, voting age population or voting age population of citizens only should be used in making the threshold inquiry in determining proportional equality of voting power. Several circuits have tackled the question of which characteristic of a minority population should be the touchstone for proving a vote dilution claim and have answered that question by holding that citizen voting age population is the proper benchmark for determining proportionality.
In *Campos v. City of Houston*, the Fifth Circuit held that the citizen voting age population of the group challenging an electoral process must be considered when evaluating §2 claims and in determining whether a minority group can satisfy the "geographical compactness" precondition. The Court rejected the plaintiffs’ invitation abandon examination of citizenship date as a factor for a vote dilution claim even though "citizenship information is unavailable until several years after release of general census data, which could hinder redistricting."

In *Negron v. City of Miami Beach*, the Eleventh Circuit upheld the district court’s consideration of citizenship statistics based on sample data, concluding:

> The citizenship information for Miami Beach is reasonably accurate and demonstrates a significant disparity between Hispanic citizenship rates and non-Hispanic citizenship rates. In order to obtain an accurate assessment of Hispanic voting strength, this reasonably accurate citizenship information should be taken into account.

The Court reasoned that in order to vote or register to vote, a person has to be a citizen, and the proper statistic for deciding if a minority group is geographically compact is voting age population as refined by citizenship, as long as reliable information indicates a significant difference or disparity in citizenship rates between the majority and minority populations, a disparity which

is unlikely "except in areas where the population includes a substantial number of immigrants." The Court held that plaintiffs had failed to show that the minority had the potential to elect a representative of its choice in a geographically compact single-member district stating:

> Both voting age and citizenship are to be considered in determining whether the minority group has the potential to elect its preferred representatives. When both citizenship and voting age are taken into account, plaintiffs cannot make the requisite showing that Hispanics will constitute a majority in a single-member district.

**Finding the Correct Benchmark**

Coming after litigation characterized as so unduly protracted as to be "absurd," the Seventh Circuit in *Barnett v. City of Chicago*, aligned itself with the Fifth and Eleventh Circuits in approving the use of citizen-voting age population as the proper population base for evaluating proportional equality of voting power and as the benchmark for vote dilution claims under §2 of the Voting Rights Act. It also sent the parties back to the drawing table.

Following a 48-day trial and a one year delay, the trial judge upheld the City of Chicago’s ward map that created a total of 50 wards, 19 majority-white, 19 majority-black, 5 "multiracial" and 7 majority-Latino. Chicago’s population was 38 percent white, 39 percent black and 20 percent Latino. The district judge had classified one of the wards along with four other wards in which whites had an absolute voting majority as "multiracial," which had the effect of reducing the number of majority white wards to 19, as compared to 19 black and 7 Latino. This "multiracial" reclassification by the trial court was based in part on the politics of these wards, including findings that white aldermen representing these wards were attentive to the interests of black voters. In the ensuing appeal by the black and Latino plaintiffs, Chief Judge Posner, speaking for the Seventh Circuit, noted that the question for decision was whether the challenged plan impaired the minority voting power more than it had to. While affirming as to the §2 claims of the Latino plaintiffs, the Seventh Circuit reversed and remanded, finding that the trial judge’s analysis in using a "multi-racial" reclassification of five wards, based in part on the responsiveness of white aldermen to black voters’ interests, was "deeply flawed."

The decision about the correct population pool or benchmark for assessing proportionality was far from an abstract and hypothetical inquiry. Barnett may well provide a practical approach for dealing with the issue of the correct population basis and determining whether distribution of effective majority status is proportional to population, an issue which will certainly not fade away with the approaching Census 2000, in which multi-racial participants will have the opportunity to select one or more categories of racial and ethnic origin.
Rejection of Virtual Representation

The concept of virtual representation, which argues for the use of total population, is based on the fact that even though children cannot vote, their parents can, and parents can be assumed to be "faithful agents of their children," thus boosting the voting power of the parents by the number of their children, thereby effectively using total population as the basis for determining equality of voting power, and giving the children "a kind of representation in the political process." The Court declined to adopt the virtual representation concept in Barnett, stating:

The census counts the total population for the same reason that it counts rather than samples in order to minimize controversy.... To verify the age and citizenship of the population would enormously complicate the decennial census and open the census-takers to charges of manipulation.... The right to vote is one of the badges of citizenship. The dignity and very concept of citizenship are deluded if non-citizens are allowed to vote either directly or by the conferral of additional voting power on citizens believed to have a community of interest with the non-citizens....

Proportional Equality of Voting Power

The Court held that "the proper benchmark for measuring proportionality is citizen voting age population," and that when citizen voting age population is used for determining proportional equality of voting power under the City of Chicago’s challenged ward map, "blacks are under-represented, whites and Latinos over-represented."

Finding the district judge’s reasoning deeply flawed when he approved the City’s map that created only 19 black majority wards, the Court noted that "Section 2 unfortunately provides no guidance on how to balance the factors and thus determine whether a challenged plan needlessly impairs a minority group’s voting power." Despite its emphatic statement that proportionality is not the "be all or end all" of redistricting under the Voting Rights Act, the Seventh Circuit suggested a narrow reading of Section 2's disclaimer against proportional representation:

Deviations from proportionality, especially small ones, can be justified by reference to other factors, such as the compactness of districts and the desirability of preserving continuity and recognizing topographical, cultural and economic factors that may make one ward mapping preserve communities of political interest better than another. The tricky part is maintaining equality of population and the desired racial and ethnic balance without creating wards of grotesque rather than merely irregular shape. But the maps submitted by the parties suggest that the creation of one additional ward for blacks, which is to say redrawing the map to give them 20 wards instead of 19, would be feasible in the sense of not trampling on any values that deserve weight in redistricting.

Remanding for a prompt determination of whether the City’s map violated §2 rights of the black plaintiffs, the Court concluded "it may not--even though a map that shifts a ward from the white to the black column is feasible and would bring these groups’ power to elect aldermen into line with their respective proportions of the citizen voting age population--because, as we have emphasized, proportionality is not the only consideration in determining a violation of §2."

So much for the Dole compromise and the §2 disclaimer against proportionality.

Defense of Lack of Racial Bias or Animus

In Solomon v. Liberty County, the Court addressed the issue of whether a defendant can defeat a §2 challenge by raising a lack of racial bias after a plaintiff has demonstrated the three Gingles preconditions.

As to the proper role of racial bias in a vote dilution inquiry under §2 of the VRA, the Court said that "the presence or absence of racial bias within the voting community is not dispositive of whether liability has been established under §2." In an effort to avoid converting vote dilution claim evaluation into a "intuitive call of the trial judge," the Court suggested that a §2 defendant could always come up with some plausible cause or causes which could explain away sustained racially polarized voting." Such proof would never be dispositive:
Where a defendant offers unrebutted proof that there is no racial bias in the subject community, does the defendant always prevail under the results test? The simple answer is no. The absence of racial bias, like proportionality, is certainly some evidence that a minority group has equal access to the political process. However, it does not automatically preclude a finding of liability under §2.

Sexual Harassment Litigation

*Title VII of the Civil Rights Act of 1964*

Title VII renders it an unlawful employment practice for an employer
to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex or natural origin.

Under the EEOC’s sexual harassment guidelines which were issued in 1980, "sexual harassment" was defined as
unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature ...when (1) submission to such conduct is made either explicitly or implicitly a term or condition of the individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

Two types of sexual harassment are defined in these guidelines, quid pro quo harassment (paragraphs 1 and 2) and hostile working environment harassment (paragraph 3). These guidelines emphasize that "prevention is the best tool for the elimination of sexual harassment." The guidelines also place appropriate emphasis on the need for a clearly expressed policy against sexual harassment, including employer-expressions of strong disapproval of sexual harassment, procedures for implementing appropriate sanctions and for fully informing employees not only of the right to raise but how to raise the issue of sexual harassment, and procedures for conducting appropriate, adequate and ongoing sexual harassment training for employees, particularly those in a supervisory capacity.

*Meritor Savings Bank v. Vinson*

In the first case decided by the United States Supreme Court involving a hostile working environment challenge, the Court cited these guidelines with approval. *Meritor Savings Bank v. Vinson* held that the determination of whether a work environment is hostile must be based upon an analysis of the totality of the circumstances. In this case, a female employee of a bank, Mechelle Vinson, claimed that the bank's vice president had repeatedly subjected her to sexual harassment over a four-year term of employment, including demands for sexual favors, sexual intercourse on forty to fifty occasions, and a number of instances of forcible rape. The bank's principal defense was that the plaintiff had failed to report any sexual harassment to the bank's supervisory staff and had failed to use the complaint procedure.

The Supreme Court relied on traditional agency principles in evaluating the bank's liability, reasoning that liability could be imposed upon an employer if it knew or should have known of its supervisor's actions and failed to take effective corrective action, and that an employee's failure to notify the employer would not necessarily insulate the employer from liability in a hostile working environment challenge. Regarding the bank's claim that Vinson had failed to use its complaint and grievance procedure, the Court held that while the existence of a grievance procedure and a policy against sex discrimination would not totally insulate an employer from liability, the effectiveness of such a procedure and policy would be important factors in the employer's favor.

*The Harris Case*
In *Harris v. Forklift Systems, Inc.*, the Court made it clear that it did not intend to limit hostile working environment harassment cases only to those cases where an employee's psychological well-being was affected. The Court enumerated the following circumstances that would be included in the "totality of the circumstances" in determining whether a working environment is hostile:

- The frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Applying *Harris v. Forklift System, Inc.*, *supra*, the Seventh Circuit held in *Saxton v. American Telephone and Telegraph Co.*, that the plaintiff had offered no evidence that the conduct was frequent or severe, that it interfered with her work or that it otherwise created an abusive work environment. It upheld the District Court's grant of summary judgment on the hostile work environment claim, reasoning that the supervisor's misconduct was not so pervasive or debilitating as to create a hostile work environment. The employer's prompt and appropriate corrective actions were held to have negated the hostile work environment claims since they were reasonably likely to prevent the misconduct from occurring. The Seventh Circuit concluded that while the plaintiff was dissatisfied with the employer's response, she was not entitled to the remedy of her choice but rather a remedy reasonably likely to stop the harassment.

**Vicarious Liability for Misuse of Supervisors Authority**

Sexual harassment law has continued to develop at a brisk pace. At the end of the 1998 term, the Supreme Court provided definitive guidance for determining an employer’s vicarious liability for sexual harassment resulting from a supervisor’s misuse of authority. In *Faragher v. City of Boca Raton*, 118 S.Ct. 2275, 1998 U.S. LEXIS 4216, 1998 WL 336322 (June 26, 1998), and *Burlington Industries, Inc. v. Ellerth*, 118 S.Ct. 2257, 1998 U.S. LEXIS 4217, 1998 WL 336326 (June 26, 1998), the Court clarified what preventative measures employers must take in order to discharge their responsibilities and minimize potential liability exposure under Title VII of the Civil Rights Act of 1964, whether for *quid pro quo* or hostile environment sexual harassment. The holding in both cases was an amalgamation of established Title VII vicarious liability and general agency principles discussed in the 1986 landmark decision, *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), expressed in virtually identical language:

In order to accommodate the principle of vicarious liability for harm caused by misuse of supervisory authority, as well as Title VII’s equally basic policies of encouraging forethought by employers and saving action by objecting employees, we adopt the following holding.... An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence.... The defense comprises two necessary elements: (a) that the employer exercise reasonable care to prevent and correct promptly any sexual harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise. While proof that an employer had promulgated an antiharassment policy with complaint procedure is not necessary in every instance as a matter of law, the need for a stated policy suitable to the employment circumstances may appropriately be addressed in any case when litigating the first element of the defense. And while proof that an employee failed to fulfill the corresponding obligation of reasonable care to avoid harm is not limited to showing an unreasonable failure to use any complaint procedure provided by the employer, a demonstration of such failure will normally suffice to satisfy the employer’s burden under the second element of the defense. No affirmative defense is available, however, when the supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion or undesirable reassignment. *Burlington Industries, Inc. v. Ellerth*, 118 S.Ct. at 2270 (1998), and *Faragher v. City of Boca Raton*, 118 S.Ct. at 2292 (1998).

Kim Ellerth’s supervisor, a middle-level manager, subjected her to constant sexual harassment, repeatedly implying that adverse employment consequences would result if she resisted his advances, even though he never fulfilled those implied threats. At no time prior to Ellerth’s leaving her employment did she register a formal
complaint with her employer or inform anyone in authority about the repeated boorish and offensive remarks and gestures made by the supervisor.

In her *quid pro quo* harassment action against her former employer, Burlington Industries, Ellerth alleged that the employer had engaged in sexual harassment and forced her constructive discharge in violation of Title VII. The district court’s Summary Judgment in favor of the employer, grounded on lack of actual or constructive knowledge of the supervisor’s conduct, was reversed on appeal to the Seventh Circuit, and the Supreme Court affirmed, in a 7-2 opinion delivered by Justice Kennedy. The Court held that when tangible employment action is not taken against an employee who is the victim of sexual harassment by a supervisor, the employer may nonetheless be subjected to vicarious liability for an offending supervisor’s sexual harassment conduct against a subordinate employee based on the “general common law of agency” and general agency principles. The employer in such a case cannot find a safe harbor in the general rule that sexual harassment by a supervisor is not conduct "within the scope of employment" since an employer can be liable where its own negligence is the cause of the harassment, as where it knew or should have known about the conduct and failed to stop it. The employer may raise an affirmative defense in such a case that consists of two necessary elements noted above, namely, that the employer exercised reasonable care "to prevent and correct promptly any sexually harassing behavior," and that the offended employee unreasonably failed to take advantage of any employer-provided preventative or corrective measure or to otherwise avoid harm.

The Court in Ellerth emphasized that the "*quid pro quo*" or "hostile work environment" label does not determine the vicarious liability issue, the critical factor being whether a tangible job loss or adverse employment action occurred.

While the Court stopped short of finding vicarious liability for all co-worker harassment, it concluded that the employer here was subject to vicarious liability under the "aided in the agency" standard, a developing feature in agency law, and noted that the employer would be allowed on remand to allege and prove the two-element affirmative defense delineated above.

Betty Faragher, a female lifeguard employed by the City of Boca Raton and working for its Park & Recreation Department, alleged that during her employment two department supervisors had touched her and other female lifeguards in a sexually offensive manner, making lewd remarks and engaging in other offensive, unwelcome conduct, including such statements as "date me or clean the toilets for a year." *Faragher*, 118 S.Ct. at 2279.

Over a five year period, one of the supervisors put his arm around one of the female employees with his hand on her buttocks, contacted another female lifeguard in a motion of sexual simulation, made crudely demeaning references to women in general, made disparaging comments on the shape of one of the female employees, and on at least two occasions told female lifeguards he would like to engage in sex with them. The district court found for the plaintiffs, holding the City as employer vicariously liable for the hostile work environment created by the supervisors which culminated in tangible employment action, and awarded Ellerth one dollar in nominal damages.

The Eleventh Circuit reversed, holding that the City as employer was not liable since the supervisors were not acting within the scope of their employment when they engaged in the sexual harassment, they were not aided in their actions by the agency relationship, and the city had no constructive knowledge of the harassment by virtue of its pervasiveness or actual knowledge on the part of one of the supervisors. The Supreme Court reversed in a 7-2 opinion delivered by Justice Souter, and remanded the case for reinstatement of district court’s judgment. The Court held that the *Ellerth* affirmative defense could not be raised by the employer, even though it had a sexual harassment policy, because it had failed to disseminate that policy among its beach employees, and because no attempt had been made to monitor or keep track of the conduct of the offending supervisors. As a matter of law the employer could not have been found to have exercised reasonable care to prevent the sexually harassing behavior of the supervisors, according to the Court.

Both *Ellerth* and *Faragher* are grounded on recognition that employers have the greater opportunity and incentive to screen supervisors, train supervisors and monitor the performance of supervisors. It is now clear, moreover, that mere adoption of a written anti-harassment policy and procedures manual will not suffice to insulate an employer from vicarious liability for sexual harassment by supervisory personnel. The employer in
has failed to disseminate its sexual harassment policy to employees, including those who harassed Beth Faragher and the other female lifeguards. Such failure to effectively disseminate its sexual harassment policy among its beach employees precluded the employer from relying upon the Ellerth affirmative defense as a matter of law. These cases provide dramatic evidence that a substantial majority of the present court will not tolerate a harassing supervisor who is aided in his misconduct and abuse of authority by the supervisory relationship, nor will the employer of such a supervisor be allowed to escape vicarious liability by arguing that the conduct was "outside the scope of employment." Taken together, Ellerth and Faragher give essential guidance for employers to avoid or minimize potential liability for sexual harassment. Under Ellerth and Faragher, employers can find solace in the fact that an effective and meaningfully implemented sexual harassment policy may tip the scales in favor of a defense verdict, particularly where the employee does not have a viable reason for failing to complain about alleged sexual harassment. Employees will also find reason to rejoice with the Court's expanded treatment of employer vicarious liability and its placement of the burden of proof for any affirmative defense on the employer. While the lower courts will continue to litigate issues over tangible vs. intangible employment action, it is a safe bet to conclude that potential harassers will increasingly be deterred from engaging in offensive and unwelcome conduct as more employers in the public and private sector adopt effective anti-harassment policies and show that they take harassment not as a "frolic" but as a serious workplace issue to be dealt with decisively and promptly.

Shortly before the Farragher and Ellerth decisions, the U. S. Supreme Court handed down Oncale v. Sundown Offshore Services, 118 S. Ct. 998 (1998), holding that a sexual harassment claim against an individual of the same sex could be asserted under Title VII. The Court emphasized that the allegedly harassing conduct does not have to be motivated by sexual desire in order to establish that there was discrimination "because of...sex," and that Title VII's prohibition of such discrimination protects not only women but also men. In Oncale, in addition to deciding that Title VII applies to claims of same-sex harassment, the Court also emphasize that Title VII is not a general civility code for the American workplace, stating:

> We have always regarded that requirement [of objectively offense, severe and pervasive conduct] as crucial, and as sufficient to insure that courts and juries do not mistake ordinary socializing in the workplace--such as male-on-male horseplay or intersexual flirtation--for discriminatory "conditions of employment." Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a reasonable person in the plaintiff's position would find severely hostile or abusive.

118 S. Ct. at 1003.

The Fifth Circuit has had a number of opportunities to apply the new standard for sexual harassment. In Sharp v. City of Houston, 164 F.3d 923 (5th Cir. 1999), the Court addressed the standard for holding employers liable for co-worker harassment, holding that an employer could be charged with actual knowledge of harassment only if knowledge of the allegedly harassing conduct was imparted to one in possession of remedial power or "authority to address the problem." Aside from actual knowledge, an employer could be charged with constructive knowledge of allegedly harassing conduct if it "should have known" of the allegedly harassing conduct through the exercise of reasonable care but failed to address it, such as where the conduct complained of is so pervasive and open that the employer, "had it but opened its corporate eyes," should have known of it. Moreover, the Fifth Circuit emphasized that an employer would not be automatically insulated from liability simply because it had in existence a sexual harassment policy or grievance procedure, even if the employee victim failed to use it.

In Deffenbaugh -Williams v. Wal-mart Stores, Inc., 188 F.3d 278 (5th Cir. 1999), the Fifth Circuit upheld an award of punitive damages in the reduced amount of $75,000 against an employer sued because of the District Manager’s racially discriminatory actions, extending Ellerth/Faragher to claims of racial discrimination by supervisors. In this case, Plaintiff was a female employee of Wal-Mart and was allegedly subjected to discriminatory conduct, harassment, pretextual disciplinary actions and ultimately termination because of her relationship with and dating of a black man. Evidence at trial included a statement by a prior district manager that Plaintiff would "never move up with the company being associated with a black man." 188 F.3d at 280. Signs in the Wal-Mart stores encouraged employees with grievances to contact higher management, and after one of the pre-termination disciplinary episodes, the Plaintiff complained to her regional manager that her supervisors were
"out to get" her because of her interracial relationship, with respect to which the regional manager responded that her "dating a black man was not a problem," and that he would "check into it," although he never contacted the Plaintiff about any follow-up. Following a jury trial and an award of $19,000 in compensatory damages and $100,000 in punitive damages, the Supreme Court decided the Ellerth and Faragher cases, clarifying vicarious liability in the context of Title VII Sexual Harassment, and in the next term of court the Supreme Court decided Kolstead v. American Dental Association, 144 L.Ed.2d 494, 119 S.Ct. 2118 (June 22, 1999), holding that punitive damages could be imposed in a Title VII action without a showing of egregious or outrageous discrimination, independent of the employer’s state of mind, but that an employer could not be held vicariously liable for discriminatory employment decisions of its managerial agents, for purposes of imposing punitive damages, if those decisions were contrary to the employer’s good faith efforts to comply with Title VII. The Fifth Circuit’s initial decision, Deffenbaugh-Williams v. Wal-Mart Stores, Inc., 156 F.3d 584 (5th Cir. 1998), was vacated on Petition for Rehearing En Banc, 169 F.3d 215, and thereafter the panel opinion except for that part related to punitive damages was reinstated and the case was remanded to the panel for consideration of the punitive damages issue in light of Kolstead v. American Dental Association, supra. In addition to extending the Ellerth/Faragher standard to all inquiries of vicarious liability under Title VII for acts by supervisors, including racially discriminatory acts, the Fifth Circuit held that, in the context of these rapidly developing legal standards, which were just as rapidly made available electronically on the Fifth Circuit’s worldwide web site and within two days on Westlaw, the employer, Wal-Mart, was "on notice that evidence of a faithfully-adhered-to non-discrimination policy may bar imputing punitive damages liability to an employer when its employee acts with malice or reckless indifference." 188 F.3d at 284. In this case, however, the Fifth Circuit concluded that the evidence of Wal-Mart’s anti-discrimination good faith "was certainly not so overwhelming that reasonable jurors could not conclude otherwise," id. at 286, reasoning that:

Wal-Mart’s only evidence (elicited in cross-examining Deffenbaugh) was that it (Wal-Mart) encourages employees to contact higher management with grievances. Plainly, such evidence does not suffice to establish, as a matter of law, Wal-Mart’s good faith in requiring its managers to obey Title VII. Wal-Mart presented no evidence either of its response to Deffenbaugh’s complaint or of any specific Title VII efforts; nor did it explain...how a Wal-Mart manager’s comment on her perceived Wal-Mart corporate hostility to interracial relationships could pass unrebuted at a meeting with two other Wal-Mart manager present. Deffenbaugh, on the other hand, presented substantial evidence that Wal-Mart failed to respond effectively to her complaints about [the district manager’s] racial animus: despite [the regional manager’s] promise to check into her complaint of hostility to her interracial relationship, she was fired the next month on pretextual grounds. Wal-Mart’s minimal presentation left the jury wide latitude to infer that any Wal-Mart policy against discrimination was too poorly enforced to distinguish Wal-Mart’s actions from [the district manager’s]. Id. at 286.

In Indest v. Freeman Decorating, Inc., 164 F.3d 258 (5th Cir. 1999), the Fifth Circuit made it clear that mere discourtesy, rudeness, offhand comments or non-serious isolated incidents would not rise to the level of such extreme conduct as to constitute actionable sexual harassment under Title VII. In Indest, a female employee brought a sexual harassment suit against her former employer and former supervisor under Title VII, alleging that in her capacity as an exhibitor services representative at one of her employer’s branch offices in New Orleans, the employer’s vice president in charge of employees who worked at trade shows made crude sexual comments and sexual gestures to Plaintiff while she was alone and in the presence of her immediate supervisor and her director at a week long convention. When the supervisor made another sexual comment to the Plaintiff at a cocktail event, she objected and warned him that this was sexual harassment, in response to which the supervisor angrily "ordered her not to threaten a vice-president, profanely disparaged her abilities as an employee, and said she must prove herself to him by working with him at a convention in Philadelphia." Id. at 260. After Plaintiff reported these incidents to her director and branch office manager and later to the employer’s Human Resources Director in its Dallas corporate office, the HR Director investigated the complaint, interviewed witnesses to the incidents, then advised the company president and chairman of the complaints of Plaintiff and of another incident six months earlier involving the same supervisor and another female employee. Following verbal and written reprimands to the supervisor, the HR Director informed Plaintiff of this reprimand and further advised that the supervisor would apologize to her and asked her for suggestions for how to discipline the supervisor. The Plaintiff said she wished to leave the disciplining of the supervisor up to the company. When it became apparent that Plaintiff intended to file an EEOC charge because of her fear of retaliation, the HR Director visited with the
Plaintiff and informed her that the supervisor would be suspended without pay for seven days and would be prohibited from attending the annual management and sales meeting which he had historically organized and conducted and also promised that Plaintiff would never again have to work at any trade shows where the supervisor was present. "[H]e expressly guaranteed that her complaint would neither jeopardize her job nor inhibit her ability to advance within the company; and he told her the company would pay for any counseling she might need." The company’s concern about the incident reached the highest level, including the CEO’s personal confirmation that the supervisor had been subjected to disciplinary action, that the company was ‘particularly concerned that there never be any discriminatory action taken against’ Plaintiff in retaliation for her complaint." Id. at 261. Since the sexual harassment incident, the Plaintiff received periodic pay increases and was not further harassed by the supervisor.

The District Court granted judgment as a matter of law to the company president in his official capacity, holding that the company had taken prompt remedial action and was thus absolved of liability. The Court also concluded that the harassing supervisor was not subject to suit in his individual capacity, based upon settled Fifth Circuit precedent that "it would be redundant for Indest to sue both [the supervisor] in his official capacity and [the company president] because [the company president] would bear responsibility for the liability of either party through Title VII’s incorporation of the principle of vicarious liability." Id. at 262. Concluding that a Title VII suit against an employee is actually a suit against the corporation, the Fifth Circuit further held that a plaintiff in a sexual harassment action cannot sue both the corporate employer and its officer in an official capacity under Title VII and, most significantly, Plaintiff in this case had failed to meet her burden of proving that the company through its president knew or should have known of the alleged harassment and failed to take prompt remedial action. The District Court had concluded that based on the company president’s prompt, humiliating punishment of the supervisor, including verbal and written reprimands, suspension without pay for a week, and banishment from his own sales meeting, and based upon the complete cessation of harassment following the incident, the company president’s actions "were sufficiently swift and effective to preclude corporate vicarious liability" for the supervisor’s conduct. Id. at 263.

In Indest, the Fifth Circuit summarized the holdings in Faragher, Ellerth and Oncale, stating:

Taken together, these cases hold that sexual harassment which does not culminate in an adverse employment decision must, to create a hostile work environment, be severe or pervasive. Incidental, occasional or merely playful sexual utterances will rarely poison the employee’s working conditions to the extent demands for liability. Dis courtesy or rudeness, "offhand comments and isolated incidents" (unless extremely serious) will not amount to discriminatory changes in "terms and conditions of employment." (Internal citations omitted). Id. at 264.

The Court in Indest further noted that in all of sexual hostile environment cases decided by the Supreme Court, there were proven patterns or allegations of extensive, long-lasting, unredressed and uninhibited sexual threats or conduct that permeated the plaintiff’s work environment, and the extreme facts in those cases highlighted the intensity of the objectionable conduct that has to be present in order to rise to the level of actionable hostile work environment. Applying this demanding standard to the conduct to which plaintiff was subjected in Indest, the Court noted that it was difficult to conclude that such conduct created a sexually abusive overall working environment, even though the supervisor may not have behaved like a gentleman or a responsible company officer, and even though his crude remarks and implied threat deserved censure. In this case, based upon the totality of the circumstances, or as the Fifth Circuit described it, "the entire context of Indest’s employment," that misbehavior was not severe nor was it pervasive, and the plaintiff’s only complaint about working with the supervisor encompassed one occasion, and even then his vulgar remarks and innuendos about his own anatomy "were not more offensive than sexual jokes regularly told on major network television programs." Id. at 264. Moreover, the supervisor’s veiled threat to the plaintiff to "prove herself to him" was considered by the Fifth Circuit far more ambiguous than the threats uttered in Ellerth, the Court noting that in this case the threat was not only hollow, because the plaintiff knew and invoked the company’s sexual harassment policy, but it also invited the company’s immediate reprisal upon the supervisor himself. Id. at 264.

The Court then addressed a separate basis upon which the plaintiff’s claim fell short, that being the fact that the plaintiff had promptly invoked the employer’s grievance procedure and received the benefit that Title VII was
meant to confer, and, moreover, the company had swiftly responded to her complaint and had "forestalled the creation of a hostile environment." *Id.* at 265. The Fifth Circuit concluded that it would undermine Title VII’s deterrent policy to impose vicarious liability on an employer for a supervisor’s "hostile environment" actions where the employer’s remedial response was swift and appropriate, *id.* at 266, and that a holding of vicarious liability under those facts "notwithstanding the employer’s having nipped a hostile environment in the bud," would conflict with the negligent standard and the agency law premise of *Ellerth* and *Faragher*:

Where the company, on hearing a plaintiff’s complaint about inappropriate sexual behavior, moves promptly to investigate and stop the harassment, it eradicates any semblance of authority the harasser might otherwise have possessed. *Id.* at 266.

The Fifth Circuit accordingly held that because the plaintiff promptly complained of her supervisor’s harassing conduct, and because the employer had promptly responded and disciplined the supervisor appropriately and stopped the harassment, the employer was entitled to judgment as a matter of law. In short, the employer’s prompt remedial response relieved it of Title VII vicarious liability. *Id.* at 267.

Following *Indest*, the Fifth Circuit also decided *Skidmore v. Precision Printing & Packaging, Inc.*, 188 F.3d 606 (5th Cir. 1999), a September 13, 1999, decision involving co-worker sexual harassment. As in *Indest*, the Fifth Circuit concluded that under the evidence adduced at trial, the employer had taken prompt remedial action and thus was not liable under Title VII. In *Skidmore*, Plaintiff worked as an inspector-packer on a flexographic machine, and a co-worker was employed as operator of the machine on the same shift. Skidmore alleged that her co-worker harassed her with constant sexual remarks, inviting her to his house for a "hot body oil massage," telling her to undress so he could "lick her from head to toe," and sometimes coming up behind her and licking or kissing her face or neck. *Id.* at 611.

One of the cutting department supervisors met with Plaintiff, and was told that the co-employee was bothering her and that his behavior was contributing to problems in her marriage, immediately after which the co-worker was moved to a warehouse facility for the rest of the week and instructed to stay away from Plaintiff and was thereafter assigned to a different work shift entirely. Thereafter while the co-worker never touched or said anything offensive to Plaintiff again, rumors about her sexual harassment complaint filed with the EEOC allegedly circulated around the office and caused other employees to ostracize her, ultimately leading to her quitting her employment later that year.

The Fifth Circuit held that it was error for the District Court not to grant judgment as a matter of law to the employer, since the employer’s action was reasonably calculated to relieve and in fact did successfully abate the hostile work environment, even though the employer conceded it did not conduct any investigation of the allegations until after the employee filed her EEOC complaint months later, nor did it reprimand the co-worker and made no follow-up inquiry with the Plaintiff as to whether the harassment had eased. *Id.* at 616. Citing *Indest*, the Fifth Circuit noted that an employer’s response to allegedly offending behavior by an employee is often found to be prompt remedial action as a matter of law, that in such instances, determining whether the employer’s actions were remedial, the Court has considered whether the offending behavior in fact ceased, as in this case it did. *Id.* at 616. In addition to holding that the employer’s conduct constituted "prompt remedial action" as a matter of law, *id.* at 616, the Fifth Circuit also rejected Plaintiff’s argument that her employer’s parent corporation, Anheuser-Busch, was also her employer within the meaning of Title VII. Plaintiff’s claim against the parent corporation was not devoid of any supporting evidence, since the parent corporation had approved the immediate employer’s awards for accident-free work records, Plaintiff had received a corporate letter of commendation that referred to her as an "Anheuser-Busch employee," the parent corporation gave production directives to the immediate employer, its vice president held meetings with the employee safety team of the immediate employer and presided over presentations on expansion and purchase of new presses, and legal counsel at Anheuser-Busch handled Plaintiff’s EEOC charge and harassment suit. The Fifth Circuit concluded this evidence did not support a finding that Anheuser-Busch was Plaintiff’s employer for Title VII purposes, since there was no showing that the parent company had participated in the immediate employer’s labor decisions, or that both the parent corporation and the immediate employer had intermingled their operations and management functions, and that such negative evidence was coupled with positive testimony from the immediate employer that it and not Anheuser-Busch hired, fired and promoted and demoted its own employees without
consulting Anheuser-Busch, and that it negotiated its own union contracts without consulting Anheuser-Busch and offered its own employee benefit packages, even though it did pay an Anheuser-Busch department to act as third party administrator of its benefit program. *Id.* at 617.

In *Watts v. Kroger Company*, 170 F.3d 505 (5th Cir. 1999), the Fifth Circuit dealt with the type of showing that would have to be made to prove that an employee had unreasonably failed to take appropriate preventative or corrective measures provided by an employer or to avoid harm otherwise, under the second prong of the *Ellerth-Faragher* affirmative defense. In *Watts*, the Plaintiff was allegedly subjected to "an invidious campaign of sexual harassment," *id.* at 507, which included her supervisors’ making inappropriate jokes to and about her, continually making sexual innuendos to her, and on one occasion grabbing her buttocks. When the Plaintiff complained to the store manager, at a time when she was crying and visibly upset, she told the store manager that her supervisor was making comments about her personal life and she wanted the conduct stopped. The store manager allegedly spoke to the offending supervisor the same day and told him to stop, after which the supervisor allegedly did not make any further sexual comments to the Plaintiff and Plaintiff was allegedly not subjected to any further sexual advances. Notwithstanding the Plaintiff’s notification and complaint to the store manager, no notification was ever given to the Human Resources Department about the situation, and a week after her complaint her work schedule was altered to such an extent that she was forced to give up her second job at another place of employment. Instead of utilizing the Kroger Company’s sexual harassment remedial policy and mechanism, the Plaintiff filed a union grievance alleging sexual harassment, and thereafter filed an EEOC Complaint alleging a hostile work environment claim. The District Court granted the employer’s Motion for Summary Judgment, following which *Ellerth* and *Faragher* were decided by the U. S. Supreme Court. On appeal, the Fifth Circuit reversed, holding that it was error for the District Court to grant Summary Judgment on the Plaintiff’s sexual harassment claim under the new standards enunciated in *Ellerth* and *Faragher*. The Fifth Circuit first noted that under the *Ellerth-Faragher* standard, "employees bringing a Title VII sexual harassment case alleging that a supervisor with immediate (or successively higher) authority over the employer [who] harassed the employee need only satisfy" the following four elements of the test to determine if a viable cause of action has been stated:

1. The employee belongs to a protected group;
2. The employee was subject to unwelcome sexual harassment;
3. The harassment complained of was based upon sex; and
4. The harassment complained of effected a "term, condition or privilege of employment," i.e., the sexual harassment must be sufficiently severe or pervasive so as to alter the conditions of employment and create an abusive working environment. *Id.* at 509.

If a plaintiff employee makes this four-part showing, the employer would be subject to vicarious liability to the Plaintiff as a victimized employee under the *Ellerth/Faragher* standard. *Id.* at 509.

The District Court the turned to the issue of whether a "tangible employment action" had been established and whether the employer could raise the affirmative defense enunciated in *Ellerth/Faragher*:

We hold that Kroger can attempt to raise the...affirmative defense because it did not take a tangible employment action against Watts. In her retaliation claim, Watts brought to our attention the fact that Bullington [her store manager] changed her work schedule and asked her to perform tasks which she had not previously been asked to perform. Kroger concedes for purposes of summary judgment that her "supervisor’s harassment culminated" in these employment actions,...and that this injury "could not have been inflicted absent the agency relation." Kroger instead relies on the claim that [the store manager]'s acts do not amount to "a significant change in employment status" and so cannot be described as a tangible employment action. *Id.* at 510. The Fifth Circuit agreed with the employer, noting that "simply changing one’s work schedule is not a change in her employment status." Neither is expanding the duties of one’s job as a member of the produce department to include mopping the floor, cleaning the chrome in the produce department, and requiring her to check with her supervisor before taking breaks.
Plaintiff in this case fell far short of proving the requisite change in employment status, clear examples of which are hiring, firing, failing to promote, or reassignment with significantly different responsibilities, or "a decision causing a significant change in benefits." *Id.* at 510.

Concluding that the employer could raise the *Ellerth/Faragher* affirmative defense, the Fifth Circuit nonetheless held that the employer "cannot show, as a matter of law, that it is entitled to" the affirmative defense, the second element of which the employer could not meet, that being the requirement that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.* at 510. Under the facts of this case, the Fifth Circuit noted that there was at least a genuine issue of material fact insofar as the Plaintiff had conceded filed a union grievance and the jury could have reasonably found that waiting until July of the same year before complaining was not unreasonable. *Id.* at 511. Further, the Fifth Circuit rejected the employer’s argument that the Plaintiff by filing a union grievance rather than going through the employer’s sexual harassment policies somehow flunked the second element of the *Ellerth/Faragher* affirmative defense. The Fifth Circuit disagreed:

This argument is without merit. We find that, under the facts and circumstances of this case, Watts’ filing of a union grievance comports with the *Ellerth/Faragher* rubric. The affirmative defense allows the plaintiff employee to take corrective opportunities provided by the employer "or to avoid harm otherwise." *Ellerth*, 118 S.Ct. at 2270. Taking advantage of the union grievance procedure falls within this language because both the employer and union procedures are corrective mechanisms designed to avoid harm. Thus, Kroger cannot show as a matter of law that it satisfies the *Ellerth/Faragher* affirmative defense.

In *Scrivner v. Socorro Ind. School Dist.*, 169 F.3d 969 (5th Cir. 1999), the Fifth Circuit held that the *Ellerth/Faragher* affirmative defense applied to preclude an elementary school teacher from imposing vicarious liability upon her school district employer for the acts of its principal, and that the Plaintiff teacher in that case had failed to show that the school district’s denial of the promotion constituted retaliation for her filing of a Title VII sexual harassment complaint. The school district’s response to the Plaintiff teacher’s sexual harassment claims were both reasonable and vigorous, according to the Court, and the Plaintiff teacher had failed reasonably to avail herself of the school district’s preventive and corrective sexual harassment policies, did not complain for several months, and even lied during the investigation that was instigated by an anonymous letter when she reported that she had not witnessed any sexually harassing conduct by the principal. Affirming the District Court’s dismissal of the Plaintiff’s claim based upon the affirmative defense and the lack of substantiation for her retaliation claims, the Fifth Circuit, speaking through Circuit Judge Edith H. Jones, reasoned that in view of the reasonable and vigorous response by the employer to the Plaintiff’s sexual harassment complaints and in view of its anti-discrimination policy and swift investigation of the alleged harasser’s behavior,

By failing to inform [the school district] of [the alleged harasser’s] conduct when given an express opportunity, Scrivner acted unreasonably. *Id.* at 971. When an employer initiates a good faith investigation of charges of discrimination, it must be able to rely on the evidence it collects. By misleading investigators, Scrivner thwarted the purposes of Title VII and frustrated [the school districts’] efforts to remedy past misconduct and prevent future harassment by [the alleged harasser]. When there is no evidence that the investigation was heavily skewed against a complainant’s interest, this court cannot sanction such deceptive conduct. The appellees have properly set forth the affirmative defense to Title VII liability for [the] harassing behavior. *Id.* at 972.

With regard to the Title VII retaliation claim, the Fifth Circuit concluded that Plaintiff had failed to establish the three elements for a *prima facie* claim of retaliation, these being

1. The employee must have engaged in an activity protected by Title VII;
2. The employer must have subjected the employee to an adverse employment action, and
3. A causal nexus must exist between the plaintiff’s participation and the protected activity and the adverse employment action. *Id.* at 972.

Here the Plaintiff had offered no admissible evidence of a causal link between the alleged adverse actions and her filing of a Title VII Complaint. Moreover, since the alleged harasser had filed a counterclaim, the Plaintiff argued that the counterclaim amounted to retaliation, but the Fifth Circuit reasoned that

> It is not obvious that counterclaims or lawsuits filed against a Title VII plaintiff ought to be cognizable as retaliatory conduct under Title VII. After all, companies and citizens have a constitutional right to file lawsuits, tempered by the requirement that the suits have an arguable basis.... Even if the filing of a counterclaim or lawsuit could violate Title VII, however, the cases Scrivner relies upon involve counterclaims by employers, not by defendants joined in their individual capacities. *Id.* at 972.

The Court concluded that since the alleged harasser/defendant had filed his counterclaim against plaintiff in his individual capacity, "his conduct cannot be attributed to the district and does not constitute retaliation in violation of Title VII. *Id.* at 972.

Thus, even though the District Court applied a pre-*Ellerth/Faragher* standard to the facts of this case, there was a sufficient record for the Fifth Circuit to evaluate the case under the new standard, on the basis of which it concluded that the plaintiff had misled investigators when she was given the opportunity to report the alleged sexual harassment during the course of a prompt investigation into his conduct, and that her conduct was so unreasonable that a trial on the merits of the school district’s affirmative defense would be futile. *Id.* at 972.

*See generally* P. Starkman, *Learning the New Rules of Sexual Harassment: Faragher, Ellerth* and Beyond, 66 Def. Couns. J. 317 (July 1999), in which the lessons of *Faragher, Ellerth* and the first wave of cases under the new sexual harassment standard are delineated:

1. Employers must institute anti-harassment policies that go beyond what the law requires.

2. The policies must have grievance procedures that provide multiple avenues for lodging complaints and must allow employees to bypass harassing supervisors.

3. Employers must document that they have fully and effectively distributed their policies and procedures.

4. Employers should republish their policies and procedures periodically.

5. Employers must be careful when deciding what titles and authority to give to persons who may be supervisors.

6. Employers need to train supervisors on appropriate behavior, what to do when they learn of a possible harassment situation, and the necessity of not retaliating against employees who bring harassment complaints. Proof of training will enable employers to show that they exercised reasonable care to prevent harassment before it occurred.

7. Employers must educate and train the persons designated to receive harassment complaints. This will ensure that a company promptly and effectively responds before a tangible employment action by a supervisor leads to strict liability.

8. Whenever feasible, employers should consider having tangible employment actions (discharges, demotions, etc.) reviewed and/or approved by an independent person, such as a member of the Human Resources Department.

9. Employees must realize that if they ignore their employer’s grievance procedures, they do so at their peril.
Above all, employers, employees, their counsel and the courts must learn the new rules laid down by the Supreme Court because they are going to be dealing with *Faragher* and *Ellerth* for years to come. *Id.* at 333.

No General Civility Code

While Title VII should not be expanded into a general civility code, *Oncale v. Sundowner Offshore Services*, 118 S.Ct. 998, 1003 (1998), the Supreme Court has served notice in the clearest terms that it will not tolerate exposing employees to disadvantageous terms or conditions of employment because of sex. *See Harris v. Forklift Systems, Inc.*, 510 U.S. 7, 25(1993) (Ginsburg, J., concurring).

The Preemptive Strike

In the wake of Anita Hill’s testimony before the Senate Judiciary Committee on confirmation of then-Supreme Court nominee Clarence Thomas, and more recently in the dregs of Monika-Bill, the public’s awareness of sexual harassment in the workplace has reached an all-time high. This new awareness has led to the "preemptive strike," which occurs when employees who believe they on the verge of being fired or disciplined try a preemptive strike by asserting sexual harassment claims against a superior in the outside hope that attention will be diverted from their own predicament and that their job will be protected.

An employer who settles quickly in the face of a preemptive strike may acquire "a reputation as a cash register for disgruntled employees." On the other hand, the employer who believes it has recognized a preemptive strike may promptly fire or otherwise discipline the complaining party, who now has a valid cause of action where there was no cause of action before, based on both federal and state statutory protection of employees from retaliation for asserting charges of sexual harassment.

Mediation of Sexual Harassment Complaints

The chances of settling a sexual harassment claim are enhanced by an informal, resolution-oriented atmosphere of mediation, a process which requires careful planning in order to arrive at a satisfactory result. As one of the most flexible forms of dispute resolution, mediation can be resorted to at any stage of a proceeding, even after a civil action has been filed in court. Key components of this process are:

1. Selection of Mediator. Consideration should be given to selecting one female and one male co-mediator to overcome the potential reluctance by each party who may believe that a mediator of the same sex as the party will have a greater understanding of that party's position.

2. Pre-mediation Preparation. In view of the highly charged emotional context in which such claims are asserted, the mediation may be structured so as to defer a face-to-face meeting initially, call for the parties to submit position papers and key documentary evidence before the mediation commences, and to agree to have a meeting of all parties and the mediator only after significant progress has been made toward resolution of the dispute.

3. Privacy and Confidentiality. Mediation also provides the benefits of privacy and confidentiality, giving the employee a private forum with an attendant reduction of the level of emotional trauma, while providing the employer with reduced risk of negative publicity. A confidentiality agreement entered into before the mediation process begins, assuring the parties that anything that may be disclosed will not be used against them if the mediation process does not succeed, will facilitate full, frank and open discussion, with assurance that those disclosures will not be used improperly by the parties nor provided to outside or third parties.

4. Reduced expense. As one of the least expensive and disruptive methods for dispute resolution, mediation bypasses the routine discovery process and often avoids other litigation expenses, with each of the parties to a mediation usually dividing the mediator's fees. Business disruption costs can also be minimized through the mediation process, such as a mediation solution that results in the complaining party returning to work and therefore limiting the wage claim, with a resulting savings to the employer, who may also avoid the cost of
extensive discovery by resolving the dispute quickly through mediation, not to mention the savings from improved employer-employee relations, reduction of the amount of work force down time, and the reduction of lost employee hours.

**Immunity: Sovereign, Legislative, Official and Governmental**

*Ministerial Acts and Immunity for Discretionary Acts*

A thorough discussion of the Mississippi Tort Claims Act and recent developments thereunder may be found in *Mississippi Tort Claims Act Law* (National Business Institute 1999), by Jim Fraiser, Special Assistant Attorney General, Civil Litigation Division, who represents the State, its agencies and employees in MTCA litigation. No effort to significantly expand upon Jim’s excellent material will be undertaken here.

Under Mississippi law, a form of qualified immunity from personal liability is given to public officials engaged in the performance of discretionary acts. For purposes of public official immunity, Mississippi and many other states recognize a distinction between "ministerial" and "discretionary" duties of public officials. The 1935 case of *Poyner v. Gilmore*, sets out the test for making this distinction between ministerial duties, which the official neglects at his peril, and qualifiedly protected discretionary public functions:

The most important criterion...is that if the duty is one that has been positively imposed by law and its performance required at a time and manner or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the [official’s] judgment or discretion, the act being discharged thereof is ministerial.

The Mississippi Supreme Court has consistently refused to extend this public official immunity defense to government employees who perform ministerial acts in a negligent manner. The rationale for this result is that the possibility of personally subjecting a person to civil liability tends to encourage proper performance of statutorily prescribed and specifically designated duties. On the other hand, the rationale for extending public official immunity to public officials performing discretionary acts is that officials who perform governmental functions and lawful duties that require "personal deliberation, decision and judgment" need to be protected in performing those governmental functions. They should be allowed to continue their basic policymaking decisions without fear of legal retribution in the form of personal financial liability.

In *State for Use and Benefit of Brazeale v. Lewis*, for example, the Court said the basis for immunizing government officials from liability when performing discretionary acts, while limiting the liability of government officials to those who perform ministerial acts,

lies in the inherent need to promote efficient and timely decision-making without lying in fear of liability for miscalculation or error in those actions.... In order to allow our lawmakers and government officials to participate freely and without fear of retroactive liability in risk-taking situations requiring the exercise of sound judgment, the discretionary-ministerial distinction has evolved....

See also *L W v. McComb Sep Mun Sch Dist.*, __ So. 2d __ (Miss. 1999), decided September 2, 1999, in which the Court significantly narrowed the scope of the discretionary acts exemption under the MTCA: :

The School successfully argued to the trial court that subsection (d) of § 11-46-9 (1) is a catchall exemption for all discretionary functions or duties. Since discretion was involved in the School's negligence, the trial court found the lawsuit was totally barred by the statute. L.W. argues that this ruling applied an overly broad interpretation to the statute.

L.W. contends that if this interpretation is accepted by this Court, then subsection (d) would obviate the purpose and need for the majority of other subsections under section 11-46-9 (1). Plaintiff argues that twelve other subsections necessarily require some element of discretion, e.g. subsection "(a)
Arising out of a legislative or judicial action or inaction, or administrative action or inaction of a legislative or judicial nature." Miss. Code Ann. § 11-46-9 (1)(a) (Supp. 1998). In other words, if the broad interpretation employed by the trial court is allowed, then the exemption will swallow the waiver of immunity.

The School counters that L.W. confuses statutory sovereign immunity with common law qualified immunity. Defendant School contends that subsection (d) and common law qualified immunity are alike in that the court must determine whether or not the function of the governmental actor was discretionary. But they differ in that statutory sovereign immunity requires only the simple, straightforward determination of discretion; whereas, with common law qualified immunity, discretion is not the sole determining factor. T.M. ex rel. E.N.M. v. Noblitt , 650 So.2d 1340, 1346 (Miss. 1995)(Banks, J. concurring). The Legislature specifically chose not to put any additional requirements on statutory sovereign immunity. For example, the Legislature expressly stated that it does not matter "whether or not the discretion be abused" in order to be exempt from liability. Miss. Code Ann. § 11-46-9 (1)(d) (Supp. 1998).

Since both statutory and common law immunity require a determination of discretion, prior case law can be used to define discretionary conduct. In Noblitt , this Court accepted the trial court's definition which stated that "[a] duty is discretionary if it requires the official to use her own judgment and discretion in the performance thereof." 650 So.2d at 1343 (citing Poyner v. Gilmore , 171 Miss. 859, 158 So. 922, 923 (1935)); see also Dalehite v. United States , 346 U.S. 15, 35-36, 73 S.Ct. 956, 968, 97 L.Ed. 1427 (1953) (interpreting "discretionary function" under the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2680 (1982), the United States Supreme Court stated that discretion means "more than the initiation of programs and activities.... Where there is room for policy judgment and decision there is discretion.")

In contrast, an act is ministerial "(if) the duty is one which has been positively imposed by law and its performance required at a time and in a manner or upon conditions which are specifically designated, the duty to perform under the conditions specified not being dependent upon the officer's judgment or discretion." Id . at 1344 (quoting Davis v. Little , 362 So.2d 642, 644 (Miss. 1978) and Poyner at 922). Additionally, this Court said that the duty to hire and supervise employees is necessarily and logically dependent on discretion. Id .

The School argues that L.W.'s allegations involve discretionary conduct rather than ministerial, because providing supervision, monitoring, and a safe environment satisfy Noblitt . See also Mohundro v. Alcorn County , 675 So.2d 848, 854 (Miss. 1996) ("road maintenance and repair are discretionary rather than ministerial . . ."); Glover ex rel. Glover v. Donnell , 878 F.Supp. 898, 901 (S.D.Miss. 1995)(defendant's conduct was discretionary and therefore immune where plaintiff alleged a failure to properly supervise and protect her from other participants in a governmental program). This Court finds that the L.W.'s allegations do in fact involve discretionary conduct rather than ministerial.

However, merely finding that the conduct at issue in the instant case was discretionary does not fully resolve the matter as the School suggests. As will be shown below, both state and federal law support our conclusion that public schools have the responsibility to use ordinary care and take reasonable steps to minimize risks to students thereby providing a safe school environment.

Miss. Code Ann. § 11-46-9 requires a minimum standard of ordinary care be exercised by the government actor in order to raise the statutory shield:

(1) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:
(b) Arising out of any act or omission of an employee of a governmental entity exercising ordinary care in reliance upon, or in the execution or performance of, or in the failure to execute or perform, a statute, ordinance or regulation, whether or not the statute, ordinance or regulation be valid;

Miss. Code Ann. § 11-46-9 (1)(b) (emphasis added). Under this statute, as long as ordinary care is used while performing a statutory duty, immunity exists. But when the state actor fails to use ordinary care in executing or performing or failing to execute or perform an act mandated by statute, there is no shield of immunity. One such statutory duty applicable to public schools is the following:

It shall be the duty of each superintendent, principal and teacher in the public schools of this state to enforce in the schools the courses of study prescribed by law or by the state board of education, to comply with the law in distribution and use of free textbooks, and to observe and enforce the statutes, rules and regulations prescribed for the operation of schools. Such superintendents, principals and teachers shall hold the pupils to strict account for disorderly conduct at school, on the way to and from school, on the playgrounds, and during recess.

Miss. Code Ann. § 37-9-69 (emphasis added). This statute mandates that school personnel maintain appropriate control and discipline of students while the children are in their care. Furthermore, the State of Mississippi mandates compulsory school attendance for all children upon penalty of law. Miss. Code Ann. §37-13-91 (Supp. 1998). (3) Since the state requires all children to be enrolled in school, it only seems logical that the state should then require school personnel to use ordinary care in administering our public schools. (4) The teachers and administrators here are then protected by sovereign immunity if and only if they used ordinary care in controlling and disciplining their students. The issue of ordinary care is a fact question. The trial court, confronted with all the relevant facts, should then under our law, decide whether or not those responsible used ordinary care as required by the statute. If the trial judge concludes that they failed, neither they nor the school are immune from liability.

Prosecutorial Immunity - Making False Statements of Fact in Applying for Arrest Warrant

In a 1997 decision that may have a chilling effect on prosecutors’ personally attesting to facts in support of the issuance of arrest warrants, the Supreme Court in Kalina v. Fletcher, 139 L.Ed.2d 471 (1997), denied absolute prosecutorial immunity to a prosecutor who had personally attested to false statements of fact in an affidavit given in support of an application for an arrest warrant. The plaintiff in this case was arrested on suspicion of burglary, based on a Deputy District Attorney’s allegedly false statements in the sworn Certificate of Probable Cause for issuance of the arrest warrant.

Justice Stevens, speaking for the Court in a unanimous opinion, adhered to the functional test for determining the applicability of prosecutorial immunity. The Court held that a prosecutor acts as an advocate for the state, as opposed to performing the function of a complaining witness, when making statements of fact to support probable cause for the issuance of an arrest warrant, but the prosecutor may be held liable under Section 1983 for false statements of fact to which she personally attested.

In Imbler v. Pachtman, 424 U.S. 409 (1976), the Court held that a prosecutor who had acted within the scope of his duties in initiating and pursuing a criminal prosecution against an individual whose conviction was thereafter set aside in collateral proceedings was entitled to absolute prosecutorial immunity from a Section 1983 suit. The Court noted in Imbler that the prosecutor’s activities were "intimately associated with the judicial phase of the criminal process, and thus were functions to which the reasons for absolute immunity apply with full force," 424 U.S. at 430, but suggested that some of a prosecutor’s official activities might be beyond the limits of a prosecutor’s absolute immunity, such as those aspects of prosecutorial responsibility "that cast him in the role of an administrator or investigative officer rather than that of advocate." Id. at 430-31. In Malley v. Briggs, 475 U.S. 335 (1986), a police officer was denied prosecutorial immunity for presenting a complaint and supporting affidavit for arrest warrant. In the 1993 case of Buckley v. Fitzsimmons, 509 U.S. 259 (1993), the Court applied a functional test to determine prosecutorial immunity’s applicability, holding there that a prosecutor enjoys absolute prosecutorial immunity for those acts that are within the scope of the initiation and pursuit of a criminal
prosecution, but loses that immunity when she assumes the role of "administrator or investigative officer rather than that of advocate." Under *Buckley*, therefore, the function determines the immunity, regardless of the actor’s office.

The Court in *Kalina* declined to treat the prosecutor’s function any differently from that of the police officer in *Malley v. Briggs*, supra, simply because it was performed by a prosecutor as opposed to a police officer, and held that the prosecutor must be denied absolute immunity for her summarizing of evidence to support the burglary charge and for swearing to the truth or facts to establish probable cause for the issuance of an arrest warrant, a function the Court concluded was outside the prosecutor’s role as advocate.

While it may be an overstatement to suggest that *Kalina* may have a chilling effect on prosecutors in the administration of justice, an argument that did not persuade the Supreme Court, it will nonetheless have a chilling effect on prosecutors personally attesting to facts in support of an application for an arrest warrant, a practice in which the prosecutor performs the function of a complaining witness and moves beyond the limits of performing traditional functions of an advocate.

*Case-by-Case Determinations*

With the ministerial-discretionary distinction well in mind, you would think there is nothing but a mechanical test, a kind of no-brainer, for determining if and when a governmental official or employee will enjoy public official immunity for discretionary acts. The test isn’t always easy to apply. Our Court once said in *Marshall v. Chawla*, "it would be difficult to conceive of any official act that did not admit some discretion in the manner of its performance, even if it involved only the driving of a nail." In short, each case has to be decided on its particular facts and circumstances. The determination of whether a government official or employee will enjoy public official immunity in the event he or she has been negligent in acting or failing to act may at times be a difficult one. It will often depend on how clearly and specifically the law has established a particular duty, act or function as one involving mandatory or unambiguously designated action, as opposed to one which the performance of her lawful duties requires "personal deliberation, decision and judgment."

*Sovereign Immunity Distinguished*

One final point needs to be made on this subject of public official immunity, and that concerns sovereign immunity. Do not confuse the two, because they are legally, conceptually and historically distinct. In the historic case of *Pruett v. City of Rosedale*, the Court abolished the common law doctrine of Sovereign Immunity, but it emphasized:

> ...It is our opinion that abolishment of sovereign immunity does not apply to legislative, judicial and executive acts by individuals acting in their official capacity, or to similar situations of individuals acting in similar capacities in local governments, either county or municipal.

*Pruett* left intact and had no effect on the immunity granted to the legislature, judiciary and executive office and to "those public officers who are vested with discretionary authority." *Id.* at 1052.

*Local Government and Legislative Immunity: Bogan v. Scott-Harris*


*Bogan* extended legislative immunity’s cloak to local government officials against whom a trial court jury had returned substantial damage verdicts for eliminating an employee’s job through a budget-cutting measure. Immunity was upheld despite findings the officials had retaliated against the employee for engaging in constitutionally protected speech.
The Court had previously extended legislative immunity to regional legislators, and lower courts applied it to local legislators, but not until Bogan did the Court explicitly apply it to local municipal officials performing legislative functions. Lake Country Estates v. Tahoe Regional Planning Authority, 440 U.S. 391 (1979). Eight circuits have extended legislative immunity to local legislators performing traditional legislative functions. M. Ross, Sword & Shield Revisited - A Practical Approach to Section 1983, 516 n.31 (State and Local Government Law Section, ABA 1998), citing Atchison v. Raffiani, 708 F. 2d 96 (3rd Cir. 1983); Bruce v. Riddle, 631 F.2d 272 (4th Cir. 1980); Hernandez v. City of LaFayette, 643 F. 2d 1188 (5th Cir. 1980); Haskell v. Washington Township, 864 F. 2d 1266 (6th Cir. 1988); Reed v. Village of Shorewood, 704 F. 2d 943 (7th Cir. 1983); Gorman Towers, Inc. v. Bogoslavsky, 626 F. 2d 272 (8th Cir. 1980); Kuzinich v. County of Santa Clara, 689 F. 2d 1345 (9th Cir. 1982); Espanola Way Corp. v. Meyerson, 690 F. 2d 837 (11th Cir. 1982), cert. denied, 460 U. S. 1039 (1983). Moreover, Justice Marshall’s dissent eighteen years earlier in Lake Country, 440 U.S. at 407, left open the question of whether egregious "legislative" misconduct falls outside the scope of legislative immunity. Bogan answered both questions, holding city officials "absolutely immune from suit under Section 1983 for their legislative activities," Bogan, 140 L.Ed.2d at 88, even in the face of a jury’s finding that "constitutionally sheltered speech was a substantial or motivating factor" underlying their conduct. Id. at 85.

Facts of the Case

Janet Scott-Harris was an African-American serving as City Administrator and sole employee of the Health & Human Services Department of Fall River, Massachusetts. Her job was eliminated by an 8-2 vote of the city council. She allegedly exercised her First Amendment rights when she charged Dorothy Bitcliffe, another city employee serving under her supervision, with making repeated racial and ethnic slurs about her colleagues --remarks that Scott-Harris deemed offensive to blacks and those of French heritage. When Scott-Harris prepared the charges, Bitcliffe allegedly used "political connections" with other officials, including Council Vice-President Roderick, to get the punishment reduced to a 60-day suspension without pay. With the charges pending, the next fiscal year’s budget was prepared, and it included eliminating the department whose sole employee was Scott-Harris. Her section1983 suit charged the city, the entire city council and mayor with racial motivation and violation of First Amendment rights. City officials claimed their actions were legislative and protected by legislative immunity. The jury exonerated all defendants on the race discrimination charge, but held Bogan and Roderick liable for damages since "constitutionally sheltered speech was a substantial or motivating factor" underlying their conduct. After the federal district court denied Bogan and Roderick’s motions for judgment notwithstanding the verdict, the Second Circuit affirmed.

A unanimous Supreme Court, speaking through Justice Clarence Thomas, reversed and held that these two local government officials were entitled to absolute legislative immunity from liability for their legislative activities. Tracing the legislative immunity doctrine back to its roots in common law and reason, the Court held that "local legislators are entitled to absolute immunity from section 1983 liability for their legislative activities." Immunity attaches to all actions taken "in the sphere of legitimate legislative activity" and cannot be overcome by proof of discriminatory, unconstitutional or illegal motive or intent on the part of the official performing the legislative act.

Rationale for Extending Immunity

The Court reasoned that the actions of Council Vice-President Roderick in voting for the ordinance were "quintessentially legislative" and that Mayor Bogan’s actions in introducing the budget and signing the budget-cutting ordinance into law were "formally legislative" even though the Mayor was an executive official, since his actions were "integral steps in the legislative process." Id. at 89. Their legislative decision-making activities involved termination of a position and had "prospective implications that reach well beyond the particular occupant of the office." Id.
The ordinance "bore all of the hallmarks of traditional legislation" and "reflected a discretionary, policymaking decision implicating the budgetary priorities of the city and the services the city provides to its constituents." *Id.* The City Council was governing "in a field where legislators traditionally have power to act," and the challenged activities of the Mayor and Council Vice-President were "undoubtedly legislative." *Id.*

**Impact of Bogan on Local Government**

Local government officials performing legislative functions often ask if they have personal liability exposure for their official actions. Before *Bogan*, no clear cut answer could be given to such questions as whether a city or county official could be held liable to

- a disgruntled government employee whose position has fallen to the budget ax?
- a person aggrieved by the passage of a law, ordinance or legislative resolution?
- a trigger-happy constituent aggrieved over statements made by an official during performance of official duties?

*Bogan* minimizes liability exposure when these actions constitute "legitimate legislative activity."

**Political vs. Litigation Hazards**

At the grassroots level of government, lively debate energizes the decision-making process. That process has its hazards, but they should be political and not litigation hazards. Political reality, at two or four-year intervals, empowers registered voters of every municipal ward and county supervisor district to help the democratic process function responsively and to help remind elected officials that their office is a public trust. *Bogan* explicitly endorses this view.

*What is a "Legislative Act"?*

Local government officials performing legitimate legislative functions are now shielded from civil liability based on their actions, conduct and decisions that are integrally related to quintessentially and undoubtedly legislative functions. In this context, a "legislative" act is "an integral part of the deliberative and communicative processes by which [legislators] participate in..."

committee and [legislative] proceedings" as well as any act that relates to "the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of [the legislative body]." *Gravel v. United States*, 408 U.S. 606, 625 (1972). Justice Felix Frankfurter’s description of the parameters of legislative immunity illustrates its breadth, extending immunity to "the giving of a vote, to the making of a written report, and to every other act resulting from the nature, and in the execution, of the office; ...securing to every member exemption from prosecution, for everything said or done by him, as a representative, in the exercise of the functions of that office, without inquiring whether the exercise was regular according to the rules of the house, or irregular and against their rules." *Tenney v. Brandhove*, 341 U.S. 367, 374 (1951).

"*Sphere of Legitimate Legislative Activity*"

Based on federal, state and regional legislative immunity precedent, the following may be within the "sphere of legitimate legislative activity":

Balancing social needs and rights of different groups. *Gutierrez v. Municipal Court*, 838 F.2d 1031, 1046 (9th Cir. 1988).

Decision-making applicable to the community, as opposed to acts directed at one or a few targeted individuals. *Negron-Gaztambide v. Hernandez-Torres*, 35 F.2d 25 (1st Cir. 1994); *Bateson v. Geisse*, 857 F.2d 1300, 1304 (9th Cir. 1988).


Making a speech favoring or opposing pending legislation. See generally, *United States v. Johnson*.


Making a speech for or against pending legislation. See generally *United States v. Johnson*, supra.

Conducting hearings, receiving information for committee consideration from confidential sources, issuing subpoenas and examining witnesses as part of a legislative committee’s authorized investigative hearing process, including developing a legislative redistricting plan. *Holmes v. Farmer*, 475 A.2d 976 (R.I. 1984); *Gravel v. United States*, supra; *Romero-Barzelo v. Hernandez-Agosto*, 75 F.3d 23 (1st Cir. 1996).


Authorizing media coverage for open hearings. *Id*.

**Immunity Not a Panacea**

*Bogan* provides a cloak of immunity for legitimate legislative activities of local government officials, but it won’t make their political life a bed of roses. Insulating legislative conduct from judicial interference through section 1983 suits for damages, declaratory judgments and injunctions goes no further than the nature of the legislative act itself. It does not extend to administrative acts or performance of ministerial duties, and liability exposure continues for those slugs who seek to exploit public office for personal gain, as these examples illustrate:


Engaging in illegal or unconstitutional conduct by legislative staff or conduct beyond what is "essential to the deliberation" of the legislative body. See generally, *Hutchinson v. Proxmire*, *supra*, and *Doe v. McMillan*, *supra*.

Engaging in legislative acts of state legislators subject to criminal prosecution in federal court, *United States v. Gillock*, 445 U.S. 360 (1980), except that legislative immunity is available to state legislators as a defense to a prosecution under RICO. *Chappell v. Robbins*, 73 F.3d 918 (9th Cir. 1996).

**Waiver of Legislative Immunity**

Legislative immunity is a personal defense assertable by an official for actions taken "in the sphere of legitimate legislative activity." It doesn’t bar suits against local government entities for constitutional and federal statutory violations under 42 U.S.C. §1983, and may be waived by an "explicit and unequivocal renunciation" of the immunity protection, cf. *United States v. Helstoski*, *supra* at 491, or by intervening in an action to defend the constitutionality of a law, as in *May v. Cooperman*, 578 F. Supp. 1308 (D. N.J. 1984). There the Attorney General and Governor of New Jersey refused to defend a "one minute period of silence" statute against a constitutional attack. The Senate President and Speaker of the House then intervened and defended the statute throughout the litigation. The court held the statute unconstitutional and found these legislators had moved outside the sphere of legitimate legislative activity, waived their legislative immunity by undertaking the executive branch’s responsibility to defend the statute, and were liable for attorneys’ fees under 42 U.S.C. §1988.

**Extension to Local Government Level**

Almost two decades after *Lake Country*, the Court has explicitly extended legislative immunity to local government legislators. Like their brothers and sisters in federal, state and regional legislative bodies, local municipal and county officials exercise legislative powers for the public good. Precedent concerning the nature, scope and applicability of legislative immunity can be found in the wealth of case law involving immunity claims of federal, state and regional legislators. Regardless of the level of government at which they serve, their actions in the legislative sphere should not be inhibited by the chilling effect of Section 1983 suits or other forms of judicial interference, nor should their exercise of legislative discretion be distorted by fear of personal liability arising from legislative activities they are called on to perform.

At the local government level, the decision-making process would surely suffer if citizen-legislators -- often serving part-time -- had their time and energy sapped away by defending lawsuits that challenge the propriety, motivation, thoroughness and wisdom of legislative actions. *Bogan v. Scott-Harris* makes clear that the threat of civil liability in the absence of legislative immunity would likely deter our best and brightest citizens-public servants from making that bold leap into service on the local government level. The ultimate check and balance on legislative abuse accordingly should remain at the ballot box through the electoral process.

**Mississippi Tort Claims Act**

Miss. Code Ann. §11-46-17 provides for creation of the Tort Claims Fund over which the Mississippi Tort Claims Board shall provide oversight, the powers and duties of the board being spelled out in detail in §11-46-19.

Section 11-46-17(3) requires all political subdivisions after October 1, 1993, to

obtain such policy or policies of insurance, establish such self-insurance reserves, or provide a combination of such insurance and reserves as necessary to cover all risks of
Interlocal Cooperation Agreements

We live in a multiplicity of overlapping jurisdictions, with federal, state, county, municipal and special district governing authorities often serving the same constituents and in some respects concerning themselves with the same, similar or related governmental functions.

While forums on effective government, consolidation or regionalization proliferate, we should not bypass a very effective statutory tool that is specifically designed to enable multiple jurisdictions to combine resources, efforts and functions in order to achieve greater efficiency in the delivery of services—the Interlocal Cooperation Agreement.


In a nutshell, the primary purpose of Interlocal Cooperation Agreements is to enable two governmental entities, often a county and a municipality or several counties and municipalities or other local government units, to perform functions or engage in governmental activities which can more efficiently and economically be performed by several entities pooling their resources than by a single governmental entity. There are a number of innovative uses of Interlocal Cooperation Agreements, many of which we have learned about from neighboring states and many of which have been the product of innovative thinking on the part of progressive county officials.

For example, Interlocal Cooperation Agreements have been approved by the Attorney General of the State of Mississippi in the following circumstances:

- Between a city and county for fire protection;
- Between a county, city, community college and department of economic and community development for construction and operation of a business incubator and vocational training center;
- For a multi-jurisdictional and jointly maintained park or recreational facility;
- For a joint narcotics task force, cooperative drug law enforcement or city-county metro narcotics unit;
- Between a city and county for jailing of prisoners;
- Between cities and a county for the joint use and maintenance of a "jaws of life";
- Between a city and county for joint road repair;
- Between a city and county for cooperative civil defense, ambulance service and jail facilities;
- And for such other joint and cooperative efforts as a joint water treatment facility, cooperative efforts in wastewater testing, use of a city landfill, school lunch purchasing consortium, establishing an alternative school and a cooperative street naming program.

Pooling of Scant Resources

Interlocal cooperation agreements should be viewed as a good alternative to traditional approaches in meeting citizens' demands for local government services in an era of declining tax bases, declining federal dollars on the local level and public demands to avoid duplication of expenditures. In addition to the above areas of governmental service which have been the subject of interlocal agreements in Mississippi, other states have
utilized interlocal cooperation agreements to facilitate a sharing of the funding and operation as between cities, counties and other local government units in the areas of recreation, library services, elections and election practices, including utilization of voting machines, registration updates and computerization of voter registration information, disaster preparedness and coordination of emergency response services, housing projects, particularly through public/private partnerships involving municipal and county government and other special government agencies, and emergency weather radar systems.

**Careful Drafting Essential**

The Board of Supervisors should make sure that its attorney either drafts or at least reviews and makes necessary revisions before a proposed interlocal cooperation agreement is finally adopted, to make sure that the statutory language authorizing the agreement and the various entities joining it is tracked to make it clear that the action proposed to be taken is indeed statutorily authorized so as to avoid jurisdictional and other legal challenges later on, and to make sure that all elements of the agreement are identified and clarified, including insurance coverage, force majeure (act of God) clauses, and other obligations imposed on the parties to the agreement.

**Typical Reasons for Disapproval**

A review of AG Opinions disapproving proposed Interlocal Cooperation Agreements reveals that most disapprovals are based upon the submission not including appropriate resolutions evidencing approval spread upon the minutes of the respective governing bodies; local government officials other than the "governing authorities" signing the actual agreement, omission of specific statutory authority under which each of the respective governing authorities may exercise the powers necessary to fulfill the terms of the agreement, failure to designate a treasurer-disbursing officer for one of the local governmental units to receive, disburse and account for joint funds, failure to clarify that purchase, identification and disposal of personal property will comply with state public purchasing laws and laws regarding disposition of publicly owned real and personal property, and similar omissions of items specified in the checklist provided in §17-13-9.

The statutory requirements for Interlocal Cooperation Agreements are set forth in §17-13-9. Such an agreement must specify:

- Its duration;
- Its purpose;
- The precise organization, composition, nature and powers of any separate legal or administrative entity created by the agreement, along with a specific citation of statutory authority vested in each of the local government units joining in the agreement;
- The manner of financing, staffing and supplying the joint or cooperative undertaking and of establishing and maintaining a budget therefor, with the treasurer or disbursing officer of one of the local governmental units to be designated to receive, disburse and account for all funds of the joint undertaking as a part of the duties of such officer;
- The permissible method to be employed in accomplishing the partial or complete termination or amendment of the agreement and for disposing of property upon such termination or amendment;
- The provision for administration, through a joint board or other means, of the joint or cooperative undertaking in the event the agreement does not establish a separate legal entity to conduct the undertaking;
- The manner of acquiring, holding and disposing of real and personal property used in the undertaking in the event the agreement does not establish a separate legal entity to conduct the undertaking;
- Any other necessary and proper matters.

**Procedure for Interlocal Cooperation Agreement Approval**
As a condition precedent to the Interlocal Cooperation Agreement becoming effective and enforceable, it must first be submitted to the Attorney General of the State of Mississippi who "shall determine whether the agreement is in proper form and compatible with the laws of this state." §17-13-11. The agreement must cite the specific statutory authority under which each of the local governing units involved may exercise the powers necessary to fulfill the terms of the joint agreement. The failure of the Attorney General to disapprove an agreement within sixty (60) days of its submission shall constitute approval thereof. §17-13-11. Once the agreement has been approved by the Attorney General, before it is in force, it must be filed with the Chancery Clerk of each of the counties wherein a participating local government unit is located and with the Secretary of State. Both the Chancery Clerk and the Secretary of State are required to preserve such Interlocal Cooperation Agreements as public records and index and docket the same separate and apart from all other records in their offices. §17-13-11 (3).

As noted above, the Attorney General's office has approved many Interlocal Cooperation Agreements pursuant to the Interlocal Cooperation Act of 1974, as amended.

· AG Op. No. 79-2027 to Young, March 2, 1979, approved an Interlocal Cooperation Agreement between a city and county for construction of a recreational building to be known as a community center, with the building to be held partly between the parties for the use and benefit of citizens, with any disposal thereof to be based on the joint amount of monies pro rata as invested by the respective governmental units.

· AG Op. No. 85-117 to Torrey, May 28, 1985, approved an Interlocal Cooperation Agreement between a county and the Federal Highway Administration by which the Federal Highway Administration will pay for certain road construction and the County will fund all construction contract costs relative to water line relocation, with a water association joining in the undertaking by separate agreement since it is not a government but a private, non-profit corporation.

· AG Op. No. 87-563 to Moss, October 22, 1987, approved an Interlocal Cooperation Agreement between a county and city relating to general use of the park by both city and county residents, with the exception of a hold harmless provision.

· AG Op. No. 87-188 to Walters, May 15, 1987, approved an Interlocal Cooperation Agreement between a county and university relating to use of a building for public activities including use as a voting precinct, with the exception that the hold harmless clause contained in the agreement was deemed against public policy.

· AG Op. to Forest, November 30, 1988, approved an Interlocal Cooperation Agreement between a municipality and county Board of Supervisors providing for a cooperative law enforcement effort.

· AG Op. No. 88-682 to Mullins, August 24, 1988, approved an Interlocal Cooperation Agreement between a county and city providing for cooperative effort in the provision of recreational services.

· AG Op. No. 88-629 to Richardson, August 2, 1988, approved an Interlocal Cooperation Agreement providing for the establishment of a multi-entity drug task force, with the provision that the standards and procedures for the purchase, identification and disposal of personal property and the disposition thereof comply with state laws concerning such activity, including state purchasing laws and laws regarding disposition of real and personal property, and that the handling and disposition of seized and forfeited property be accomplished in accordance with the Uniform Controlled Substances Law.

· AG Op. No. 88-653 to Harrison, August 24, 1988, approved an Interlocal Cooperation Agreement providing for the creation of the Pearl River Basin Narcotics Task Force.

· AG Op. No. 88-665 to Beasley, August 24, 1988, approved an Interlocal Cooperation Agreement providing for a Joint Task Force for the enforcement of the Controlled Substances Law.

· AG Op. No. 88-563 to Davis, August 2, 1988, approved an Interlocal Cooperation Agreement for a multi-jurisdictional drug enforcement program, subject to the agreement being amended to provide for the designation of a treasurer/disbursing officer for one of the local governmental units for the purposes of receiving, disbursing...
and accounting for the joint funds of the undertaking, and subject to the standards and procedures for the purchase, identification and disposal of personal property and disposition thereof complying with state purchasing laws and laws regarding the disposition of real and personal property and, finally, subject to the handling and disposition of seized and forfeited property being accomplished in accordance with the Uniform Controlled Substances Law.

· AG Op. No. 88-421 to Griffith, August 1, 1988, approved an Interlocal Cooperation Agreement between a county and school district for the joint maintenance of school property.


· AG Op. No. 89-605 to Gant, August 11, 1989, approved an Interlocal Cooperation Agreement for establishment of the Northeast Narcotics Task Force, with statements of clarification.

· AG Op. No. 88-965 to Ellis, December 20, 1988, approved Interlocal Cooperation Agreements between a city and county relating to collection of taxes, fire protection and ambulance services.

· AG Op. No. 88-964 to Barry, December 20, 1988, approved an Interlocal Cooperation Agreement between a town and county regarding the collection of ad valorem taxes, subject to the requirement that all properties sold for taxes by the county for the city must be sold in accordance with the applicable statutes governing the sales of real and/or personal property for city taxes.

· AG Op. No. 89-564 to Thaxton, August 21, 1989, approved an Interlocal Cooperation Agreement between a county and town providing for joint efforts relating to solid waste collection disposal.

· AG Op. No. 88-931 to Haque, December 15, 1988, approved an Interlocal Cooperation Agreement between a city and county providing for a cooperative effort in the training and use of firearms by county law enforcement officers.

A copy of an Interlocal Cooperation Agreement made under this law is required to be filed with the State Department of Audit for audit purposes no later than sixty (60) days after it is in force. §17-13-11(4).

Road and Bridge Maintenance, Repair and
Construction Work on Private Property;
School Bus Turnarounds; Drainage; and Abandonment

The Board of Supervisors has authority to work, construct, reconstruct and maintain public roads and bridges and to raise funds for such work by ad valorem taxes, bond issues or both. Miss. Code Ann. §65-15-1 (Supp. 1989).

The principal statutes relating to public roads and streets are set forth in Miss. Code Ann. §§65-7-1, et seq. (1972). The statutory provisions pertaining to state aid roads in counties are set forth in Miss. Code Ann. §§65-9-1, et seq. (Supp. 1985), a detailed discussion of which is beyond the scope of this presentation.

Public Roads

The following is a brief summary of Mississippi law on what constitutes a "public" road which may lawfully be repaired, constructed or maintained by a county, as opposed to a "private" road, with respect to which no county funds, labor or equipment may be utilized or expended.

The classic definition of a public road is set forth in the 1918 decision of the Mississippi Supreme Court in Gulf and S.I.R. Co. v. Adkinson, 117 Miss. 118, 77 So. 954, 955 (1918), cited in Myers v. Blair, 617 So. 2d 969 (Miss. 1992):

http://www.griffithlaw.net/research.database/uploads/957187922_file_finalboardattorney... 10/16/2014
A highway is a road or way upon which all persons have the right to travel at pleasure. It is the right of all persons to travel upon a road, and not merely their traveling upon it, that makes it a public road or highway. This right may be acquired in various ways, one of which is by prescription; but in order for it to be so acquired, the road must be habitually used by the public in general for a period of ten years; and such user must be accompanied by evidence, other than mere travel thereon, of a claim by the public of the right so to do. The only evidence of such claim here is that the road was formerly worked by the public road hands of that vicinity, but when, for how long a period, and by what authority, does not appear, so that it is of no value. For aught that appears to the contrary, the travel over the road is by the sufferance or permission of the owners of the land over which it passes.

A public road may be created by prescription or by dedication, as well as by being laid out and established in accordance with statutory provisions, where the general public or several freeholders or householders of the county are interested in the road, and where the public interest or convenience requires a road to be established. A settlement or a neighborhood road may become a public road by prescription from user for the period required by law, generally the ten (10) year statute of limitations applicable to adverse possession.

A public road may be established by dedication by the landowner donating the right-of-way and where the public authorities accept the dedication by taking over and maintaining such a road at public expense, without having followed the statutory proceeding.

George County By and Through Bd. of Sup'rs v. Davis, 721 So. 2d 1101 (Miss. 1998) was an action between the George County Board of Supervisors and the State to determine whether certain secondary roads being maintained by the county were private or public. The action arose on the heels of a complaint to the Audit Department that the county supervisors were paving private driveways and roads. In response to the Audit Department's findings that a number of these roads were private, the board members had taken Landowners' Affidavits, Prescriptive Road Affidavits, and photographs showing that these roads had been maintained by the county for a great number of years. The county also filed the instant civil action for declaratory and injunctive relief. The chancery court denied the county's motion for summary judgment and found that certain of the subject roads were private, and the Mississippi Supreme Court upheld this finding on appeal, holding that it is not enough for a Board of Supervisors to have maintained a road for over ten years and that a road could not be made a public road via the affidavit procedure used by George County, and that such affidavits "submitted in support of the Board's contention that the roads possessed the required claim of public use and necessity are not exclusive proof, but are only one factor to be taken into consideration by the chancellor in making his decision." Id. at 1107.

The county argued on appeal that the Mississippi Constitution, statutes and supporting case law afforded the Board of Supervisors broad authority and jurisdiction over its public, not private, roads, and that the board had broad discretion when dealing with roads and when acting on petitions seeking a declaration that roads have become public. The Mississippi Supreme Court did not take issue with this position, noting that "[j]udicial review of the Board of Supervisor's decision concerning whether the public interest or convenience requires the establishment of a new road is limited to whether there was any reasonable basis for the board's action," citing Board of Supervisors Tishomingo County v. Blissitt, 200 Miss. 645, 657, 27 So.2d 678, 680-81 (1946). The Court then noted that the chancellor's review of the Board's actions was limited to a determination of whether the Board had any reasonable basis for acting, and that the task before the Court in this appeal was to determine whether the chancellor abused his discretion in determining the public or private status of the roads in question. "Absent an abuse of discretion, this Court will uphold the decision of the chancellor. This Court will not disturb the factual findings of the chancellor unless said factual findings are manifestly wrong or clearly erroneous."

Affirming the chancery court, the Mississippi Supreme Court set forth a detailed analysis of the caselaw, including an interesting commentary on former State Auditor Ray Mabus’ 1983 memorandum to county boards of supervisors on this subject:

This Court has stated that a public road may be created by prescription, dedication, or pursuant to statutory provisions. Coleman v. Shipp, 223 Miss. 516, 530, 78 So.2d 778, 784 (1955) (citing
Armstrong v. Itawamba County, 195 Miss. 802, 16 So.2d 752, 757-58 (1944); Miss.Code Ann. § 65-7-57 (1991). The chancellor’s ruling separated the roads in question into two categories. The first category included those roads that were determined to be public by virtue of the fact that they were petition roads and established as contemplated by § 65-7-57. The second category included those roads that were alleged to have been established by dedication or prescription. The final results of the chancellor's ruling and supplemental ruling have been previously stated in the Statement of Facts.

The Board maintains that in the late 1980's, the George County Board of Supervisors was advised by then State Auditor Ray Mabus, and then District Attorney Mike Moore that in those instances where a road had not been dedicated or petitioned, the county could gain the road by prescription or affidavit. Specifically, "[t]he County was told that after years of the County maintaining a road and there wasn't any record of it being dedicated or petitioned then the supervisor could gain the road by the affidavit procedure [whereby] the supervisors gets [sic] affidavits from the landowners and surrounding community citizens who have knowledge of the road and knows that the road has existed and that the county has maintained it for at least ten (10) years." Therefore, the Board alleges that "this resolution set a custom as to which counties declared roads public or private." Furthermore, the Board maintains that "[a]t times, this was the only criteria the supervisors used in their determination."

We reject the Board’s argument concerning this "resolution." Even though this may have been the understanding of incoming supervisors, there is no proof in the record that the Board was actually advised of the affidavit procedure. In its Motion for New Trial, the Board relies upon an Attorney General's Opinion dated April 24, 1984. However, this Opinion is void of any guidance concerning the affidavit procedure. Conversely, the Opinion reiterates the established case law in Mississippi; in order for a road to become public by prescription the road must be habitually used by the public in general for a period of ten years, and such use must be accompanied by a claim by the public of the right so to do.

In order for the roads to be public by prescription, all the required elements must be present. This Court has previously identified the required elements.

The county claims the road public by prescription and, therefore, has the burden of proving, as does an individual claimant, that the use is:

(1) open, notorious and visible;
(2) hostile;
(3) under claim of ownership;
(4) exclusive;
(5) peaceful; and
(6) continuous and uninterrupted for ten years.

Myers v. Blair, 611 So.2d 969, 971 (Miss.1992) (citations omitted).

Furthermore, this Court has consistently held that the Board of Supervisors can only act through its minutes. Martin v. Newell, 198 Miss. 809, 23 So.2d 796 (1945); Noxubee County v. Long, 141 Miss. 72, 82, 106 So. 83, 86 (1925); Smith v. Board of Supervisors, 124 Miss. 36, 86 So. 707 (1921).

.... [I]t is error for the Board to rely solely on the fact that it has maintained the roads for more than ten (10) years. If the roads do not have all the required elements of prescription and have not been properly acted upon by the Board of Supervisors, under established law in this state, they can only be considered private roads. The affidavits submitted in support of the Board's contention that the roads
possessed the required claim of public use and necessity are not exclusive proof, but are only one factor to be taken into consideration by the chancellor in making his decision.

In the case at bar, the chancellor's decision was based upon numerous factors such as the Board minutes, the State Auditor reports, testimony from Board members, the public and the State Auditors, as well as on-site inspection of each of the roads in question. Therefore, in accordance with this Court's limited standard of review in regards to the chancellor's decision and further recognizing the time and effort exhibited by the chancellor in this case, the Board must show that the chancellor manifestly erred in his decision. Id. at 1106-08.

Despite the Board’s contention on appeal that the chancellor's decision was arbitrary and capricious in regard to certain roads he deemed as private but the Board had declared on its minutes to be public, the Mississippi Supreme Court concluded that "review of the record reveals that there was sufficient evidence for the chancellor's rulings and that his decisions were not manifestly in error." Id. at 1110.

Public Road Easement

The owner of property may also grant to certain persons or to the public the easement of a highway over his land, which does not necessarily have to be technically by a deed, but may be done by "those acts which unequivocally manifest an intention that the community shall have and enjoy a highway on his private property. When the public accepts his offer there has been consummated that which is of equal import with a contract or grant, there has been accomplished what is expressed by the term "dedication." Armstrong v. Itawamba Co., 16 So. 2d 752, 757 (Miss. 1944).

Public Acceptance

Public acceptance of a landowner's offer to grant a public easement of a highway over his land may be shown in two ways: first, by a formal act of the proper authority competent to speak and act for the public, or second, it may be implied from the circumstances, such as user, as the Court noted in Armstrong v. Itawamba Co., supra, "continued user when taken in connection with the working of the road for nearly twenty years at public expense should be deemed to have been a sufficient acceptance."

It is also clear that a public road or highway "may be established by immemorial usage." Armstrong v. Itawamba Co., supra.

In summary, a road or street may qualify as a public road, street or highway under any of these recognized definitions:

· by being used continuously and maintained by public authorities as a public way for a period of ten years or longer

· by being formally dedicated as a public way by the owner by formal plat or map or otherwise

· by being created, established or laid out as a public road or highway according to statutory procedure by any public authority

Southern Life & Health Ins. Co. v. Kemp, 300 So. 2d 782, at 783-84 (Miss. 1974).
**Private Roadway**

In *Saxon v. Harvey*, 190 So. 2d 901, 906 (Miss. 1966), the Mississippi Supreme Court held that a road was a private roadway and not a public road where it departed from the old public road some 200 to 300 yards and formed a driveway to an individual's home and a pond in his pasture.

**Cul de Sac**

In *Quin v. Northside Baptist Church*, 105 So. 2d 151, 153 (Miss. 1958), the Mississippi Supreme Court held that a passageway which did not connect any roads or streets and was a cul de sac, was a private road and not a public road, where the county never spent a penny in the upkeep or maintenance of the passageway, such work as was done upon the road was done by those who resided along or near it, the passageway never appeared upon any map or plat or public record of the county, there had been no attempt by the landowner to dedicate a public highway, nor had there been any attempt by the county to accept or create one, and the county had not exercised any jurisdiction whatever over the passageway.

Many of the county-maintained roads in counties throughout the State of Mississippi are public roads which have been established by prescription or by continued user, rather than through the formal dedication process. In other words, many counties in our state have exercised jurisdiction over such roads, legally and properly, for so many years, including the working of the roads at public expense, so as to create the status of the public road. Even though these roads may not have been laid out and established in accordance with statutory provisions, they are nevertheless "public roads" created by prescription, dedication or continued user, despite the absence of a deed or conveyance from the landowner to the county. This applies equally to a settlement road, a neighborhood road, or a community road which the landowner has for years allowed the public to use generally and has allowed the county at public expense to maintain and work.

**Official Record of County Road System**

In 1998, the Mississippi Legislature enacted Senate Bill 2995, which amended Miss. Code Ann. § 65-7-1 (1998), now entitled "Jurisdiction over county roads; width of roads; drainage; inclusion of new roads in official records," and added a new statutory provision, Miss. Code Ann. §65-7-4 (1998), entitled "County road systems; official maps; register; hearings; additions, deletions, and changes." S.B. 2995 may have been motivated by the best of legislative intentions, but it placed significant requirements on every county in this state. Indeed, long before most county boards were giving more than passing thought to Y2K glitches and the vague concerns over cyber-headaches as the next millennium approached, this legislative response to the Mississippi Supreme Court's holding in *George County* brought its own little surprise: a July 1, 2000 deadline and a specific means for counties to establish or accept roads as part of the county road system.

One of the additional clauses engrafted onto § 65-7-1 provides as follows:

> (3) From and after July 1, 2000, no road shall be included as a part of the county road system until and unless the board of supervisors, by appropriate action spread on its minutes, has established or accepted such road and caused the road to be included in the official record of the county road system as provided in Section 65-7-4.

New §65-7-4 mandates the establishment of an official record of the county road system, complete with requirements that counties adopt official maps showing all public roads on the county road system, adopt and annually revise a county road system register with what amounts to a dossier of the physical features as well as all action and changes concerning each public road, maintain a prospective history of official board action concerning roads after the July 1, 2000 deadline, provide notice and public hearings on the content of the official map and the county road system registry,

and reflect by appropriate orders or resolutions spread upon the board minutes all future additions to, deletions from or changes in the public road system. This new statute provides as follows:
(1) On or before July 1, 2000, the board of supervisors of each county shall prepare and adopt an official map designating and delineating all public roads on the county road system. Changes to the county road system shall be recorded on this map as soon as is reasonably possible. The map, as it is periodically revised, shall be kept on file in the office of the clerk of the board of supervisors where it shall be available for public inspection.

(2) On or before July 1, 2000, the board of supervisors of each county shall prepare and adopt a county road system register in which shall be entered:

(a) The number and name of each public road on the county road system.

(b) A general reference to the terminal points and course of each such road.

(c) A memorandum of every proceeding in reference to each such road, with the date of such proceeding, and the page and volume of the minute book of the board of supervisors where it is recorded; however, reference to proceedings before July 1, 2000, shall not be required.

(3) Before the initial adoption of the official map and the county road system register, the board of supervisors shall hold a public hearing on the content of the official map and the county road system registry and shall publish notice of the hearing at least one (1) time, not less than two (2) weeks before the date of the hearing, in a newspaper having general circulation in the county.

(4) All subsequent proceedings and changes to the county road system shall be recorded in the county road system register as soon as is reasonably possible. The county road system register, as it is periodically revised, shall be kept on file in the office of the clerk of the board of supervisors where it shall be available for public inspection.

(5) From and after July 1, 2000, the official record of the county road system shall consist of an official map, as provided for in subsection (1) of this section, and the county road system register, as provided for in subsection (2) of this section. The county road system register shall have priority in case of conflict between the register and the official map. The minutes of the board of supervisors containing proceedings with respect to county roads and the county road system shall serve as the official record until such proceedings are recorded on the official map and in the county road system register. The official record of the county road system, at a minimum, shall be revised and updated on or before July 1 of each year.

(6) It is the intention of the Legislature that the initial official record of the county road system prepared and adopted in accordance with this section shall include all public roads that the board of supervisors determines, consistent with fact, as of July 1, 2000, or such date the initial official record is adopted, are laid out and open according to law. From and after July 1, 2000, no road shall be added or deleted from the county road system or otherwise changed except by order or other appropriate action of the board of supervisors and such action shall be recorded in the minutes of the board. All additions, deletions or changes to the county road system shall be recorded in the official record of the county road system as provided for in this section.

_manual on uniform traffic control devices (mutcd)_

In addition to the statutory standards and broad guidelines for county road and bridge construction and maintenance, counties must now adhere to the federal guidelines set forth in the Manual on Uniform Traffic Control Devices, known by its acronym, MUTCD. To date, two decisions interpreting and applying the MUTCD to county roads have been handed down by the Mississippi Supreme Court.

In Jones v. Panola County, 725 So. 2d 774 (Miss. 1998), rhg denied Aug. 6, 1998, a personal injury action was brought against a county by a truck driver who had driven down a closed gravel road at 35 m.p.h. at twilight with his lights off and, while looking off to the side of the winding gravel road at an animal in the bushes, crashed into
a gravel barrier placed in front of a collapsed bridge. The driver intended to offer into evidence portions of the Manual on Uniform Traffic Control Devices (MUTCD) in an attempt to prove the applicable standard of care regarding placement of warning signs and barricades on public roads and to show that the county had not followed required standards. The trial court granted the county’s motion in limine to preclude the introduction of the Manual with respect to a gravel road. From a defense verdict, the driver appealed, contending that it was error to prohibit the offering of the MUTCD. The Mississippi Supreme Court agreed and reversed, holding that the "federal guidelines" applied to rural county gravel roads.

The MUTCD is a national publication promulgated by the Federal Highway Administration and is the "national standard for all traffic control devices installed on any street, highway, or bicycle trail open to public travel." The States may draft their own manual, so long as it is in " substantial conformance" with the national MUTCD [citing Fritz v. Howard Township , 570 N.W.2d 240, 243 (S.D. 1997)].

The Court relied on Miss. Code Ann. § 63-3-305 (1996), which provides that:

Local authorities in their respective jurisdictions shall place and maintain such traffic control devices upon highways under their jurisdiction as they may deem necessary to indicate and to carry out the provisions of this chapter or provisions of local traffic ordinances or to regulate, warn, or guide traffic. All such traffic-control devices hereafter erected shall conform to the state manual and specifications.

Local authorities in exercising those functions referred to in the preceding paragraph shall be subject to the direction and control of the state highway commission.

According to the Court, this statute provided that traffic control devices on Mississippi "highways" shall conform to the "state manual and specifications." The "state manual" referred to in § 63-5-305 is in turn discussed in Miss. Code Ann. § 63-3-301 (1996):

The commissioner of public safety shall adopt a manual and specifications for a uniform system of traffic-control devices consistent with the provisions of this chapter for use upon highways within this state. Such uniform system shall correlate with and so far as possible conform to the system then current as approved by the American Association of State Highway Officials.

While the statute did not mention the MUTCD, it was not disputed that the MUTCD is the system "approved by the American Association of State Highway Officials." Evaluating cases from other jurisdictions involving the "MUTCD," the Court concluded that the Manual should not have been excluded from evidence, stating:

Numerous courts have utilized this manual as the standard for determining the duty owed by a governmental entity in cases such as the one at bar, and, in most cases, the applicability of the provisions is not even disputed. ... As noted by the Supreme Court of South Dakota in Fritz , 570 N.W. 2d at 243, 23 Code of Federal Regulations § 655.603 provides that state manuals regulating all public streets, including "bicycle trails" must be in substantial conformance with the MUTCD.

The Court also rejected the county’s contention that counties of this State are not subject to the official standards set forth in the MUTCD when they are "maintaining and/or temporarily closing secondary gravel roads which are solely within their jurisdiction and are not state, state-aid or federal-aid highways" by virtue of Miss Code Ann. § 65-7-1 through 65-7-121, reasoning that

The County's arguments are without merit. The provisions of 65-7-1, et seq. are clearly applicable to the board of supervisors, but there is nothing in these provisions which indicates that they operate to the exclusion of the requirements of the state manual. The County acknowledges the broad definition of "street or highway" in the Mississippi Code, but it argues that an application of the definition to a county gravel road would be "unreasonable." Specifically, the County argues that:

Title 63, Chapter 3, Rules of the Road, contains a very expansive definition of "street or highway" which Jones asserts as authority for his contention that counties must comply...
with the Manual on Uniform Traffic Control Devices in maintaining gravel roads like the one in question. ... Jones thus urges this Court to interpret this onerous design standard to each and every mile of public road within a county's jurisdiction, not just state, state-aid, and federal-aid highways which are controlled and maintained by them with the express approval of the Commissioner of Public Safety ... but (also) gravel roads like the secondary road at issue.

It is clear, however, that the statutory definition of "street or highway" was in fact intended to encompass the roads and streets other than federal-aid and state-aid highways, and the definition specifically states that it includes "streets of municipalities." There can be no interpretation of the statutory definition "way or place of whatever nature open to the use of the public for the purpose of vehicle travel" which would exclude Sardis Landfill Road. Further, the language of the MUTCD extending the provisions thereof to all streets including "bicycle trails" leaves little room for doubt in the present case. This Court thus concludes that the trial judge erred in disallowing the evidence of the MUTCD.

The Court remanded with directions that the MUTCD provisions could be considered by a jury as evidence of negligence, "although not as conclusive evidence thereof," noting that

[i]n the view of this Court, the jury should be able to consider the federal guidelines in the context of their own common sense, judgment, and experience in driving local roads, but a verdict should not be granted to Jones based on the guidelines alone.

Following the Court’s ruling in Panola County was another case involving admissibility of the MUTCD, Jones v. Miss. Dept. of Transp., __ So. 2d __ (Miss. 1999). The Mississippi Supreme Court held in this case that a county's failure to place traffic control devices on a road as required by the MUTCD was a discretionary act, but that the county (and the MDOT, its co-Defendant) had a duty to warn motorists of a dangerous condition of which it had knowledge. In Jones, a driver and passenger were injured in an single-vehicle accident while driving on Bowden Lost Lake Road in Tunica County, when they approached a T-intersection and crashed into a ditch. No STOP sign or traffic control devices were in place on the road or at any point before the intersection. Facing claims of negligent failure to erect traffic control signs warning of the "T" intersection and/or a STOP sign, the county and MDOT filed Rule 12(b)(6) motions to dismiss, and the trial court found that the placement of traffic control signs was a discretionary function and as such the defendants were immune from suit pursuant to the Mississippi Tort Claims Act’s discretionary acts exemption, Miss. Code Ann. § 11-46-9 (d)(Supp. 1998).

On appeal, the plaintiffs/appellants argued that placement of traffic control devices was statutorily mandated and not covered under the discretionary acts exemption of the MTCA.

They claimed that Miss. Code Ann. §§ 63-3-301, 63-3-303, 63-3-305, 63-3-805, 65-7-15, and specified provisions of the Manual on Uniform Traffic Control Devices ("MUTCD"), read in pari materia, amount to a mandatory requirement for the placement of traffic control signs on Bowden Lost Lake Road, but the Court disagreed, noting that these provisions did not support a finding that the placement of traffic control signs on Bowden Lost Lake Road was mandatory.

[N]either § 63-3-301, § 63-3-303, § 63-3-305, nor the MUTCD mandate the placement of traffic control devices under the facts of this case. Section 63-3-301 directs the commissioner of public safety to adopt a manual and specifications for the uniform placement of traffic control signs and devices, it does not, however, mandate where traffic control signs and devices are to be placed.

Although Mississippi has not formally adopted such a manual, this Court recognized in Jones v. Panola County, 725 So. 2d 774, 777-78 (¶¶9, 12-13) (Miss. 1998), that the MUTCD was the manual to be used in conformity with the statute.

Sections 63-3-303 and 63-3-305 direct the commissioner of public safety and the state highway commission and, when applicable, local authorities to refer to "the manual" for guidance on the placement of traffic control devices. However, §§63-3-303 and 63-3-305 both contain language
indicating that the placement of traffic control signs or devices is dependant upon the discretion of the responsible entity. ...

Jones and the Stills claim that the MUTCD mandates placement of the traffic control devices. The MUTCD provisions cited by Jones and the Stills list circumstances which may warrant the placement of the STOP sign and set out the intended use for the "T" symbol sign. The provisions cited in no way mandate the placement of either a STOP sign or the "T" symbol sign. ...[T]he placement of traffic control devices is in the discretion of the responsible entity.

Turning to the next issue of whether a governmental entity had a duty to warn of dangerous conditions of which it has notice, the Court noted that the subject accident occurred prior to the 1996 amendment to § 11-46-9 (1) providing immunity for claims:

(w) Arising out of the absence, condition, malfunction or removal by third parties of any sign, signal, warning device, illumination device, guardrail or median barrier, unless the absence, condition, malfunction or removal is not corrected by the governmental entity responsible for its maintenance within a reasonable time after actual or constructive notice;

Even though §11-46-9 (1)(w) was not applicable to this action, according to the Court, "it was an extension of an exemption subsumed in § 11-46-9 (d), as opposed to the establishment of a new exemption." Moreover, the Court reasoned, even before this statute was enacted a governmental entity had a duty to warn of a dangerous condition of which it has notice, citing Coplin v. Francis, 631 So. 2d 752, 755 (1994)(holding that even where a government employee's actions are deemed to be discretionary, rather than ministerial, the question may remain as to whether the public was afforded adequate warnings of the dangerous condition.)

The Court was thus faced with a clearly discretionary act by a governmental entity, and then turned to the language of the MTCA, parsing the discretionary acts exemption in a way that superimposed an added requirement that ordinary care be exercised by the governmental actor "in order to raise the statutory shield," citing § 11-46-9(1)(b):

(1) A governmental entity and its employees acting within the course and scope of their employment or duties shall not be liable for any claim:

....

(b) Arising out of any act or omission of an employee of a governmental entity exercising ordinary care in reliance upon, or in the execution or performance of, or in the failure to execute or perform, a statute, ordinance or regulation, whether or not the statute, ordinance or regulation be valid;

...Under this statute, as long as ordinary care is used while performing a statutory duty, immunity exists. But when the state actor fails to use ordinary care in executing or performing or failing to execute or perform an act mandated by statute, there is no shield of immunity.

...Additionally, the decision to build a road and the initial placement of traffic control devices is of the planning nature, involving public policy considerations. Bailey Drainage Dist. v. Stark, 526 So. 2d 678, 681 n.2 (Fla. 1988). However, once the road is built and the responsible entity becomes aware of a dangerous condition in connection with the road, the duty becomes one of maintenance. Id. Therefore, MDOT and Tunica County were required to use due care in the exercise of their discretion.

Here, Jones and the Stills claim that MDOT and Tunica County negligently failed to warn of the danger created by the reopening of Irwin Place Road. Jones and the Stills also claim that MDOT and Tunica County had knowledge of the dangerous intersection. Given these factual allegations, it was reversible error for the trial court to grant MDOT's and Tunica County's motion to dismiss.
Private Roads

On the other hand, if a road is one which forms a driveway to an individual's home or property, and departs from any recognized public roadway, and has never been kept up or maintained at public expense and could be closed entirely to public vehicular traffic if the landowner so chose, then it is a private road and cannot legally be maintained or graveled by the county at public expense. See generally Coleman v. Ship, 78 So. 2d 778, 784 (Miss. 1955).

Finally, in Myers v. Blair, supra, the Mississippi Supreme Court, relying upon the fundamental principle that the minutes of the Board of Supervisors are the exclusive evidence of what the Board did, held that the lower court erred in ruling that a county had acquired a public road across private property by prescription, noting that there was no record in the case of any official action taken by the Board of Supervisors to make this particular road public. At trial, individual Supervisors, past and present, gave conflicting testimony as to whether the road was private or public, but no Board minutes were ever offered in evidence. Citing Smith v. Board of Supervisors of Tallahatchie County, 124 Miss. 36, 41, 86 So. 707 (1920), wherein the Mississippi Supreme Court ruled that there was no proof of any public use under a claim of right for the requisite ten year prescription period, and that the minutes of the Board of Supervisors must be evidence of their official acts, the Court concluded in Myers:

We also think it was error for the Court to permit individual members of the Board of Supervisors to testify what the Board did, and what the Board understood, and what the Board had authorized to be done in the premises. A Board of Supervisors can act only as a body, and its act must be evidenced by an entry on its minutes. The minutes of the Board of Supervisors are the sole and exclusive evidence of what the Board did. The individuals composing the Board cannot act for the County, nor officially in reference to the County's business, except as authorized by law....

School Bus Turnarounds

Private roads and driveways may properly be used for school bus turnarounds, and public school grounds may properly be maintained at county expense, so long as the County Board of Supervisors follows the provisions of Miss. Code Ann. §19-3-42 (Supp. 1989):

(1) The Board of Supervisors of any county is hereby authorized and empowered, in its discretion, to grade, gravel or shell, repair and/or maintain private gravel or shell roads or driveways to private residences if such roads or driveways are used for school bus turnarounds.

(2) Prior to engaging in the work authorized in subsection (1) in this section, the Board of Supervisors shall spread upon the official minutes of the board:

(a) the written request of the school board for such work;

(b) the written approval of the Board of Supervisors for such work;

(c) the specific location of the road or driveway to be worked; and,

(d) the name of the owner of the road or driveway to be worked.

(3) The written request of the school board, as required in subsection 2(2)(a) above, shall contain a current list of all active school bus turnarounds presently in use by the school district or contemplated for use by the school district for the present school year. The approval by the Board of Supervisors shall be valid and effective for the period of time that a turnaround is anticipated for use, but in no event for a period greater than one year.
In addition to the authority granted in subsection (1) of this section, from and after October 1, 1989, the Board of Supervisors of any county is further authorized, in its discretion, to maintain public school grounds of the county and to grade, gravel, shell or overlay, and/or to maintain gravel, shell, asphalt or concrete roads, driveways or parking lots of public schools of the county if, before engaging in such work, the Board of Supervisors shall spread upon its official minutes the written request of the school board for such work, the written approval of the Board of Supervisors for such work and the specific location of the school grounds or road, driveway or parking lot, to be worked.

In AG Op. No. 89-067 to Shaw, dated February 22, 1989, the Attorney General's office issued an opinion stating that §19-3-42 does not contemplate authority to lay out and construct a new private road or driveway to be used as a school bus turnaround.

**Drainage Work**

The jurisdiction of a Board of Supervisors over county roads includes the road right-of-way and under certain circumstances, acquisition of drainage easements and drainage of ditches as well as installation of culverts. The Board is required to properly maintain the road right-of-way up to but not beyond the private property line. If the Board finds that in order to properly drain or otherwise maintain the county road and road right-of-way, it is necessary to install culverts, it may install culverts in the right-of-way or perform other maintenance work thereon, so long as the installation of culverts is not for the exclusive use of abutting landowners.

In this regard, Miss. Code Ann. §65-7-1 (1972) authorizes and requires a county to keep ditches and borrow pits open in order to drain water from roadbeds, stating in part:

> Ditches and borrow pits shall be kept open or connected so as to drain off the water from the roadbed, as far as practicable.

A further grant of authority is contained in Miss. Code Ann. §65-7-63 (1972), which provides:

> The Board of Supervisors shall have power, whenever necessary, to drain water off the public roads through and over the adjacent lands, and damages may be allowed and paid to the owners of said adjacent lands in the same manner as is provided in regard to locating public roads.

Under Miss. Code Ann. §57-5-17 (1990), a county may develop ditches for drainage purposes when building industrial parks, provided such drainage is considered by the Board to be essential to the complete development of the industrial park.

According to the Attorney General's office, a County Board of Supervisors may engage in drainage work only on county-owned property or county-owned easements, and only for public purposes such as protection of county roads, buildings or other county-owned property. See AG Op. No. 92-0725 to Gamble, dated September 23, 1992.

If a Board finds that in order to properly drain a county road and road right-of-way, the construction of a certain ditch is necessary, it may lawfully acquire a drainage easement from the landowner and cut a ditch a reasonable distance across his land in order to provide sufficient drainage of the road and road right-of-way. Such ditch construction is authorized so long as its purpose is to drain the county roads and road right-of-way as authorized by §65-7-63, and so long as the ditch is not constructed on private property for the exclusive use and benefit of a landowner. Otherwise, any such construction or maintenance work, using public funds on private roads for private benefit and not for a public purpose, would subject the Board of Supervisors to personal liability and substantial sanctions for expending public funds for an object not authorized by law.

The above drainage statutes were construed in light of County Home Rule in AG Op. No. 92-0351 to Teel, dated May 20, 1992, in which the Attorney General's office issued an opinion stating that the specific statutory provisions for local flood control and drainage set forth in Miss. Code Ann. §§51-21-1, et seq. deprived a county of authority to engage in a general program of flood control projects except as authorized in those statutes.

http://www.griffithlaw.net/research.database/uploads/957187922_file_finalboardattorney... 10/16/2014
In AG Op No. 91-0802 to Ready, dated November 18, 1991, the Attorney General's office issued an opinion stating that if a county believed that in order to preserve an industrial park's value to the community and to prevent flooding and erosion of the land within the industrial park, it was necessary for a ditch to be maintained by the County, it could acquire an easement on which the ditch is located by negotiating with the landowners to purchase their property, and if the negotiations with the landowners fail, the County could condemn the property by power of eminent domain in the name of the County, as a result of which the County could maintain or repair such ditch, concluding that "ditches may be dug anywhere within the industrial parks, so long as the ditches are deemed necessary by the County in order to drain water from the park."

Abandonment

Up until 1986 there was no legislative guide establishing a formal procedure for abandoning county or other public roads. The exclusive statutory method for a Board of Supervisors to abandon any section of the county road system is set forth in Miss. Code Ann. §65-7-121 (Supp. 1986), which authorizes the Board under the following circumstances, either on its own motion or on petition of any interested county resident, to declare any section of the county road system abandoned:

- The section must not provide primary access to occupied property;
- Traffic on the section for the last ten years must have been intermittent and of such low volume that no substantial public purpose is being served by it; and,
- The board has, for a period of at least the previous five years, not maintained the section as a part of the county road system.

Limited Immunity

This statute provides for a public hearing to be held on the question of abandonment, following not less than two weeks publication of notice of the hearing. After abandonment, the board is required to post clearly visible signs at any intersection of the abandoned roadway with the county road system indicating the abandoned section is no longer part of the county road system and is not maintained by the county. Miss. Code Ann. §65-7-121(3) further provides:

Once the required signs are posted, the county shall not be liable for the death of or injury to a vehicle, owner, operator or passenger, or for damage to a vehicle or its contents, resulting from a dangerous condition on the abandoned section.

Prior to the 1986 enactment of §65-7-121, it was sufficient for a Board of Supervisors to declare a road closed by making a factual determination of abandonment and placing that decision on its minutes. In AG Op No. 94-0169 to Trapp, dated March 23, 1994, the Attorney General's office issued an opinion stating that if a Board of Supervisors determines that certain roads that may have previously been regularly maintained as county roads many years ago "were effectively abandoned before the enactment of §65-7-121 in 1986, it may enter an Order adjudicating those facts and the abandonment of the roads prior to the enactment of the statute. If there is any doubt of abandonment prior to 1986, then the procedure set forth in §65-7-121 must be utilized." In adjudicating such pre-1986 abandonment, the Board would be well-advised to make specific factual findings that there had been complete, continuous and protracted non-use of the subject road by the general public for a period in excess of ten years, during which time there had been an absence of control and regular maintenance by the County and, where applicable, the County acquiesced in the placement of physical obstructions or encroachments in or upon the road consistent with an intent by the County to abandon it. See R & S Development, Inc. v. Wilson, 534 So. 2d 1008, 1010 (Miss. 1988), and McNeely v. Jacks, 526 So. 2d 541, 544 (Miss. 1988), both cited in AG Op No. 94-0169.

In AG Op. No. 92-0347 to Holley, dated May 13, 1992, the Attorney General's office issued an opinion stating that when a county abandons an easement in a public road, the fee title remaining in the landowner is no longer burdened by the easement, citing Miss. State Highway Commission v. McClure, 536 So. 2d 895, 896 (Miss. 1988).
Abandonment of a road should be distinguished from mere discontinuance of segments of a public road rendered unnecessary by reason of alteration, improvement or straightening of the route. In an AG opinion issued one year after the adoption of the 1986 enactment of §65-7-121, the Attorney General's office construed the application of §65-7-121 by considering it in para materia with other statutes and constitutional provisions dealing with the same subject matter, including Section 170 of the Mississippi Constitution of 1890, and Miss. Code Ann. §§19-3-41, 65-7-5 and 65-7-57, concluding that "the discontinuance of segments of a public road made unnecessary as a consequence of alteration, improvement, or straightening of the route as authorized by constitutional and statutory provisions does not require adherence to §65-7-121." See AG Op. No. 87-602 to Griffith, dated December 7, 1987.

Establishment of Private Right of Way

In *Hooks v. George County*, 1999 WL 718795 (Miss. 1999), the Court held that a county board of supervisors acted in an arbitrary and capricious manner by granting a landowner’s petition for a right-of-way across another landowner’s property, in proceedings brought pursuant to Miss.Code Ann. § 65-7-201 (1991). This statute provides as follows:

> When any person shall desire to have a private road laid out through the land of another, when necessary for ingress and egress, he shall apply by petition, stating the facts and reasons, to the board of supervisors of the county, which shall, the owner of the land being notified at least five days before, determine the reasonableness of the application. If the petition be granted, the same proceedings shall be had thereon as in the case of a public road; but the damages assessed shall be paid by the person applying for the private road, and he shall pay all the costs and expenses incurred in the proceedings.

According to the Court, the petitioners (Welfords) seeking the private right of way should have offered proof that they had first sought to purchase the right of way from the other landowners (Hooks), prior to filing their petition with the Board of Supervisors. Although the chancery court upheld the Board’s action in granting the private right of way, the Mississippi Supreme Court reversed, holding that the Board failed to make a determination that the right of way was in fact "reasonably necessary" in light of the fact that the petitioning landowners already allegedly had two other alternative rights of way or easements of access to their land. Moreover, "the Board should not rule on the petition until the status of the easements is determined in chancery court, because the status of the easements will have a direct bearing on the reasonable necessity of a private way." *Id.* at *7.

In reversing the chancery court which had upheld the county’s action, the Court also noted that "[i]t seems from the record that the Board was acting in manner to determine at least in some part the outcome of the legal issues of the parties rather than simply determining whether a private way was in fact a reasonable necessity," and that "[a] finding of fact in this regard is mandatory when determining whether the Welfords met their burden of proof, especially where the Welfords did not provide any evidence to the Board that the right of way across Hooks's property is any more reasonable than the other two easements the Welfords already have." *Id.* at *6.

Work On and Cleanup of Private Property

Use of county equipment and property and expenditure of county taxpayer funds for the benefit of a private landowner is generally illegal, except within very narrow and exceptional circumstances, such as those addressed in AG Op. No. 87-67 to Griffith, dated February 19, 1987, in which the Attorney General's office issued an opinion stating that it found no legal prohibition to a County Supervisor dumping dirt and debris onto the property of an adjacent property owner with that owner's permission, so long as that method of disposal was elected solely for the purpose of accomplishing an effective and efficient means of disposal and not merely for the benefit of the private landowner, and the dirt and debris in question did not reasonably constitute acceptable road building materials and possessed no intrinsic value to the county. Under certain circumstances, the Board of Supervisors may lawfully go onto private property and clean it by cutting weeds, filling cisterns and removing rubbish, dilapidated fences, outside toilets, dilapidated buildings and other debris, and draining cesspools and standing water from it, so long as the following statutory requirements spelled out in Miss. Code Ann. §19-5-105 (Supp. 1983) are met:
1. The Board may act either on its own motion or on receipt of a petition requesting the Board to act signed by a majority of adult residents residing upon any street or alley within 750 feet of the precise location of the alleged menace.

2. The alleged menace must be situated on a parcel of land located in a populated area or in a housing subdivision and must be alleged to be in need of cleaning.

3. The Board must give notice to the property owned by United States certified mail, return receipt requested, receipted by addressee only, three weeks before the date of the hearing, or if the property owner is unknown or his address is unknown, then by three weeks notice in a newspaper having general circulation in the county, of a hearing to determine whether or not the parcel of land is in such a state of uncleanliness as to be a menace to the public health and safety of the community.

4. If at this hearing the Board of Supervisors adjudicates in its resolution that the parcel of land in its then condition is a menace to the public health and safety of the community, "the Board of Supervisors may, if the owner not do so himself, proceed to have the land cleaned" as set forth above.

5. The Board of Supervisors may thereafter at its next regular meeting by resolution adjudicate the actual cost of cleaning of the said lot and the cost may become an assessment against the same.

6. Such action shall not be taken against any one parcel of land more than twice in any one calendar year, and the expense of cleaning shall not exceed One Thousand ($1,000.00) Dollars in any one calendar year.

**Conclusion**

I conclude this work with very little change in the end, but maybe with some helpful supplementations sandwiched in between the beginning and the end. The role of the Board Attorney as legal advisor to the county Board of Supervisors is a challenging one. As chief legal officer for the county's governing authority, a Board Attorney is expected to know--or find out quickly ("I need it yesterday") and correctly--the answer to increasingly complex questions of local government jurisdiction, overlapping state and federal regulatory compliance, statutory interpretation, legal or ethical limitations on official action, and constitutional law. He or she will be looked to for competent and timely guidance through the maze of legal and ethical requirements, some of which have been described in this chapter.

In closing, please take these a few nuggets about client-relations in the spirit of a mutual desire for professional advancement among my brothers and sisters at the Board table. These are taken from Henry W. Ewalt's Through The Client's Eyes (ABA Section of Law Practice Management 1994), adapted to Board representation:

1. **Treat the Board like a relative.** Don't agitate any person who works for or is part of the "family" of a client you love.

2. **Communicate effectively.** Always take care to communicate with the Board in a participatory, as opposed to paternalistic, manner. The difference is tremendous. Compare "here's what we're going to do" with "this is what I recommend as your Board Attorney. Does it meet your objectives?"

3. **Earn the Board's confidence.** The Board's confidence in its attorney and respect for his judgment grows more from its relationship with the attorney and from its perception of the attorney's truthfulness, sincerity and personal interest in the Board than from the attorney's technical legal competence. A practice solution to a knotty local government problem is much more important to the Board than extensive research, footnotes and string cites.

4. **Open up to the Board.** Let them see your sensitive, human side, not just your formal side as the dispenser of sterilized legal opinions and advice. This means constantly making the Board aware of the factual dynamics of complex governmental issues by using sensible analogies and explaining situations in terms of facts, not cold legal theory from case precedents. The Board's confidence in the legal ability of its attorney is directly related to its clear understanding of what the attorney says and writes about the rationale and wisdom of his recommendations.
The reward for doing the job right is the satisfaction of faithfully serving the public interest and helping local government officials carry out their legal responsibilities.

ORDER AND MINUTES OF EXECUTIVE SESSION

Pursuant to the terms of Miss. Code Ann. §25-41-7 (1990), as amended, Supervisor __________ __________ moved, and Supervisor ____________________ seconded, that the Board of Supervisors of __________ County, Mississippi, make a closed determination upon the issue of whether or not to declare an executive session at _____ _.m. for the purpose of discussing _____________________________________________________________________________.

(specify reason)

with the following persons deemed necessary for the discussions, deliberations and recording of such executive session: ______________________________________________________________________

which motion received the unanimous vote of the members of the Board of Supervisors of __________ County, Mississippi.

The discussion of the nature of the matters requiring executive session was had, and the Board, on motion by Supervisor ____________________, seconded by Supervisor ____________________, and approved by unanimous vote, declared the Board of Supervisors to be in executive session for the consideration of such matters.

No final action was taken in such executive session of any of the matters discussed, and by unanimous vote it was ordered that the meeting again be opened to the public at _____ _.m.

ORDERED this ____ day of ____________, 19__, all members present voting "Aye."

________________________________________
President

RESOLUTION ESTABLISHING AND ADOPTING PROCEDURES

UNDER MISSISSIPPI PUBLIC RECORDS ACT OF 1983

WHEREAS, §3(1) of the Mississippi Public Records Act of 983, S.B. No. 2448, provides that certain public records are declared to be public property and that any person shall have the right to inspect, copy or mechanically reproduce or obtain a reproduction of any public record of a public body in accordance with reasonable written procedures adopted by the public body concerning the cost, time, place and method of access, and that public notice of the procedures shall be given by the public body; and

WHEREAS, the Board of Supervisors of __________ County, Mississippi, being a public body within the meaning and intent of said Act desires to establish and adopt such written procedures;

THEREFORE, BE IT RESOLVED by the Board of Supervisors of __________ County, Mississippi, that the following procedures be and the same are hereby established and adopted in accordance with the Mississippi Public Records Act of 1983:

COST
All fees for the cost of searching, reviewing and/or duplicating and mailing copies of public records shall be collected by the Board of Supervisors of ___________ County, Mississippi, in advance of complying with each request for access to or copies of public records, on the basis of not less than Fifty Cents ($0.50) for each page of each public record so copied or duplicated, plus such additional costs as may be incurred for searching, reviewing and/or mailing such duplications or copies. Such fees shall be collected by and remitted to the Clerk of the Board of Supervisors of ___________ County.

TIME

Copies of public records not determined to be exempted under the provisions of the Mississippi Public Records Act of 1983, shall be produced by the Board of Supervisors of ___________ County, Mississippi, no later than fourteen working days from the date of request for production of such records; provided, however, that in the event a request is made for production of public records which are exempted under the provisions of the Mississippi Public Records Act of 1983 or which are exempted as otherwise provided by law, the Board of Supervisors of ___________ County, Mississippi, shall provide a written statement setting forth specific reasons for such denial, no later than fourteen working days from the date of such request, which written statement shall be in the form set forth in Exhibit A, attached to and incorporated herein by reference.

PLACE

All requests for access to or copies of public records may be addressed and directed to County Administrator of ___________ County, P. O. Box ________, ________, MS _____, or Clerk of the Board of Supervisors, P. O. Box ________, ________, MS _____, which requests shall be in the form set forth in Exhibit B, attached to and incorporated herein by reference.

Inspection and/or copying of non-exempt public records shall be made and provided in the Office of the Chancery Clerk of ___________ County, at the Courthouse in ____________.

METHOD OF ACCESS

Access to all non-exempt public records shall be provided in accordance with the foregoing provisions, with physical inspection of such records and copying of the same to be performed, made and carried out in the Office of the Chancery Clerk, Courthouse, in ____________.

The above Resolution was reduced to writing and was read and considered section by section at a public meeting of said Board at the ___________ County Courthouse in ____________, Mississippi, and was then adopted section by section and then as a whole at said public meeting, on motion by Supervisor ____________________, seconded by Supervisor ____________________, with the following members voting "Aye":

_______________________________________________

And those voting "Nay" being: ________________________________.

The Clerk of the Board of Supervisors of ___________ County, Mississippi, is hereby authorized and directed to publish the above and foregoing Resolution in (newspaper) , and to post copies of said Resolution in the ___________ County Courthouse in ____________, Mississippi, and, further, the above Resolution was directed to be entered on the minutes of the Board of Supervisors of ___________ County, Mississippi, at its meeting in ____________, Mississippi, on this the ___ day of ____________, 19__.

RESOLVED AND ADOPTED this ___ day of ____________, 19__.

_________________________________________

President

DENIAL OF REQUEST FOR ACCESS TO
AND COPIES OF PUBLIC RECORDS

DATE OF REQUEST: _______________________

TO: _______________________

DATE OF DENIAL: _______________________

Your request for access to or copies of public records under the Mississippi Public Records Act of 1983 has been denied.

The specific reason(s) for denial is indicated below: (circle applicable exemption)

1. Trade secrets
2. Confidential commercial or financial information
3. Personnel records
4. Application for employment
5. Test questions and answers used in employment examinations
6. Test questions and answers to be used in future examinations
7. Letters of recommendation respecting employment application
8. Letters of recommendation respecting admission to educational agency or institution
9. Work product of attorney, including attorney-client communications
10. Information about individual tax payment or status
11. Appraisal information concerning sale or purchase of property for public purpose
12. Public hospital records
13. Information relating to criminal investigation
14. Other _______________________

This denial shall remain on file in the office of the Clerk of the Board of Supervisors of _________ County for not less than three years from the date hereof.

________________________________________
Clerk
EXHIBIT "A"

REQUEST FORM

For Copies or Reproduction of Public Record

1. Description of Record

2. Date of record (best estimate):

3. Public agency or board having custody of record:

I agree to pay the actual cost of searching, reviewing, duplicating and/or mailing copies of the requested public records, estimated to be $______.

________________________________________
Signature of Person Requesting Record

CLERK'S ACKNOWLEDGMENT

I acknowledge receipt of $______ from the above individual as payment in full for the cost of searching, reviewing, duplicating and/or mailing the requested records.

Date: __________________________

________________________________________
Clerk
INTERLOCAL COOPERATION AGREEMENT

THIS INTERLOCAL COOPERATION AGREEMENT (the "Agreement") made and entered on this ___ day of ______, 199__, by and between ____________ County, Mississippi ("County"), and (City or other local governmental unit)("City");

WITNESSETH:

WHEREAS, County will (specify the services and/or facilities to be provided to the mutual advantage of the contracting parties, or briefly describe how the parties propose to promote the needs and development of the communities served); and,

WHEREAS, City will (specify services and/or facilities to be provided, etc.);

WHEREAS, City will hold County harmless with respect to any and all claims arising out of (description of activity or service, etc.) save those caused by County's negligence or fault; and,

WHEREAS, County and City do hereby invoke the provisions of Miss. Code Ann. §§17-13-1 (1974), as amended ("Interlocal Cooperation Act of 1974, as Amended") for the purpose of setting forth the interest of County and City with respect to the (description of joint undertaking); and

WHEREAS, County and City both constitute local governmental units acting by and through their respective governing authorities as such terms are used in the Interlocal Cooperation Act.

NOW, THEREFORE, in consideration of the premises and the mutual agreements hereinafter contained, the parties hereto agree as follows:

SECTION 1. Joint Action and Authority. County and City hereby find and determine that they are acting jointly with respect to (joint undertaking) described hereinabove; that the use of the (services, facilities, assets or other property) shall be for the joint benefit and in furtherance of mutual interests and advantage of County and City.

SECTION 2. Purpose and Duration. The purpose of this agreement is to authorize and provide for (specify in detail the services or facilities to be provided, articulate how this will be to the mutual advantage of the parties or will promote the needs and development of the communities served by the respective local governmental units),
and the duration of this agreement shall be ( ) years, subject to earlier termination or amendment as provided hereinafter.

SECTION 3. Amendments. This agreement may be amended only upon the prior written agreement of County and City.

SECTION 4. Termination. This agreement may not be terminated either partially or completely without the prior written consent of County and City.

SECTION 5. Statutory Authority. County is statutorily authorized to take all necessary and proper action contemplated by this Interlocal Cooperation Agreement, by virtue of the following statutes: Miss. Code Ann. §______________. City is statutorily authorized to take all necessary and proper action contemplated by this Interlocal Cooperation Agreement, by virtue of the following statutes: Miss. Code Ann. §______________.

SECTION 6. Separate Legal or Administrative Entity. (Describe the precise organization, composition, nature and powers of any separate legal or administrative entity created by this agreement).

SECTION 7. Financing, Staffing and Budget. (Describe the manner of financing, staffing and budgetary needs for the undertaking, including designation of one individual employee of one of the local governmental units as treasurer or disbursing officer to receive, disburse and account for all funds of the joint undertaking).

SECTION 8. Administration. (If the separate legal entity is not established by the agreement, describe how a joint board or other appropriate mechanism will be established to administer and conduct the joint undertaking).

SECTION 9. Acquisition and Disposal of Property. (Describe the manner in which real and personal property used in the undertaking will be acquired, held or disposed of, provided the agreement does not set up a separate legal entity to conduct the undertaking).

SECTION 10. Conditions Precedent. (a) This agreement shall not become effective until: (i) this agreement is submitted to and approved by the Attorney General of the State of Mississippi in accordance with Section 17-13-11 of the Interlocal Cooperation Act; (ii) a copy of this agreement is filed with the Chancery Clerk of the County and in the office of the Secretary of State. (b) A copy of this agreement shall be filed with the State Department of Audit for audit purposes within sixty (60) days after this agreement shall be effective.

IN WITNESS WHEREOF, the Board of Supervisors of ________ County, acting for and on behalf of the County, have caused this agreement to be signed by its President and attested by its Clerk and the official seal of the County to be hereunto affixed, and the ______________, acting for and on behalf of the ______________, has caused this agreement to be signed by ______________ and attested by ______________, all on the day and year hereinabove first written.

______ COUNTY, MISSISSIPPI

ATTEST: By:_____________________________________

President, Board of Supervisors

______________________________ of ________ County, Mississippi

Clerk

CITY OF ______________, MISSISSIPPI
ATTEST: By:________________________________
_______________________________________

STATE OF MISSISSIPPI
COUNTY OF __________

Personally appeared before me, the undersigned notary public in and for the above state and county, the within named ___________ and ________________, who acknowledged before me that they are President and Clerk, respectively, of the Board of Supervisors of __________ County, Mississippi ("County"), and that for and on behalf of County and as its act and deed, they executed and sealed the above and foregoing instrument on the day and in the year therein mentioned, they being first duly authorized so to do by County.

Given under my hand and official seal this ____ day of __________, 199_.

____________________________________
Notary Public

My Commission Expires:

_____________________

STATE OF MISSISSIPPI
COUNTY OF __________

Personally appeared before me, the undersigned notary public in and for the above state and county, the within named ___________ and ________________, who acknowledged before me that they are ______________ and ________________, respectively, of the _____________________ ("City"), and that for and on behalf of City and as its act and deed, they executed and sealed the above and foregoing instrument on the day and in the year therein mentioned, they being first duly authorized so to do by City.

Given under my hand and official seal this ____ day of __________, 199_.

____________________________________
Notary Public

My Commission Expires:

_____________________