

Analyzing Complaint Against Texas AG Ken Paxton

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An advocacy group filed a complaint against Texas Attorney General Ken Paxton that alleges he committed a third-degree felony by violating state securities laws between 2004 and 2012.

Texans for Public Justice of Austin on April 6 sent the Collin County District Attorney's office a complaint that alleged that while in Collin County, Paxton violated the Texas Securities Act by acting as an investment adviser representative without being registered with the Texas State Securities Board. The complaint said the allegations were based on a securities board disciplinary order against Paxton.

The securities board's May 2, 2014, disciplinary order said that Paxton occasionally solicited clients for Mowery Capital Management in exchange for 30 percent of MCM's asset management fees. In 2004, 2005 and 2012, Paxton solicited three clients to MCM, but he wasn't registered as an investment adviser representative as required under the securities act, said the order. It found that Paxton violated Section 12B of the securities act. He paid a \$1,000 administrative fine and agreed to disclose certain information to future clients that he solicits.

To learn how a case against Paxton might pan out if the complaint proceeds, Texas Lawyer emailed questions to white-collar criminal defense lawyer Cynthia Orr, who is not representing Paxton, but regularly handles the defense of securities cases. Here



Paxton

are her answers, edited for style and length.

Texas Lawyer: The complaint alleged that Paxton committed a third-degree felony under Texas Securities Act §29.1. What does the law say about the offense?

Cynthia Orr, partner, Goldstein, Goldstein & Hilley, San Antonio: Section 29 (a) makes it a third-degree felony to sell, offer for sale or delivery, solicit subscriptions or orders for, dispose of, invite offers for, or deal in any other manner in any security without being a registered dealer or agent. The document entitled "complaint" alleges a violation of Section 12B of the Texas Securities Act. This separate, nonpenal provision requires investment advisers who are not exempt to register and provide notice under the act.

TL: In your opinion, do the allegations against Paxton make up an offense under the law? If you don't have the knowledge to answer, what information would you need to tell?

Orr: It appears from the face of the securities board order that the cited infraction is a regulatory wrong sanctioned by an administrative fine. ... However, since Mr. Paxton did not ask for notice and hearing, it is impossible to tell if an exemption applied to the registration requirement for investment advisers. ... Further, it is not clear to what extent, if any, Mr. Paxton's activities described in the complaint could be seen as selling, offering for sale or deliv-



Orr

ery, soliciting subscriptions or orders for, or inviting offers or dealing in a security. The securities order is bereft of facts about the specific conduct involved, other than to say that respondent successfully solicited three clients for MCM at times when MCM was a state-registered investment adviser but respondent was not registered as an investment adviser representative of MCM. ... Also, some investment offerings are exempt from the Texas Securities Act.

TL: If Paxton were charged, what would a prosecutor have to prove to win a conviction?

Orr: Assuming that the penal provision in the Texas Securities Act under Section 29(a) were alleged, then a prosecutor would have to prove the following elements: A person 1) intentionally, 2) solicited subscriptions or orders, 3) for a security, 4) without being a registered dealer or agent under the Texas Securities Act. Element No. 1 might arguably require willfulness instead of mere knowledge because of the regulatory nature of the infraction and the complexities of securities law in Texas under U.S. Supreme Court case law. Since the act does not contain a mental state, this is open to debate and decision. But one Court of Criminal Appeals case states that the act requires knowledge. The Texas Securities Act would have to also apply. Some securities are exempt or excluded by registration or permit.

TL: How might the securities board's disciplinary order against Paxton impact a potential criminal case?

Orr: They are different proceedings,

different elements, different infractions, and they would be pending before different deciding bodies using different procedures. Most importantly here, an administrative wrong is proven on a much lower standard of proof than a criminal offense. Therefore, it could not be used to prove a criminal offense. But one might attempt to make use of the concession in one proceeding as conceding elements in another. Given the different securities law provisions involved, however, this would not likely be successful. This is especially so since the securities board order is also bereft of specific facts.

TL: If Paxton were charged, how would a criminal defense lawyer go about defending him?

Orr: A defense lawyer would determine the facts under consideration and determine if the securities act applied. In addition, counsel would determine which provision applies and seek a determination from a court regarding whether the securities act gave adequate notice of what actually constitutes a criminal offense. Counsel would also determine the elements of the offense and determine whether the state could prove each element beyond a reasonable doubt. On the face of the securities board order, this appears to be an administrative wrong. If one were to attempt to argue that the same conduct was also a violation of the penal provision, counsel should determine if the securities board order constitutes a criminal sanction sufficient to bar subsequent prosecution under double jeopardy. A civil sanction can be considered punitive. Multiple punishments are prohibited for the same offense. **TLN**

Dallas Judge: Doctor's Cow in Road Is Not Med Mal

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In a case that's testing the reach of Texas tort reform laws, a Dallas judge has ruled that it's not a "health care liability claim" when a plaintiff hits a cow in the road that's owned by a doctor.

The ruling concerns Richard K. Archer, an 82-year-old retired doctor who filed a motion to dismiss a personal injury case filed against him by Bobby Tunnell, who was allegedly injured when the vehicle he was travelling in hit several of Archers' loose cows. Archer argued that Tunnell's claim is really a medical malpractice case (See "How Is Hitting a Cow in the Road Med Mal?" Texas Lawyer, Jan. 19, 2015.)

Archer focused his argument on Chapter 74 of the Texas Civil Practices and Remedies Code, which houses Texas' 2003 medical malpractice reforms—including the requirement that plaintiffs first file "expert reports" detailing the expected standard of care of doctors before they can sue them. The basis of Archer's motion is Texas *West Oaks Hospital v. Williams*, a 2012 decision from the Texas Supreme Court that requires plaintiffs to file expert reports when they sue doctors—even if the plaintiff's claim has no

direct relation to health care.

"This has caused a considerable amount of controversy, as you know. It's hit the news. Some people say it's crazy and some people say it's not," argued Phillip Russ, an Amarillo solo who represents Archer, to 298th District Court Judge Emily Tobolowsky on April 10.

"The point is the Supreme Court has said if you're a physician and safety is an issue, you've got to file a report. They didn't do that. So you have to dismiss the case and let them appeal, or approve it and let us appeal," Russ argued.

However, Leighton Durham, a partner in Dallas' Kelly, Durham & Pittard who represents Tunnell, argued that Archer's motion was just a "delay tactic" intended to put off an April 13 trial setting. Defendants are afforded an automatic right to appeal under Chapter 74, he noted.

That statute should not apply to Archer because he is retired and has not been licensed to practice medicine for a decade, Durham argued to Tobolowsky.

"We don't even get to whether or not a cow in the road owned by somebody who used to be a doctor is a health care liability claim because he wasn't a doctor at the time," Durham argued. "Clearly this is not a health care liability claim. And I don't think anybody

"Clearly this is not a health care liability claim," said Leighton Durham, a partner in Dallas' Kelly, Durham & Pittard who represents Bobby Tunnell.

in their right mind thinks the legislature intended this situation to fall into the provision. The truth is, this is designed to blow out our [trial] setting."

Of Archer's Chapter 74 motion, Durham said, "This was filed in October. They never set it for hearing. They filed a mandamus on a motion that had never been set for a

hearing."

Dallas' Fifth Court of Appeal's denied Archer's writ of mandamus on Jan. 9.

Tobolowsky said during the hearing that she was concerned the case is now 3 years old.

"I don't like the sense that there is some built in delay, as has been suggested," Tobolowsky told Russ. "I've said my peace about that and I deny your motion."

After the hearing, Russ said he'll appeal Tobolowsky's ruling to Dallas' Fifth Court of Appeals but believes the issue is ultimately destined for the Texas Supreme Court.

"It will go to the court of appeals and they'll probably affirm her," Russ said of Tobolowsky's decision. "And we'll see what the Supreme Court has to say."

Durham said the appeal of the issue could put off Tunnell's trial for at least another year.

Dean Boyd, an Amarillo lawyer who also represents Tunnell, said he dreaded calling his severely injured client and explaining that the trial will be put off while appellate courts further consider the Chapter 74 issue.

"It's really hard to explain to regular folks how this could be," Boyd said. "That's the thing. How can this be? Are you kidding me?" **TLN**

Judge Indicted on Federal Firearms Charges

by ANGELA MORRIS
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A Georgetown judge is off the bench after being indicted for allegedly selling firearms to a convicted felon, helping to smuggle firearms, and lying to law enforcement about gun sales, among other charges.

Williamson County Court-at-Law No. 2 Judge Tim Wright on April 14 pleaded not guilty.

The State Commission on Judicial Conduct on April 8 suspended Wright one day after federal prosecutors unveiled a nine-count indictment against him. If convicted, the judge could face up to 80 years in prison: 10 years on each of the seven counts related to firearms and up to five years in prison on each of the two counts of making false statements, according to a news release by the U.S. Attorney's Office for the Western District of Texas.

Wright's attorney, Austin solo Jeff Senter, said, "Judge Wright is innocent of the charges against him. Judge Wright looks forward to a clear and positive, direct analysis of the facts. ... His innocence will be established."

The government seeks to seize the judge's 51 guns, \$42,604 in alleged criminal proceeds and a 2013 Ford F-150.

When asked why Wright had so many guns in his home, Senter replied, "He was at the time a possessor of a federal firearms license which is a document that authorizes him to engage in the purchase and sales of firearms."

Many of the guns were family heirlooms, he added.

U.S. Magistrate Judge Mark Lane issued an arrest warrant for Wright on April 7. Wright appeared in court on April 8, and Lane released him on a \$25,000 bond. In an order setting conditions of release, Lane ordered that Wright cannot possess guns or weapons and ordered him to surrender his concealed handgun license. Lane also restricted Wright's travel to Central Texas, prohibited him from using alcohol or drugs, and ordered him to get mental health and substance abuse treatment.

Mike Galdo, the assistant U.S. attorney representing the government, declined to comment.

Indictment

According to the April 7 indictment in

United States v. Wright, the judge faces three counts of selling firearms to a prohibited person; one count of aiding and abetting and facilitating the smuggling and attempted smuggling of firearms; one count of facilitating the smuggling and attempted smuggling of firearms; two counts of false statement during purchase of a firearm; and two counts of false statement to government agents.

The indictment alleges that on three dates in February, Wright sold seven pistols to "J.C.," a person Wright knew or had cause to believe had been convicted of a crime punishable by more than one year in prison.

Between June and October 2014, Wright allegedly helped or attempted to export multiple firearms from the country, although neither the judge nor the gun buyer had a license or authorization to export the guns. He again attempted to export guns between Dec. 4, 2014, and March 27, according to the indictment.

When the judge bought six Zastava M92 firearms at a Georgetown gun store on July 14, 2014, he allegedly lied on a written statement by saying he was the actual buyer of the guns when he knew he was buying them for someone else.

He did the same thing at another gun store on Dec. 19, 2014, when buying two Glock .45 caliber pistols, the government claims.

Then on March 27, Wright allegedly lied to a Bureau of Alcohol, Tobacco, Firearms and Explosives agent by saying he had not sold any guns "between the time ATF agents visited him on Sept. 23, 2014, and the time in January 2015 when he began selling as a licensed firearm dealer." The government alleges the statement was false because Wright had sold guns in December 2014 and then "created false paperwork representing falsely the sale took place in August 2014."

The government also alleges Wright lied by telling the ATF agent he hadn't sold J.C. any guns or allowed him to be present at sales after learning J.C. was a felon. The indictment said the statement was false because Wright had sold J.C. guns three times after learning he was a felon.

Senter said he's waiting for the government to produce discovery in the case to learn the source of the allegation that Wright knew that J.C. was a felon. **TL**

Ex-Judge McGinty Pleads Guilty in Bribery Case

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Former 144th District Judge Angus McGinty of San Antonio pleaded guilty April 13 to one count of honest services wire fraud for taking car repairs from a lawyer in exchange for rulings favorable to the defense in criminal cases.

McGinty must return to court July 15 for sentencing. Under a plea agreement, he faces two years in prison followed by supervised release.

The U.S. Attorney's Office for the District of New Mexico prosecuted the case after the local federal prosecutor's office recused itself.

"This case should serve as a reminder to those who occupy positions of public trust that they must act with integrity and in conformity with the highest ethical standards. Individuals who abuse positions of public trust for private gain will be held accountable," said U.S. Attorney Damon Martinez of New Mexico in a statement.

McGinty's plea agreement included statements by the ex-judge supporting his guilty plea. McGinty stated that during his term he "knowingly participated in a scheme to defraud the state of Texas and citizens of Bexar County ... of their right to my honest services inasmuch as I solicited and accepted things of value from Alberto Acevedo Jr., including vehicle repairs to my two Mercedes-Benz. ... I accepted these benefits knowing that the purpose behind them was to influence me to exercise my official discretion as judge of the 144th Judicial District Court in favor of Mr. Acevedo and his clients. ... I took steps to cover up my dealing with Mr. Acevedo by fail-

ing to report the benefits I had received from him on my Personnel Statement for 2013."

McGinty cocounsel Brown & Norton founding partner Alan Brown of San Antonio said McGinty made the choice to plead guilty after examining discovery in the case and weighing all of his options.

"Whether you are guilty or not, you can lose a case, and if you lose a case, the guidelines are way more severe," said Brown. "Trials are interesting; they can go either way. They are adversarial contests. ... It was going to be a media frenzy. That's what Angus decided was in his best interest, and he personally decided; not the lawyers."

Brown said he thinks McGinty's two-year sentence is "fairly severe" but it might be about sending a message.

"I know one thing: The public doesn't want their officials doing anything improper," said Brown. "It's kind of a hot issue right now."

People in the courthouse community who knew McGinty liked him, said Brown. Many offered to be character witnesses for the former judge, he added.

"They think he just kind of ... talked too much and really didn't do bad things," said Brown. "But people who don't know the system ... they judge the whole system bad."

Background

McGinty, who resigned from the bench in February 2014, pleaded guilty to Count 3 in the superseding indictment in *United States v. McGinty*, filed in the U.S. District Court for the Western District of Texas. That count claimed McGinty participated in a bribery scheme while

intending to defraud citizens of their right to his honest services. McGinty sent a text message to Acevedo that said, "Hey amigo, I'll bring the car to your office tomorrow morning. I'll call you when I'm close and maybe someone can come and get the keys from me. About 8:45-8:50 good?"

The indictment also charged McGinty with one count of conspiracy to commit honest services wire fraud, two additional counts of honest services wire fraud and one count of extortion under color of official right. Generally, when a defendant pleads guilty to one charge in

a deal, the sentencing judge will dismiss the other charges at the hearing.

Separately, McGinty faces an attorney disciplinary lawsuit that could take away his law license.

Acevedo, a criminal-defense lawyer who practiced before McGinty, pleaded guilty to one count of theft or bribery concerning programs receiving federal funds. Martinez's statement said Acevedo's sentence could be up to 10 years in prison and up to a \$250,000 fine. The Commission for Lawyer Discipline suspended Acevedo's law license in a pending disciplinary suit. **TL**

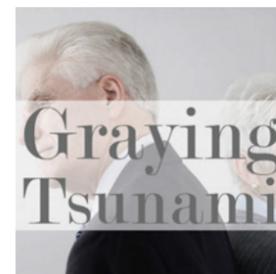
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TEXAS LAWYER

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