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Lawyers, Guns, and Money

Michael J. Golden

Author contact information:
Michael J. Golden
Tanya D. DeMent
Boulette Golden & Marin L.L.P.
Austin, TX 78746

mike@boulettegolden.com
512-732-8902
tanya@boulettegolden.com
512-732-8925

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I. PROLOGUE (OR HOW PEOPLE IN THE MIDWEST VIEW TEXAS GUN LAWS – A JUDGE’S PERSPECTIVE)

We have assumed ... that the police, who did not know [Defendant’s] name and therefore did not know that he was a felon, knew, or at least had reason to believe, that if he was carrying a concealed firearm he was violating the law. They did know. It is a crime in Illinois to carry a concealed gun.... Even if this were Texas rather than Illinois, and carrying a concealed weapon was lawful ... the police would have been entitled to accost [Defendant] and ask him whether he was carrying a gun.... But if the asking crossed over to commanding, so that [Defendant] was stopped, then it would be essential that the officers have a reasonable belief ... that if he was carrying a gun he was violating the law. But they would have a reasonable belief, because this is Illinois rather than Texas.

U.S. v. DeBerry, 76 F.3d 884, 886-87 (7th Cir. 1996) (Posner, C.J.)

II. INTRODUCTION

Over the past 20 years, gun laws across the country, and particularly in Texas, have substantially expanded the rights of gun owners, particularly with respect to where firearms can be carried, which particular kinds of firearms can be carried, and how they can be carried by the common citizen. Since first permitting concealed carry in public (including on college campuses) in 1995, Texas has significantly expanded the places where an average Texan should expect to encounter a person with a gun, or even catch a glimpse of the gun itself, as the Legislature finally sanctioned open carry in 2015.

It hasn’t always been this way. Texas was actually the first state in the U.S. to ban the open carry of handguns, all the way back in 1871, when the Legislature first outlawed the carrying of pistols outside of the home: “If any person in this state shall carry on or about his person, saddle, or in his saddle-bags, any pistol ... he shall be punished by a fine of not less than twenty-five nor more than one hundred dollars.”¹ And prior to the 2015 session of the Legislature, Texas was one of only six states that continued to ban the open carry of handguns.

This paper will highlight the existing state of gun laws in Texas, with special focus on recently-implemented and perhaps soon-to-be-implemented changes relating to open carry and campus carry, as well as the way in which those laws affect employers.

III. CURRENT TEXAS LAWS RELATING TO THE POSSESSION OF FIREARMS

A. Timeline

1995 – Concealed carry first permitted by non-law enforcement. Significant restrictions still apply: a license is required and citizens are prohibited from carrying firearms in many places.

¹ <http://www.houstonchronicle.com/news/politics/texas/article/First-to-ban-open-carry-Texas-could-be-one-of-5974401.php> As the Houston Chronicle notes, that maximum fine would be roughly \$2,000 in today’s dollars.

2007 – A person who is permitted to possess a gun at home may now also do so while inside or directly en route to that person’s car.

2011 – A person who is permitted to possess a gun at home may now also do so while inside or directly en route to that person’s watercraft.

2011 – Employers may not prohibit employees from storing firearms in their locked personal vehicles parked in employer-provided parking areas.

2016 – Open carry permitted (January 1); campus carry expanded to include some buildings (August 1).

B. Open Carry

Texas’s “open carry” law went into effect January 1, 2016, and implemented the following:

- Current CHL (“concealed handgun license”) holders are authorized to open carry effective January 1, 2016, without any additional training;
- Other individuals may obtain a license to carry a handgun (“LTC”) openly in all of the same places that currently allow the licensed carrying of a concealed handgun;
- Unconcealed handguns (loaded or unloaded) must be carried in a shoulder or belt holster;
- Eligibility requirements for a license to carry do not change; and
- Training curriculum for new applicants will be updated regarding the use of restraint holsters and methods to ensure the secure open carrying of handguns effective January 1, 2016.²

C. Location Restrictions

Texas law restricts license holders from carrying handguns in certain places, with some restrictions being automatic and others requiring particular notice in order to prohibit handguns. The below table summarizes these locations:

Location	Automatically Prohibited³	Prohibited Only With “Effective Notice”⁴
Federal building	X	

² House Bill 910, available at <http://www.legis.state.tx.us/tlodocs/84R/billtext/pdf/HB00910F.pdf#navpanes=0>.

³ Texas Penal Code §46.035.

⁴ Texas Penal Code §46.03, §46.035(b)(4)-(6), (i).

Business that derives 51% or more of income from on-premises alcohol sales	X	
Athletic events	X	
Schools ⁵	X	
Correctional facilities	X	
Polling place on the day of an election or while early voting is in progress	X	
Any government court or court office (absent written authorization from the court)	X	
Racetrack	X	
Secured area of an airport	X	
Within 1,000 feet of premises designated as a place of execution on the day a sentence of death is set to be imposed	X	
Hospitals or nursing home (unless licensee has written authorization)		X
Amusement park		X
Place of worship		X
Meeting of a governmental entity		X

For purposes of the above restrictions, “effective notice of prohibition” occurs separately for concealed handguns and openly carried handguns. In addition, even if a property is not the type of property included in any of the above categories, a property owner is permitted to forbid weapons on their premises by the same type of “effective notice of prohibition.”⁶ It is a criminal trespass to carry where a license holder has been told he or she is not allowed to do so according to the following procedure:⁷

⁵ The laws regarding carrying concealed firearms at institutions of higher learning changed on August 1, 2016, to allow license holders to carry a concealed handgun on university campuses, with private universities being allowed to opt out and some discretion provided to public universities to regulate campus carry. See Julian Aguilar, *At Shooting Range, Abbott Signs “Open Carry” Bill*, THE TEXAS TRIBUNE, available at <http://www.texastribune.org/2015/06/13/abbott-signs-open-carry-bill/>.

⁶ Texas Penal Code §§ 30.06(a), 30.07(a).

⁷ *Id.*

1. *Concealed Handguns:*

Notice: The owner of the property or someone with apparent authority to act for the owner provides notice to the person by oral or written communication.⁸

Written Communication: either

(A) a card or other document on which is written language identical to the following:

Pursuant to Section 30.06, Penal Code (trespass by license holder with a concealed handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a concealed handgun; *or*

(B) a sign posted on the property that: (i) includes the language described by Paragraph (A) in *both English and Spanish*; (ii) appears in contrasting colors with block letters at least one inch in height; and (iii) is displayed in a conspicuous manner clearly visible to the public.⁹

2. *Open Carry Handguns:*

Notice: The owner of the property or someone with apparent authority to act for the owner provides notice to the person by oral or written communication.¹⁰

Written Communication: either

(A) a card or other document on which is written language identical to the following:

Pursuant to Section 30.07, Penal Code (trespass by license holder with an openly carried handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a handgun that is carried openly; *or*

(B) a sign posted on the property that: (i) includes the language described by Paragraph (A) in both English and Spanish; (ii) appears in contrasting colors with block letters at least one inch in height; and (iii) is displayed in a conspicuous manner clearly visible to the public at each entrance to the property.¹¹

A few specific notes regarding these requirements:

⁸ Texas Penal Code § 30.06(b).

⁹ Texas Penal Code § 30.06(c)(3). The following link is to a sample sign provided by the Texas Retailers Association: http://c.ymcdn.com/sites/www.txretailers.org/resource/resmgr/30.06_sign.pdf.

¹⁰ Texas Penal Code § 30.07(b).

¹¹ Texas Penal Code § 30.07(c)(3). The following link is to a sample sign provided by the Texas Retailers Association: http://c.ymcdn.com/sites/www.txretailers.org/resource/resmgr/30.07_sign.pdf.

- The notices for concealed carry and open carry are different, so to be in full compliance with the trespass violation-compliant language, property owners must post two signs, one that meets the requirements for each type of carry.
- The sign prohibiting open carry must be posted at *each entrance to the property* not just in a conspicuous manner clearly visible to the public as with the concealed carry sign.
- Effective notice may also take place by the provision of oral notice, and the statute does not provide any magic language for oral notice, although obviously property owners need to be clear about what they are asking people to do.
- If a property owner finds the required signage off-putting, the property owner may use a more polite, elegant sign along the lines of “We prohibit weapons on our premises. Visitors carrying weapons will be asked to leave and return without weapons.” However, such a sign on its own ***will not*** create a trespass violation if a person ignores it and comes in with a gun. If such a sign is used, someone still has to ask the person to leave to provide proper trespass notice. This strategy may create a confrontation point for the property owner or staff, if a gun owner ignores the non-compliant sign.

IV. EMPLOYER POLICIES AND OPEN CARRY

With regard to employment, employers remain free to adopt policies restricting weapons in the workplace itself. However, with some limited exceptions, an employer may not prohibit an employee who holds a license to carry a handgun or otherwise lawfully possesses a firearm or ammunition from transporting or storing a firearm or ammunition the employee is authorized by law to possess in a locked, privately owned motor vehicle in a parking lot, parking garage, or other parking area the employer provides for employees.¹²

Accordingly, an employer who already has a 2011-compliant weapons policy in place does not have to do anything new with regard to their employees in connection with the implementation

¹² Texas Labor Code §52.061. The exceptions include the following: (1) property where the possession of a firearm or ammunition is prohibited by state or federal law; (2) vehicles owned or leased by the employer and used by the employee in the course and scope of the employee’s employment, unless the employee is required to transport or store a firearm in the official discharge of the employee’s duties; (3) a school district; (4) an open-enrollment charter school; (5) a private school; (6) property owned or controlled by a person other than the employer that is subject to a valid, unexpired oil, gas, or other mineral lease that contains a provision prohibiting the possession of firearms on the property; and (7) property owned or leased by a chemical manufacturer or oil and gas refiner with an air authorization under Chapter 382, Health and Safety Code, and on which the primary business conducted is the manufacture, use, storage, or transportation of hazardous, combustible, or explosive materials, except in regard to an employee who holds a license to carry a handgun under Subchapter H, Chapter 411, Government Code, and who stores a firearm or ammunition the employee is authorized by law to possess in a locked, privately owned motor vehicle in a parking lot, parking garage, or other parking area the employer provides for employees that is outside of a secured and restricted area:(i)that contains the physical plant;(ii)that is not open to the public; and(iii)the ingress into which is constantly monitored by security personnel. Texas Labor Code § 52.062(a).

of open carry. However, employers may wish to send employees a reminder email advising them nothing has changed with regard to the corporate policy on weapons.

V. CAMPUS CARRY

Passed by the Texas Legislature and signed into law by Governor Abbott in 2015, Senate Bill 11 permits concealed handgun license holders to carry handguns on university campuses effective August 1, 2016, for universities and August 1, 2017, for junior colleges. Before it passed, the bill was significantly “watered down” from its original version by allowing universities limited discretion to regulate, but not ban, concealed handguns altogether, leading it to be deemed a victory by both the Everytown for Gun Safety gun control group and the National Rifle Association.¹³

The persons permitted to carry concealed handguns are limited to concealed handgun license holders.¹⁴ As individuals must be at least 21 years of age to qualify for a concealed handgun license, campus carry is accordingly limited to individual at least 21 years old.¹⁵ In addition, license holders are not permitted to open carry on campus and must conceal their handgun.¹⁶ Concealed handgun license holders have been permitted to carry weapons on campus since 1995, but have not been permitted to do so in campus buildings until now.

By default, institutions of higher education may not “adopt any rule, regulation, or other provision prohibiting license holders from carrying handguns on the campus of the institution.”¹⁷ However, there are some notable exceptions:

- **Public and Private Institutions May Regulate Storage in Dorms:** An institution of higher education (public or private) *may* establish rules, regulations, or other provision concerning the storage of handguns in dorms or other residential facilities owned or leased and operated by the institution and located on the campus of the institution.¹⁸

¹³ Tyler Kingkade, THE HUFFINGTON POST, *Guns On Campus Bill Passes In Texas, But Gun Activists Are Not Happy* (June 5, 2015), available at http://www.huffingtonpost.com/2015/06/05/guns-on-campus-texas_n_7520316.html.

¹⁴ Texas Government Code § 411.2031(b) (“A license holder may carry a concealed handgun on or about the license holder’s person while the license holder is on the campus of an institution of higher education or private or independent institution of higher education in this state.”).

¹⁵ Texas Government Code § 411.172(a)(2).

¹⁶ See Texas Government Code § 411.2031(b) (“A license holder may carry a *concealed* handgun on or about the license holder’s person while the license holder is on the campus of an institution of higher education or private or independent institution of higher education in this state.”) (emphasis added); see also, Tex. Penal Code 46.035 (a-1) (“a license holder commits an offense if the license holder carries a partially or wholly visible handgun, regardless of whether the handgun is holstered, on or about the license holder’s person under the authority of Subchapter H, Chapter 411, Government Code, and intentionally or knowingly displays the handgun in plain view of another person: (1) on the premises of an institution of higher education or private or independent institution of higher education; or (2) on any public or private driveway, street, sidewalk, or walkway, parking lot, parking garage, or other parking area of an institution of higher education or private or independent institution of higher education.”).

¹⁷ Texas Government Code § 411.2031(c).

¹⁸ Texas Government Code § 411.2031(d).

- **Public Institutions Shall Establish Reasonable Rules but NOT Prohibit Campus Carry:**
 - **The President Shall Establish Reasonable Rules:** After consulting with students, staff, and faculty about the nature of the student population, specific safety considerations, and the uniqueness of the campus environment, the president or CEO of an institution of higher education *shall* establish reasonable rules, regulations, or other provisions regarding the carrying of concealed handguns by license holders on campus, but may not establish provisions that “generally prohibit or have the effect of generally prohibiting license holders from carrying concealed handguns” on campus. The president or CEO may amend the provisions as necessary for public safety, and the provision will take effect as determined by the president or CEO unless amended by the board of regents or other governing board.¹⁹
 - **Board of Regents Has Final Authority:** No later than 90 days after the rules, regulations, or provisions are established by the president or CEO, the board of regents shall review the provisions and may, by a vote of at least two-thirds of the board, amend wholly or partly the provisions established by the president or CEO. If amended by the board of regents, those are the official provisions of the institution.²⁰
 - **Rules Must Be Distributed:** Any rules established according to the above must be “widely” distributed to the students, staff, and faculty, including by prominently publishing the rules on the institution’s Internet website.²¹
 - **Notice to License Holders:** The institution must give effective notice with respect to any portion of a premises on which license holders may not carry.²²
 - **Bi-Yearly Review:** By September 1 of each even-numbered year, each institution must submit a report to the legislature that describes its rules, regulations, or other provisions regarding the carrying of concealed handguns on the campus of the institution, and explains the reasons the institution has established those provisions.²³
- **Private Universities May Opt Out:** After consulting with students, staff, and faculty of the institution, a private or independent institution of higher education may establish rules, regulations, or other provisions prohibiting license holders from carrying handguns on the camps of the institution, any grounds or building on which an activity sponsored

¹⁹ Texas Government Code § 411.2031(d-1).

²⁰ Texas Government Code § 411.2031(d-2).

²¹ Texas Government Code § 411.2031(d-3).

²² Texas Government Code § 411.2031(d-1).

²³ Texas Government Code § 411.2031(d-4).

by the institution is being conducted, or a passenger transportation vehicle owned by the institution.²⁴

As with employers, institutions of higher education (whether public or private) may not adopt or enforce any rules or take any other action, including posting notices, prohibiting or placing restrictions on the storage or transportation of a firearm or ammunition in a locked, privately owned or leased vehicle by a person, including a student, who holds a license to carry and lawfully possesses the firearm or ammunition either (1) on a street or driveway located on the campus of the institution or (2) in a parking lot, parking garage, or other parking area located on the campus of the institution.²⁵

VI. CARRY ON GOVERNMENT PREMISES

As noted above, the statutes specifically prohibit carrying of firearms in some government locations, which include “the premises of any government court or offices utilized by the court, unless pursuant to written regulations or written authorization of the court,”²⁶ “on the premises of a correctional facility,”²⁷ and “in the room or rooms where a meeting of a governmental entity is held and if the meeting is an open meeting subject to Chapter 551, Government Code, and the entity provided notice as required by that chapter.”²⁸

However, while the on the one hand prohibiting carry in some government locations, the Legislature has also expressly limited government entities’ rights to prohibit open or concealed carry in the way that private entities can.

First, a person who carries a concealed or open handgun on property owned or leased by a governmental entity has a defense to a criminal trespass claim brought under sections 30.06 or 30.07:

It is an exception to the application of this section that the property on which the license holder carries a handgun is owned or leased by a governmental entity and is not a premises or other place on which the license holder is prohibited from carrying the handgun under Section 46.03 or 46.035.²⁹

Second, and perhaps more importantly, a state agency or political subdivision of the state is liable for a civil penalty if it prohibits a license holder from carrying a concealed handgun onto the premises.³⁰ The civil penalty is \$1,000 to \$1,500 for the first violation and \$10,000 to \$10,500 for the second or subsequent violation.³¹ Each day of a continuing violation constitutes a separate violation.³² This portion of the statute applies only to concealed carry, not open carry.

²⁴ Texas Government Code § 411.2031(e).

²⁵ Texas Government Code § 411.2032.

²⁶ Texas Penal Code § 46.03(a)(3).

²⁷ Texas Penal Code § 46.035(b)(3).

²⁸ Texas Penal Code § 46.035(c).

²⁹ Texas Penal Code § 30.06(e) (concealed carry); § 30.07(e) (open carry).

³⁰ Texas Government Code § 411.209.

³¹ Texas Government Code § 411.209(b).

³² Texas Government Code § 411.209(c).

Not surprisingly, governmental entities are concerned about compliance with these provisions. At least two Texas Attorney General Opinions address inquiries by government entities with respect to the government entities' ability (or lack thereof) to prohibit license holders from bringing handguns onto the government premises. Texas Attorney General Opinion KP-00049 makes it clear that government entities may only prohibit license holders from carrying in the places already prohibited by sections 46.03 and 46.045 of the statute.³³

Also in December 2015, the Texas Attorney General attempted to address the scope of the exception in section 46.03(a)(3) (prohibiting carry on the “premises of any government court or offices utilized by the court”):

To determine the scope of the prohibition in subsection 46.03(a)(3), we need to construe the phrase “premises of any government court or offices utilized by the court,” which requires an examination of the term “premises.” TEX. PENAL CODE § 46.03(a)(3). Subsection 46.035(f) defines the term “premises” for purposes of section 46.03. *Id.* § 46.035(f)(3); see also *id.* § 46.03(c)(1) (defining “premises” by reference to section 46.035). “‘Premises’ means a building or a portion of a building. The term does not include any public or private driveway, street, sidewalk or walkway, parking lot, parking garage; or other parking area.” *Id.* § 46.035(f)(3) (emphasis added)... Section 46.03 neither provides nor directs us to a definition of “government court,” but article V, section 1 of the Texas Constitution vests judicial power in listed courts and “such other courts as may be provided by law.” Tex. Const. art. V, § 1. It is likely that a court would determine that a “government court” under section 46.03 is any of the judicial bodies created by either the Texas Constitution or by the Legislature.³⁴

The opinion identifies the following types of courts as falling within the definition of “court”: appellate courts, district courts, statutory county courts, constitutional county courts, justice courts, municipal courts, and municipal courts of record.³⁵

The key question, of course, is what parts of a courthouse constitute “offices utilized by the court” and are thus subject to the automatic exclusion of both concealed and open carry. The opinion addresses this issue as well:

We also consider the meaning of “offices utilized by the court.” TEX. PENAL CODE § 46.03(a)(3). Section 46.03 does not define the term “office,” but a Texas court of appeals has defined “office” as a “place where a particular kind of business ... is transacted.”... While the outside limits of subsection 46.03(a)(3) may be unclear, at the very least it can be said that the Legislature intended to prohibit concealed handguns from the rooms that house government courts and offices central to the business of the courts. Accordingly, in the absence of clarity from the Legislature and in order to provide concrete advice to governmental entities seeking to secure their courts without penalty, we construe subsection 46.03(a)(3) to

³³ Texas Attorney General Opinion KP-0049 (Dec. 21, 2015).

³⁴ Texas Attorney General Opinion KP-0047 (Dec. 21, 2015) (some citations omitted).

³⁵ *Id.* at n. 5.

encompass only government courtrooms and those offices essential to the operation of the government court.³⁶

Finally, the opinion notes that the “questions implicate many fact sensitive issues that cannot be resolved in an attorney general opinion” and ultimately notes that it is the responsibility of the court to make this decision and then face possible action for noncompliance.³⁷

VII. MONEY, LAWYERING, AND TEXAS GUN LAWS

Not surprisingly, the attention brought to gun laws, licenses to carry, and signage requirements has had a business impact for some industries. It has been reported that the Texas Department of Public Safety encountered a 140% increase in applications for licenses to carry from December 2015 through February 2016 compared to that same time period the year before.³⁸ Businesses that are open to the public have had to make decisions about whether to specifically allow or restrict concealed carry and open carry. Businesses that cater to an elegant clientele have grappled with whether to utilize the required signage to trigger an automatic trespass or opt for more polite but less legally potent signs. The below are just a few examples of the economic impact of the new laws.

A. The Boycott List

The Second Amendment Check is an organization that publishes a list of companies to boycott based on their restrictions on carrying handguns at their establishments. The current list includes 53 companies.³⁹ According to the Second Amendment Check website:

All companies we boycott have received a [2ACheck rating](#) of “F” for their lack of respect for the rights of gun owners. Your experience with some of these companies will vary based on location, however, the boycott is based on the [corporate policy](#) toward responsible gun owners.

We believe guns in the hands of good people make everyone safer. We encourage freedom loving Americans to boycott anti-gun companies until they improve their policy. **Please share this page.** We also strongly recommend everyone know the firearms laws applicable in their own state, and states they travel through. We recommend something like the [Traveler’s Guide to Firearms Laws](#).⁴⁰

It is unclear what economic impact such boycotts and lists may have. While patrons wishing to carry firearms may avoid the establishments on the list, presumably customers wishing to visit restaurants or shopping centers without the presence of guns may also seek out the list in order to determine which businesses to patronize. For example, the organization Moms Demand Action

³⁶ *Id.*

³⁷ *Id.* (“Accordingly, the responsible authority that would notify license holders of their inability to carry on the respective premises must make the determination of which government courtrooms and offices are essential to the operation of the government court. And it is that authority that could face the statutory civil penalty.”).

³⁸ <http://www.breitbart.com/big-government/2016/03/25/concealed-carry-permits-surgin/>

³⁹ <http://www.2acheck.com/the-boycott-list/>

⁴⁰ <http://www.2acheck.com/the-boycott-list/>

for Gun Sense In America published its own list of businesses that have said “no” to open carry with a request to “Be sure to thank these establishments for their gun sense!”⁴¹

B. Legal Insurance

The increase in license to carry applications also benefits companies that advertise legal defense insurance for license holders. For example, Texas Law Shield costs \$10.95/month and advertises the following on its website:

24/7/365 emergency hotline, direct access to an experienced firearm program attorney

Peace of mind. Defend yourself, family, and property without the risk of legal fees.

No-hassle cancellation policy, no minimum commitment period.

For both criminal and civil proceedings, we’ve got your back.⁴²

In 2013, a lawsuit was filed alleging Texas Law Shield pays facilities that offer CHL courses \$30 for each student that signs up for the company’s legal services.⁴³ The lawsuit charges Texas Law Shield with barratry and was approved as a class action in July 2015. On December 20, 2016, the Houston Court of Appeals (14th District) reversed the order granting class certification and remanded. Plaintiffs sought review of that decision in the Texas Supreme Court on February 16, 2017. Defendants’ response to the request for review is due May 15, 2017.

VIII. CONCLUSION

Texas’s expansion of gun rights has created a whole new set of obligations for property owners in general and Texas employers in particular. We expect as disputes play out on the courts, more clarification (or even expansion) will come from the Legislature in the coming years. Nothing is for certain, but a return to 1871 does not seem to be in our collective sights.

⁴¹ See <http://momsdemandaction.org/campaigns/texas-businesses-say-no-to-open-carry/>.

⁴² <https://www.texaslawshield.com>.

⁴³ Adam Weinstein, *The Texas Legal Outfit Accused of Preying on Concealed Carry Holders*, THE TRACE (August 17, 2015), available at, <http://www.thetrace.org/2015/08/texas-law-shield-concealed-carry-insurance-class-action-lawsuit/>.

This paper is not intended as legal advice.