



**Office of the Attorney General
State of Texas**

October 12, 1992

DAN MORALES
ATTORNEY GENERAL

Honorable Allen Hightower
Chairman
Committee on Corrections
Texas House Of Representatives
P. O. Box 2910
Austin, Texas 78768-2910

Letter Opinion No. 92-66

Re: Whether a physician contracting with the Texas Department of Criminal Justice would be eligible for state indemnification under chapter 104, Civil Practice and Remedies Code, on a malpractice claim (ID# 17439)

Dear Representative Hightower:

You ask whether a private doctor performing medical services under contract for the Texas Department of Criminal Justice would be eligible for indemnification under chapter 104, Civil Practices and Remedies Code, on malpractice claims arising from his performance of services under such contract. Section 104.001 of chapter 104 provides in pertinent part:

In a cause of action based on conduct described in Section 104.002, the state shall indemnify the following persons for actual damages, court costs and, and attorney's fees adjudged against:

....

(3) a physician or psychiatrist licensed in this state who was performing services under a contract with any state agency, institution, or department . . . when the act or omission on which the damages are based occurred;

....

(5) the estate of a person listed in this section.

In our opinion, section 104.001 would clearly require the state to indemnify actual damages, court costs, and attorney's fees which were adjudged against the contract physicians you ask about for conduct which occurred in the performance of

the contract services, if the conduct and associated damages fall within the scope of section 104.002 and if there is compliance with the other provisions of the chapter.

Section 104.002 provides in relevant part:

[T]he state is liable for indemnification under this chapter only if the damages are based on an act or omission by the person in the course and scope of the person's . . . contractual performance for . . . the agency, institution, or department and if:

(1) the damages arise out of a cause of action for negligence, except a wilful or wrongful act or an act of gross negligence; or

....

(3) indemnification is in the interest of the state as determined by the attorney general or his designee.

See also §§ 104.003 (limits on indemnity amounts; no state liability to extent damages recoverable under insurance contract or authorized self-insurance plan); 104.0035 (state liability for attorney's fees in criminal prosecution); 104.004 (attorney general to defend public servant in cause of action covered by chapter 104); 104.005 (service of process on or notice to attorney general required); 104.008 (no waiver by chapter 104 of any defense, immunity, or jurisdictional bar available to contractor).

Of course we cannot anticipate all the particular fact situations which may arise with respect to the eligibility of Department of Criminal Justice contract physicians for chapter 104 indemnification. But as a general matter, we believe that that chapter's provisions would clearly entitle such a physician to state indemnification of actual damages, court costs, and attorney's fees adjudged against him on malpractice claims arising from his performance of contract services.

S U M M A R Y

Physicians performing medical services under contract with the Texas Department of Criminal Justice fall within the scope of the provisions of chapter 104, Civil Practices and Remedies Code, requiring state indemnification of actual damages, court

acts or omissions occurring within the course and scope of their performance of services for state agencies, institutions, and departments.

Yours very truly,

A handwritten signature in cursive script, appearing to read "William Walker".

William Walker
Assistant Attorney General
Opinion Committee