



# Texas State Board of Public Accountancy

333 Guadalupe, Tower III Suite 900, Austin, Texas 78701-3900

William Treacy, Executive Director

April 8, 1996

The Honorable Dan Morales  
Attorney General  
P.O. Box 12548  
Austin, Texas 78711

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Opinion Committee  
**RA-905**

FILE # <sup>ML</sup> 38750-96  
I.D. # 38750

request for an opinion on whether the AG's Office will defend the TSBPA's constructive enforcement volunteers against defamation lawsuit arising from actions taken at the TSBPA's request

Dear General Morales:

The Texas State Board of Public Accountancy (the "Board") is seeking an Attorney General's Opinion addressing whether the Attorney General's Office will assert an absolute privilege that bars a civil action of defamation against the Board's constructive enforcement volunteers and will defend them if they are sued while assisting the Board in investigative matters.

Constructive enforcement volunteers are certified public accountants who are selected, approved, trained and supervised by the Board. These volunteers are used to report violations, gather evidence and to aid the Board in enforcing the Public Accountancy Act (the "Act"), the Board's Rules and Board Orders. The Board is concerned that liability may be imposed upon constructive enforcement volunteers while assisting the Board with Board investigations.

Under the Board's direction, constructive enforcement volunteers are asked to do various investigative tasks including:

- 1) on-site investigations;
  - a) taking photographs;
  - b) obtaining statements;
  - c) gathering evidence such as letterhead or business cards;
- 2) locating witnesses;
- 3) making telephone calls to verify compliance with the Act, the Rules and Board Orders;
- 4) testifying at administrative hearings;
- 5) reviewing continuing professional education sponsors' courses; and
- 6) carrying out other investigative tasks, as needed.

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The Board believes constructive enforcement volunteers should have a similar level of protection as Board members and Board staff. Although the constructive enforcement volunteers are not employed by the Board, they are directed to carry out Board duties.

Due to limited funding, the Board is unable to employ investigators. Consequently, the Board relies heavily on constructive enforcement volunteers to assist in assuring compliance with the Act, the Rules and Board Orders. If these volunteers are faced with the prospect of having to bear the expense of litigation resulting from their efforts while performing investigations at the request of the Board, the Board will have a difficult time obtaining volunteers. The Board asserts that an absolute privilege exists for volunteers aiding a licensing agency in an investigation.

Enclosed are copies of two letters from the Attorney General's Office regarding liability for expert witnesses in administrative proceedings. According to the first letter, dated March 1, 1989 and signed by Assistant Attorney General Dwight Martin, an absolute privilege in law of defamation exists to protect witnesses when making statements to state licensing agencies in the course of quasi-judicial administrative disciplinary proceedings. This opinion is in line with Putter v. Anderson, 601 S.W.2d 73 (Tex. Civ. App.--Dallas 1980, writ ref'd n.r.e.) and Reagan v. Guardian Life Ins. Co., 166 S.W.2d 909 (Tex. 1942).

The letter also states that expert witnesses will be defended by the Attorney General's Office should a suit arise from such statements. The rationale for the absolute privilege, as addressed in the letter, is to avoid deterring witnesses from testifying in administrative proceedings and impairing the agency's ability to discharge its duties. The second letter, dated November 16, 1990 and signed by Assistant Attorney General Janet I. Monteros, reaffirms the March 1, 1989 letter.

In James v. Brown, 637 S.W.2d 914 (Tex. 1982), the court did not restrict the absolute privilege to expert witnesses in judicial proceedings. Rather, the court extended the privilege to judges, jurors, counsel, parties and witnesses. The court further held that communications made in contemplation of judicial proceedings were included within the absolute privilege. The Board's constructive enforcement volunteers are utilized solely in contemplation of judicial proceedings.

The Board seeks an Attorney General's Opinion addressing whether an absolute privilege against defamation lawsuits exists for the Board's constructive enforcement volunteers and if the Attorney General's Office will defend such actions. Additionally, please advise the Board whether the Attorney General's Office would indemnify constructive enforcement volunteers for the cost of obtaining independent legal counsel to defend such defamation lawsuits.

If the Attorney General's Office does not find that an absolute privilege against defamation lawsuits is available to constructive enforcement volunteers, the Board seeks an Attorney General's Opinion regarding whether a qualified privilege against defamation lawsuits exists and whether the Attorney General's Office will defend constructive enforcement volunteers in such actions. In Darrah v. Hinds, 720 S.W.2d 609 (Tex. App.--Fort Worth, 1986, no writ), the court held that a qualified privilege exists when a communication of an alleged wrongful act is made to an official authorized to protect the public from such an act. The court further held that a qualified privilege is not absolute

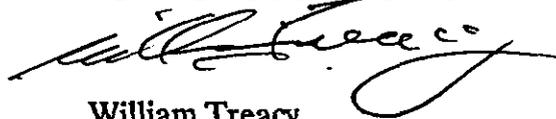
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and shields the communicator only if he or she acts in good faith and without malice. Since the Board is charged with protecting the public by insuring high standards of competence and integrity from the public accounting profession, it appears that at least a qualified privilege is available to constructive enforcement volunteers acting in good faith in the fulfillment of their duties to communicate to the Board information regarding potential wrongdoers and wrongdoing.

Please feel free to give me a call should you have any questions.

Sincerely,

TEXAS STATE BOARD OF  
PUBLIC ACCOUNTANCY

A handwritten signature in black ink, appearing to read "William Treacy", written in a cursive style.

William Treacy  
Executive Director

Enclosure



Part of  
RQ-905

Re - 38750

TEXAS DEPARTMENT OF CRIMINAL JUSTICE  
RECEIVED

JUN 06 1996

Wayne Scott  
Executive Director

Opinion Committee

May 28, 1996

The Honorable Dan Morales  
Attorney General of Texas  
Price Daniel Sr. Building  
P.O. Box 12548, Capitol Station  
Austin, Texas 78711

FILE #	ML-38854-96
I.D. #	38854

Attention: Sarah J. Shirley  
Chair, Opinion Committee

Dear General Morales:

The Texas Department of Criminal Justice (TDCJ) requests your opinion regarding whether the State of Texas can indemnify volunteers who perform services for TDCJ and against whom a civil judgment may be taken for acts arising in the course and scope of their voluntary services. TDCJ is studying the feasibility of developing a program using the assistance of volunteers to perform certain services for this agency. One of the issues TDCJ is studying prior to implementing this program concerns liability aspects involving the use of volunteers. A major concern for which this agency seeks your guidance regards whether the State can indemnify volunteers of a state agency.

V.T.C.A., Civil Practice and Remedies Code, Section 104.001 states that in a cause of action based on conduct described in Section 104.002, [of this code] the state shall indemnify the following persons, without regard to whether the persons perform their services for compensation, for actual damages, court costs, and attorney's fees adjudged against:

- (1) an employee, a member of the governing board, or any other officer of a state agency, institution or department;
- (2) a former employee, former member of the governing board, or any other former officer of a state agency, institution or department who was an employee or officer when the act or omission on which the damages are based occurred; . . . .

In 1995 the Seventy-Fourth Legislature added the phrase "without regard to whether the persons perform their services for compensation" to Section 104.001, supra. See Act 1995, Seventy-Fourth Leg., Ch. 139, Section 2, p. 982. Prior to this change in Section 104.001, supra, it appears that the State was only liable for actual damages, court costs, and attorney's fees

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Attorney General of Texas  
April 30, 1996  
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adjudged against an employee, member of a governing board or any other officer of a state agency or a former employee, member of a governing board, or officer thereof.

Before this change was made to Section 104.001, supra, it was the understanding of this agency that volunteers who suffered an adverse judgment for acts arising out of services to a state agency could not be indemnified by the State. Although Chapter 104 of the Civil Practice and Remedies Code does not define the word "employee", V.T.C.A., Civil Practice and Remedies Code, Section 101.001(1) defines "employees" to mean a person, including an officer or agent, who is in the paid service of a governmental unit by competent authority, but does not include an independent contractor, an agent or employee of an independent contractor, or a person who performs tasks the details of which the governmental unit does not have the legal right to control.

Hence it was inferred that the word "employee" as used in Section 104.001, supra, was consistent with the definition found in Section 101.001(1), supra, and therefore volunteers did not fall within the meaning of "employee" for purposes of indemnification. Nevertheless, with the changes made to Section 104.001, supra, in 1995 it now appears that volunteers may be entitled to indemnification by the State.

Therefore, our agency would ask that you address whether volunteers who perform services for a state agency and against whom an adverse judgment may be taken for actions arising in the course and scope of their volunteer services with the agency may be entitled to indemnification pursuant to V.T.C.A., Civil Practice and Remedies Code, Section 104.001.

I look forward to receiving your response to this request at your earliest convenience. If I or my staff can provide any further assistance to you in answering this request, please do not hesitate to contact this office.

Respectfully submitted,

  
Wayne Scott, Executive Director  
Texas Department of Criminal Justice