



DALLAS COUNTY
SUSAN HAWK
DISTRICT ATTORNEY
CIVIL SECTION

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OPINION COMMITTEE

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January 13, 2015

Via CMRRR and email: Opinion_committee@texasattorneygeneral.gov

Honorable Ken Paxton
Office of the Attorney General
Attention: Opinion Committee
P.O. Box 12548
Austin, Texas 78711-2548

Re: *Request for an opinion regarding a county's duty to defend a county judge in a proceeding before the State Commission on Judicial Conduct pursuant to Tex. Loc. Gov't Code Section 157.901.*

Dear Attorney General Paxton:

I respectfully request your opinion on behalf of the Dallas County Commissioners Court and myself.

QUESTION PRESENTED

A county judge has requested that Dallas County provide representation in defending against a disciplinary proceeding before the State Commission on Judicial Conduct ("the CJC") arising from her conduct while on the bench. Does Dallas County have a duty to defend a county official or employee in a disciplinary proceeding arising from an alleged ethical violation committed in the performance of public duties?

DISCUSSION

Dallas County has a statutory duty to provide a legal defense to elected county officials and county employees under specific circumstances enumerated in Section 157.901(a) of the Texas Local Government Code:

- (a) A county official or employee sued by any entity, other than the county with which the official or employee serves, for an action arising from the performance of public duty is entitled to be represented by the district attorney of the district in which the county is located, the county attorney, or both.

TEX. LOC. GOV'T CODE §157.901(a). It is unclear, however, whether Section 157.901(a) contemplates the defense of a county official or employee in a disciplinary proceeding for an alleged ethical violation arising from the performance of public duties.

1. Does a disciplinary proceeding, such as that initiated by the CJC against a county judge, fall within the plain meaning of the term “sued” as intended in Section 157.901(a)?

Section 157.901(a) only creates a duty to defend a county official or employee “sued by any entity other than the county.” In construing a statute, a court first looks at the statute’s plain and common meaning. *National Liab. & Fire Ins. Co. v. Allen*, 15 S.W.3d 525, 527 (Tex. 2000). A reviewing court presumes that the Legislature intended the plain meaning of the words it uses. *Id.* And if the statute is unambiguous, the reviewing court generally adopts the interpretation supported by the plain meaning of the statute’s words. *Fitzgerald v. Advanced Spine Fixation*, 996 S.W.2d 864, 865 (Tex. 1999).

It is unclear whether the plain language of the term “sued by any entity other than the county” contemplates a disciplinary proceeding, such as that initiated by the CJC against a county judge. Ballantine’s Law Dictionary defines “sue” as “to prosecute; to make legal claim; to seek for in law.” Ballantine’s Law Dictionary (3d. Ed.). Black’s Law Dictionary defines a “suit” as “a generic term, of comprehensive signification, referring to any proceeding by one person or persons against another or others in a court of law in which the plaintiff pursues, in such court, the remedy which the law affords him for the redress of an injury or the enforcement of a right, whether at law or in equity.” Black’s Law Dictionary, p. 1000 (Abridged Sixth Ed. 1991) (emphasis supplied). Likewise, Ballantine’s Law Dictionary also limits the definition of “suit” to proceedings in a court.¹ The Legislature could have used a much broader term than “sued” in drafting Section 157.901 if it had intended to do so. See TEX. HUM. RES. CODE § 101.055 (“The attorney general shall represent the ombudsman or a representative if a suit or other legal action is brought or threatened to be brought against that person in connection with the person’s performance of the official duties of the office.”).

A disciplinary proceeding, such as one initiated by the State Commission on Judicial Conduct, does not appear to fall within the plain meaning of the words “sue” or “suit”. Not only is the CJC not a private party or a prosecutor, but a CJC proceeding also is not held in a court at law. It is unclear how Texas courts would specifically apply the term “sued” as used in Section 157.901 to a disciplinary proceeding, however, as my office could not locate any governing authority.² Thus, I seek guidance from your Office on whether the plain language of Section 157.901(a) encompasses a disciplinary proceeding, such as that initiated by the CJC against a county judge.

¹ “It must be conceded that the word, as applied to legal controversies, both by the legal profession and others, is now used and recognized as a generic term of broad significance, often understood and used, even by legislatures and courts, to designate almost any proceeding in a court, even, though rarely, being applied to a criminal prosecution in certain connections.” Ballantine’s Law Dictionary, Suit at 2 (3rd Ed.) (emphasis supplied).

² It is notable, however, that an intermediate appellate court and the Attorney General have strictly construed “sued” by its plain meaning as defined by Black’s Dictionary in precluding criminal prosecutions from the purview of Section 157.901. See *White v. Eastland Cnty*, 12 S.W.3d 97, 102 (Tex.App.—Eastland 1999, no writ) and Tex. Att’y Gen. Op. No. GA-0523 (2007).

2. Does the phrase “performance of a public duty” in Section 157.901(a) encompass a county official’s or employee’s alleged ethical violation arising from the performance of public duties?

Section 157.901(a) does not impose a statutory duty to defend unless a county official’s or employee’s action arises from the performance of a public duty. Your Office has routinely engrafted the requirements of the common law duty to defend on the statutory duty to defend mandated by Section 157.901(a). “The suits must concern events occurring during the course of the public servant’s performance of public duties within the scope of authority of the public office or position.” Tex. Att’y Gen. Op. No. JM-755 (1987). Thus, it appears that for purposes of a county’s duty to defend under Section 157.901(a), the county official’s or employee’s performance of public duties also must be within the scope of authority of the public office or position.

Here, the question is whether an alleged ethical violation committed in the course of a county official’s or employee’s public duties also is within the scope of authority of that public office or position.

There is a dearth of authority on this issue. The only case on point located concerned a Washington supreme court justice, who sought representation by the state Attorney General in defending against a disciplinary proceeding. *See Sanders v. State*, 166 Wn.2d 164, 172 (Wash. 2008). In that case, the Washington Commission on Judicial Conduct (“the Commission”) initiated proceedings against a state supreme court justice for out-of-court conduct, and the justice requested representation by the state Attorney General’s Office on the matter. After the Attorney General deferred a determination on whether the state had a duty to defend, the justice sued the State of Washington for reimbursement for his private attorneys’ fees arising from his defense before the Commission. *Id.* at 168-169.

The Washington Supreme Court affirmed the intermediate appellate court’s holding that the justice was not entitled to a public defense because an ethical violation, by its very nature, does not arise from an official act:

Representation of a judge being disciplined for ethical violations is beyond the purpose of RCW 43.10.040. Its purpose is to provide defense to an official when engaged in official acts. Justice Sanders knew or should have known that his conduct was unethical; therefore, he is not entitled to representation. Justice Sanders argues that denying representation could leave a judge vulnerable to improper or unfounded charges of ethics violations. If a judge is wrongly charged, however, there are adequate safeguards within the Commission’s procedures. Before a case may proceed to hearing, there must be a screening, a preliminary investigation, and a finding of probable cause.

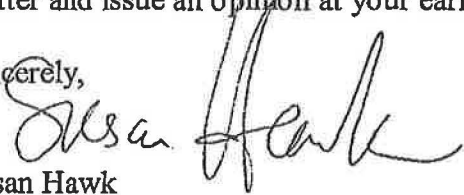
Id. at 172. But the Washington Supreme Court’s holding is merely persuasive. It is unclear how Texas courts would apply Section 157.901 to allegations of ethical violations committed by a county judge while on the bench.³

³ In the case of *In re Reed*, 137 S.W.3d 676, 679-80 (Tex.App.—San Antonio 2004, no writ), the San Antonio Court of Appeals concluded that the district attorney’s office had no duty to defend a judge in an appeal from a CJC

CONCLUSION

Section 157.901(a) of the Texas Local Government Code requires that a County provide legal defense to any “county official or employee sued by any entity, other than the county with which the official or employee serves, for an action arising from the performance of public duty.” First, it does not appear that the plain language of the statute requires Dallas County to pay for representation for a county judge in a disciplinary proceeding, which is not a suit in a court of law. Second, your Office has stated that Section 157.901(a) merely codifies the common law duty to defend any suit concerning actions taken by a county official or employee during the public servant’s performance of public duties, within the scope of authority of the public office or position. It is unclear whether an alleged ethical violation—even if committed during the performance of a county official’s or employee’s duties—is within the scope of authority of that public office or position. Accordingly, this office respectfully requests that you review the matter and issue an opinion at your earliest convenience.

Sincerely,



Susan Hawk
Dallas County District Attorney

suspension proceeding because the allegations of indecent exposure did not arise from the performance of a public duty. But the Court did not address whether an ethical violation arising from conduct in the courtroom “arises out of the performance of a public duty” or whether a CJC suspension proceeding constituted a “suit” under the plain language of the statute.