

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION**

KEVIN N. BASS,
Plaintiff,

V.

TEXAS TECH UNIVERSITY HEALTH
SCIENCES CENTER, et al.,
Defendants.

Civil Action No. 5:25-cv-00244-H-BV

TAB A

OUTSIDE COUNSEL CONTRACT
No. 2025-768-0071

Between Texas Tech University System
and Michael Best & Friedrich LLP

Referenced in: Sections IV.A.1, IV.A.2, IV.A.3, IV.B.1

Description:	<i>Selected pages: Contract face page (p.1), Section 8.1 — Independent Contractor (p.10), Signature page (p.14), Addendum A — Scope of Services (p.15)</i>
Source:	<i>TPIA production, Office of the Attorney General (Dec. 2025)</i>

*Appendix to Plaintiff's Motion to Disqualify Counsel
Bass v. TTUHSC et al., No. 5:25-cv-00244-H-BV*

OUTSIDE COUNSEL CONTRACT

OAG Contract No. 2025-768-0071

This Agreement, including all Addenda (incorporated herein by reference), is hereinafter referred to as the “Outside Counsel Contract,” “Contract” or “OCC.” This Outside Counsel Contract is made and entered into by and between the Texas Tech University System (“Agency”) and Michael Best & Friedrich LLP (“Outside Counsel”). The term “Parties” as used in this OCC refers to Agency and Outside Counsel and does not include the Office of the Attorney General of Texas (“OAG”). This OCC is made and entered into with reference to the following facts:

INDUCEMENTS

Whereas, Agency requires the assistance of outside legal counsel in carrying out its responsibilities;

Whereas, Agency has received prior approval from the OAG to contract for outside legal services; and

Whereas, Outside Counsel desires to provide legal services to Agency, subject to the authority of the OAG.

AGREEMENT

Now, therefore, in consideration of the inducements, covenants, agreements, and conditions herein contained, the Parties agree as follows:

Section 1. Purpose/OAG Approval.

1.1 Purpose. Outside Counsel shall provide legal services to Agency, as described in Addendum A. Outside Counsel and Agency understand and agree to the OAG’s continuing authority and right to expand or limit the scope of legal services provided by Outside Counsel to Agency.

1.2 OAG Approval. The Texas Attorney General’s, or his Designee’s, signature on this OCC represents the OAG’s approval of Outside Counsel serving as legal counsel to Agency during the term of, and for the purposes expressed in, this OCC. Consistent with Section 402.0212 of the Texas Government Code, the OAG may withdraw, modify, or expand this approval at any time.

1.2.1 Litigation. Outside Counsel shall not represent Agency in any litigation unless Addendum A specifically and unambiguously authorizes litigation in a particular matter. If Addendum A does not specifically authorize Outside Counsel’s representation of Agency in a particular litigation matter and Agency requires such representation, Agency must request and receive OAG approval of a new Outside Counsel Contract for litigation, before filing or responding to litigation matters. If Addendum A specifically authorizes litigation in a particular matter, Outside Counsel has the duty to promptly notify Agency and the OAG of the desirability or likelihood of an appeal.

Section 8. General Terms and Conditions.

8.1 Independent Contractor. Outside Counsel agrees and acknowledges that during the OCC Term, Outside Counsel and Outside Counsel's subcontractors are independent contractors of Agency or the State of Texas and are not employees of Agency or the State of Texas.

8.1.1 Responsibility for Acts and Omissions. Outside Counsel will be solely and entirely responsible for its acts and omissions and the acts and omissions of its agents, employees, subcontractors, and representatives in the performance of this OCC.

8.1.2 Responsibility for Employee Costs. Outside Counsel agrees and acknowledges that during the OCC Term, Outside Counsel shall be entirely responsible for the liability and payment for Outside Counsel or Outside Counsel's employees or assistants, of all taxes of whatever kind, arising out of the performance of this OCC. Other than the payments described in this OCC, Outside Counsel agrees and acknowledges that Outside Counsel or Outside Counsel's employees or assistants shall not be entitled to any State benefit on account of the services provided hereunder. Agency shall not be liable to Outside Counsel, its employees, agents, or others for the payment of taxes or the provision of unemployment insurance and/or workers' compensation, or any benefit due to a state employee. If Agency or the State of Texas shall nonetheless become liable for such payments or obligations, Outside Counsel shall promptly pay or reimburse Agency or the State of Texas for such liability or obligation.

8.2 Assignment of OCC. Outside Counsel may not assign this OCC, or assign any right or delegate any duty under this OCC, and any attempted assignment in violation of this provision is void and without effect.

8.3 Survival. The obligations of Outside Counsel under the following Sections and Subsections shall survive the termination or expiration of this OCC: 3.3, 4, 5, 6.5, 7.1, 7.3, 7.4, 8.3, 8.7, 8.11, 8.13, and Addendum C, Section 8.

8.4 Copyright/Intellectual Property. Outside Counsel shall take reasonable measures to protect Agency from material risks of Agency liability known to, or reasonably anticipated by, Outside Counsel for any copyright or patent infringement or disclosure of trade secrets resulting from the use of any equipment, materials, information, or ideas furnished by Outside Counsel pursuant to this OCC (other than equipment, materials, information, or ideas supplied or required by Agency or its employees or other agents). Outside Counsel and Agency agree to furnish timely written notice to each other, and to the OAG, of any claim of copyright, patent, trade secret, or other intellectual property infringement arising out of services under this OCC.

8.5 Media Releases or Pronouncements. Outside Counsel understands that the OAG and Agency do not endorse any vendor, commodity, or service. Outside Counsel, its employees, representatives, agents, or subcontractors may not participate in any media event or news interview, or issue any media release, advertisement, social media post, publication, editorial, article, or public pronouncement that pertains to this OCC or the services or project to which this OCC relates, or that mentions the OAG or Agency, without the prior written approval of the OAG and Agency.

IN WITNESS THEREOF, THE PARTIES HAVE SIGNED AND EXECUTED THIS OCC.

Michael Best & Friedrich LLP

Texas Tech University System

Signed by:

Darren G. Gibson

910E9CDAD75B4B9...

Darren G. Gibson

Partner

515 Congress Avenue, Suite 2500

Austin, Texas 78701

Tax ID# 39-0934985

Signed by:

Eric Bentley

050660EED5C44F7...

Eric Bentley

Vice Chancellor and General Counsel

Office of General Counsel

P.O. Box 42021

Lubbock, TX 79409

Approved:

By the Office of the Attorney General of Texas

DocuSigned by:

Forrest Brumbaugh

1E31CE3D626C4E3...

Texas Attorney General or Designee

OUTSIDE COUNSEL CONTRACT

OAG Contract No. 2025-768-0071

Addendum A

Scope of Services

OUTSIDE COUNSEL WILL ASSIST TEXAS TECH UNIVERSITY SYSTEM WITH POLICY AND PROCEDURAL MATTERS RELATED TO SEXUAL MISCONDUCT, AND ITS IMPACT ON THE TTU SYSTEM AND ITS COMPONENT INSTITUTIONS AND PROGRAMS, INCLUDING PROVIDING ADVICE REGARDING TITLE IX LAW AND REGULATIONS AND **POTENTIALLY SERVING AS A HEARING OFFICER IN LIVE HEARINGS REQUIRED BY TITLE IX AND/OR THE UNIVERSITY.**

OUTSIDE COUNSEL WILL PROVIDE LEGAL ADVICE AND CONSULTATION REGARDING EMPLOYMENT LAW, EMPLOYEE BENEFITS, AND HIGHER EDUCATION MATTERS ON AN AS-NEEDED BASIS, INCLUDING WITH RESPECT TO CONDUCTING INTERNAL INVESTIGATIONS OF SEXUAL HARASSMENT, DISCRIMINATION, AND SIMILAR MATTERS WHERE A CONFLICT OF INTEREST OR VOLUME EXISTS; PROVIDING LEGAL ADVICE AND COUNSEL ON EMPLOYMENT LAW AND HIGHER EDUCATION ISSUES, INCLUDING NIL AND REVENUE SHARING FOR STUDENT ATHLETES; CONDUCTING EMPLOYMENT LAW AND HIGHER EDUCATION TRAININGS; PERFORMING EMPLOYMENT LAW AND HIGHER EDUCATION AUDITS/REVIEWS AND OVERSEEING IMPLEMENTATION OF LEGAL RECOMMENDATIONS; AND **SERVING AS A HEARING OFFICER FOR EMPLOYMENT AND ACADEMIC GRIEVANCE HEARINGS TO COVER THE TITLE IX, NON-TITLE IX DISCRIMINATION, ADA/504, AND OTHER HEARING OFFICER WORK.**

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION**

KEVIN N. BASS,
Plaintiff,

V.

TEXAS TECH UNIVERSITY HEALTH
SCIENCES CENTER, et al.,
Defendants.

Civil Action No. 5:25-cv-00244-H-BV

TAB B

1 TEXAS ADMINISTRATIVE CODE § 57.1

Definitions — Outside Counsel Oversight

Referenced in: Section IV.A.2

Description:	<i>Office of the Attorney General rule defining “outside counsel” as attorneys retained under contract who are not full-time state employees.</i>
Source:	<i>Texas Secretary of State</i>

*Appendix to Plaintiff's Motion to Disqualify Counsel
Bass v. TTUHSC et al., No. 5:25-cv-00244-H-BV*

TEXAS ADMINISTRATIVE CODE

Title 1. Administration

Part 3. Office of the Attorney General

Chapter 57. Approval of Payment for Legal Services of Outside Counsel

§ 57.1. Definitions

Source: Adopted effective March 27, 2012, 37 TexReg 2065

The following words and terms, when used in this chapter, shall have the following meanings, unless the context clearly indicates otherwise.

(1) Agency — A department, commission, board, authority, office, or other agency in the executive branch of state government, including university systems and institutions of higher education as defined by § 61.003 of the Education Code, but excluding public junior colleges.

(2) Chief Administrator — Has the meaning defined by § 660.002(4) of the Government Code.

(3) Contingency Fee — Has the meaning defined by § 2254.101(1) of the Government Code.

(4) Invoice — An itemized list of legal services provided, and fees, charges, or expenses associated with those services, by Outside Counsel to an Agency pursuant to an Outside Counsel Contract.

(5) Invoice Summary — A document furnished by Outside Counsel in support of each Invoice showing total hours worked by each legal professional or, for each task or project, showing: a description of work performed; subtotals for legal fees and expenses; and cumulative Invoice totals under the Outside Counsel Contract.

(6) Outside Counsel — An attorney or law firm selected by an Agency to provide legal services. The term **does not include a full-time employee** of the Agency or the Office of the Attorney General.

(7) Outside Counsel Contract — A contract for legal services between an Agency and Outside Counsel selected by the Agency that must be approved by the Office of the Attorney General pursuant to this chapter.

(8) Request for Voucher Approval — A request from an Agency to the Office of the Attorney General to review and approve an Outside Counsel Invoice for payment.

(9) Request to Retain Outside Counsel — A request from an Agency to the Office of the Attorney General for approval to retain Outside Counsel for the provision of legal services.

(10) State Fiscal Biennium — A period of time running concurrent with that set by the General Appropriations Act.

Source: The provisions of this § 57.1 adopted to be effective March 27, 2012, 37 TexReg 2065.

*Retrieved from Cornell Law Institute, Legal Information Institute:
<https://www.law.cornell.edu/regulations/texas/1-Tex-Admin-Code-SS-57-1>*

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION**

KEVIN N. BASS,
Plaintiff,

V.

TEXAS TECH UNIVERSITY HEALTH
SCIENCES CENTER, et al.,
Defendants.

Civil Action No. 5:25-cv-00244-H-BV

TAB C

**TEXAS ATTORNEY GENERAL
OPINION DM-0409**

August 20, 1996

Referenced in: Section IV.A.3

Description:	<i>Independent contractors are excluded from state indemnification under Health & Safety Code § 777.004 and the Tort Claims Act because they are not state “employees.” The AG concluded that the legislature’s enumeration of covered persons is exclusive.</i>
Source:	<i>Office of the Attorney General of Texas</i>

*Appendix to Plaintiff's Motion to Disqualify Counsel
Bass v. TTUHSC et al., No. 5:25-cv-00244-H-BV*



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

DAN MORALES
ATTORNEY GENERAL

August 20, 1996

Mr. James D. Goerke
Executive Director
Advisory Commission
on State Emergency Communications
333 Guadalupe Street, Suite 2-212
Austin, Texas 78701-3942

Opinion No. DM-409

Re: Whether Health and Safety Code
section 777.007 requires the state to in-
demnify an individual who is not an
employee of a regional poison control cen-
ter and related questions (RQ-874)

Dear Ms. Boyd:

Section 777.007 of the Health and Safety Code requires the state to indemnify an employee of a regional poison control center under Civil Practice and Remedies Code chapter 104. We understand you to ask primarily whether section 777.007 requires the state to indemnify an individual who is not an employee of a regional poison control center. **In our opinion, the plain language of section 777.007 limits indemnity under that section to employees; it does not indemnify individuals who are not employees of a poison control center. Thus, section 777.007 does not require the state to indemnify a volunteer and an independent contractor, nor does it require the state to indemnify an employee of a state agency whose job involves performing some work for a poison control center.** Another statute, however, may indemnify an employee of a state agency acting within the scope of his or her official duties.

We believe it will be helpful to begin by discussing Health and Safety Code chapter 777, which designates six health-care facilities as regional poison control centers.¹ Each poison control center must provide a twenty-four hour, toll-free telephone referral service that provides to the public and health-care professionals information on ingested poisons and exposure to poisons.² Moreover, a poison control center must attempt to educate the public about poison prevention and health-care professionals about the treatment of poi-

¹Health & Safety Code § 777.001(a). Health and Safety Code section 777.001(a) designates as the six regional poison control centers the University of Texas Medical Branch at Galveston; the Dallas County Hospital District/North Texas Poison Center; The University of Texas Health Science Center at San Antonio; R.E. Thomason General Hospital, El Paso County Hospital District; Northwest Texas Hospital, Amarillo Hospital District; and Scott and White Memorial Hospital, Temple. The Texas Board of Health may designate a seventh regional poison control center in Harris County. *Id.* § 777.001(c).

²*Id.* § 777.002(a). Indeed, each regional poison control center must meet the criteria of the American Association of Poison Control Centers, and that association requires a regional poison control center to provide information to health-care professionals and the public 24 hours each day, 365 days per year. See American Ass'n of Poison Control Centers, Criteria for Certification as a Regional Poison Center pt. II.A (Jan. 1996).

son and overdose victims, provide toxicologic³ assistance to state agencies, and be available to consult on medical toxicology.⁴ To carry out its functions, a poison control center is required to “use” physicians, pharmacists, nurses, other professionals, and support staff trained in various aspects of toxicology and poison control and prevention.⁵

Section 777.007, about which you specifically ask, requires the state to indemnify “a poison control center and an employee of a poison control center under” Civil Practice and Remedies Code chapter 104.⁶ In your letter to this office, you have described various individuals and organizations that are involved with a poison control center: the Advisory Commission on State Emergency Communications and its personnel; the Texas Department of Health and its personnel; personnel of the General Services Commission; the members of the coordinating committee on poison control; health-care professionals who volunteer their time to the poison control center; and specialty consultants who provide, as you state, “sophisticated toxicology or patient care information in their areas of expertise,” *e.g.*, herpetology, botany, and forensic toxicology.⁷ As we understand your question, you wish to know which, if any, of these persons section 777.007 requires the state to indemnify, to the extent they serve a poison control center.

Aside from volunteer health-care professionals and specialty consultants, the entities you list require some explanation. The first entity, the Advisory Commission on State Emergency Communications, is created by Health and Safety Code chapter 771. Twelve of its sixteen members are appointed by various public officials; the remaining four members sit on the advisory commission because of another public office they hold.⁸ With

³Toxicology is a science that deals with poisons and their effects. WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 1248 (1990).

⁴Health & Safety Code § 777.003.

⁵*Id.* § 777.004(a). To be certified by the American Association of Poison Control Centers as a regional poison center, a center must have at least one specialist in poison information in the center at all times, sufficient additional staff promptly to handle the center’s incoming calls, and the medical director or qualified designee available, at least on-call by telephone, at all times. Criteria for Certification as a Regional Poison Center *supra*, pt. II.A.

⁶Because you do not ask about a poison control center’s corporate liability, we consider only the indemnity to which an employee is entitled.

⁷To be certified by the American Association of Poison Control Centers, a regional poison control center must maintain a list of specialty consultants who are available on an on-call basis. Criteria for Certification as a Regional Poison Center *supra*, pt. II.C.4. A specialty consultant must be qualified to provide sophisticated toxicology or patient-care information in the consultant’s area of expertise. *Id.* pt. II.E.5. A specialty consultant should be available on-call, as needed. *Id.* Finally, the areas of expertise reflected by the center’s list of consultants should mirror the types of poisonings encountered in the region. *Id.*

⁸Health & Safety Code § 771.031(a).

reference to the poison control center network, the advisory commission is to administer the centers' telecommunications requirements.⁹ The advisory commission funds poison control center services by collecting a surcharge on local exchange and intrastate long-distance telephone charges.¹⁰

The Texas Department of Health is established generally to protect and promote public health.¹¹ The department is governed by a six-member board, each member of which is appointed by the governor.¹² With respect to the regional poison control centers, the Department of Health shares rule-making authority with the Advisory Commission on State Emergency Communications;¹³ it also shares with the advisory commission responsibility to award grants to fund the regional poison control centers.¹⁴

The General Services Commission, whose six members are gubernatorial appointments,¹⁵ is generally responsible for procuring all of a state agency's goods and services.¹⁶ Significant to your question, the General Services Commission must manage the operation of a telecommunications system for all state agencies.¹⁷ The General Services Commission also must, to the extent possible, satisfy each state agency's telecommunications needs.¹⁸ For purposes of the State Purchasing and General Services Act,¹⁹ a "state agency" includes an agency in the executive branch of state government created by a state statute.²⁰ The Advisory Commission on State Emergency Communications, which administers the poison control centers' telecommunications needs, qualifies as a state agency under the State Purchasing and General Services Act.

⁹*Id.* § 771.051(a)(1).

¹⁰*Id.* §§ 771.071(a), .072(a), (d), (e), .075.

¹¹*Id.* § 11.002.

¹²*Id.* § 11.005(a). The board employs a commissioner to administer the department, but the commissioner is always subject to the board's supervision. *Id.* §§ 11.012(a), .013(a), (b).

¹³*Id.* § 777.001(b).

¹⁴*Id.* § 777.009.

¹⁵Gov't Code § 2152.051.

¹⁶*Id.* § 2155.061(a).

¹⁷*Id.* § 2170.051(a).

¹⁸*Id.* § 2170.051(b).

¹⁹Gov't Code tit. 10, subtit. D; *see id.* § 2151.001.

²⁰*Id.* § 2151.002(2)(A).

The coordinating committee on poison control, the last entity you specifically mention, advises the Texas Board of Health and the Advisory Commission on State Emergency Communications.²¹ Six of the committee's members are appointed by each of the health-care institutions that serve as regional poison control centers; the remaining nine members are appointed by other public health-care institutions and state agencies, including the Advisory Commission on State Emergency Communications and the Department of Health.

To resolve whether these entities, as well as volunteers and specialty consultants, are entitled to indemnity under Health and Safety Code section 777.007, we must interpret the section. On its face, section 777.007 requires the state to indemnify only an employee of the center under Civil Practice and Remedies Code chapter 104. Consequently, anyone who is not employed by a poison control center is not entitled to indemnity under section 777.007.

Chapter 777 of the Health and Safety Code does not, however, define the term "employee." Incidentally, when the legislature enacted Health and Safety Code section 777.007 in 1993,²² chapter 104 of the Civil Practice and Remedies Code also did not define the term.²³ We must, therefore, define the term in context and consistent with common usage.²⁴ In Attorney General Opinion JM-525 this office defined the term "employee" for purposes of Civil Practice and Remedies Code chapter 104 in light of the statute's purpose to indemnify an employee of the state.²⁵ Because chapter 104 generally renders the state liable for damages caused by an employee's conduct, the opinion exam-

²¹Health & Safety Code § 777.008(a).

²²See Act of May 27, 1993, 73d Leg., R.S., ch. 670, sec. 1, § 777.007, 1993 Tex. Gen. Laws 2495, 2497.

²³Prior to 1995, Civil Practice and Remedies Code chapter 104 indemnified, among others, an employee or officer of a state agency. See Civ. Prac. & Rem. Code § 104.001(1), *amended by* Act of May 9, 1995, 74th Leg., R.S., ch. 139, § 2, 1995 Tex. Sess. Law Serv. 982, 982. The Seventy-fourth Legislature amended section 104.001 to indemnify the same people but *regardless of whether they performed their services for compensation*. See Act of May 9, 1995, 74th Leg., R.S., ch. 139, § 2, 1995 Tex. Sess. Law Serv. 982, 982. To the extent that the 1995 amendment defines the term "employee" to include a volunteer, we cannot import the definition into Health and Safety Code section 777.007; we may import a statutory definition only into a later-enacted statute. See *Brookshire v. Houston Indep. Sch. Dist.*, 508 S.W.2d 675, 677-78 (Tex. Civ. App.—Houston [14th Dist.] 1974, no writ) (citing *Brown v. Darden*, 50 S.W.2d 261 (Tex. 1932)). Because the "definition" cannot be imported, for purposes of this opinion we discuss Civil Practice and Remedies Code chapter 104 as though the 1995 amendment to section 104.001 had not occurred. Of course, if an individual performing services for a regional poison control center is doing so as a volunteer for a state agency to which Civil Practices and Remedies Code chapter 104 applies, the individual is indemnified under chapter 104.

²⁴See Attorney General Opinion JM-525 (1986) at 4 (citing Gov't Code § 311.011).

²⁵*Id.*

ined analogous private-sector tort cases in which an employer's liability depends on the tortfeasor's being an employee, not an independent contractor.²⁶ In these cases, an individual's status as an employee depends upon whether the employer has the right to control the details of the work.²⁷ Whether the employer actually exercises the right is inconsequential.²⁸

In our opinion, because the context of Health and Safety Code section 777.007 is similar to that of Civil Practice and Remedies Code chapter 104, we may define "employee" in the same way. The definition articulated by Attorney General Opinion JM-525 is designed to distinguish an employee from an independent contractor, however; it does not necessarily distinguish an employee from a volunteer. Nevertheless, a federal court in Maryland has noted that the nature of a volunteer's service is such that an "employer" has little control over the volunteer.²⁹ For instance, although an employer may instruct a volunteer as to the services the employer wishes the volunteer to perform, the employer has little control over the volunteer's hours of work, dress, absenteeism, or whether the volunteer satisfactorily completes the assigned tasks.³⁰

Furthermore, we believe an express or implied contract for compensation is an additional characteristic of the employee-employer relationship that distinguishes an employee from a volunteer. Section 101.001 of the Civil Practice and Remedies Code defines "employee" for purposes of the Texas Tort Claims Act³¹ as "a person . . . who is in the paid service of a governmental unit . . ."³² A volunteer is not an employee for whose conduct a governmental unit may be liable under the Tort Claims Act.³³ Because the pur-

²⁶*Id.*

²⁷*Id.* (citing *Newspapers Inc. v. Love*, 380 S.W.2d 582, 591 (Tex. 1964)).

²⁸*Id.* (citing *Great Western Drilling Co. v. Simmons*, 302 S.W.2d 400, 403 (Tex. 1957)).

²⁹See *Haavistola v. Community Fire Co.*, 812 F. Supp. 1379, 1386 (D.C. Md.), *rev'd on other grounds*, 6 F.3d 211 (4th Cir. 1993).

³⁰See *id.*

³¹Civ. Prac. & Rem. Code ch. 101; see *id.* § 101.002.

³²In Attorney General Opinion DM-346 this office stated that commissioners of the Texas Workers' Compensation Commission are in the paid service of a governmental entity and therefore "employees" for purposes of Civil Practice and Remedies Code chapter 101 because they are "entitled to reimbursement for actual necessary expenses and actual lost wages due to attendance at commission meetings." Attorney General Opinion DM-346 (1995) at 1 n.1. Although a volunteer for a regional poison control center may receive reimbursement for his or her expenses, we find no statute entitling a volunteer to reimbursement. Cf. Gov't Code § 2109.004(b)(1) (authorizing governmental entity that provides human services to reimburse volunteers for actual and necessary expenses). In addition, a volunteer is not compensated in any way for lost wages due to the volunteer work.

³³See *Harris County v. Dillard*, 883 S.W.2d 166, 167 (Tex. 1994).

poses of the Tort Claims Act and section 777.007 of the Health and Safety Code pertain to the state's liability in tort cases, we believe we must construe the term "employee" consistently in both statutes, especially since the legislature has not provided to the contrary.

In addition, for purposes of the Workers' Compensation Act, the Texas Court of Civil Appeals has held that an individual who performs a service of his or her own free will without any promise of remuneration is a volunteer, not an employee.³⁴ While the court based its conclusion on the definition of the term "employee" in the Workers' Compensation Act, we believe the court's definition comports with the common understanding of the term. For example, *Black's Law Dictionary* defines employee generally as "a person in the service of another under [a] contract of hire³⁵ . . . a person working for salary or wages."³⁶ A volunteer, by contrast, is an individual who serves with no promise of remuneration.³⁷

We therefore conclude that, unless defined otherwise by statute, an individual's status as an employee is determined not only by whether the putative employer has a right to control the employee, but also by whether the putative employer has contracted, explicitly or implicitly, to compensate the employee for the employee's services. We note that Civil Practices and Remedies Code section 102.001(1) explicitly defines "employee" for purposes of determining a local government's tort-claim liability to include a volunteer. We think, though, that this inclusion of volunteer is an exception to the general rule. Moreover, we believe the definition of employee in the Texas Tort Claims Act³⁸ more closely fits the legislature's intended usage of the term in Health and Safety Code section 777.007, given that both statutes involve the state's liability for its employees' conduct.

Consequently, in answer to your specific questions, Health and Safety Code section 777.007 requires the state to indemnify only those individuals with whom a poison control center contracts, explicitly or implicitly, to compensate and whose services the poison control center has a right to control. Both of these requirements must be met. An

³⁴See *Texas Employers Ins. Ass'n v. Burrell*, 564 S.W.2d 133, 134 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.) (citing *Nobles v. Texas Indem. Ins. Co.*, 24 S.W.2d 367, 369 (Tex. Comm'n App. 1930, judgment adopted) and other cases).

³⁵*Black's* cites, for this definition of "employee," *Riverbend Country Club v. Patterson*, 399 S.W.2d 382, 383 (Tex. Civ. App.—Eastland 1965, writ ref'd n.r.e.). *BLACK'S LAW DICTIONARY* 471 (5th ed. 1979).

³⁶*Id.* (footnote added); see also *Graves v. Women's Professional Rodeo Ass'n*, 907 F.2d 71, 73 (8th Cir. 1990) (stating that essential prerequisite of employer-employee relationship is that employer compensates employee).

³⁷*BLACK'S LAW DICTIONARY* at 1413.

³⁸See *supra* text accompanying notes 31-32.

individual employed by a state agency who, in accordance with statutory duties bestowed upon that agency, works with a regional poison control center is not an employee of the center, although the individual is an employee of the state agency. A volunteer who serves a regional poison control center is not an employee of the center because the volunteer has no expectation of remuneration for his or her services. Likewise, **an individual who is contractually entitled to payment from a poison control center, but who is not subject to the center's right to control the details of the work, is an independent contractor, not an employee of the center.**

Accordingly, section 777.007 does not require the state to indemnify many of the individuals you list. The state need not indemnify under that section individuals who serve a regional poison control center because they are employed by a state agency that has some responsibility with respect to the center. Thus, officers and employees of the Advisory Commission on State Emergency Communications, the Texas Department of Health, the General Services Commission, or the coordinating committee are not employees of a regional poison control center, and section 777.007 does not require the state to indemnify them.

Other statutes may provide these individuals with indemnity or exempt them from liability, however. Health and Safety Code section 771.053(b), for example, may exempt from liability members of the Advisory Commission on State Emergency Communications. Furthermore, **chapter 104 of the Civil Practice and Remedies Code requires the state to indemnify an employee or officer of a state agency.**³⁹ Although chapter 104 does not define state agency, we believe the term includes entities created by statute, that have statewide jurisdiction, and the members of which are appointed by state officials.⁴⁰ Accordingly, we conclude that employees and officers of the Advisory Commission on State Emergency Communications (to the extent they are not exempt from liability), the Texas Department of Health, and the General Services Commission are within the indemnity Civil Practice and Remedies Code chapter 104 provides. Of course, chapter 104 requires the state to indemnify an employee or officer only if the damages are predicated on the employee's or officer's act or omission performed in the course and scope of the employment or office.⁴¹ Additionally, chapter 104 requires the state to indemnify an employee or officer only if the damages arise out of a cause of action for negligence; the damages arise out of a cause of action for deprivation of a federal constitutional or statutory right, privilege or immunity; or the attorney general determines that the state's best interest warrants indemnifying the employee or officer.⁴²

³⁹Civ. Prac. & Rem. Code § 104.001(1).

⁴⁰See Attorney General Opinion JM-1005 (1989) at 4 (citing Attorney General Opinion H-297 (1974)) (defining "state agency").

⁴¹Civ. Prac. & Rem. Code § 104.002(a).

⁴²Health & Safety Code § 777.007.

Section 777.007 of the Health and Safety Code does not require the state to indemnify a volunteer of a regional poison control center.⁴³ We cannot determine whether section 777.007 requires the state to indemnify a specialty consultant because you do not indicate the circumstances of a specialty consultant's service to a regional poison control center. If the specialty consultant is an employee of a regional poison control center, he or she is entitled to indemnity under section 777.007. If, on the other hand, the specialty consultant is not a poison control center employee, he or she is not entitled to indemnification under section 777.007, although the consultant may be entitled to indemnification, under another statute, as an employee of another agency.

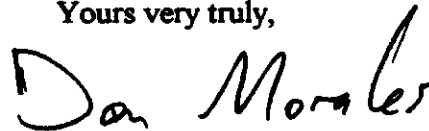
⁴³Government Code chapter 2109 requires a governmental entity that provides for basic human mental or physical needs to use volunteers, if feasible. Gov't Code § 2109.002; *see also id.* § 2109.001 (defining "governmental entity," "human services"). A governmental entity's volunteer program may, among other things, "establish an insurance program to protect volunteers in the performance of volunteer services." *Id.* § 2109.004(b)(2). You do not ask, and we do not, therefore, determine whether a regional poison control center is a governmental entity that provides human services, to which Government Code chapter 2109 is applicable. We also do not consider whether the insurance program chapter 2109 authorizes a governmental entity to establish includes liability insurance.

S U M M A R Y

Health and Safety Code section 777.007 requires the state to indemnify only an employee of a regional poison control center. **An individual's status as an employee is determined by whether the putative employer has a right to control the details of the individual's work.** In addition, an employee is distinguished from a volunteer by an employee's contractual (express or implied) right to compensation.

An employee of a state agency, not a regional poison control center, is not entitled to indemnification under Health and Safety Code section 777.007. Thus, an officer or employee of the Advisory Commission on State Emergency Communications, the Texas Department of Health, the General Services Commission, or the coordinating committee established by Health and Safety Code section 777.008 who are not employees of a regional poison control center are not entitled to indemnification under section 777.007. Of course, other statutes may provide these individuals with indemnity or exempt them from liability. **Furthermore, section 777.007 does not require the state to indemnify volunteers or independent contractors of a regional poison control center.**

Yours very truly,



DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

SARAH J. SHIRLEY
Chair, Opinion Committee

Prepared by Kymberly K. Oltrogge
Assistant Attorney General

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION**

KEVIN N. BASS,
Plaintiff,

V.

TEXAS TECH UNIVERSITY HEALTH
SCIENCES CENTER, et al.,
Defendants.

Civil Action No. 5:25-cv-00244-H-BV

TAB D

**TEXAS ATTORNEY GENERAL
OPINION DM-0457**

November 26, 1997

Referenced in: Section IV.A.3

Description:	<i>Volunteers are excluded from Chapter 104 indemnification and defense because § 104.001 enumerates specific categories of persons entitled to representation, and “volunteers” are not listed. Applies expressio unius est exclusio alterius.</i>
Source:	<i>Office of the Attorney General of Texas</i>

*Appendix to Plaintiff's Motion to Disqualify Counsel
Bass v. TTUHSC et al., No. 5:25-cv-00244-H-BV*



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

DAN MORALES
ATTORNEY GENERAL

November 26, 1997

Mr. William Treacy
Executive Director
Texas State Board of Public Accountancy
333 Guadalupe, Tower III, Suite 900
Austin, Texas 78701-3900

Opinion No. DM-457

Re: Whether state indemnification and defense in certain legal actions pursuant to chapter 104 of the Civil Practice and Remedies Code is available to a volunteer performing services for a state agency (RQ-905)

Mr. Wayne Scott
Executive Director
Texas Department of Criminal Justice
P.O. Box 99
Huntsville, Texas 77342-0099

Dear Gentlemen:

Civil Practice and Remedies Code section 104.001 requires the state to indemnify those individuals listed in that section for damages, court costs, and attorney fees if the damages are premised on an act or omission that occurred during the individual's service to the state. Section 104.004 requires the state to defend those same individuals. Section 104.001 does not list volunteers. You both ask whether the state must indemnify and defend a volunteer¹ who provides services for your agency if a civil action is brought against him or her for an action performed in the course and scope of the voluntary services.² The Department of Criminal Justice inquires generally about volunteers who provide services for it,³ while the Board of Public Accountancy asks about its constructive enforcement volunteers, who assist the board with investigations. **Because volunteers are not among those individuals listed in section 104.001, we conclude that they are not entitled to indemnification from and legal representation by the state.**

¹See Gov't Code § 2109.004(a) (listing requirements to which state agencies that wish to establish a volunteer program must adhere).

²Attorney General Opinion DM-173 (1992) concludes that section 101.063 of the Human Resources Code accorded immunity from liability to volunteer ombudsmen in the Texas Department of Aging long-term care ombudsman program for the good-faith performance of their functions as volunteers, and Attorney General Opinion DM-206 (1993) concludes that this statute also applied to interns in the volunteer ombudsman program. These two opinions address a specific provision of the Human Resources Code adopted to comply with a federal requirement, and they do not address the question of immunity for volunteers in general.

³See Gov't Code § 501.009 (requiring Department of Criminal Justice to encourage volunteer organizations to provide various programs for inmates).

The executive director of the State Board of Public Accountancy also asks whether a constructive enforcement volunteer may claim an absolute or qualified privilege if the volunteer is sued for defamation for his or her official work. We conclude that, in appropriate circumstances, the volunteer may claim one or the other.

We will consider first your questions about the extent of Civil Practice and Remedies Code chapter 104. Section 104.001 of that chapter requires the state to indemnify certain individuals for damages, court costs, and attorney fees:

In a cause of action based on conduct described in Section 104.002, the state shall indemnify the following persons, *without regard to whether the persons performed 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 . . . occurred;

(3) a physician or psychiatrist . . . who was performing services under a contract with any state agency, institution, or department or a racing official performing services under a contract with the Texas Racing Commission when the act or omission . . . occurred;

(4) a person serving on the governing board of a foundation, corporation, or association at the request and on behalf of an institution of higher education, . . . , not including a public junior college;

(5) a state contractor who signed a waste manifest as required by a state contract; or

(6) the estate of a person listed in this section. [Emphasis added.]

Section 104.002 limits indemnification to damages based on an action or omission committed in the course of the individual's service to the state, with certain qualifications irrelevant here.⁴ Any public

⁴An appropriation to pay a claim under Civil Practice and Remedies Code chapter 104 is to be made from otherwise unappropriated amounts in a special fund or an account that may be appropriated to the affected state agency, to the extent that funds are available. *Id.* §§ 109.002(b), .003, .007 (excepting certain claims from chapter 109). If funds are unavailable, the appropriation may be made from the general revenue fund. *Id.* § 109.003. The comptroller will (continued...)

Mr. Wayne Scott

servant who is entitled to indemnification under sections 104.001 and 104.002 similarly is entitled to be defended by the attorney general.⁵

To conclude that a volunteer is entitled to indemnification under section 104.001, we must interpret the section in one of two ways: either the list of positions numbered (1) through (6) is exemplary and not exclusive, or one of the listed positions includes volunteers. Because you ask about volunteers whose service fits under none of the listed categories except perhaps employee, we will consider only whether the term “employee” in section 104.001(1) encompasses volunteers.⁶ We believe the section’s plain language precludes either conclusion. Because we find the language clear, we need not rely on legislative history to determine what the legislature intended the section to mean.⁷

We first conclude that section 104.001 provides indemnification to only those individuals explicitly listed. A statute that creates an entitlement and designates the individuals who may claim the entitlement should be construed restrictively to infer that any individual not expressly described is excluded⁸ unless the statute clearly states the contrary.⁹ Section 104.001 contains no language clearly stating the contrary, nor does it imply that the class of positions entitled to indemnification is broader than those positions specifically listed. The section does not, for example, require the state to indemnify those public servants including those listed. Similarly, the section does not suggest that the listed positions are described as an example. Nor does the list establish a seventh, open-ended category indemnifying, for example, any other public servant.

Second, we do not believe the term “employee” includes volunteers, even though the section refers to individuals who are not compensated for their service to the state. This office refused in

⁴(...continued)

reduce the appropriation for the state agency in an amount not to exceed \$5,000 per claim or five percent of the agency’s appropriation for that fiscal year for all claims. *Id.* § 109.004.

⁵*Id.* § 104.004(a).

⁶We do not consider in this opinion whether a state employee is entitled to indemnification and representation for an act or omission committed in the course of volunteer work.

⁷*See Boykin v. State*, 818 S.W.2d 782, 785-86 n.4 (Tex. Crim. App. 1991) (explaining that, despite Government Code’s invitation to examine legislative history regardless of statute’s clarity, court generally should decline to do so where language of statute in question is unambiguous); *Lumbermen’s Underwriters v. State Bd. of Ins.*, 502 S.W.2d 217, 219 (Tex. Civ. App.—Austin 1973, writ ref’d n.r.e.) (citing 53 TEX. JUR. 2D *Statutes* § 125, at 182 n.17) (stating that, when legislature plainly has expressed its intent in statute’s language, intent must be effectuated without attempting to construe or interpret law).

⁸*See Bidelsbach v. State*, 840 S.W.2d 516, 518 (Tex. App.—Dallas 1992), writ *dism’d*, 850 S.W.2d 183 (Tex. Crim. App. 1993) (per curiam); 2A NORMAN J. SINGER, *STATUTES AND STATUTORY CONSTRUCTION* § 47.23 (5th ed. 1992).

⁹*See* 2A SINGER, *supra* note 8, § 47.23.

Attorney General Opinion DM-409 to construe Health and Safety Code section 777.007, which requires the state to indemnify under Civil Practice and Remedies Code chapter 104 “an employee” of a regional poison control center, to require the state to indemnify a regional-poison-control-center volunteer.¹⁰ In that opinion, we distinguished an employee from a volunteer on two bases: employer control and an express or implied contract for compensation.¹¹ An employer has control over an employee, but little over a volunteer.¹² In addition, an employee has an express or implied contract for compensation with the employer, while a volunteer has no such contract.¹³ We believe the same rationale applies here.

Our construction of section 104.001 does not render the phrase “without regard to whether the persons performed their services for compensation” meaningless, although our conclusion necessitates a finding that an employee cannot be uncompensated. In our opinion, the phrase refers, at the least, to board members, officers, and former board members whom the state must indemnify. We understand from one of the briefs we received on this issue that individuals serving as board members and officers generally are not compensated for their services, and evidently this fact caused confusion as to whether an individual must be compensated to be entitled to indemnification and defense. The amendment thus rectifies this incongruity and “clearly indicates that board members and former board members are entitled to indemnification, . . . whether or not they perform their services for monetary compensation.”¹⁴

Finally, with respect to your joint question, **because a volunteer is not entitled to indemnification from the state under section 104.001, a volunteer is likewise not entitled to the attorney general’s defense under section 104.004.**

We turn now to the additional questions posed by the executive director of the State Board of Public Accountancy regarding the board’s constructive enforcement volunteers. Under the board’s direction, constructive enforcement volunteers are asked to do various investigative tasks including:

- (1) on-site investigations;

¹⁰Attorney General Opinion DM-409 (1996) at 6-7.

¹¹See *id.* at 4-6.

¹²See *id.* at 5 (citing *Haavistola v. Community Fire Co.*, 812 F. Supp. 1379, 1386 (D.C. Md.), *rev’d on other grounds*, 6 F.3d 211 (4th Cir. 1993)).

¹³*Id.* at 5-6.

¹⁴Letter from Delmar Cain, General Counsel, The Texas A&M University System, to Sarah Shirley, Chair, Attorney General Opinion Committee (Oct. 23, 1996) (on file with the Opinion Committee, Office of the Attorney General).

Mr. William Treacy - Page 3
Mr. Wayne Scott

(DM-457)

- (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.

The executive director inquires whether an absolute privilege against a suit for defamation would apply to its constructive enforcement volunteers. Chapter 73 of the Civil Practice and Remedies Code defines defamation as follows:

A libel is a defamation expressed in written or other graphic form that tends to blacken the memory of the dead¹⁵ or that tends to injure a living person's reputation and thereby expose the person to public hatred, contempt or ridicule, or financial injury or to impeach any person's honesty, integrity, virtue, or reputation or to publish the natural defects of anyone and thereby expose the person to public hatred, ridicule, or financial injury. [Footnote added.]

There is an absolute privilege for communications in the due course of a judicial proceeding made by the judge, jurors, counsel, parties, or witnesses.¹⁶ Such communications will not serve as the basis of a civil action for libel or slander, regardless of the negligence or malice with which they are made.¹⁷ The privilege attaches to all aspects of the proceedings, including statements made in open court, pre-trial hearings, depositions, affidavits, and any of the pleadings or other papers in the

¹⁵Recovery may be had for defamation of the dead only upon proof of injury to the reputation of the person by or for whom the action is brought. *Renfro Drug Co. v. Lawson*, 160 S.W.2d 246, 250 (Tex. 1942).

¹⁶*James v. Brown*, 637 S.W.2d 914, 916-17 (Tex. 1982); *Reagan v. Guardian Life Ins. Co.*, 166 S.W.2d 909, 912 (Tex. 1942).

¹⁷*James*, 637 S.W.2d at 916-17; *Reagan*, 166 S.W.2d at 912.

case.¹⁸ The privilege barring defamation suits applies to proceedings before executive officers and boards and commissions that exercise quasi-judicial powers.¹⁹

Also subject to the absolute privilege are out-of-court communications made by attorneys preliminary to a judicial proceeding or in connection therewith, if the statements relate to a judicial proceeding in which the attorney is employed and are in furtherance of the representation.²⁰ In a suit for damages instituted by a woman who was involuntarily hospitalized upon the application of her son and daughter, the Texas Supreme Court held that reports by three psychiatrists to the probate judge in the mental health proceedings were absolutely privileged.²¹ A letter by one of the psychiatrists to the attorney for the plaintiff's children was also within the privilege because it was written in contemplation of a judicial proceeding.²²

Accordingly, we believe that the constructive enforcement volunteers would have an absolute privilege against a civil action for libel or slander for statements made as witnesses in a quasi-judicial proceeding before the State Board of Public Accountancy and for communications preliminary to a proposed proceeding in which the volunteer will testify, if the communication has some relation to the hearing.²³ Whether a preliminary communication is related to the proceeding is a question of law, to be determined by considering the entire communication in its context.²⁴

¹⁸*James*, 637 S.W.2d at 916-17.

¹⁹*Reagan*, 166 S.W.2d at 912 (Board of Insurance Commissioners); *Putter v. Anderson*, 601 S.W.2d 73, 76 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.) (internal affairs division of city police department when investigating citizen's complaint about police officer); see also *Odeneal v. Wofford*, 668 S.W.2d 819, 820 (Tex. App.—Dallas 1984, writ ref'd n.r.e.) (State Bar Grievance Committee).

²⁰*Russell v. Clark*, 620 S.W.2d 865, 869 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.); see also *Odeneal*, 668 S.W.2d at 820 (privilege applies to letter written by attorney who is subject to grievance proceeding). The question of the relationship of the defamatory matter to a judicial proceeding is a question of law, to be determined by the court by considering the entire communication in its context and extending the privilege to any statement that bears some relation to a judicial proceeding. *Russell*, 620 S.W.2d at 870.

²¹*James*, 637 S.W.2d at 916-17.

²²*Id.* at 917. The *James* court described the scope of the privilege for matters written in contemplation of a judicial proceeding:

A witness is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding or as a part of a judicial proceeding in which he is testifying, if it has some relation to the proceeding.

Id. (quoting from THE RESTATEMENT 2D OF TORTS § 588 (1981)).

²³*Id.*

²⁴*Russell*, 620 S.W.2d at 870.

You also ask whether a conditional or qualified privilege might be available to constructive enforcement volunteers in defamation suits. This privilege applies to bona fide communications, oral or written, made in good faith on any subject matter in which the author has an interest or with reference to which he has a duty to perform, to another person having a corresponding interest or duty.²⁵ It does not change the actionable quality of the words published, but merely rebuts the inference of malice that is imputed in the absence of privilege and makes a showing of falsity and actual malice essential to the right of recovery.²⁶ The communication of alleged wrongful acts to an official authorized to protect the public from such acts is protected by a qualified privilege.²⁷ In our opinion, a constructive enforcement volunteer acting at the direction of the State Board of Public Accountancy or of paid employees who supervise volunteers would have a sufficient interest in the work of the board to invoke this privilege for communications to the board or to employees that have a corresponding interest or duty with respect to the substance of the communication. Whether this privilege would apply in a particular situation must be decided in light of all the facts and circumstances.

We wish to emphasize that the privileges we have discussed apply only to utterances that are made the basis of a subsequent suit for libel or slander.²⁸ An action taken by a witness may be the basis of a civil suit on other grounds, even though it is the subject of the witness's testimony in a judicial or quasi-judicial proceeding.²⁹ Communicating investigative findings to the board and testifying at hearings are only two of many tasks that constructive enforcement volunteers might perform for the board. Causes of action other than an action for defamation might arise out of a volunteer's other activities on behalf of the board.³⁰

²⁵*Mayfield v. Gleichert*, 484 S.W.2d 619, 625 (Tex. Civ. App.--Tyler 1972, no writ).

²⁶*Id.* at 626.

²⁷*Zarate v. Cortinas*, 553 S.W.2d 652, 655 (Tex. Civ. App.--Corpus Christi 1977, no writ) (accusation filed with sheriff's office accusing deputy county clerk of unauthorized loan of county equipment).

²⁸*Charter Med. Corp. v. Miller*, 605 S.W.2d 943, 953 (Tex. Civ. App.--Dallas 1980, writ ref'd n.r.e.).

²⁹*James*, 637 S.W.2d at 917-18 (defamation action cannot be based on doctors' communication to court of diagnoses of plaintiff's mental condition, but diagnoses themselves may be actionable on other grounds, such as medical malpractice).

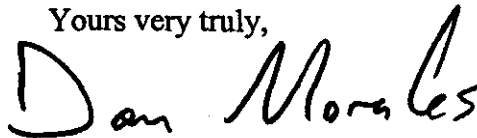
³⁰We do not know the full extent of the services performed by constructive enforcement volunteers, because, as the executive director of the Board of Public Accountancy informs us, their service includes "carrying out other investigative tasks, as needed."

S U M M A R Y

A person who serves a state agency as an uncompensated volunteer is not entitled to indemnification against actual damages, court costs, and attorney fees adjudged against him or her under the circumstances described in section 104.002 of the Civil Practice and Remedies Code. Likewise, a volunteer is not entitled to be defended by the attorney general in suits subject to chapter 104 of the same code.

Constructive enforcement volunteers who assist in investigations for the State Board of Public Accountancy would have an absolute privilege against a civil action for defamation for statements made as witnesses in a quasi-judicial proceeding before the board. They would have a conditional or qualified privilege against a defamation suit under appropriate circumstances. The conditional or qualified privilege applies to bona fide communications, oral or written, made in good faith on any subject matter in which the author has an interest or with reference to which he has a duty to perform, to another person having a corresponding interest or duty. The absolute and conditional privileges apply only to a defamation suit and not to other causes of action that might arise out of a volunteer's activities on behalf of the Board of Public Accountancy.

Yours very truly,



DAN MORALES
Attorney General of Texas

JORGE VEGA
First Assistant Attorney General

SARAH J. SHIRLEY
Chair, Opinion Committee

Prepared by Susan Garrison and Kymberly K. Oltrogge
Assistant Attorneys General

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION**

KEVIN N. BASS,
Plaintiff,

V.

TEXAS TECH UNIVERSITY HEALTH
SCIENCES CENTER, et al.,
Defendants.

Civil Action No. 5:25-cv-00244-H-BV

TABLE

**TEXAS ATTORNEY GENERAL
OPINION GA-0523**

March 5, 2007

Referenced in: Section IV.A.3

Description:	<i>A criminal district attorney is not covered by Chapter 104 defense obligations because the statute's enumerated list of covered persons is exclusive. Confirms that individuals not specifically listed in § 104.001 fall outside the AG's defense authority.</i>
Source:	<i>Office of the Attorney General of Texas</i>

*Appendix to Plaintiff's Motion to Disqualify Counsel
Bass v. TTUHSC et al., No. 5:25-cv-00244-H-BV*



ATTORNEY GENERAL OF TEXAS
G R E G A B B O T T

March 5, 2007

Ms. Margie Ainsworth
Interim Auditor
San Jacinto County
1 State Highway 150, Room B1
Coldspring, Texas 77331

Opinion No. GA-0523

Re: County's payment of legal fees of a
criminal district attorney charged with criminal
offenses (RQ-0461-GA)

Dear Ms. Ainsworth:

Your predecessor informed us that over the last few years, several local officials and employees in San Jacinto County were defendants in diverse civil and criminal litigation.¹ His request letter recounts that a number of such criminal charges, including charges against the criminal district attorney for the county, resulted in acquittal or dismissal. *See Request Letter, supra* note 1, at 2. Some of these officials and employees sought reimbursement for attorneys fees incurred in defending these matters. *See id.* Given these circumstances, your predecessor asked whether the state or the county may reimburse a criminal district attorney's legal fees incurred in connection with official duties, whether the commissioners court may reimburse unbudgeted legal fees of county officials without finding the existence of "a grave public necessity," and whether the county "would expose itself to liability" if it pays the legal bills of some of the officials but not others. *See id.* at 2-3.

The request letter states that the county has not had a policy in the past to pay legal fees for county officials charged with criminal offenses. *See id.* at 1. In work-related civil actions, the county's insurance carrier has generally provided county officials with a defense, although in one instance a commissioner had to pay for his own defense in a suit arising out of an accident involving the commissioner's private trailer used to move county equipment. *See id.* at 1, 3. Recently, however, the commissioners court adopted a policy that "[i]f and when an elected county official of San Jacinto County, [S]tate of Texas incurs [certain civil or criminal legal] expenses and meets [specific] criteria . . . , those expenses will be reimbursed by the county."²

¹See Letter from Mr. Ray Stelly, C.P.A., San Jacinto County Auditor, to Honorable Greg Abbott, Attorney General of Texas, at 1-2 (Mar. 6, 2006) (on file with the Opinion Committee, *also available at* <http://www.oag.state.tx.us>) [hereinafter Request Letter].

²REIMBURSEMENT OF LEGAL EXPENSES FOR ELECTED COUNTY OFFICIALS, submitted by Mr. Ray Stelly, C.P.A., San Jacinto County Auditor, to Honorable Greg Abbott, Attorney General of Texas (Mar. 6, 2006) (submitted as part of Request Letter, on file with the Opinion Committee, *also available at* <http://www.oag.state.tx.us>) [hereinafter Reimbursement Policy].

First, we are asked generally whether the criminal district attorney for San Jacinto County would be covered by chapter 104 of the Texas Civil Practice and Remedies Code, concerning the indemnification and defense of state officials in various circumstances. *See* Request Letter, *supra* note 1, at 2; *see also* TEX. CIV. PRAC. & REM. CODE ANN. §§ 104.001–.002, .0035, .004–.005 (Vernon 2005); TEX. GOV'T CODE ANN. § 44.304 (Vernon 2004) (creating the office of criminal district attorney for San Jacinto County). Chapter 104 covers “an employee, a member of the governing board, or any other officer of a state agency, institution, or department.” TEX. CIV. PRAC. & REM. CODE ANN. § 104.001(1) (Vernon 2005). The chapter does not define “state agency, institution, or department,” nor has any court construed the phrase in the context of chapter 104. However, a criminal district attorney must be considered to be an employee or officer of a “state agency, institution, or department” for chapter 104 to apply. *Id.*

Article V, section 21 of the Texas Constitution provides for criminal district attorneys, as well as district attorneys and county attorneys. *See* TEX. CONST. art. V, § 21. The Legislature has created the offices of criminal district attorneys by county. *See* TEX. GOV'T CODE ANN. § 44.001 (Vernon 2004) (providing that the voters of specified counties shall elect criminal district attorney). As the Legislature provides, a resident criminal district attorney performs the duties of county attorneys. *See Neal v. Sheppard*, 209 S.W.2d 388, 390 (Tex. Civ. App.—Texarkana 1948, writ *ref'd*) (stating “A resident criminal district attorney acts in lieu of the county attorney and necessarily would perform the duties of the county attorney in both civil and criminal matters.”). And the geographic jurisdiction of the criminal district attorney is San Jacinto County rather than statewide. *See, e.g.,* TEX. GOV'T CODE ANN. § 44.304 (Vernon 2004). We therefore conclude that the criminal district attorney is not an employee or officer of a “state agency, institution, or department” for purposes of chapter 104. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 104.001 (Vernon 2005). *Cf. Crane v. State*, 766 F.2d 193, 195 (5th Cir. 1985), *cert. denied sub. nom., Dallas County v. Crane*, 474 U.S. 1020 (1985) (finding a district attorney to be a county official for purposes of county liability due to the district attorney’s local election, funding, powers, and duties); *Hill County v. Sheppard*, 178 S.W.2d 261, 263 (Tex. 1944) (criminal district attorney is a “class or kind” of district attorney). As a criminal district attorney is not a covered person under section 104.001, a criminal district attorney is not entitled to be defended by the attorney general or receive reimbursement of defense costs under that chapter. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 104.001–.005 (Vernon 2005).

Next, we are asked broadly if the county is responsible for the criminal district attorney’s criminal defense. *See* Request Letter, *supra* note 1, at 2. As a court has determined, however, a county does not have a general duty to provide for the criminal defense of any of its officers and employees. *See White v. Eastland County*, 12 S.W.3d 97, 102 (Tex. App.—Eastland 1999, no *pet.*). A pertinent statute, section 157.901 of the Local Government Code, requires a county to employ and pay for private counsel to represent a county official or employee in an action arising out of the performance of public duties. *See* TEX. LOC. GOV'T CODE ANN. § 157.901 (Vernon 1999). The court in *White* determined that section 157.901 creates a duty to provide for a defense in civil cases, but does not create a duty to defend an official or employee against a criminal charge. *See White*,

12 S.W.3d at 102.³ The court in *White* also determined that the common law does not impose a duty on a county to pay for the criminal defense of its officers and employees. *Id.* at 103. Consistently with the opinion in *White*, we conclude that a county does not have either a statutory or common-law duty to provide for criminal defense expenses of an officer or employee.

The reimbursement policy adopted by the commissioners court that was included with the request letter represents another potential source of duty to reimburse an officer's or employee's criminal defense costs. Reimbursement Policy, *supra* note 2, at 1. Although a county has no statutory or common-law duty to provide or pay for criminal representation of its officers or employees, it has the discretion to do so for certain kinds of claims. *See White*, 12 S.W.3d at 102–03 (discussing discretionary authority of county to pay employee or officer's criminal legal fees when it serves a public purpose); *see also* Tex. Att'y Gen. Op. No. JC-0294 (2000) at 9 (discussing limits on a city's discretion to pay criminal defense expenses). The policy adopted by the commissioners court states that legal expenses meeting certain criteria "will be reimbursed by the county." Reimbursement Policy, *supra* note 2, at 1. We cannot say as a matter of law whether the policy makes the county legally responsible for the criminal district attorney's legal fees, however. The answer to that question would require a construction of the policy and resolution of fact questions, which are matters for the commissioners court to determine in the first instance. *See* Tex. Att'y Gen. Op. Nos. GA-0433 (2006) at 1 (stating that this office generally refrains from construing ordinances); GA-0308 (2005) at 3 (approval of requested expenditure is a matter for commissioners court to determine in the first instance). Consequently, we do not opine on whether the county policy identified in this request requires the reimbursement of the criminal district attorney's legal expenses in this instance.

We are also asked whether the commissioners court could pay any of these officials' legal bills from the current budget only upon finding the existence of "a grave public necessity." Request Letter, *supra* note 1, at 2. The request letter states that "payment of the bill is not budgeted." *Id.* Local Government Code section 111.010 governs this question. *See* TEX. LOC. GOV'T CODE ANN. § 111.010 (Vernon 1999). A commissioners court must "spend county funds only in strict compliance with the budget, except in an emergency." *Id.* § 111.010(b). The court may amend the original budget for an emergency item "only in a case of grave public necessity to meet an unusual and unforeseen condition that could not have been included in the original budget through the use of reasonably diligent thought and attention." *Id.* § 111.010(c). Assuming that no budget item corresponds to the payment of the legal expenses of an individual or individuals, it is correct that the county may pay the bills from the current budget only by amending the budget upon the commissioners court's finding of a grave public necessity consistent with section 111.010(c). *See* Tex. Att'y Gen. Op. No. GA-0426 (2006) at 7.

Finally, we are asked whether the county may pay legal bills in some instances but not in others. *See* Request Letter, *supra* note 1, at 3. A county's "decision to provide or not provide

³Additionally, this office observed that the statutory predecessor to section 157.901 of the Local Government Code applied to county officers and employees but not to a district attorney who is a district officer. *See* Tex. Att'y Gen. Op. No. MW-252 (1980) at 2.

counsel is one of governmental policy and discretion.” *White*, 12 S.W.3d at 104 (discussing a county’s discretion to defend a sheriff from criminal charges). Provided that the official or employee is not found guilty, the commissioners court may reimburse criminal defense costs upon its determination that the prosecution was for an act performed in the bona fide performance of official duties and that the expenditure will serve a public interest and not merely an officer’s or employee’s private interest. *See* Tex. Att’y Gen. Op. No. JC-0294 (2000) at 1, 2–3. Consequently, within these bounds, the commissioners court has discretion to determine whether to pay legal bills in some instances but not in others, subject to judicial review.

S U M M A R Y

A criminal district attorney is not a person covered by chapter 104 of the Civil Practice and Remedies Code and is not entitled to be defended by the attorney general or receive reimbursement of defense costs under the chapter. A commissioners court has discretion to pay for a person's legal expenses in a criminal matter upon findings that the payment furthers a county purpose and that the prosecution was for an act performed in the bona fide performance of official duties. After approving its budget, a county may not pay for unbudgeted legal defense expenses without a finding of grave public necessity.

Very truly yours,


GREG ABBOTT
Attorney General of Texas

KENT C. SULLIVAN
First Assistant Attorney General

ELLEN L. WITT
Deputy Attorney General for Legal Counsel

NANCY S. FULLER
Chair, Opinion Committee

William A. Hill
Assistant Attorney General, Opinion Committee

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION**

KEVIN N. BASS,
Plaintiff,

V.

TEXAS TECH UNIVERSITY HEALTH
SCIENCES CENTER, et al.,
Defendants.

Civil Action No. 5:25-cv-00244-H-BV

TAB F

**TEXAS ATTORNEY GENERAL
OPINION MW-475**

May 20, 1982

Referenced in: Section IV.A.3

Description:	<i>State universities lack authority to execute contractual indemnity agreements. Universities cannot agree to hold harmless or indemnify private contractors, reinforcing that contractors operate outside the state's liability framework.</i>
Source:	<i>Office of the Attorney General of Texas</i>

*Appendix to Plaintiff's Motion to Disqualify Counsel
Bass v. TTUHSC et al., No. 5:25-cv-00244-H-BV*



The Attorney General of Texas

May 20, 1982

MARK WHITE
Attorney General

Supreme Court Building
P. O. Box 12548
Austin, TX. 78711-2548
512/475-2501
Telex 910/874-1367
Telecopier 512/475-0266

Mr. Al Hurley
President
North Texas State University
P. O. Box 13426
Denton, Texas 76203

Opinion No. MW-475

Re: Authority of state
universities to execute
contractual indemnity agree-
ments, and related questions

1807 Main St., Suite 1400
Dallas, TX. 75201-4709
214/742-8944

4824 Alberta Ave., Suite 160
El Paso, TX. 79905-2793
915/533-3484

1220 Dallas Ave., Suite 202
Houston, TX. 77002-6986
713/650-0666

806 Broadway, Suite 312
Lubbock, TX. 79401-3479
806/747-5238

4309 N. Tenth, Suite B
McAllen, TX. 78501-1685
512/682-4547

200 Main Plaza, Suite 400
San Antonio, TX. 78205-2797
512/225-4191

An Equal Opportunity/
Affirmative Action Employer

Dear Mr. Hurley:

You have asked about the authority of the state to indemnify others contractually. If such authority exists, you ask what acts can be covered by the indemnity agreement. If it does not exist, you ask whether a contract containing such an agreement would be void or voidable.

The following clause is one, you advise, that commonly is found in contracts proffered by the university:

University shall indemnify and hold harmless contractor from and against any and all claims, actions, or damages including attorneys fees caused by or arising out of the performance, failure to perform or breach of any of the university's obligations under this lease.

Some indemnity agreements require the indemnitor to hold the indemnitee harmless from liability arising by reason of the indemnitee's own acts, or arising from the acts of third parties. See 14 Tex. Jur. III Contribution and Indemnification §24, at 675. But see V.T.C.S. arts. 249d, 2212b. The clause set out above is not of that type, however. It purports to indemnify only against harm arising from acts of the university itself.

To the extent that such a clause merely reinforces obligations the university has legally undertaken elsewhere, and does not expand or increase the school's liability or the scope of its liability, it is harmless surplusage. But to the extent that it purports to create liability or potential liability on the part of the university beyond its statutory or constitutional powers to incur liability, it is invalid. The governing bodies of state universities are creatures of statute and may constitutionally exercise only powers properly

delegated to them by the legislature. See Foley v. Benedict, 55 S.W.2d 805 (Tex. 1932).

A contractually imposed obligation of indemnity creates a "debt" in the constitutional sense unless at the time of the agreement it is within the lawful and reasonable contemplation of the parties that it will be satisfied out of current revenues or some currently available fund. Tex. Const. art. III, §49, art. XI, §§5, 7; T & N.O.R.R. Company v. Galveston County, 169 S.W.2d 713 (Tex. 1943). See also Brown v. Jefferson County, 406 S.W.2d 185 (Tex. 1966). Cf. City of Big Spring v. Board of Control, 404 S.W.2d 810 (Tex. 1966) (duration and extent of liability controlled by agency); Harris County v. Dowlearn, 489 S.W.2d 140 (Tex. Civ. App. - Houston [14th Dist.] 1973, writ ref'd n.r.e.) (prohibition not applicable to non-contractual obligations). Section 49, article III of the Texas Constitution commands that "no debt shall be created by or on behalf of the State...." The only exceptions are for supplying casual deficiencies of revenue, repelling invasion, suppressing insurrection, defending the state in war, or paying "existing debt." The term "existing debt" apparently refers to the debt existing in 1876 when the provision was adopted. Further, the provision places a \$200,000 limit on "debt created to supply deficiencies in the revenue."

There are no saving provisions in the article III, section 49 constitutional prohibition against state debt such as there are in the article XI, sections 5 and 7 provisions dealing with debts of cities and counties. The latter section provides:

[N]o debt for any purpose shall ever be incurred in any manner by any city or county unless provision is made, at the time of creating the same, for levying and collecting a sufficient tax to pay the interest thereon and provide at least two percent (2%) as a sinking fund....

The Texas Supreme Court has held that this provision does not prevent a county from agreeing to assume indebtedness in the form of a "hold harmless" agreement so long as provision is made for levying and collecting the tax required. Brown v. Jefferson County, *supra*. See also County of Ector v. City of Odessa, 492 S.W.2d 360 (Tex. Civ. App. - El Paso 1973, no writ).

In light of the restrictive constitutional prohibition against state debt, especially when coupled with the "cash basis" requirements of article III, section 49a of the constitution, a state agency will ordinarily be unable to execute an enforceable indemnity agreement in favor of another party. Persons contracting with agents of the state are bound at their peril to ascertain the limitations of the agent's authority and cannot recover to the extent the agent exceeds it.

State v. Ragland Clinic-Hospital, 159 S.W.2d 105 (Tex. 1942). Nor will statutory "control and management" authority in the agent suffice if there is no constitutional warrant for it. T & N.O.R.R. Company v. Galveston County, supra. See Kearse v. Kearse, 276 S.W. 690 (Tex. 1925). Constitutional limitations must be read into a statute so as "to restrict literalism to proper bounds." Kearse v. Kearse, supra; cf. Educ. Code §105.41 (management and control of N.T.S.U.).

A relatively recent Texas Supreme Court case might at first appear to undermine the holding of State v. Ragland Clinic-Hospital, supra, and the efficacy of the section 49, article III "debt" prohibition, but not if seen in proper perspective. In State v. City National Bank of Austin, 603 S.W.2d 764 (Tex. 1980), the court held a state agency liable for the "holdover occupancy" of office building space after the expiration of a four year lease containing a "holdover" clause. The state contended, as briefs on file with the court reveal, that the "holdover" arrangement was a new one negotiated with the lessor after the original lease expired, and that the agency was prohibited from contracting with respect to it by both the "pre-existing law" provision of the constitution (article III, section 44) and a statute. But the state did not claim that the original lease had been invalid for lack of authority in the agency to incur debt on behalf of the state. Since the validity of the original lease contract -- which contained a "holdover" clause -- was uncontested, the court said (after noting the state's contentions applicable only to an alleged "subsequent" agreement): "In view of our holding that the State is liable because of the written agreement, we find it unnecessary to discuss these points." Similarly, the prohibition of section 49, article III was not put at issue in either Board of Regents of the University of Texas v. S. & G. Construction Company, 529 S.W.2d 90 (Tex. Civ. App. - Austin 1975, writ ref'd n.r.e.), or University of Texas System v. Robert E. McKee, Inc., 521 S.W.2d 944 (Tex. Civ. App. - Eastland 1975, writ ref'd n.r.e.).

We think it continues to be the law in this state that the State of Texas cannot be held liable for a contractual obligation concluded by an agent of the state in excess of his authority, and that no state agent can be given authority to incur or create a debt on behalf of the state in contravention of the constitution. See City of Wichita Falls v. Kemp Public Library Board of Trustees, 593 S.W.2d 834 (Tex. Civ. App. - Fort Worth 1980, writ ref'd n.r.e.). In holding that Jefferson County had complied with the constitutional requirement that provision be made for levying and collecting the required tax, the supreme court in Brown v. Jefferson County, supra, did not declare that the county was unconditionally bound to perform the indemnity agreement as agreed. It said:

The 'hold and save' agreement herein involved...
may be one which may be funded and paid off

without violating any constitutional debt limit or taxing restrictions applicable to counties. If such obligation may be so discharged, the County has bound itself to do so.... Necessarily, the agreement to levy a 'sufficient tax' from year to year is subject to constitutionally imposed restrictions.... 406 S.W.2d 189, 190. (Emphasis added).

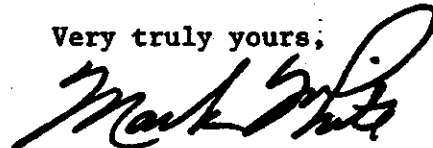
See Galveston, H & S.A.Ry. Company v. Uvalde County, 167 S.W.2d 305 (Tex. Civ. App. - San Antonio 1942, writ ref'd w.o.m.); Attorney General Opinion WW-423 (1958). See also Attorney General Opinion C-385 (1965).

We advise, therefore, that only those obligations which the state agency or university has the constitutional and statutory power to discharge may be the subject of a valid indemnity agreement by it in favor of others. An indemnity agreement negotiated by a state instrumentality in violation of law is unenforceable and void, although an invalid indemnity clause in an otherwise enforceable contract will not ordinarily invalidate the remainder of the contract. See Williams v. Williams, 569 S.W.2d 867 (Tex. 1978); Paschall v. Gulf C. & S.F.Ry. Company, 100 S.W.2d 183 (Tex. Civ. App. - Dallas 1936), modified and aff'd sub nom. Campbell v. Paschall, 121 S.W.2d 593 (Tex. 1938). See generally Susman, Contracting With the State Fiscal and Constitutional Limitations, 44 Tex. L.Rev. 106 (1966).

S U M M A R Y

Only those obligations which the state agency or university has the constitutional and statutory authority to discharge may be the subject of a valid indemnity agreement by it in favor of others. An indemnity agreement negotiated by a state instrumentality in violation of law is unenforceable and void, although an invalid indemnity clause in an otherwise enforceable contract will not ordinarily invalidate the remainder of the contract.

Very truly yours,



MARK WHITE
Attorney General of Texas

JOHN W. FAINTER, JR.
First Assistant Attorney General

RICHARD E. GRAY III
Executive Assistant Attorney General

Prepared by Bruce Youngblood
Assistant Attorney General

APPROVED:
OPINION COMMITTEE

Susan L. Garrison, Chairman
Virginia Daugherty
Rick Gilpin
Patricia Hinojosa
Jim Moellinger
Bruce Youngblood

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

KEVIN N. BASS,
Plaintiff,

v.

TEXAS TECH UNIVERSITY HEALTH
SCIENCES CENTER, et al.,
Defendants.

§
§
§
§
§
§
§
§
§
§

Civil Action No. 5:25-cv-00244-H-BV

TAB G

**TEXAS PROFESSIONAL ETHICS
COMMITTEE OPINION No. 579**

November 2007

Referenced in: Section IV.B.2

Description:	<i>Government legal offices constitute a single “law firm” for purposes of conflict-of-interest imputation under Texas Disciplinary Rule 1.06(f). Conflicts attributable to one lawyer in a government office are imputed to all lawyers in that office.</i>
Source:	<i>State Bar of Texas</i>

*Appendix to Plaintiff’s Motion to Disqualify Counsel
Bass v. TTUHSC et al., No. 5:25-cv-00244-H-BV*

**THE PROFESSIONAL ETHICS COMMITTEE
FOR THE STATE BAR OF TEXAS**

**Opinion No. 579
November 2007**

QUESTIONS PRESENTED

Question 1: May a lawyer in a public defender's office avoid a conflict of interest arising from representation of two different clients by referring one of the clients to another lawyer in the same public defender's office?

Question 2: May a lawyer in a public defender's office, after concluding that a conflict exists, continue to represent a client subsequent to withdrawing as counsel for another client?

STATEMENT OF FACTS

Lawyer, employed in a public defender's office, represents Client A in a criminal case. While this case is pending, Lawyer receives another assignment to represent Client B in a separate criminal case. During the initial interview of Client B, it becomes apparent to Lawyer that the criminal charges against both clients are substantially related to a single alleged incident. It also becomes apparent to Lawyer that the interests of each client could become adverse to the interests of the other client. Lawyer then concludes that, in view of Lawyer's representation of Client A, Lawyer will not be able to represent Client B because the continuing representation of Client B would be materially affected by Lawyer's continuing representation of Client A. Lawyer proposes to continue to represent Client A and to withdraw from representing Client B and arrange for another lawyer in the public defender's office to take over Client B's case.

DISCUSSION

Raising questions of conflict of interest is first and foremost the responsibility of the lawyers undertaking the representation of clients. See Comment 17 to Rule 1.06 of the Texas Disciplinary Rules of Professional Conduct. In the facts presented, Lawyer correctly determined that a conflict of interest under Rule 1.06(b)(2) would exist in the continued representation of both Client A and Client B.

Rule 1.06(b) addresses conflicts of interest that arise in cases where clients are not opposing each other in the same litigation within the meaning of Rule 1.06(a). Client A and Client B, in the facts presented, are not opposing each other in the same litigation. Rule 1.06(b)(2) provides:

“(b) In other situations and except to the extent permitted by paragraph (c), a lawyer shall not represent a person if the representation of that person:

...
(2) reasonably appears to be or become adversely limited by the lawyer's or law firm's responsibilities to another client or to a third person or by the lawyer's or law firm's own interests.”

Rule 1.06(b)(2) precludes the representation of Client B on the facts presented here because Lawyer's representation of Client B appears likely to become adversely limited by Lawyer's responsibilities to Client A. Moreover the exception provided by Rule 1.06(c) does not

apply because Lawyer has concluded that representation of one of the two clients would be materially affected by representation of the other.

The issue then becomes whether transferring Client B to another lawyer in the public defender's office will resolve the conflict. Transferring Client B to another lawyer in the public defender's office does not resolve this conflict of interest. Under Rule 1.06(f), any conflict that prevents a particular lawyer from undertaking or continuing representation of a client also prevents any other lawyer who is a member of or an associate with that lawyer's firm from undertaking the same representation. See also Comment 1 to Rule 1.06. A "law firm" is defined in the Terminology section of the Texas Disciplinary Rules of Professional Conduct as ". . . a lawyer or lawyers in a private firm; or a lawyer or lawyers employed in the legal department of a corporation, legal services organization, or other organization, or in a unit of government." All lawyers in a public defender's office are in the same "law firm" for purposes of Rule 1.06(f). Therefore, another lawyer in the public defender's office may not represent Client B after Lawyer withdraws from representing Client B because of a conflict of interest based on representation of Client A.

If Lawyer withdraws from representation of Client B and the representation is not undertaken by another lawyer in the public defender's office, Lawyer may continue to represent Client A without violation of the Texas Disciplinary Rules of Professional Conduct if the following requirements are met: (1) Lawyer does not use to the disadvantage of Client B confidential information that was obtained from Client B and that has not become generally known unless Client B consents after consultation under Rule 1.05(b)(3) and (2) the representation of Client A is not "adverse" to Client B within the meaning of Rule 1.09(a) or, if the representation is adverse to Client B, Client B consents to Lawyer's representation of Client A under Rule 1.09(a).

Rule 1.06(e) contemplates that there will be circumstances in which, after multiple representation becomes improper under Rule 1.06, the lawyer withdraws from representation of one or more clients in order to remove the conflict of interest and then continues the representation of one or more other clients. However, in such cases, the requirements of Rule 1.09 relating to conflicts of interest involving former clients must be considered. Rule 1.09 states:

“(a) Without prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client:

. . .
(3) if it is the same or a substantially related matter.”

If Lawyer's representation of Client A is not adverse to Client B, then Rule 1.09 would not affect the representation. However on the facts presented Lawyer would have to consider whether it was likely that either Client A or Client B would be a witness against the other. See Comment 4A to Rule 1.09. If because of such circumstance or for some other reason, the representation of Client A would be adverse to Client B, then Lawyer could represent Client A only if Client B gave valid consent to the representation under Rule 1.09(a).

CONCLUSION

Question 1 is answered in the negative. A public defender's office is a "law firm" as defined in the Terminology section of the Texas Disciplinary Rules of Professional Conduct. Therefore, under Rule 1.06(f), a conflict of interest precluding a lawyer in the public defender's

office from representation of a client precludes the representation of the client by any other lawyer in that office.

Question 2 is answered in the affirmative, provided that the continued representation is not “adverse” to the former client under Rule 1.09 of the Texas Disciplinary Rules of Professional Conduct and that there is no violation of Rule 1.05 relating to use of confidential information obtained from the former client. If, however, the continued representation of a client is or becomes “adverse” to the former client, consent for continuing representation of the client must be obtained from the former client as required under Rule 1.09. Further, in the absence of an exception to the general prohibition on revealing or using confidential information received from clients, confidential information that was obtained from the former client and remains confidential may not be used to the disadvantage of the former client without the former client’s consent after consultation as required by Rule 1.05(b)(3).

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION**

KEVIN N. BASS,
Plaintiff,

V.

TEXAS TECH UNIVERSITY HEALTH
SCIENCES CENTER, et al.,
Defendants.

Civil Action No. 5:25-cv-00244-H-BV

TAB H

STUDENT CONDUCT BOARD FINDINGS (EXCERPT)

Dkt. 27-8, p. 6

Referenced in: Section IV.A.1

Description:	<i>Defendants’ own filing describing Defendant Gibson as “an outside attorney” — supporting Plaintiff’s position that Gibson is not a state employee entitled to AG representation under Chapter 104.</i>
Source:	<i>Filed by Defendants in support of Motion to Dismiss (Dkt. 27)</i>

*Appendix to Plaintiff's Motion to Disqualify Counsel
Bass v. TTUHSC et al., No. 5:25-cv-00244-H-BV*

questioned an attending physician's diagnosis . Dr. Nunez's evaluation is one of the six "below expectations" professionalism evaluations referenced above.

Each of Dr. Bass's six grievances is addressed below in the Findings section.

III. Hearing and Process

a. Pre-Hearing Process

On November 9, 2023, Dr. Trotter sent Dr. Bass a letter informing him that TTUHSC was consolidating multiple outstanding matters regarding Dr. Bass, including the pending misconduct complaints, his "below expectations" professionalism evaluations, and his grievances, into the Consolidated Hearing process. Dr. Trotter also stated, "To ensure that you are afforded maximum due process, the Consolidated Hearing will proceed according to the Student Conduct Board hearing procedures as set forth in the TTUHSC Student Handbook, Part II Code of Professional Conduct."

On November 16, 2023, Dr. Morales, as Chair of the Student Conduct Board, provided Dr. Bass and Dr. Islam the hearing notice, including the names of the five Board members, in accordance with the Code of Conduct Part II.F.4.b. In addition, the hearing notice included: (i) a list and copies of the four misconduct complaints against Dr. Bass and the relevant Code of Conduct sections allegedly violated; and (ii) the first five "below expectations" performance evaluations to be considered under the SOM Operating Policy 40.04, Student Promotion.¹ Dr. Bass was provided an opportunity to challenge the individual Board members in accordance with Part II.F.4.b. He did not provide any challenge to the specific Board members, and instead expressed general concerns about bias against him at TTUHSC and challenged "the impartiality of the committee, as a whole." In accordance with Part II.F.4.b, Dr. Trotter denied his challenge.

In addition, the parties were provided the opportunity to present evidence in accordance with the Code of Conduct Part II.F.4.d, and each parties' submission was shared with the other party in advance of the hearing in accordance with Part II.F.4.e. Notably, Dr. Morales granted Dr. Bass multiple extensions to present evidence beyond the applicable deadline. Both parties submitted evidence to the Board, and the SOM Administration included the sixth "below expectations" performance evaluation in its submission, as the evaluation had been completed in the intervening period.

b. Consolidated Hearing

The Board conducted the Consolidated Hearing on December 11, 2023. The hearing was conducted in accordance with Part II.F.4 of the Code of Conduct. **As the Chair of the Student Conduct Board, Dr. Morales delegated his authority regarding procedural matters to the Hearing Officer, Darren G. Gibson, an outside attorney who is experienced in conducting these types of hearings for higher education institutions. Mr. Gibson conducted the hearing as hearing officer and addressed any issues related to evidence and relevance.** Each Board member confirmed that they had reviewed the evidence and information provided by the parties prior to the hearing.

¹ At the time of Dr. Morales's letter, Dr. Thomas's Family Medicine evaluation was not yet completed.

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION**

KEVIN N. BASS,
Plaintiff,

V.

TEXAS TECH UNIVERSITY HEALTH
SCIENCES CENTER, et al.,
Defendants.

Civil Action No. 5:25-cv-00244-H-BV

TAB I

LBB CONTRACTS DATABASE SUMMARY

Darren G. Gibson / Littler Mendelson P.C. /
Michael Best & Friedrich LLP

Referenced in: Sections IV.A.1, IV.A.2

Description:	<i>38 contracts with 11 Texas state agencies (2018–2027), with total contract authority exceeding \$3.2 million. Documents Gibson’s independent contractor relationships across the state.</i>
Source:	<i>contracts.lbb.texas.gov (258,678 contracts searched); supplemented by TPIA responsive documents</i>

*Appendix to Plaintiff's Motion to Disqualify Counsel
Bass v. TTUHSC et al., No. 5:25-cv-00244-H-BV*

LEGISLATIVE BUDGET BOARD CONTRACTS DATABASE

Summary: Darren G. Gibson / Littler Mendelson, P.C. /
Michael Best & Friedrich LLP

Source: *contracts.lbb.texas.gov* (258,678 contracts searched)

Supplemented by TPIA responsive documents from TSUS, UTS, TTUS, OAG

Date compiled: March 5, 2026

I. TEXAS TECH UNIVERSITY SYSTEM (Agency 768)

8 contracts — \$393,000 total

OCC / Contract No.	Vendor	Term	Value
2020-768-0641	Littler Mendelson	2020-03 to 2021-08	\$49,000
2020-768-0674	Littler Mendelson	2020-06 to 2021-08	\$49,000
2022-768-0123	Littler Mendelson	2021-09 to 2023-08	\$49,000
2022-768-0124	Littler Mendelson	2021-09 to 2023-08	\$49,000
2024-768-0010 *	Littler Mendelson	2023-09 to 2025-08	\$49,000
2024-768-0018	Littler Mendelson	2023-09 to 2025-08	\$49,000
2025-768-0071	Michael Best	2025-05 to 2025-08	\$50,000
2026-768-0034	Michael Best	2025-09 to 2027-08	\$49,000

* Contract under which Gibson presided over Plaintiff's December 11, 2023 hearing.

II. TEXAS STATE UNIVERSITY SYSTEM (Agency 758)

4 contracts — \$448,997 total

OCC / Contract No.	Vendor	Term	Value
2022-758-0459	Littler Mendelson	2021-10 to 2023-08	\$339,000
2024-758-0159	Littler Mendelson	2023-09 to 2025-08	\$49,999
2025-758-0065	Michael Best	2025-04 to 2025-08	\$9,999
2026-758-0176	Michael Best	2025-09 to 2027-08	\$49,999

III. UNIVERSITY OF TEXAS SYSTEM (Agency 720)

8 contracts — \$600,000+ total

OCC / Contract No.	Vendor	Term	Value
2018-720-0432	Littler Mendelson	2018	Redacted
2020-720-0427	Littler Mendelson	2019	Redacted
2022-720-0199	Littler Mendelson	2022	Redacted
2024-720-0347	Littler Mendelson	2024	Redacted
2024-720-0564	Littler Mendelson	2024	Redacted
2025-720-0069	Michael Best	2025	Redacted
2025-720-0070	Michael Best	2025	Redacted
2026-720-0015	Michael Best	2025 to 2027	\$600,000

IV. OTHER STATE AGENCIES

Agency	Contracts	Total Value
Lamar University	1	\$339,000
Stephen F. Austin State University	4	\$317,554
Teacher Retirement System of Texas	2	\$190,000
Texas Woman's University	2	\$187,041
The University of Texas Rio Grande Valley	1	\$35,000
University of Houston	3	\$633,000
University of North Texas System	3	\$372,493

Administration		
----------------	--	--

TOTALS

Total contracts (excl. Comptroller):	36
Total documented contract authority:	\$3,516,085+
TTUS-specific total (relevant to this motion):	\$393,000
Consecutive TTUS contracts (2020–2027):	8

***Note:** Multiple UTS contracts have redacted caps. Minimum documented figure shown. Hearing officer role expressly in scope of TTUS contracts. Independent contractor status defined in Section 8.1 of each OCC.*