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OPINION COMMITTEE



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Texas Medical Board

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RQ-0248-KP

September 5, 2018

Via Email: Opinion.committee@texasattorneygeneral.gov

The Honorable Ken Paxton
Attorney General of Texas
Attn: Opinions Committee
P.O. Box 12548
Austin, Texas 78711-2548

Dear Attorney General Paxton:

The Texas Medical Board ("TMB") is seeking an Attorney General Opinion regarding the following issue:

Whether the members of the Physician Health and Rehabilitation Advisory Committee ("PHRAC"), created by Tex. Occ. Code 167.004 to assist the governing board of the Texas Physicians Health Program ("PHP" or "program"), are entitled to legal representation by the Attorney General ("AG") and indemnification, for acts or omissions performed in the course of scope of their duty on behalf of the PHP, under the Civil Practice and Remedies Code, Section 104 and 108, respectively?

The PHP was created by the legislature in 2009. The governing statutes for the program are found in Tex. Occ. Code, Section 167 et. al. It is a program that is administratively attached to the TMB. PHP's mission and purpose is to promote physician and physician assistant wellness and treatment of these practitioners' mental health, substance and addiction issues.¹

The PHRAC is authorized to assist the PHP governing board "by making recommendations on the request of the governing board."² PHRAC members, who must be physicians or mental health providers actively licensed in Texas with at least five years of experience in disorders commonly affecting program participants (i.e. substance abuse disorders and mental health issues), are appointed by the PHP governing board.³ In addition, TMB is authorized to adopt rules relating to the PHRAC appointments, length of terms, filling vacancies and conflict of interests.

¹ Tex. Occ. Code, Section 167.005

² Tex. Occ. Code 167.004(b)

³ See Tex. Occ. Code 167.004(a) and 22 TAC 180.3.

This opinion is being sought to address the current status and inability of the PHP to fulfill its statutory mission due to an extended backlog of pending intake evaluations of referred providers. The backlog is primarily the result of the current process in place for completing the intake evaluation, which involves the PHP's Executive Medical Director single-handedly interviewing all providers referred to the program, without any assistance from the PHRAC committee, despite express authority granted to PHRAC to provide such assistance under Tex. Occ. Code 167.004(b). The PHRAC members are willing and qualified to assist in performing such interviews and evaluations. However, due to the ambiguity concerning indemnification of such members, they are not being utilized, resulting in an inability for impaired providers to be timely evaluated and accepted into the program.

The tenets of statutory construction, including the plain language of the statutory provisions, support immunity for the PHRAC members, but also support being entitled to AG representation and indemnification.

Texas Civil Practices and Remedies Code §104.001 provides for mandatory state indemnification for several category of persons, for liability for conduct described in §104.002. This indemnification includes compensation for actual damages, courts costs, and attorney's fees.⁴ The listed persons entitled to indemnification relevant to PHRAC members include "any other officer of a state agency institution, or department."⁵

In looking at the question of whether members of an advisory committee of a state agency are consider to be "officers" for the purposes of indemnification under Tex. Civ. Prac. & Rem. Code §104.001(1), one must look to the constitutional or statutory provisions creating the board or commission and conferring authority on it, in their entirety and on a case-by-case basis, to determine whether a board or commission is advisory.⁶ In *Aldine Indep. School Dist. v. Standley*,⁷ the Court held that a public officer is someone upon whom some sovereign function of the government is conferred for the benefit of the public, largely independent of the control of others.⁸ Attorney General Opinion GA-0021 held that under the test of *Aldine*, "if an advisory board exercises some sovereign authority of the state largely independent of the control of others, that advisory board or commission is not truly advisory, regardless of whatever name the board of commission is given."⁹

GA-0021 further found:

After examining each of the opinions and letter opinions cited, we conclude that none of them stand for the proposition that a member of an otherwise advisory board or advisory commission whose statute confers duties authorizing the member to exercise some "de minimis" sovereign

⁴ Tex. Civ. Prac. & Rem. Code §104.001.

⁵ *Id.* at §104.001 (1).

⁶ Attorney General Opinion GA-0021 (2003) (page 6); *see also* DM-218 (1993).

⁷ 280 S.W.2d 578 (Tex. 1955),

⁸ *Id.* at 583.

⁹ Attorney General Opinion GA-0021 (2003) (page 6).

functions of the state independent of the control of others somehow remains a member with only advisory status and is not an “officer” for purposes of the *Aldine* standard. In several of the cited authorities, members of boards or commissions that were advisory in name were deemed to exercise sovereign functions of the state independent of the control of others and, therefore, were held to be officers of board or commission that were, by law, not advisory.¹⁰

Following the instruction of Attorney General Opinion GA-0021 above, the statutory authority for the PHRAC is set out in Tex. Occ. Code §167.004. While PHRAC is denominated as an “advisory” committee, the title is not determinative. An analysis of the statutory duties conferred must be further reviewed.

As authorized by Texas Occupations Code Section 167.004, TMB promulgated the following rules:

22 TAC 180.3(b)(2) Responsibilities of the Committee: “The committee shall provide opinions upon request of the governing board or program staff”; and

22 TAC 180.4(f): Process.

(1) Interview by Medical Director.

(A) Upon receipt of a referral as described in subsection (a) of this section, the applicant or licensee shall be invited to meet in person with the TXPHP medical director *or a member of the advisory committee designated by the medical director for an interview to determine eligibility for the PHP.*

(C) An interview may be waived if the medical director determines that good cause exists. *Advisory committee members are to be given records only in relation to those individuals that they have been assigned to review.*

(emphasis added)

The statutes and rules provide the members of the PHRAC are appointed to serve PHP in various ways, including a statutory authorization to perform sovereign state functions upon delegation or request by the PHP governing board (i.e., determination of eligibility for participation in PHP, in rulemaking and policy making functions).

Given this statutory creation of the PHRAC and authority to receive delegation from the PHP to perform functions, TMB believes that PHRAC falls within the protections of the Civil Practices and Remedies Code 104.001.

In addition, under Tex. Occ. Code §108.001 defines a “**public servant,**” as public official elected or **appointed to serve a governmental unit** and acting in a capacity when the act

¹⁰ *Id.* at pgs. 5–6.

or omission on which the damages were based occurred, and are entitled to the limitation of liability provided for in §108.002.

Due to the legislative mandate to create the PHRAC to assist the PHP, to conclude that the PHRAC cannot carry out those duties, as they lack certain protections because they are not public servants, or must only serve an "advisory" role runs contrary to the language of the statute. The statute requires the PHRAC members to be "physicians who have experience in disorders commonly affecting" individuals. The level of experience and expertise required of these members is not only aimed at ensuring that qualified individuals are available to assist the PHP governing board with policy matters, but also to assist the PHP in carrying out its legislative mandate. To conclude otherwise, renders Texas Occupations Code, Section 167.004 meaningless, and leads to the absurd result of creating a PHRAC without an ability to function and assist the program.

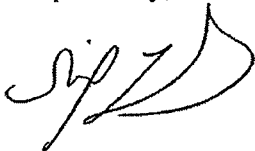
When applying the above determinations and factors considered to the PHRAC, the following is clear:

1. the duties of the PHRAC are clearly for the benefit of the public, and the evaluations performed are independent of control of others;
2. any impairment determination made during an evaluation is solely that of the PHRAC member; and
3. the members are exercising sovereign functions of the PHP as delegated and authorized.

Clearly, the PHRAC is advisory in name only. In light of the roles, functions, authority and structure, the individual members are "public servants" upon whom the PHP confers certain delegated duties and acts.

In order to properly guide and advise PHP and PHRAC members, TMB respectfully requests an AG opinion on whether the PHRAC members would be entitled to: (1) indemnification under Tex. Civ. Prac. & Rem. Code §104; (2) capping of damages under Tex. Civ. Prac. & Rem. Code §108; or (3) governmental immunity.

Respectfully,



Sherif Zaafran, M.D.
President
Texas Medical Board