

POTENTIAL LIABILITY ON THE PART OF ADVISORS TO STUDENT ORGANIZATIONS

In this memorandum I will address the various issues relevant to the analysis of whether, and to what extent, liability on the part of advisors to student organizations may exist.

DISCUSSION

One of the factors a plaintiff considers in filing a lawsuit is who to sue. It should be no surprise that defendants with “deep pockets” are sought, as it accomplishes little to obtain a judgment against a party with limited assets available to satisfy the judgment. Chapters 41 and 42 of the Texas Property Code describe what real and personal property is exempt from attachment or execution. Most personal property, up to a total fair market value of \$60,000 for a family and \$30,000 for a single adult, as well as retirement plans, are exempt. With respect to real property, homestead and/or business locations in an urban area are exempt up to one acre, which may be in one or more lots, together with any buildings or other improvements thereon. If rural in nature, the exemption is up to 200 acres for a family or up to 100 acres for a single adult. Again, these tracts may consist of more than one lot and includes any buildings or other improvements.

Given the limitations involved in satisfying a judgment from the assets of an individual, the primary target of a lawsuit will rarely be the faculty member but rather will be the University. As an aside, if the advisor is named in the lawsuit in his/her official capacity, that is essentially the same as suing the University itself. In fact, the advisor may not be named at all. The University becomes implicated by law when its employees allegedly commit a wrongful act while in the course and scope of their employment. In the event of a tort claim, naming the University and/or the advisor in his/her official capacity invokes the provisions of the Texas Tort Claims Act, Chapter 101 of the Civil Practice and Remedies Code. The University, as a member of a state agency, enjoys sovereign immunity unless such immunity has been specifically waived. The Tort Claims Act is a limited waiver of that immunity, but any tort claim brought against the university must fall within the parameters of, and is subject to the limitations of, the Act. Under the Act, a governmental unit of the state is liable for:

- (1) property damage, personal injury, and death proximately caused by the wrongful act or omission or the negligence of an employee acting within his scope of employment if:
 - (a) the property damage, personal injury, or death arises from the operation or use of a motor-driven vehicle motor-driven equipment; and
 - (b) the employee would be personally liable to the claimant according to Texas law; and
- (2) personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.

Tex. Civ. Prac. & Rem. Code §101.021.

Thus, liability may be invoked if the University provides defective equipment to a student organization which causes a subsequent injury, or if an advisor causes a traffic accident during an organization sponsored trip which likewise results in an injury, or if an advisor unlawfully provides alcohol to minors at an organization sponsored event. Liability of the university is, however, limited to \$250,000 for each person and \$500,000 for each single occurrence for bodily injury or death and \$100,000 for each single occurrence for injury to or destruction of property. Tex. Civ. Prac. & Rem. Code §101.023. The university is not subject to punitive damages. Tex. Civ. Prac. & Rem. Code §101.024.

Advisors naturally are concerned over the personal impact of a lawsuit brought against them. Do they have to hire their own attorney? Are their personal assets at risk if a judgment is entered against them? Officers and employees of the university, as well as former officers and employees who were such when the act or omission on which the alleged damages are based occurred, are, under certain circumstances, protected by state law. Tex. Civ. Prac. & Rem. Code §104.001. Those circumstances are limited to those where the damages are based on an act or omission by the person in the course and scope of the person's office or employment for, or service on behalf of, the university and if:

1. the damages arise out of a cause of action for negligence (i.e., an action based on the Tort Claims Act), except a wilful or wrongful act or an act of gross negligence; or
2. the damages arise out of a cause of action for deprivation of a right, privilege, or immunity secured by the constitution or laws of Texas or the United States, except when the court in its judgment or the jury in its verdict finds that the person acted in bad faith, with conscious indifference or reckless disregard; or
3. indemnification is in the interest of the state as determined by the attorney general or his designee.

Tex. Civ. Prac. & Rem. Code §104.002.

If these conditions are met, absent a specific appropriation by the legislature, state liability for indemnification may not exceed \$100,000 to a single person and \$300,000 for a single occurrence in the case of personal injury, death, or deprivation of a right, privilege, or immunity; and \$10,000 for a single occurrence of damage to property. Tex. Civ. Prac. & Rem. Code §104.003. Furthermore, the person is entitled to representation by the Attorney General. Tex. Civ. Prac. & Rem. Code §104.004. These indemnification and representation provisions are, however, further contingent upon service of the lawsuit upon the Attorney General or delivery of the lawsuit and citation to the Attorney General within 10 days after the date of service (which is why, by the way, this office stresses the importance of a person who is served with a lawsuit forwarding the documents to us as soon as possible). Tex. Civ. Prac. & Rem. Code §104.005.

If an advisor is a faculty member and is sued for an act or omission in connection with a recognized student organization, it would seem that his/her role as an advisor falls within the “service” component of their role as a faculty member, and thus within the course and scope of their employment, entitling them to coverage of the indemnification and representation provisions of Chapter 104, Civil Practice and Remedies Code, subject to the limitations previously discussed. Concern has been expressed as to whether staff members, whose job descriptions do not necessarily include service to the university community, would likewise be covered. The language of Tex. Civ. Prac. & Rem. Code §104.001 indicates, however, that as employees performing a service on behalf of the university, they would be covered under the provisions of Chapter 104.

Furthermore, there are other protections available as well. Section 108.002 of the Code states that an individual who is a public servant is not personally liable for damages to the extent that the state is liable for indemnification under Section 104.002. The legal principle known as qualified immunity will generally bar recovery of damages against an individual governmental employee who is found to have been negligent in the performance of his duties. Qualified immunity is based on the premise that the government is entitled to immunity from suit, and such immunity is abrogated only by statutes such as the Tort Claims Act and Chapter 104 of the Civil Practice and Remedies Code. This limited waiver of immunity protection is also applicable to individuals employed by the government when they are acting in discretionary functions, such as in advising student organizations. Finally, we have in place an insurance policy which will generally cover employees under similar guidelines as Chapter 104, and “picks up” the amount of a judgment where Chapter 104 leaves off.

If the advisor serves in that capacity for a student organization that is not recognized by the university, there may very well not be coverage under Chapter 104. In that event, it becomes difficult to argue that such service is on behalf of the university. Further, as the statute indicates, if the advisor engages in intentional or grossly negligent activity (i.e., the previously mentioned example of providing alcohol to a minor at an organization event), he/she may not be covered by Chapter 104. Finally, if the advisor engages in conduct which he/she has specifically been directed not to engage in by the university, then they have taken themselves outside of the course and scope of their employment, and they likewise may not be covered by Chapter 104.

Absent special circumstances (such as an employer-employee relationship), students are not agents of the University and the University is not liable for their torts. Recent years have seen the eclipse of the doctrine of In Loco Parentis, despite periodic attempts at its resurrection, as courts have recognized that a university has neither the authority nor the duty towards its students that a parent has towards a child. And unless there is a “special relationship” established by a school’s assumption of particular duties of care or supervision with respect to students, Universities have no duty to control the conduct of their students in order to prevent them from injuring themselves or others. This is a critical point, as any court examining our conduct will hold the University and its employees to any self-imposed duties, and may find the University and/or its employees liable based on any breach of those duties. The University should not assume duties of care or supervision lightly or inadvertently; but should do so only as

a matter of deliberate, considered policy with full awareness of the practical difficulties in consistently and effectively fulfilling those duties and the consequences attendant to any breach of those duties. In this regard, I note that proposed revisions to the rules and regulations pertaining to student organizations, including Appendix VIII concerning alcohol rules for student organizations, which have been recently brought to my attention, generally remove from the role of the advisor duties of supervision over student organization activities. This appears to be prudent from a liability perspective.

It should be noted that the lack of a legal duty certainly does not mean that the advisor and/or the University will not be sued in the event that any activity of a student organization leads to the injury of a student or third party. Nor does the lack of a legal duty necessarily mean the liability will not be found after a trial of the lawsuit. Like other institutions, universities have found some trial courts willing to impose sweeping new “duties of care”, or the permit juries to apply them, under elastic theories of liability that may trigger resource-consuming litigation even when the University and/or advisor ultimately prevails on appeal. These are numerous examples of verdicts based on sympathy for victims, the search for “deep pockets”, and disregard for the traditional principle that liability should be based on fault.

