



Physicians Caring for Texans

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**MISSION:** TMA supports Texas physicians by providing distinctive solutions to the challenges they encounter in the care of patients.

## **TMA Office of the General Counsel**

### ***Charitable Immunity***

July 2014

#### **Federal Law: Volunteer Protection Act of 1997**

The purpose of the Volunteer Protection Act of 1997 is to promote the interests of social service program beneficiaries and taxpayers and to sustain the availability of programs, nonprofit organizations, and governmental entities that depend on volunteer contributions by reforming the laws to provide certain protections from liability abuses related to volunteers serving nonprofit organizations and governmental entities.<sup>1</sup> Two types of organizations can qualify as nonprofit organizations. The type kind of nonprofit organization is an organization which is described in section 501(c)(3) of the Internal Revenue Code of 1986 and exempt from tax under section 501(a) of the Code and which does not practice any action which constitutes a hate crime.<sup>2</sup> The second type of nonprofit organization is a not-for-profit organization which is organized and conducted for public benefit and operated primarily for charitable, civic, educational, religious, welfare, or health purposes and which does not practice any action which constitutes a hate crime.<sup>3</sup>

The Act defines a volunteer as “an individual performing services for a nonprofit organization or a governmental entity who does not receive compensation (other than reasonable reimbursement for expenses) or any other thing of value in lieu of compensation in excess of \$500 per year.”<sup>4</sup> This term includes those serving as director, officer, trustee, or direct service volunteer.<sup>5</sup>

This law provides that no volunteer of a nonprofit organization or governmental entity shall be liable for harm caused by an act or omission of the volunteer on behalf of the organization or entity if the volunteer meets four requirements. First, the volunteer must have been acting within the scope of the volunteer's responsibilities in the nonprofit organization or governmental entity at the time of the act or omission. Next, if it is required or appropriate, the volunteer must have been properly licensed, certified, or authorized by the appropriate authorities for the activities or

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<sup>1</sup> 42 U.S.C. § 14501(b).

<sup>2</sup> 42 U.S.C. § 14505(4)(A).

<sup>3</sup> 42 U.S.C. § 14505(4)(B).

<sup>4</sup> 42 U.S.C. § 14505(6).

<sup>5</sup> *Id.*

practice in the State in which the harm occurred, where the activities were or practice was undertaken within the scope of the volunteer's responsibilities in the nonprofit organization or governmental agency. Third, the harm may not have been caused by willful or criminal misconduct, gross negligence, reckless misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed by the volunteer. And finally, the harm may not have been caused by the volunteer operating a motor vehicle, vessel, aircraft, or other vehicle for which the State requires the operator or the owner of the vehicle, craft, or vessel to possess an operator's license or maintain insurance.<sup>6</sup>

The Act provides a general rule regarding punitive damages that may be awarded against a volunteer: “(p)unitive damages may not be awarded against a volunteer in an action brought for harm based on the action of a volunteer acting within the scope of the volunteer's responsibilities to a nonprofit organization or governmental entity unless the claimant establishes by clear and convincing evidence that the harm was proximately caused by an action of such volunteer which constitutes willful or criminal misconduct, or a conscious, flagrant indifference to the rights or safety of the individual harmed.”<sup>7</sup> This law does not create a cause of action for punitive damages and does not preempt or supersede any Federal or State law to the extent that such law would further limit the award of punitive damages.<sup>8</sup>

A further limitation of liability exists for noneconomic loss.<sup>9</sup> Noneconomic losses are nonpecuniary losses of any kind or nature including losses for physical and emotional pain, suffering, inconvenience, physical impairment, mental anguish, disfigurement, loss of enjoyment of life, loss of society and companionship, loss of consortium.<sup>10</sup> In any civil action against a volunteer, based on an action of a volunteer acting within the scope of the volunteer's responsibilities to a nonprofit organization or a governmental entity, the liability of the volunteer for noneconomic loss shall be determined as follows. Each defendant who is a volunteer shall be liable only for the amount of noneconomic loss allocated to that defendant in direct proportion to the percentage of responsibility of that defendant for the harm to the claimant with respect to which that defendant is liable and the court shall render a separate judgment against each defendant.<sup>11</sup> For purposes of determining the amount of noneconomic loss allocated to a defendant who is a volunteer, the trier of fact shall determine the percentage of responsibility of that defendant for the claimant's harm.<sup>12</sup>

However, there are some exceptions to the limitation for noneconomic losses. The limitation on the liability of a volunteer for noneconomic losses does not apply to any misconduct that constitutes a crime of violence or act of international terrorism for which the defendant has been convicted in any court. The limitation also does not apply to misconduct that constitutes a hate crime, or misconduct that involves a sexual offense for which the defendant has been convicted in any court. Also, misconduct for which the defendant has been found to have violated a

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<sup>6</sup> 42 U.S.C. § 14503(a).

<sup>7</sup> 42 U.S.C. § 14503(e)(1).

<sup>8</sup> 42 U.S.C. § 14503(e)(2).

<sup>9</sup> 42 U.S.C. § 14504.

<sup>10</sup> 42 U.S.C. § 14505(3).

<sup>11</sup> 42 U.S.C. § 14504(b)(1).

<sup>12</sup> 42 U.S.C. § 14504(b)(2).

Federal or State civil rights law is not subject to the liability limitation for noneconomic loss. Finally, the limitation does not apply to misconduct where the defendant was under the influence of intoxicating alcohol or any drug at the time of the misconduct.<sup>13</sup>

This law, however, does not affect a civil action brought by any nonprofit organization or any governmental entity against any volunteer of such organization or entity.<sup>14</sup> Furthermore, this law does not affect the liability of any nonprofit organization or governmental entity with respect to harm caused to any person.<sup>15</sup>

It is very important to note that this law preempts State laws to the extent that such laws are inconsistent with this law, except it shall not preempt any State law that provides additional protection from liability relating to volunteers or to any category of volunteers in the performance of services for a nonprofit organization or governmental entity.<sup>16</sup> The state of Texas provides additional protection for volunteers providing services for nonprofit organizations.

### **Texas Law: Charitable Immunity and Liability Act of 1987**

The purpose of the Charitable Immunity and Liability Act of 1987 is to encourage volunteer services and maximize the resources devoted to delivering these services by reducing the liability exposure and insurance costs of charitable organizations and their employees and volunteers.<sup>17</sup> The Act provides physician volunteers immunity for performing non-emergency care for certain charitable organizations.

Five categories of organizations fall within the definition of a "charitable organization." The first category of charitable organizations are those that are exempt from federal income tax under Section 501(a) of the Internal Revenue Code of 1986 by being listed as an exempt organization in Section 501(c)(3) or 501(c)(4). Generally, these are organizations that are organized and operated exclusively for charitable, religious, prevention of cruelty to children or animals, youth sports and youth recreational, neighborhood crime prevention or patrol, fire protection or prevention, emergency medical or hazardous material response services, educational purposes, or is organized and operated exclusively for the promotion of social welfare by being primarily engaged in promoting the common good and general welfare of the people in a community.<sup>18</sup>

The second category includes any bona fide charitable, religious, prevention of cruelty to children or animals, youth sports and youth recreational, neighborhood crime prevention or patrol, or educational organization organized and operated exclusively for the promotion of social welfare by being primarily engaged in promoting the common good and general welfare of the people in a community, so long as it meets six additional requirements. The additional requirements include: the organization is organized and operated exclusively for one or more of

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<sup>13</sup> 42 U.S.C. § 14503(f)(1)(A)-(E).

<sup>14</sup> 42 U.S.C. § 14503(b).

<sup>15</sup> 42 U.S.C. § 14503(c).

<sup>16</sup> 42 U.S.C. § 14502(a).

<sup>17</sup> TEX CIV. PRAC. & REM. CODE § 84.002.

<sup>18</sup> TEX CIV. PRAC. & REM. CODE § 84.003(1)(A).

the above purposes; it does not engage in activities which are not in furtherance of the purpose or purposes; it does not participate or intervene in any political campaign of any candidate for public office; it dedicates its assets to achieving the stated purpose or purposes of the organization; the organization does not allow inurement to the benefit of any group, shareholder, or individual; and it normally receives more than one-third of its support in any year from private or public gifts, grants, contributions, or membership fees.<sup>19</sup>

The third category of charitable organizations is made up of homeowners associations as defined by Section 528(c) of the Internal Revenue Code of 1986 and organizations which are exempt from federal income tax under Section 501(a).<sup>20</sup>

The fourth category charitable organization is volunteer centers, as defined by Government Code Section 411.126.<sup>21</sup>

Finally, the fifth listed charitable organization category is comprised of local chambers of commerce that meets certain requirements.<sup>22</sup>

Under the Texas Act, a volunteer is a person rendering services for a charitable organization who does not receive compensation in excess of reimbursement for expenses incurred. This includes a person serving as a director, officer, trustee, or direct service volunteer, including a volunteer health care provider.<sup>23</sup> There are many types of health care providers that may be volunteer health care providers, provided they are either licensed or retired and eligible to provide health care services under the law of this state. These include practicing or retired: physicians, physician assistants, registered nurses (including advanced nurse practitioners), vocational nurses, pharmacists, podiatrists, dentists, dental hygienists, optometrists or therapeutic optometrists, physical therapists or physical therapist assistants, occupational therapists or occupational therapy assistants, audiologists or assistants in audiology and speech-language pathologists or assistants in speech-language pathology.<sup>24</sup>

A volunteer, including one who is serving as an officer, director, or trustee of a charitable organization, is immune from civil liability for any act or omission that results in death, damage, or injury if the volunteer was acting in the course and scope of his duties or functions.<sup>25</sup> A volunteer health care provider who is serving as a direct service volunteer of a charitable organization is immune from civil liability for any act or omission resulting in death, damage, or injury to a patient if the volunteer meets three requirements. First, the volunteer commits the act or omission in the course of providing health care services to the patient. Second, the services provided are within the scope of the license of the volunteer. And finally, before the volunteer provides the health care services, the patient, or if the patient is a minor or is otherwise legally incompetent, the person responsible for the patient signs a written statement that acknowledges

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<sup>19</sup> TEX. CIV. PRAC. & REM. CODE § 84.003(1)(B).

<sup>20</sup> TEX. CIV. PRAC. & REM. CODE § 84.003(1)(C).

<sup>21</sup> TEX. CIV. PRAC. & REM. CODE § 84.003(1)(D).

<sup>22</sup> TEX. CIV. PRAC. & REM. CODE § 84.003(1)(E).

<sup>23</sup> TEX. CIV. PRAC. & REM. CODE § 84.003(2).

<sup>24</sup> TEX. CIV. PRAC. & REM. CODE § 84.003(5).

<sup>25</sup> TEX. CIV. PRAC. & REM. CODE § 84.004(a).

that the volunteer is providing care that is not administered for or in expectation of compensation *and* the limitations on the recovery of damages from the volunteer in exchange for receiving the health care services.<sup>26</sup> (See attached sample form) These provisions apply *even if* the patient is incapacitated due to illness or injury and cannot sign the acknowledgment statement required by that subsection or the patient is a minor or is otherwise legally incompetent and the person responsible for the patient is not reasonably available to sign the acknowledgment statement required by that subsection.<sup>27</sup>

A volunteer is liable to a person for death, damage, or injury to the person or his property proximately caused by any act or omission arising from the operation or use of any motor-driven equipment to the extent insurance coverage is required by Chapter 601 of the Transportation Code and to the extent of any existing insurance coverage applicable to the act or omission.<sup>28</sup>

Also, the liability of nonhospital charitable organizations and their employees for damages based on an act or omission is limited to money damages of \$500,000 for each person and \$1,000,000 for each single occurrence of bodily injury or death and \$100,000 for each single occurrence for injury to or destruction of property.<sup>29</sup> These liability limitations do not apply to a health care provider unless the provider is a federally funded migrant or community health center, is a nonprofit health maintenance organization created and operated by a community center, or the provider usually provides discounted services at or below costs based on the ability of the beneficiary to pay.<sup>30</sup> Also, these limitations do not apply if the charitable organization does not have liability insurance coverage in the amount of at least \$500,000 for each person and \$1,000,000 for each single occurrence for any act or omission resulting in death or bodily injury and \$100,000 for each single occurrence of injury to or destruction of property.<sup>31</sup> Note that the insurance requirement does not apply to volunteers.

The limitations and immunities found in this Act do not apply in some situations. First, they do not apply to an act or omission that is intentional, willfully negligent, or done with conscious indifference or reckless disregard for the safety of others.<sup>32</sup> This Act also does not limit the liability of an organization or its employees or volunteers if the organization was formed substantially to limit its liability under this law.<sup>33</sup> Also, this law does not apply to organizations formed to dispose, remove, or store hazardous waste, industrial solid waste, radioactive waste, municipal solid waste, garbage, or sludge as defined under state and federal law.<sup>34</sup> Finally, this law does not apply to a governmental unit or employee of a governmental unit.<sup>35</sup> However, state sovereign immunity may provide protection to governmental units and their employees.

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<sup>26</sup> TEX. CIV. PRAC. & REM. CODE § 84.004(c).

<sup>27</sup> TEX. CIV. PRAC. & REM. CODE § 84.004(e).

<sup>28</sup> TEX. CIV. PRAC. & REM. CODE § 84.004(d).

<sup>29</sup> TEX. CIV. PRAC. & REM. CODE §§ 84.005 and 84.006.

<sup>30</sup> TEX. CIV. PRAC. & REM. CODE § 84.007(e).

<sup>31</sup> TEX. CIV. PRAC. & REM. CODE § 84.007(g).

<sup>32</sup> TEX. CIV. PRAC. & REM. CODE § 84.007(a).

<sup>33</sup> TEX. CIV. PRAC. & REM. CODE § 84.007(c).

<sup>34</sup> TEX. CIV. PRAC. & REM. CODE § 84.007(d).

<sup>35</sup> TEX. CIV. PRAC. & REM. CODE § 84.007(f).

**NOTICE:** Unlike the (Federal) Volunteer Protection Act of 1997, the (Texas) Charitable Immunity and Liability Act of 1987 has been revised several times since being initially passed. Please make sure you are referencing the most current version when working with your retained legal counsel.

### **Texas Good Samaritan Law: Liability for Emergency Care**

The Texas Good Samaritan Law limits the civil liability of persons administering emergency care in good faith unless their actions are wilfully and wantonly negligent.<sup>36</sup> This protection does not apply to care administered for or in expectation of remuneration, or by a person who was at the scene of the emergency because he or a person he represents as an agent was soliciting business or seeking to perform a service for remuneration.<sup>37 38</sup> Also, the limited civil liability is not available for a person whose negligence was a producing cause of the emergency for which care is being administered.<sup>39</sup>

Emergency medical service personnel who are not licensed or certified in the healing arts who administer emergency care in good faith are not liable in civil damages for an act performed in administering the care unless the act is wilfully or wantonly negligent. This limit of liability applies regardless of whether the care is provided for or in expectation of remuneration.<sup>40</sup>

**NOTICE:** The Texas Good Samaritan Law has been revised several times since being initially passed. Please make sure you are referencing the most current version when working with your retained legal counsel.

### **Insurance**

The Texas Medical Liability Insurance Underwriting Association (a/k/a “Joint Underwriting Association” or “JUA”), as required by statute, does offer professional liability insurance to volunteer health care providers.<sup>41</sup> Other insurance companies are permitted to offer similar coverage.<sup>42</sup> Check the language of your professional liability insurance policy for specifics.

### **Licensure**

Retired physicians whose only practice is voluntary charity care and retired physicians whose only practice is voluntary medical care for a disaster relief organization may be exempt from the registration permit fee requirement.<sup>43</sup>

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<sup>36</sup> TEX. CIV. PRAC. & REM. CODE § 74.151.

<sup>37</sup> TEX. CIV. PRAC. & REM. CODE § 74.151(b).

<sup>38</sup> This is true regardless of whether there is a legal theory which would permit the physician to seek payment. *See McIntyre v. Ramirez*, 109 S.W.3d 741 (Tex. Jun 26, 2003); and *See* H.B. 4, 78<sup>th</sup> Leg., R.S. (Tex 2003) stating “that being legally *entitled* to receive remuneration for the emergency care rendered shall not determine whether or not the care was administered *for or in anticipation of* remuneration (emphasis added).”

<sup>39</sup> TEX. CIV. PRAC. & REM. CODE § 74.151(e).

<sup>40</sup> TEX. CIV. PRAC. & REM. CODE § 74.152.

<sup>41</sup> TEX. INS. CODE § 2203.1021(b).

<sup>42</sup> TEX. INS. CODE § 1901.255(b).

<sup>43</sup> TEX. OCC. CODE § 156.002.

## **Conclusion**

Under the Charitable Immunity and Liability Act, physician volunteers may be immune from civil liability in providing non-emergency medical services as a volunteer health care provider. In order to assure that the immunity will apply, physicians should verify that they are working for a charitable organization, within the scope of their employment and license, and obtain written consent from the patient, when required by statute.

Furthermore, a physician may be immune from civil liability in providing emergency medical services. The Good Samaritan Law was intended by the legislature to provide physicians broad immunity when administering uncompensated emergency care.

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The following consent form is an example to be used for volunteer health care providers in non-hospital charitable organizations.

### CONSENT FOR CHARITY CARE

I, \_\_\_\_\_, acknowledge that Dr. \_\_\_\_\_ is a volunteer health care provider, and is not administering care for or in expectation of compensation. I also understand that as a volunteer health care provider, the physician is immune from civil liability for any act or omission resulting in death, damage, or injury as long as the volunteer acts in good faith and in the scope of his or her duties within the organization in providing the health care services.

Furthermore, I realize that the civil liabilities of both the charitable organization and an employee of the charitable organization are limited to money damages of \$500,000 for each person, \$1,000,000 for each occurrence of bodily injury or death, and \$100,000 for each occurrence of injury to property. These limits apply to the employee and the organization separately; they are not aggregate limits.

\_\_\_\_\_  
Patient's signature

\_\_\_\_\_  
Date

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