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**OPINION COMMITTEE**

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**RQ 0978GA**

FILE # ML-46766-11

I.D. # 46766

June 16, 2011

The Honorable Greg Abbott  
Attorney General of Texas  
Attn: Opinion Committee  
P.O. Box 12548  
Austin, Texas 78711-2548

CERTIFIED MAIL  
RETURN RECEIPT REQUESTED

RE: Authority of El Paso County Ethics Commission members to serve as the review officer to a Preliminary Screening Committee?

Dear General Abbott:

I am soliciting your opinion on behalf of the El Paso County Ethics Commission. My question to you is the following: 1) May a member of the El Paso County Ethics Commission serve as the review officer to a Preliminary Screening Committee if he/she is a practicing attorney or a former judge?

Background

On June 19, 2009, the Governor signed S.B. 1368 into law enacting Chapter 161 of the Texas Local Government Code. On September 1, 2009, the El Paso County Commissioners Court entered an Order pursuant to Local Government Code Section 161.051, creating the El Paso County Ethics Commission.

Legal Arguments and Authorities

Texas Local Government Code Section 161.1551 states as follows:

(b) The standing preliminary review committee consists of:

- (1) two members of the commission, determined as provided by Subsection (c); and
- (2) a review officer selected and retained by the commission.

(e) The review officer must be a practicing attorney or former judge.

In an effort to save El Paso County money by not paying an attorney or former judge for services rendered while working on this committee, the Ethics Commission seeks to appoint a third Commission member who is an attorney or former judge to serve on Preliminary Review Committees.

In order to determine if this action is permissible, it is necessary to turn to the rules for the construction of statutes found under Texas Government Code, Chapter 312.

Specifically, Section 312.002 Meaning of Words, provides as follows:

- (a) Except as provided by Subsection (b), words shall be given their ordinary meaning.
- (b) If a word is connected with and used with reference to a particular trade or subject matter or is used as a word of art, the word shall have the meaning given by experts in the particular trade, subject matter, or art.

Case law developed from this section states that a court may not imply a term when there is an indication that the legislature did not intend and include it in the statute. This concept is captured in a Latin phrase, "*expressio unius est exclusio alterius*," which means the expression of one thing is the exclusion of another, which has been expanded to mean the express mention of one thing, person, consequence, or class is equivalent to the express exclusion of all others. 1-4 Dorsaneo, Texas Litigation Guide § 4.03 (2011).

An example of the exclusion of a person is found in a medical malpractice cause of action wherein the plaintiff attempted to sue her psychologist for malpractice under the Medical Liability and Insurance Improvement Act which applied to physicians and health care providers. Lenhard v. Butler, 745 S.W.2d 101, 1988 Tex. App. Lexis 453 (Tex. App. Ft. Worth 1988). When the court reviewed the definition of Health care provider, under the relevant statute, the profession of psychologist was not contained in the list of person enumerated in the definition of health care providers. The court issued the following rationale for its decision:

"As mentioned above, article 4590i, section 1.03(a)(3) enumerates several types of professionals who are considered "health care providers." The statute goes so far as to expressly list podiatrists, nurses, dentists and pharmacists, while failing to include other professionals such as chiropractor, optometrist or psychologist. We cannot consider the legislature's failure to include psychologists as "health care providers" in section 1.03(a)(3) to be a mere oversight. Under the rules of statutory construction, the express mention of one person, thing, consequence or class is tantamount to the express exclusion of all others. See Ex Parte Mclver, 586 S.W.2d 851, 856 (Tex.Crim.App. Panel Op. 1979). Craft v. Craft, 579

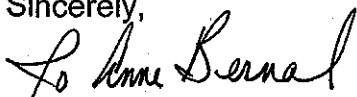
S.W.2d 506, 509-10 (Tex.Civ.App. -- Dallas 1979, writ ref'd); *see also*: 53 TEX.JUR.2d, *Statutes*, sec. 142 (1964). Therefore, we find that psychologists are not "health care providers" for the purposes of the Medical Liability and Insurance Improvement Act, because the profession was not enumerated in section 1.03(a)(3) along with the other professions in the health care field. Although we find the omission of psychologists from article 4590i to be a curiosity, we cannot interpret section 1.03(a)(3) to include psychologists within the provisions of article 4590i simply because of our quandary. An appellate court is prohibited from supplying a meaning or word which was intentionally deleted from a statute by the legislature merely to make the statute conform to its own notions of justice. *See Franklin v. Pietzsch*, 334 S.W.2d 214, 219 (Tex.Civ.App. -- Dallas 1960, writ ref'd n.r.e.). *Id.* at 105.

### Conclusion

Consequently, while the effort to save the County money is admirable, it does not appear that the Ethics Commission can appoint one of its members to serve as a review officer for the preliminary review committee. The statute specifies two members of the commission and the members of the commission serve six month terms. The review officer must be a practicing attorney or former judge and has no set term. We do not believe that the Commission may infer that a third member of the commission may be selected to serve as the review officer when the legislature specified that only two commission members would serve on the preliminary review committee.

I respectfully request your opinion regarding these issues.

Sincerely,



Jo Anne Bernal  
El Paso County Attorney

cc:	Commission Chair Terry Pasqualone	Commissioner Ralph W. Mitchell
	Commissioner Servando Hernandez	Commissioner Roberto Oaxaca
	Commissioner David Nemir	Commissioner Susanna Visconti
	Commissioner John "Jack" McGrath	Commissioner Susan Barlow
	Commissioner Evelina "Lina" Ortega	Commissioner James Clair