THE ATTORNEY GENERAL OF TEXAS

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June 10, 1988

Honorable Chet Brooks
Chairman
Senate Committee on Health
and Human Services
P. O. Box 12068
Austin, Texas 78711-0360

LO-88-68

Dear Senator Brooks:

This letter opinion is furnished to you to provide an answer to one of the questions submitted for our opinion in RQ-1361. Our answers to the remaining questions will follow shortly.

The Public Accountancy Act of 1979 provides:

> A member or employee of the [State Board of Accountancy] may not be related within the second degree of affinity or within the second degree of consanguinity to a person who is an officer, employee, or paid consultant of a trade association of the profession of public accountancy.

Article 41a-1, section 4(c), V.T.C.S.

A question has arisen about whether the officers, employees, or paid consultants of an organization known as TAPA are subject to the prohibitions in this section of the Public Accountancy Act. We conclude that TAPA is a "trade association of the profession of public accountancy" within the meaning of the nepotism provision in section 4(c) of the Public Accountancy Act of 1979.

TAPA describes itself as a voluntary association consisting of accounting practitioners, educators, attorneys, and others dedicated to "elevating and maintaining among its members a high standard of proficiency and integrity" in the accounting profession and to "promot[ing] and protect[ing]

the interest" of its members, including licensed attorneys. Constitution of TAPA, article III.

TAPA claims to have members who are certified public accountants and who thus must have certificates and licenses issued by the State Board of Public Accountancy. See generally V.T.C.S. art. 41a-1, §§ 9, 12. We are informed that TAPA also permits persons to be members who must be registered with the Board of Public Accountancy. See id., §§ 10, 14. Additionally, we understand that TAPA accepts as members persons who are not subject to the certification, licensing, or registration provisions of the Public Accountancy Act.

Thus, some members of TAPA clearly are subject to the regulatory reach of the State Board of Public Accountancy, including both initial certification, licensing, or registration and on-going disciplinary control. See, e.g., V.T.C.S. art. 41a-1, § 21. One of the stated purposes of TAPA is to "promote and protect the interest" of its members in the state of Texas, including, we presume, before the public body which controls the professional fate of some of the members of TAPA. Constitution of TAPA, art III. For this reason, the presence alone as members of TAPA of persons subject to the Public Accountancy Act must place the association within the meaning of section 4(c) of the act.

"The practice of public accountancy is in all respects a learned profession having specialized educational and experience requirements." (Emphasis supplied.) V.T.C.S. art. 41a-1, § 1. The Board of Accountancy defines the practice of public accountancy as "performance or offering to perform by a person holding himself out to the public as a certificate holder [under the Public Accountancy Act of 1979], for a client or potential client . . . of services involving the use of accounting or auditing skills . . . ." 22 T.A.C. § 501.2. The regulation by the state of the practice of public accountancy is to insure that "the public will be provided with a high level of professional competence at reasonable fees by independent, qualified persons." V.T.C.S. art. 41a-1, § 1. This regulation in the public interest is to be carried out by a Board of Public Accountancy whose membership is fixed according to a scheme to insure maximum independence from undue or improper influence by the persons subject to regulation. See id., § 4.

The nepotism restrictions in the Public Accountancy Act are a part of the statutory design to insure fair, unbiased protection of the public. The nepotism rule in section 4(c) of the act obviously is designed to prevent the

contamination of vital mechanisms in place to protect the public by the influence of irrelevant sentiment and undue favoritism sometimes promoted by ties of kinship. Section 4(c) of the Public Accountancy Act merely applies this familiar public policy to every trade association with members who are subject to the commands of the regulatory agency the association may intend to influence. It is undisputed that some of the members of TAPA practice public accountancy; likewise, it is a fact that TAPA is organized in part to "promote and protect" the interests of its members. TAPA, like most trade associations, by its own admission, is not an organization designed to promote purely fraternal or social ends. Unabashedly, one of the purposes of TAPA, according to its constitution, is the "promotion and protection" of the interests of its members "in the State of Texas," which presumably includes before a government entity charged with regulating the profession of some of its members.

Thus, TAPA unmistakably has as a purpose to influence, on behalf of those of its members subject to regulation, the course of the regulation of the "practice of the profession of public accountancy" by the only official body charged by the legislature with undertaking a myriad of tasks to protect the public in its dealings with those practicing the profession of public accountancy. See, e.g., id., § 8.

We believe that it is irrelevant for the purposes of applying section 4(c) that TAPA permits some persons to be members who are not required, at least at the time of their initial decision to become members of TAPA, to be licensed, certified, or registered with the Board of Public Accountancy. The presence of such persons as members in TAPA does not change the obvious complexion of the organization as an entity that by its own declaration is interested in no small way in the regulation of the practice of public accountancy on behalf of its members, who are subject to the Public Accountancy Act and who are under the sway of the Board of Public Accountancy.

The public policy embodied in the nepotism rule applicable to the Board of Public Accountancy would be subject to easy evasion if a trade association dedicated to influencing the Board could escape completely the strictures of the nepotism rule simply by having some members who were not subject to regulation by the Board. Indeed, in such circumstances we suppose that it would be perfectly natural for trade associations in the profession of public accountancy to have as members persons who do not hold themselves

out as public accountants. See V.T.C.S. art. 41a-1, § 8. For instance, scholars in the science of public accountancy teaching at Texas universities who have neither the need for nor an interest in obtaining certificates, licenses, or registrations from the Board of Accountancy may be logical candidates for membership in a Texas "trade association in the profession of public accountancy," which has as one of its stated purposes the "promotion and protection" of the interests of its members before governmental entities. The presence in a trade association of some members free from regulation by the Board of Accountancy should not permit the removal of the entire association from the prohibitions of section 4(c). Such a result would make the legislature's remedy for the lurking evil of the prohibited kinds of nepotism a mockery. A statute should be interpreted in the light of the evil addressed and the remedy to be applied. Gov't Code, § 312.005.

Additionally, nothing in the Public Accountancy Act permits the state to prescribe membership qualifications for trade associations in the profession of public accountancy. There is no warrant for the Board of Accountancy to decree that trade associations devoted to interests touching on the practice of public accountancy must have as members only persons subject to its regulation. (Consider the example of university scholars in the science of accounting discussed above.) Private voluntary associations -- even if organized to influence the government -- remain free to set their own non-invidious criteria for membership. See and NAACP v. Button, 371 U.S. 415 (1963); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958).

The Public Accountancy Act cannot be read to permit the Board of Public Accountancy alone to decide which trade associations are subject to section 4(c) of the act or, in a de facto fashion, to decide that trade associations which claim to represent the interests of those who practice the profession of public accountancy must limit their membership only to persons subject to the Board's control before the protection for the public embodied in the nepotism rule applies. The mischief that such a reading of the act promotes is apparent.

Very truly yours,

Rick Gilpin
Chairman
Opinion Committee

RG/DRB/bc

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