

STATE OF MONTANA
DEPARTMENT OF JUSTICE
AGENCY LEGAL SERVICES BUREAU
444-2026

MEMORANDUM

CONFIDENTIAL
ATTORNEY-CLIENT PRIVILEGED

TO: DARLENE STAFFELDT
Montana State Librarian

FROM: JIM SCHEIER
Assistant Attorney General

RE: Trustees' Liability

DATE: October 16, 2007

You asked me to conduct some research on the potential liability of trustees of boards of local public libraries. Depending on the circumstances, trustees may be subject to the provisions of the Montana State Tort Claims Act, Mont. Code Ann. §§ 2-9-101 through 2-9-805. As you will see, the answer to the liability question depends on a number of factors.

If a library trustee meets the definition of "employee" in Mont. Code Ann. § 2-9-101, he or she would be entitled to the immunization, defense, and indemnification provisions of Mont. Code Ann. § 2-9-305. I can't give you an unqualified opinion on this question because of the nature of library trustees' powers, as recognized in several Attorney General's opinions. For example, in 41 Op. Att'y Gen. No. 91 (1986), the Attorney General noted: "This brief description of library trustees' powers and duties reflects *substantial autonomy from the governing body of the local governmental unit* within which the library has been established. (Emphasis added)" Despite this autonomy with respect to trustees' authority, I think it is likely that library trustees meet the definition of "employee" in Mont. Code Ann. § 2-9-101(2)(a). However, I recommend that local library trustees present this question to their city or county attorney, as appropriate, or to the city or county's insurance carrier.

Mont. Code Ann. § 2-9-305 essentially provides that if a public officer or employee is civilly sued for a negligent act, error, or omission, including an alleged violation under 42 U.S.C. § 1983, while acting in the course and scope of their office or employment, the governmental entity employer will defend and indemnify the officer or employee, except as provided in subsection (6) of Mont. Code Ann. § 2-9-305. The exceptions, or exclusions, described in that subsection are:

- 1) If the conduct upon which the claim is based constitutes oppression, fraud, or malice, or for any other reason does not arise out of the course and scope of the employee's employment;
- 2) If the conduct of the employee constitutes a criminal offense;
- 3) If the employee settled the claim without the consent of the governmental entity employer; and
- 4) If the employee fails or refuses to cooperate in the defense.

If one or more of the circumstances described above exists, the officer or employee may not be defended or indemnified by the governmental entity employer. Either a court or the governmental entity employer may make the determination whether one or more of the exclusions in subsection (6) applies. See Mont. Code Ann. § 2-9-305(7).

As noted above, local public library trustees should consult with the legal advisor of the local governmental entity employer – usually the city or county attorney – regarding all of these questions. While there are no definitive answers to the liability and coverage questions that will apply across the board in all circumstances, a general rule of thumb is that a trustee who meets the statutory definition of “employee” should be entitled to defense and indemnification if sued for actions taken as part of their normal responsibilities as trustees, assuming none of the exclusions in Mont. Code Ann. § 2-9-305(6) applies.

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TRUSTEE LIABILITY

- A trustee may be entitled to immunization, defense and indemnification provisions of MCA 2-9-305 if they meet the definition of an employee as defined in MCA 2-9-101. Due to the substantial authority of library boards, a trustee may or may not meet the definition of an employee as defined in MCA 2-9-101. A trustee should contact their city or county attorney or if appropriate the city or county's insurance carrier to see if they meet the definition of an employee as defined in MCA 2-9-101.
- Employees, as defined in MCA 2-9-101, are entitled to immunization, defense, and indemnification provisions of MCA 2-9-305.
- If a public officer or employee is civilly sued for a negligent act, error, or omission, including an alleged violation under 42 U.S.C. 1983 while acting in the course and scope of their office or employment, the governmental entity employer will defend and indemnify the officer or employee, except as provided in subsection (6) of MCA 2-9-305.
- The exceptions or exclusions as described in that section are:
 - If the conduct upon which the claim is based constitutes oppression, fraud, or malice or for any other reason does not arise out of the course and scope of the employee's employment;
 - If the conduct of the employee constitutes a criminal offense;
 - If the employee settled the claim without the consent of the governmental entity employers; and
 - If the employee fails or refuses to cooperate in the defense.
- If one or more of the circumstances above exists, the officer or employee may not be defended or indemnified by the governmental entity employer. Either a court or the governmental entity employer may make the determination whether one or more exclusions in subsection (6) applies. See MCA 2-9-305(7)