

**DISTRICT ATTORNEY'S OFFICE**

Fort Bend County, Texas

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OPINION COMMITTEE

JOHN F. HEALEY, JR.  
District Attorney

(281) 341-4460  
Fax (281) 238-3340

January 18, 2007

FILE # ML-45104-07  
I.D. # 45104

The Honorable Greg Abbott  
Attorney General  
Office of the Attorney General  
P.O. Box 12548  
Austin, Texas 78711-12548

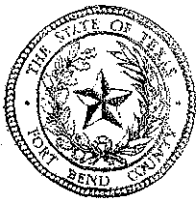
**RQ-0563-GA**

Re: Whether a regional administrative district court judge may appoint a visiting judge to sit in a newly-created statutory district court before the Governor has made an appointment to that bench.

Dear General Abbott:

I am writing to request your opinion as to whether a regional administrative judge has the authority to appoint a visiting judge to sit in a newly-created statutory district court before the Governor has made an appointment to that bench. The 434th Judicial District Court of Fort Bend County was created by the 79th Legislature and by statute, became effective on January 1, 2007. TEX. GOV'T CODE § 24.578. Pursuant to the creation of this new court, the District Court Judges of Fort Bend County signed an order effective January 1, 2007, which transferred twenty-five percent of each of the existing Courts' dockets to the newly-created 434th Judicial District Court.

When the Governor did not make an appointment as of January 1, 2007, Judge Olin Underwood, Administrative Judge of the Second Judicial District, designated a visiting judge, Larry Wagenbach, to sit in the 434th Judicial District Court and Judge Wagenbach is currently presiding over felony criminal cases. See Exhibit A. When I became aware of this order, other representatives of my office and I expressed to the District Court Judges of Fort Bend County my belief that a visiting judge is not authorized at this time to preside over cases in the 434th District Court. It is my understanding pursuant to Article Four, Section Twelve, of the Texas Constitution that a "vacancy" in a District Court bench may



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only be filled by the Governor. TEX. CONST. Art. 4 § 12(a). Under that section, "vacancy" is defined as "the expiration of a term of office or the creation of a new office." TEX. CONST. Art. 4, § 12(i). Therefore, I recommended to the District Court Judges that they either rescind the transfer order which became effective on January 1, 2007, or enter a new order transferring the cases in the 434th District Court back to the existing Court from which they originated. Because Judge Underwood has already signed an order appointing Judge Wagenbach as a visiting judge in the three other existing Courts in Fort Bend County, Judge Wagenbach could still preside over those cases. See Exhibit B. Further, because cases indicted since January 1, 2007, are currently being assigned to the 434th District Court, I also suggested that any assignment of future cases to the 434th District Court be delayed until the Governor's appointee to that bench has met all legal requirements for taking office. However, none of my recommendations were implemented.

On January 17, 2007, Judge Wagenbach was presiding over a hearing in cause number 44,055, *The State of Texas v. Victor Zavala, Jr.*, a case transferred to the 434th District Court. The defense attorney objected to the visiting judge's authority to preside over cases in a newly-created district court when the Governor has not yet made an appointment to that bench. Judge Wagenbach reset the hearing for January 19, 2007, and requested that the parties brief the issue as to whether he has authority to preside over cases in the 434th District Court. Again, it is my position that he does not have authority in light of Article Four, Section Twelve, of the Texas Constitution, but I am not aware of any case law or statutes which support my position. Accordingly, I request an opinion from your office as to whether Judge Underwood had the authority to appoint Judge Wagenbach to preside over cases in the 434th District Court when no appointment to that bench has been made by the Governor. If you have any questions or need any additional information, please contact my office at the number listed above. Thank you for your assistance in this matter.

Sincerely,

A handwritten signature in cursive script that reads "John F. Healey, Jr.".

John F. Healey, Jr.  
Fort Bend County District Attorney

**EXHIBIT A**

THE STATE OF TEXAS

SECOND ADMINISTRATIVE JUDICIAL REGION

ORDER OF ASSIGNMENT BY THE PRESIDING JUDGE

Pursuant to Sections 74.056, Texas Government Code, I hereby assign the Honorable Larry D. Wagenbach, Retired Judge, County Court at Law No. 1, Fort Bend Co. to the 434th Judicial District Court of Fort Bend County, Texas.

This assignment is for the period of one month, beginning the 9th day of January, 2007, provided that this assignment shall continue after the specified period of time as may be necessary for the assigned Judge to dispose of any accumulated business and to complete trial of any case or cases begun during this period, and to pass on motions for new trial and all other matters growing out of accumulated business or cases tried by the Judge herein assigned during this period, or until terminated by the Presiding Judge.

CONDITIONS OF ASSIGNMENT:

To try cases and dispose of accumulated business.

It is ordered that the Clerk of the Court to which this assignment is made, if it is reasonable and practicable, and if time permits, give notice of this assignment to each attorney representing a party to a case that is to be heard in whole or in part by the assigned Judge.

It is further ordered that the Clerk, upon receipt hereof, shall post a copy of this order in a prominent place in the public area of the Clerk's office. This posting shall constitute "Notice of Assignment" as required by Section 74.053, Texas Government Code.

Ordered this 8th of January, 2007.

*Olen Underwood*

Olen Underwood, Presiding Judge  
Second Administrative Judicial Region

Attest:

*Kassi Cranfill*

Kassi Cranfill  
Administrative Assistant

Assignment # 13774

FILED

2007 JAN -8 11:10

I, Annie Rebecca Elliott, District Clerk of Fort Bend County, Texas, do hereby certify that the foregoing is a true, correct and full copy of the instrument herein set out as appears of record in the District Court of Fort Bend County, Texas. This 18 day of January 2007

*Annie Rebecca Elliott*  
CLERK OF DISTRICT COURT  
FORT BEND COUNTY, TEXAS



ANNIE REBECCA ELLIOTT, DISTRICT CLERK  
By *Annie Rebecca Elliott* Deputy

# **EXHIBIT B**

THE STATE OF TEXAS

SECOND ADMINISTRATIVE JUDICIAL REGION

ORDER OF ASSIGNMENT BY THE PRESIDING JUDGE

Pursuant to Section 74.056, Texas Government Code, I hereby assign the Honorable Larry D. Wagenbach, Retired Judge of the County Court at Law No. 1, Fort Bend Co., to the 240th, 268th and 400th Judicial District Courts of Fort Bend County, Texas.

This assignment is for the period of one month, beginning the 1st day of January, 2007, provided that this assignment shall continue after the specified period of time as may be necessary for the assigned Judge to dispose of any accumulated business and to complete trial of any case or cases begun during this period, and to pass on motions for new trial and all other matters growing out of accumulated business or cases tried by the Judge herein assigned during this period, or until terminated by the Presiding Judge.

CONDITIONS OF ASSIGNMENT:

To try cases and dispose of accumulated business.

It is ordered that the Clerk of the Court to which this assignment is made, if it is reasonable and practicable, and if time permits, give notice of this assignment to each attorney representing a party to a case that is to be heard in whole or in part by the assigned Judge.

It is further ordered that the Clerk, upon receipt hereof, shall post a copy of this order in a prominent place in the public area of the Clerk's office. This posting shall constitute "Notice of Assignment" as required by Section 74.053, Texas Government Code.

Ordered this 28th of December, 2006.

*Olen Underwood*

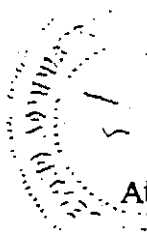
Olen Underwood, Presiding Judge  
Second Administrative Judicial Region

Attest:

*Kassi Cranfill*

Kassi Cranfill  
Administrative Assistant

Assignment # 13734



FILE

2006 DEC 28

I, Annie Rebecca Elliott, District Clerk of Fort Bend County, Texas, do hereby certify that the foregoing is a true, correct and full copy of the instrument herein set out as appears of record in the District Court of Fort Bend County, Texas. This 28 day of December, 2006

CLERK DISTRICT COURT



ANNIE REBECCA ELLIOTT, DISTRICT CLERK  
*Annie Rebecca Elliott*