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June 14, 2007

OPINION COMMITTEE

RQ-0607-GA

General Greg Abbott
 Office of the Attorney General
 P. O. Box 12548
 Austin, Texas 78711-2548

FILE # ML-45283-07
 I.D. # 45283

RE: Whether a County Judge or County Commissioner can hire outside legal counsel to advise the Court on legal issues facing the Court, without the consent of the elected County or District Attorney. This request is seeking clarification between JM-1281 and GA-0153 (and now GA-0545). It should be noted that we believe the correct legal analysis and conclusions were drawn in JM-1281 and we respectfully request GA-0153 and GA-0545 be reconsidered.

Dear General Abbott:

County and District Attorneys are elected by the voters of their respective counties to represent the County and its officials. The Constitution and statutes of Texas spell out that authority, some more clearly than others. All County and District Attorneys derive their authority from the Constitution, Art. V section 21, and various state statutes. The problem is that for some counties, the legislature has failed to enact legislation in Chapter's 43, 44, and 45 of the Government Code which additionally spell out the duties of county and district attorneys and how they are to divide their authority. It is our opinion that even without this one specific statute, County and District Attorneys maintain their civil authority which is given through the Constitution and other clear statutes. The other problem is that much of the case law relied on in this area pre-dates some of the important statutes requiring that County and District Attorneys advise and represent county officials. The legal analysis in these old cases should no longer hold true.

BACKGROUND:

In Williamson County, the County Attorney's Office acts as the legal advisor to the Commissioner's Court. For the past year, the court has been dealing with legal issues

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surrounding the renewal and expansion of the county owned landfill. Due to the immense public pressure, some of the commissioners have requested the court hire outside legal counsel to advise the court. The County Attorney has objected to the hiring of outside counsel. This very issue was raised in the Fannin County opinion (Tex. Att'y. Gen. Op. No. GA-0153, 2004) and in the Harris County opinion (Tex. Att'y. Gen. Op. No. JM-1281, 1990). The opinions reach very different conclusions, based on one statute. We are seeking clarification between the two opinions and requesting that GA-0153 be reconsidered based on another review of all of the laws of Texas and based on public policy.

In JM-1281, the Harris County case, the opinions committee correctly interpreted the Constitution, statutes and case law to draw the conclusion that "the thrust of Article V, Section 21 of the Texas Constitution (which requires a county attorney to 'represent the state in *all* cases'), the Tex. Gov't. Code §41.007 (which requires a county attorney, on request, to 'give to a county or precinct official of his district or county a written opinion or written advise relating to the official duties of that elected official), and section §45.201 of the Tex. Gov't Code, which is specific to Harris County (which requires the County Attorney to represent its officials in civil matters), taken together, compel[s] the various officials of Harris County to obtain representation and advise in all legal matters from the Harris County Attorney, and him alone, absent the exceptions provided by Tex. Local Gov't Code §89.001 (which allows counties over the population of 1.25 million to hire outside counsel, with the County Attorneys' consent)". It should be noted here that JM-1281 (and GA-0153) did not mention §157.901 of the Local Gov't Code, which requires the County or District Attorney to represent officials and employees who are sued in their official capacity.

More recently, in GA-0153, the same question was posed to the opinions committee with a very different result. In GA-0153, again, the commissioner's court was attempting to retain outside legal counsel, without the consent of the elected county attorney, and the opinions committee found the opposite conclusion than was found in JM-1281. The only difference between JM-1281 and GA-0153, is that in JM-1281, the legislature has enacted §45.201 for Harris County, with specific language stating that the Harris County Attorney's primary duty is to "represent the state. . . in all civil matters..." (Tex. Gov't Code §45.201), and in GA-0153 which involved the Fannin County Attorney, the legislature has failed to enact §45.174 of the Government Code. Simply because the legislature has failed to enact this section of Chapter 45 of the Gov't Code for Fannin County, as they have failed to do in many, many other counties, should not mean that county and district attorneys across the state have suddenly been divested of their civil jurisdiction. The county and district attorneys of Texas still derive their authority from the Constitution and other state statutes discussed below.

THE CONSTITUTION:

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The Texas Constitution states clearly that “the county attorney shall represent the State in *all cases* in the district and inferior courts in their respective counties, but if a county is included in a district with a District Attorney, the legislature shall regulate the respective duties of district and county attorneys...” Tex. Constitution Art. V Section 21. As far back as 1882, the Texas Supreme Court interpreted “all cases” in the Tex. Const. Article V, §21 to mean “all civil and criminal cases (except so far as the Constitution itself confers power upon the Attorney General to represent the State” (see *State v. Moore*, 57 Tex. 307 Tex. 1882). If the framers of the constitution had intended that county and district attorneys only have criminal jurisdiction, they would have stated so in Article V §21. The Constitution goes further to state that “the legislature shall regulate the respective duties of a district and county attorney in counties where a district attorney is created,” however, the law does not say what happens if the legislature fails to act. The presumption should be that the Constitution controls.

If the legislature fails to enact specific legislation, does this mean that county and district attorneys have no civil authority? “That the Constitution might empower the legislature to withdraw power from the hands in which the Constitution placed it, and to confer the same upon another officer or tribunal cannot be questioned; but to enable the legislature to do so, the power must be given in *express* terms, and it cannot be implied.” *Id.* If the legislature intended to authorize a particular county’s commissioners’ court to hire outside legal counsel, separate from the district or county attorney and without their consent, it would have to say so expressly. There are a number of statutes granting such authority, which will be discussed below. “A power may not be implied from a failure to mention it in a statute; rather, the legislature must state in the statute, in clear and positive terms, the intention to grant the authority . . .” *Guynes v. Galveston County* 861 S.W.2d 861 (Tex. 1993), citing *Red River Nat’l Bank v. Ferguson*, 109 Tex. 287 (1918).

In *Maud v. Terrell*, the Texas Supreme Court interpreted Tex. Const. Article V §21 to say that “the power conferred upon the county or district attorney . . . cannot be devolved by the legislature upon others, nor can it interfere with their rights to exercise them...the legislature may provide assistance for them in the exercise of their duties, but, since their powers are exclusive in nature, it cannot compel such officers to accept the assistance, and, if availed, such assistance is to be rendered in subordination to their authority”. *Maud v. Terrell*, 200 S.W. 375 (Tex. 1918). Furthermore, if the legislature “increases, diminishes or changes the civil and criminal jurisdiction of an [elected official] . . . the legislature shall also conform the jurisdiction of the other [officials] to such change.” *Id.* In the case of a county or district attorney’s duties, where the legislature has not expressly taken civil jurisdiction away from the hands of the county and district attorneys and given it to another officer or tribunal, the Constitution and state statutes still delegate that authority to the county and district attorneys. Representing the County and its officials “in *all cases* in district and inferior courts” is a core constitutional duty of a county and district attorney. If a commissioners court is allowed to hire outside counsel to do the job of the county and district attorney, this is a blatant interference with “the sphere of authority” of a county and district attorney.

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LEGISLATIVE AUTHORITY:

What happens if the legislature fails to enact one piece of legislation "regulating the respective duties of the county and district attorney" in those counties which have both a county attorney and district attorney? In Williamson County, neither Chapter 43 nor Chapter 45 has been enacted, so the county and district attorney have historically divided their authority by agreement. Many counties that have a district attorney have no specific legislation in Chapter 43 regulating the duties of the district attorney (*See*, as examples §§ 43.113, 43.118, 43.117, 43.119, 43.140, 43.141, 43.143, 43.102, 43.107, 43.145, 43.146, 43.121, 43.123, 43.126, 43.129, 43.131, 43.135, 43.149, 43.152, 43.156, 43.158, 43.159, 43.162, 43.164, 43.166, 43.167, 43.168 Tex. Gov't Code). The language of these statutes simply says, "The voters of this Judicial District elect a District Attorney". Some of the Chapter 43 statutes delegate specific duties to the District Attorney, such as "the district attorney represents the State in district court only and in all criminal cases . . ." (*See* § 43.111, 43.112, 43.114, 43.122, 43.127, 43.130, 43.132, 43.134 . . . Tex. Gov't Code), but many times, there is no corresponding statute with regard to the county attorney's duties in these counties. One example is §43.132 which states that the Travis County District Attorney "represents the State in all criminal matters . . .", but §45.327, the statute which should regulate the duties of the Travis County Attorney is blank. Does this mean that neither the district attorney nor county attorney have civil jurisdiction? Note, the Travis County Attorney currently handles all the civil matters for Travis County. One statute, §43.106, states that the Leon County District Attorney has both criminal and civil jurisdiction (*See* §43.106 Leon County). Other counties have specific statutes for both the district attorney and county attorney stating that the district attorney has criminal jurisdiction in district court and the county attorney has civil and sometimes criminal misdemeanor jurisdiction, (*See* §§ 43.110, 45.261 Matagorda County and §§ 43.120, 45.171 El Paso County). Then, there are the statutes that do not regulate or delegate authority to either the district attorney or the county attorney (*See* examples §§ 43.133, 45.322 Williamson County, §§ 43.133, 45.322 Terrell and Val Verde Counties). One county gives the district attorney and the county attorney the exact same jurisdiction (*See* §§ 43.1243, 45.142 Coleman County). One statute expressly relinquishes the duty of the district attorney to handle civil matters (*See* §43.1745 Grimes County), but, §45.193 does confer civil jurisdiction on the Grimes County Attorney. These are just examples of the confusion that the legislature has created by enacting some legislation with respect to some counties, but failing to enact legislation in other counties. In those instances where the legislature has failed to act, we believe that the county and district attorneys throughout the state are to rely on their constitutional and other statutory authority.

The opinions committee in GA-0153 relied heavily on *Guynes v. Galveston County*, which states that "it is not usually the *statutory* duty of a county attorney to represent the county in its general legal business or in conducting ordinary civil actions" (*Guynes v. Galveston County*, 861 S.W. 2d 861, 864 (Tex. 1993) citing *Hill Farms v. Hill*

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County 425 S.W.2d 414, Tex. 1969, citing *Attorney General's Opinions*: 1939, No. 864, 1941, No. 3656; 1942, No. 0-4301). The problem here is that *Guynes* took this quote from *Hill Farms v. Hill County*, which took this quote from several Attorney General Opinions from the 1930s and 40s. These Attorney General opinions which are quoted in *Hill Farms* in 1969 and then repeated in *Guynes* in 1993, predate two important statutes listed below.

EXPRESS LEGISLATIVE AUTHORITY:

In 1987, the legislature enacted §81.023, now §89.001 of the Local Government Code. This section states:

- (a) The commissioners court of a county with a population of more than 1.25 million may employ an attorney as special counsel.
- (b) The special counsel may be employed to:
 - (1) represent the county in any suit brought by or against the county;
 - (2) prepare necessary documents and otherwise assist the court, the county engineer, and other county employees in the acquisition of right-of-way for highways and other purposes which the county has the right of eminent domain.
- (c) The county attorney shall select the special counsel. If the county does not have a county attorney the district attorney or criminal district attorney shall select the special counsel. The selecting officer shall determine the terms and duration of employment of the special counsel, subject to the court's approval.

Prior to the enactment of §89.001 (formerly §81.023), it was held that a commissioners court could not appoint or employ private attorneys to perform the regular duties of a district and county attorney. *Terrell v. Green*, 31 S.W. 631 (Tex. 1895). After the enactment of §81.023 (now §89.001), a commissioners court, in counties over 1.25 million, [may now] employ special counsel to represent the county in suits brought by or against the county, prepare necessary documents and otherwise assist the court... (See, Tex. Local Gov't Code 89.001). But, even in these counties, the special counsel must be chosen by the County Attorney. (See, Tex. Local Gov't Code §89.001(c)). By enacting this legislation and stating that only under these circumstances may a Commissioner's Court employ outside counsel, the implication is that the legislature intends for a Commissioners' Court in a county with a population under 1.25 million, to rely on the county or district attorney for representation in suits brought by or against the county, or to prepare necessary documents and otherwise assist the court, etc.

Along those same lines, Section §89.0041 of the Texas Local Government Code assumes that either the District or County Attorney has civil jurisdiction, as it is required under this statute for "a person suit against the county or against a county official in the official's capacity...to deliver notice to (1) the county judge; and (2) the county or district attorney having jurisdiction to defend the county in a civil suit". (See Tex. Loc. Gov't Code §89.0041). This statute is another example of the assumption on the part of the

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legislature that either the county or the district attorney, in every county, has civil jurisdiction.

Section §41.007 of the Texas Government Code expressly provides that the district and county attorney "shall give advice to the county and its officials with regard to their official duties". In Tex. Att'y Gen. Op. JM-1281, citing *Jones v. Veltman* 171 S.W. 287 Tex. Civ. App. 1914, the opinions committee agreed that §41.007 of the Local Government Code should be "construed [to mean that] the county attorney's statutory duty to advise [its] officials is an authority that is "all inclusive", and that "there could be no county matter which would not fall within the contemplation or definition of such duty." *Id.* We agree that all acts taken by a commissioners' court, with respect to conducting the county's business, are a result of these officials acting in their official capacity and it is difficult to imagine a situation where advice would be needed that does not fall within this definition.

The Opinions Committee in Tex. Att'y Gen. Op. JM-1281 went further to state that in the Harris County's case, "the facts clearly indicate[d] a determined purpose upon the part of the commissioners court to evade and thwart the provisions of Articles V, §21 of the Constitution and the statutes of this State...[and] the advice to be given by the county attorney to the county judge and the commissioners court were provided for in Tex. Gov't Code, §41.007, which impose[s] a duty to give an opinion or advise in writing to any county or precinct officer...[furthermore] it was as much the duty of the county attorney to advise the county judge and commissioner's court in regard to properly preparing and issuing the road bonds as in regard to any other matter in which the county was interested, and it was his duty to advise them in regard to all county matters...[so] there could be no county matters about which advice was required that was not contemplated or covered by his official duties as county attorney" (Attorney General Opinion JM-1281, 1990 citing *Jones v. Veltman*, 171 SW 287 (Tex. Civ. App.—San Antonio 1914, writ ref'd).

Tex. Gov't Code, §41.007, expressly provides that the district and county attorney will advise the county and its officials, which includes the members of the commissioner's court. The proviso "on request", serves only to protect district and county attorneys from being considered derelict in their duty to advise if public officials fail or refuse to request assistance" Tex. Att'y Gen. Op. No. JM-1281 (1990). "Just as the court has no duty to pass upon a petition until some request or other contingency has occurred, the commissioner's court may not suspend a portion of the duties required by law to be performed by an elected legal officer by simply refusing to request advice the commissioners court deems necessary". *Id.*

Neither Attorney General opinion JM-1281 or GA-0153 ever mention section §157.901 of the Texas Local Government Code, which requires the county and district attorney to represent the county, county officials and employees who are sued for an action arising from the performance of their official duties. The first opinion given on

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this section after it was adopted is found in Tex. Att'y Gen. Op. No. LA-24 (1973). It is clear from the Letter Advisory that the purpose of the legislation was to require district and county attorneys to defend public servants. "Prior to this legislation, district and county attorneys had no duty to defend county officials," *White v. Eastland County Commissioners Court* 12 S.W. 3d 97 (Tex. App.-Eastland 1999, no writ). One of the reasons that county and district attorneys were not charged with defending county officials and employees is because originally, county and district attorneys were not paid a salary; they earned their living through fees collected on tax delinquencies and the like.

Taken together: Tex. Const., Article V, §21; Tex. Gov't Code §41.007 and Tex. Local Gov't Code §89.001 and §157.901, along with the relevant case law stated herein, it is clear that it is the duty of either the county or district attorney in their respective counties to advise the commissioners court on legal matters involving the court and to represent the county and its officials in suits brought by or against the county, to prepare necessary documentation and otherwise assist the court, etc. Again, it is difficult to imagine a situation that does not fall within the contemplation of these statutes. Even without the one specific statute in Chapter 43, 44, or 45 of the Texas Government Code, the law is still clear.

Attorney General Opinion GA-0153 and GUYNES:

We believe that Tex. Att'y Gen. Op. No. GA-0153 (2004) incorrectly places too much emphasis upon the absence of specific legislation in Chapters 43, 44 and 45 of the Tex. Gov't Code. The Constitution, section §41.007 of the Tex. Gov't Code §41.007 and Tex. Local Gov't Code §89.001 and §157.901, taken together, vest authority in the county and district attorney to advise and represent the commissioner's court in all legal matters. To hold otherwise is to divest the county and district attorneys throughout the state of the civil jurisdiction conferred upon them through the Constitution and statutes cited above. Furthermore, to hold otherwise, as the committee has done in GA-0153, is to divest the voters throughout the state of their choice of attorney to represent their counties. To allow a commissioners court to "go around" the elected county or district attorney to seek advice from attorneys who are not elected, is to allow them to "go around" the voters in their counties. County and district attorneys are elected by the voters and are therefore held accountable to the voters, private lawyers are not.

In Tex. Att'y Gen. Op. No. GA-0153 (2004), the opinions committee placed a great deal of emphasis on some language in *Guynes v. Galveston County*; however, they ignored a very critical point in that case. In *Guynes*, the elected district attorney did not want to handle the civil affairs of the county and was therefore in agreement with the commissioners' court hiring and employing outside counsel. The Supreme Court very clearly stated that, "in this case, Criminal District Attorney Guarino has clearly and unequivocally consented to the present arrangement for handling the county's civil legal affairs" (*Guynes v. Galveston County*, 861 S.W. 2d 861 (Tex. 1993)). The dissent in *Guynes* makes several very important comments that we believe should be noted. Four

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of the Justices who dissented, commented that, "the court bases its decision [of allowing a commissioners court to employ outside attorneys] upon the implied powers of the commissioners court" *id.* They go on to say, "the court stretches the implied powers of the commissioner's court beyond their limit...the commissioners court has implied power to hire outside counsel to assist it or other officials in carrying out their responsibilities as long as it does not infringe on the statutory [and constitutional] duties of other officials". *Id.* "It has been settled policy of this state to *not* find implied powers for commissioner's court". *Id.* The dissenters go on to say, "while the commissioner's court might employ counsel to assist the county attorney in the performance of this duty, it had not the authority under the law to displace him from his position and rightful authority under the law as an officer of that county". *Id.* By allowing a commissioners court to hire outside counsel without the consent of the duly elected county or district attorney, the commissioners court will effectively be divesting the county and district attorney of a duty given to him under the constitution and laws of this state.

In *Guynes*, the dissenters sum up our very argument when they state, "for civil legal matters, [the Galveston County Commissioners Court] has not just "assisted its duly elected criminal district attorney, rather, it has entirely supplanted the district attorney by the in-house 'legal department' which is comprised of unelected attorneys employed by the county and selected, hired, fired and supervised exclusively by the commissioner's court". *Id.* We believe that in GA-0153, the Opinions Committee's holding results in commissioners' courts across the state having this very "implied power" that the Supreme Court in *Guynes* found to be outside their authority. Texas County Government was founded on the principle of separation of powers. By allowing a commissioner's court to "go around" the elected county or district attorney, there is a substantial erosion of that separation of power.

The dissenters in *Guynes* go further to say, "the majority errs when it authorizes the Galveston County Commissioners Court to create its own peculiar "legal department" as though it still had a County Attorney, with the glaring exception that the 'substitute county attorneys' are answerable only to the commissioners court and not to the electorate". *Guynes dissent 861 S.W. 2d 861, 868.* They go on to say, "the Galveston County Commissioners Court simply has neither the express or implied constitutional or statutory authority to run this 'de facto' county attorney's office". *Id.* To make the point that a commissioners' court does not have the authority to "go around" the county or district attorney, the dissenters in *Guynes* list the specific statutes which allow a commissioners court to hire outside counsel:

For Austin County, Tex. Gov't Code §44.108(b) provides:

"The criminal district attorney shall represent the state in all matters in the district and inferior courts in the county (same language of Constitution) . . . This subsection does not prevent the county from retaining other legal counsel as it considers appropriate..."

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For Bexar County, Tex. Gov't Code §44.115(e) provides:

"The commissioners court of Bexar County, acting in conjunction with and on the approval of the criminal district attorney, may employ special counsel . . . The employment shall be for the time and on the terms that the commissioners court and the criminal district attorney consider necessary and proper . . ."

For Calhoun County, Tex. Gov't Code §44.129(b) provides:

"The criminal district attorney shall represent Calhoun County in any court which the county has pending business (broad language similar to the Constitution Article V §21). This subsection does not prevent the county from retaining other legal counsel in a civil matter as it considers appropriate. Denton County as the same language in Texas Government Code §44.151."

For Tarrant County, Tex. Gov't Code §44.320(b)(d), provides:

- (b) The criminal district attorney has all the powers, duties, and privileges . . . that are conferred by law on county attorney and district attorneys . . . except in a condemnation case in which the commissioners court hires special counsel to represent the County as provided by subsection (d):
- (d) The commissioner's court of Tarrant County may employ special counsel of its own choice . . . to represent the county in condemnation or eminent domain proceedings, to assist the commissioner's court . . ."

In *Guynes*, the dissenter's state, "The majority sits as a super-legislature to convey this power [to hire outside counsel] despite established legal principles and precedent that dictate against it...if the legislature meant for Galveston County [Commissioners Court] to have this extra ordinary power, it would have said so, as it did for those counties granted special litigation authorization [above]" (*See, Dissenting Opinion on Motion for Rehearing in Guynes v. Galveston County, 861 S.W. 2d 861, 869 (Tex. 1993).*)

CONCLUSION:

The Tex. Const. Article V, §21 states that "the county attorney shall represent the state in *all cases* in the district and inferior courts in their respective counties, but if a county is included in a district with a district attorney, the legislature shall regulate the respective duties of the district attorneys and county attorneys". As far back as 1882, the Texas Supreme Court has interpreted Article V, §21 of the Texas Constitution to mean just what it says: "*all cases* means civil and criminal cases (except so far as the Constitution itself confers power upon the Attorney General to represent the state)".

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(*State v. Moore*, 57 Tex. 307; 1882 Tex). If it was the intent of the framers of our constitution that county and district attorneys only have criminal jurisdiction, they would have said so in the constitution. Any analysis of the authority of the district and county attorneys of this state should begin with the Constitution. If a statute is silent because the legislature has failed to act, then we should fall back to the Constitution and other relevant statutes. And, although the legislature has the power to withdraw authority from one officer, it cannot do so without also conferring that power upon another officer or tribunal and it must do so in express terms; it shall not be implied. Here, if it were the intention of the legislature to give a commissioners court authority to hire outside counsel, without the consent of the county or district attorney, it must do so in express terms. As for Williamson and many, many other counties, the legislature has not given commissioners courts the authority to go around the elected county or district attorneys.


This failure on the legislature's part should, by no means, decrease, diminish or change the authority granted to the county and district attorneys under the Constitution and other statutes of this state. The only difference between JM-1281, which we believe reaches the correct conclusion, and GA-0153 is *one* statute. The lack of one statute, as in GA-0153, the Fannin County case (and as in many counties), should not result in such an upheaval of the laws and public policy in Texas.

The conclusion drawn by the committee in GA-0153 effectively divests county and district attorneys across the state of their civil jurisdiction based on the absence of one statute in Chapter 43 if he is a district attorney, Chapter 44 if he is a criminal district attorney or Chapter 45 if he is a county attorney. This surely was not the intention of the framers of our Constitution. Furthermore, if the legislature intends to divest county and district attorneys of their civil authority, then it must also expressly give that authority to another officer of tribunal. Only in those statutes listed above, does the legislature give a commissioners court authority to hire private attorneys to do the job of the elected county or district attorney.

Justice Hightower put it best in his dissent in *Guynes* when he stated that by allowing a commissioners court to hire attorneys to do the job of a county attorney is allowing the commissioners court to circumvent the will of the voters, whom the county attorney is answerable to, (*See Guynes dissent 861 S.W.2d 861, Tex. 1993*).

We respectfully ask that GA-0153 and GA-0545 be reconsidered on the grounds that much of the law was not fully analyzed in these opinions and on the grounds of public policy.

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Sincerely,

Jana Duty
Williamson County Attorney

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