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OPINION COMMITTEE



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I.D. # 45749

SMITH COUNTY COURTHOUSE  
100 N. BROADWAY 4<sup>th</sup> Floor  
TYLER, TEXAS 75702

**D. Matt Bingham**  
Criminal District Attorney  
Smith County

TELEPHONE: (903) 590-1720  
TELECOPIER: (903) 590-1719

April Allison Sikes, First Assistant

Deloris Johnson, Office Director

**RQ-0723-GA**

June 13, 2008  
Via certified mail & facsimile

Honorable Greg Abbott  
Attn: Intergovernmental Relations  
Attorney General of Texas  
P.O. Box 12548  
Austin, Texas 78711-2548

*In re: Request for Attorney General Opinion Pursuant to Texas Government Code § 402.043*

Dear Attorney General Abbott:

On behalf of the Smith County District Attorney's Office, and in the interest of justice, this office kindly requests an opinion from the Texas Attorney General to address an issue of importance in the prosecution of criminal cases receiving sentences of probation.<sup>1</sup> Specifically, it has come to our attention that a question has been recently raised surrounding the scope of judicial immunity for Texas judges and probation supervisors as it relates to granting *temporary*<sup>2</sup> travel or residence for both felony and

<sup>1</sup> See Tex. Gov't Code § 402.43 (Stating that "The attorney general shall advise a district or county attorney of this state, on the attorney's request, in the prosecution or defense of an action in which the state is interested before a district or inferior court if the requesting attorney has investigated the question involved and submitted a brief to the attorney general.")

<sup>2</sup> The Interstate Compact For Adult Offender Supervision has no rules addressing travel of fewer than 30 days.

misdemeanor offender-probationers under the Interstate Compact For Adult Offender Supervision ("The Compact").

**Issues Presented:**

The rationale for the concern is that The Compact, as well as the rules of the Interstate Commission for Adult Offender Supervision ("ICAOS"), is silent with regard to express authority of judges and probation officers to permit temporary travel outside the State of Texas, and the rules also fail to address authority to allow the majority of probationers to reside out of state. Therefore, we ask that your office issue a legal opinion regarding the following specific questions:

1. **Whether or not Tex. Crim. Proc. Code Art. 42.12 grants express authority for judges to issue orders granting permission for felony and misdemeanor probationers to travel outside the state temporarily or to reside outside the state?**
2. **If so, whether or not the "Full Faith and Credit Clause" of the U.S. Constitution, U.S.C.S. Const. Art. IV, § 1, compels other states to recognize the full scope of judicial immunity granted by Texas to judges who issue orders pursuant to Tex. Crim. Proc. Code Art. 42.12?**

**Background:**

The Interstate Compact For Adult Offender Supervision ("The Compact") has been adopted under authority of Federal law and State law. *See* 4 U.S.C. § 112; *see also*, *Tex. Gov't Code Ch. 510 et seq.* (stating at § 510.017 that the purpose of the act is to create a commission "to oversee, supervise and coordinate the interstate movement of offenders subject to the terms of this compact and any bylaws adopted and rules promulgated by the Interstate Commission.").

In running its training programs for the judiciary and probation officials, the State of Texas through the Texas Interstate Compact Commission ("TICC") has identified potential areas of concern with regard to alleged limits on judicial immunity as it relates to The Compact. Smith County judicial officials received notification of these concerns when the TICC sent a request for an advisory opinion to the national commission, which is known as the Interstate Commission for Adult Offender Supervision ("ICAOS"). *See Exhibit "A," Copy of Letter to ICAOS from Kathie Winckler, dated May 19, 2008.* The request to the ICAOS indicates in pertinent part:

**Texas judges and probation officers are hesitant to allow misdemeanor offenders who apparently do not fall under the Interstate Compact**

**misdemeanor rule, Rule 21.05, to leave the State of Texas after these offenders are placed under supervision. The hesitance of these officials is based on their concern for their potential liability to injured parties should the offenders commit criminal acts that result in injury to third parties outside of Texas. Because Rule 21.05 has been interpreted to make only those offenders who have committed four specified types of misdemeanor offenses eligible for transfer . . . . See Exhibit "A" at pg. 1.**

Exhibit "A" is attached hereto and incorporated herein as if copied in full.

It should be noted that numerous federal circuit courts have adopted a "state-created danger" theory of liability. *See e.g., Bright v. Westmoreland County*, 443 F.3d 276 (3<sup>rd</sup> Cir. 2006), *cert. denied*, 127 S.Ct. 1483 (2007). The potential liability for a Texas judge issuing an order allowing a misdemeanor probationer to travel would be great if judicial immunity does not apply. The theory holds that officials can be held liable in tort if the "state authority is affirmatively employed in a manner that injures a citizen or renders him 'more vulnerable to injury from another source than he or she would have been in the absence of state intervention.'" *Id.* at 281 (quoting *Schieber v. City of Philadelphia*, 320 F.3d 409, 416 (3<sup>rd</sup> Cir. 2003)). The Seventh Circuit has stated that "If the state puts a man in a position of danger from private persons and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tortfeasor as if it had thrown him into a snake pit." *See Bowers v. DeVito*, 686 F.2d 616, 618 (7<sup>th</sup> Cir. 1982).

In a recent letter to Texas judges, Judge Larry Gist, Chairman of the Judicial Advisory Council Board of Criminal Justice & TDCJ Community Justice Assistance Division, stated as follows:

**ICAOS rules are silent regarding a Texas judge having authority to authorize a felony probationer to temporarily travel to or through another state for reasons like employment, visiting relatives, receiving medical treatment, etc.**

**The compact and rules are also silent regarding a judge having authority to permit most misdemeanor probationers to reside in another state.**

**The Judicial Advisory Council has been advised that if a judge permits such offenders to be in another state and the offender causes injury while there, the judge may lose judicial immunity and may be personally liable for damages. See Exhibit "B" at pg. 1.**

Exhibit "B" is attached hereto and incorporated herein as if copied in full.

**Authorities:**

Article 42.12 § 1 of the Texas Code of Criminal Procedure states in pertinent part:

**It is the purpose of this article to place wholly within the state courts the responsibility for determining when the imposition of sentence in certain cases shall be suspended, the conditions of community supervision, and the supervision of defendants placed on community supervision, in consonance with the powers assigned to the judicial branch of this government by the constitution of Texas. It is the purpose of this article to remove from existing statutes the limitations, other than questions of constitutionality, that that acted as barriers to effective systems of community supervision in the public interest. See Tex. Crim. Proc. Code Art. 42.12 § 1.**

Article IV. § 1 of the U.S. Constitution states in pertinent part:

**Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof. See U.S.C.S. Const. Art. IV, § 1.**

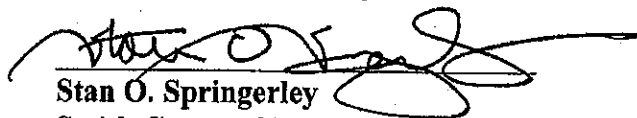
**Request for Legal Opinion:**

The concern for liability would be justified if in fact there is an absence of judicial immunity; however, judges do have authority for orders granting temporary out of state travel or residency under the Texas Code of Criminal Procedure. Article 42.12 charges the state courts with the "responsibility" in "determining when the imposition of sentence in certain cases shall be suspended, the conditions of community supervision, and the supervision of defendants placed on community supervision, in consonance with the powers assigned to the judicial branch of this government by the constitution of Texas. **See Tex. Crim. Proc. Code Art. 42.12 § 1.** This language is certainly broad enough to encompass permission for felony and misdemeanor offenders to temporarily travel outside the State of Texas for funerals, medical treatment, employment, and other compelling reasons. Additionally, under Article 42.12, judges have express authority to allow the misdemeanor probations to reside out of state, if the necessary conditions of the statute are met. *Id.* at § 3g.

In that there is express statutory authority for court orders under Article 42.12 of the Texas Code of Criminal Procedure, the "Full Faith & Credit" clause of the U.S. Constitution mandates that other states recognize judicial immunity of Texas judges under these specific orders. *See U.S.C.S. Const. Art. IV, § 1.* **A failure to recognize such authority will have a chilling effect on judicial action for temporary felony and misdemeanor-probationer travel and will negatively impact the district attorney's willingness to agree to probation sentences given the limitations of community supervision programs.** Based on the foregoing, the Smith County Criminal District Attorney's Office is requesting that the Texas Attorney General issue a legal opinion with regard to the express authority of Texas judges to issue orders granting temporary travel and or residency outside the state for felony and misdemeanor probationers and the scope of judicial immunity for acts that traveling probationers might commit. Without a legal opinion clarifying this important issue, many judges around the State of Texas will be compelled to stop issuing orders permitting travel of probations under the circumstances in question.

Thank you for your time and attention to this matter.

Sincerely,

  
**Stan O. Springerley**  
**Smith County Civil Attorney &**  
**Assistant Criminal District Attorney**

Cc: Hon. Judge Cynthia S. Kent  
Hon. Judge Kerry L. Russell

Enclosure

**Kathie Winckler**  
**Texas Interstate Compact Commissioner**  
**618 Northport Lane**  
**Kemah, Texas 77565**  
**(281) 558-1451**  
**kathie.winckler@gmail.com**

May 9, 2008

**EXHIBIT A**

Mr. Harry Hageman  
Executive Director  
Interstate Commission for Adult Offender Supervision  
2760 Research Park Dr.  
Lexington KY 40578-1910

Re: Request for advisory opinion

Dear Harry:

As you know, the State of Texas has carried out an aggressive program of training for both the judiciary and the officials involved in supervision of Interstate Compact offenders. During this process areas of concern have been identified that could potentially impact the personal liability of judges and other supervisory officials in states across the nation. We feel that it is prudent to bring this to your attention, and we are, therefore, requesting that in your capacity as executive director of the Commission you render an advisory opinion on the following matters pursuant to the provisions of Rule 6.101 (c).

The matters in question are as follows:

1. Texas judges and probation officers<sup>1</sup> are hesitant to allow misdemeanor offenders who apparently do not fall under the Interstate Compact misdemeanor rule, Rule 2.105, to leave the State of Texas after these offenders are placed under supervision. The hesitance of these officials is based on their concern for their potential liability to injured parties should the offenders commit criminal acts that result in injury to third parties outside of Texas. Because Rule 2.105 has been interpreted to make only those offenders who have committed four specified types of misdemeanor offenses eligible for transfer under the Interstate Compact; and because Rule 2.110 (b) states that "[a]n offender who is not eligible for transfer under this Compact is not subject to these rules and remains subject to the laws and

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<sup>1</sup> For purposes of offender supervision, probation officers are agents of the court.

Harry Hageman  
May 9, 2008  
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# EXHIBIT A

travel permits to offenders under the circumstances described above. The Texas Interstate Compact Office has received an email from a defense attorney asking whether the "official position" of the office is that judges have no authority to issue travel permits and another stating that "a crisis is developing in Texas concerning the compact and the liability of judges." Today the Houston Chronicle, the state's most widely circulated newspaper, published an article by a columnist describing how a probationer who had only one DWI had a tougher time than an offender who had three DWIs or a felony. The article cited the Interstate Compact and a "glitch in federal law, as interpreted by a Texas assistant attorney general," and quoted the director of one of the largest counties in Texas as saying, "Currently the department is not issuing any travel permits out of state." A copy of this article is attached.

Because of the mounting difficulties caused by the concern and confusion about judges' and other officials' potential personal liability, we ask that you, in consultation with General Counsel Rick Masters, act in an expedited, informal manner to immediately determine whether the Interstate Compact, its rules, by-laws, advisory opinions or other acts affords the authority to allow judges and other supervisory officials to permit offenders as described above to travel outside of Texas. Following that action, we ask that you render an advisory opinion on the same matter to put to rest this area of great uncertainty and potential peril for judges and supervision professionals in all states.

If I can give you further information about these issues, please contact me. I look forward to hearing from you in the very near future.

Sincerely,

Kathie Winckler

Kathie Winckler  
Commissioner  
State of Texas

cc: Rick Masters, General Counsel, ICAOS  
David Harris, Texas Ass't Attorney General,  
Stuart Jenkins, Texas Parole Director, Compact Administrator  
Regina Grimes, Texas Interstate Compact Office Director  
Judge Larry Gist, Chair, Judicial Advisory Council  
Steve Enders, Chair, Probation Advisory Committee  
Mary Anne Wiley, Assistant General Counsel, Governor Rick Perry

Attachment: Houston Chronicle article, *Probation Tougher for 1 DWI Than 3*, May 9, 2008

# EXHIBIT B



**JUDICIAL ADVISORY COUNCIL**  
Board of Criminal Justice & TDCJ Community Justice  
Assistance Division  
Judge Larry Gist, Chairman  
215 Franklin St., Beaumont, TX 77701  
409-835-8506 Fax 409-839-2304

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TO: Felony & Misdemeanor Judges

RE: Interstate Compact Issues

DATE: May 19, 2008

As you are aware, Texas is a member of the Interstate Compact For Adult Offender Supervision. The original compact of 1937, the compact as amended in 2002, and the rules promulgated by the Interstate Commission for Adult Offender Supervision (ICAOS) have the force of Federal law. Two issues arising from interpretation of the compact, its amendments and rules have been identified that require your attention and consideration.

ICAOS rules are silent regarding a Texas judge having authority to authorize a felony probationer to temporarily travel to or through another state for reasons like employment, visiting relatives, receiving medical treatment etc.

The compact and rules are also silent regarding a judge having authority to permit most misdemeanor probationers to reside in another state.

The Judicial Advisory Council has been advised that if a judge permits such offenders to be in another state and the offender causes injury while there, the judge may lose judicial immunity and may be personally liable for damages.

We have asked Governor Perry and our Texas Interstate Compact Commissioner Kathie Winckler to do everything possible to have the ICAOS rules address these issues. A copy of Commissioner Winckler's request for an expedited advisory opinion from the ICAOS Executive Director is attached. We wanted to alert you to this possible loss of judicial immunity and personal liability exposure. You will be kept advised of all future developments.

  
Judge Larry Gist, Chairman

LJG/sb

Cc; CSCD Directors